

# THREATS TO INDIGENOUS PEOPLES' RIGHTS IN BRAZIL

Legal and policy gaps



## COLOPHON

**TITLE** Threats to indigenous peoples' rights in Brazil – Legal and policy gaps

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**Conectas** exists to preserve, implement and extend human rights. More than a non-governmental organisation, we are part of a lively and global movement that continues in the fight for equal rights. Connected via a broad network of partners, spread across Brazil and around the world, we are always available, and we participate in various decision-making debates that advance the path of human rights from the Global South perspective. We work to secure and extend the rights of all, especially the most vulnerable. We propose solutions, avert setbacks, and denounce violations to create transformations.



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# 1

## Introduction

### GLOSSARY OF ACRONYMS

APIB	Brazilian Articulation of Indigenous Peoples
CIMI	Indigenist Missionary Board
FUNAI	National Indian Foundation
IBAMA	Brazilian Institute for the Environment and Renewable Natural Resources
ICMBio	Chico Mendes (National) Institute for Biodiversity Conservation
ILO	International Labour Organisation
INCRA	National Colonization and Agrarian Reform Institute
PNGTAT	Managing Committee for National Land Management and Environment Policy
SESAI	Indigenous Health Secretariat
STF	Federal Supreme Court

On 25 January 2022, the Organisation for Economic Cooperation and Development (OECD) invited Brazil along with five other countries to begin an accession process to become an OECD member state.<sup>1</sup> To be allowed to accede, Brazil needs to demonstrate “willingness, preparedness and ability” to “adopt OECD practices, policies and standards.”<sup>2</sup> The accession process itself is envisaged as a “powerful transformative instrument to secure a country’s convergence with the values, standards and membership obligations of the Organisation.”<sup>3</sup> As re-stated by the OECD Ministerial Council in October 2021, these values include: the promotion of open, free, fair and rules-based multilateral trading system; government transparency and accountability; the rule of law; gender equality; the protection of human rights; and the promotion of environmental sustainability, including with focus on addressing climate change.<sup>4</sup>

**At present, Brazil is far from being in alignment with these values, standards and obligations. In the view of the authors of this paper series, Brazil’s record on environmental protection, deforestation and the fight against climate change, and its failures to protect the human rights of workers, environmental and human rights defenders, indigenous peoples, and other traditional communities, currently make it unfit for accession.**

This paper is one of five submitted by Conectas Human Rights (Conectas), OECD Watch, and the International Federation for Human Rights (FIDH) to the OECD assessing the extent to which Brazil’s laws, policies and practices in these areas meet OECD expectations. It focuses on impacts to indigenous peoples, particularly in relation to land rights, in the context of business activity underway in Brazil. It is of particular interest to OECD committees and divisions focused on Environment Policy, Agriculture, Corporate Governance, Development Assistance, Investment, and Health, Public Governance, and Steel.

**Brazil is home to over 300 distinct indigenous groups encompassing about a million people.** They live across the country, primarily in ancestral natural lands where they play a major role outweighing their small population size in the conservation of natural resources and, through the protection of forests, the prevention of climate change.

A major threat to indigenous peoples’ rights is the government’s failure to protect indigenous lands through “demarcation.” Although the constitution required all Indigenous lands to be assessed and labelled for protection by 1993, successive governments have repeatedly failed to complete the task. Likely as a result of the current president’s rhetoric against Indigenous peoples and their rights, the incidence of land-grabbing has skyrocketed in recent years. In tandem with increased land grabs, violence against indigenous peoples has increased, including assassinations and homicides as well as harassment, suppression of rights, and denial of identity.

Indigenous representative groups, civil society organizations, researchers and members of academia, and others have shown that the increasing vulnerability of indigenous peoples in Brazil results from both omissions and intentional actions of the government. These failures put into question Brazil’s “willingness, preparedness and ability” to comply with OECD values and standards, all of which constitute critical aspects of the OECD’s decision on whether or not to invite aspiring states to accede.

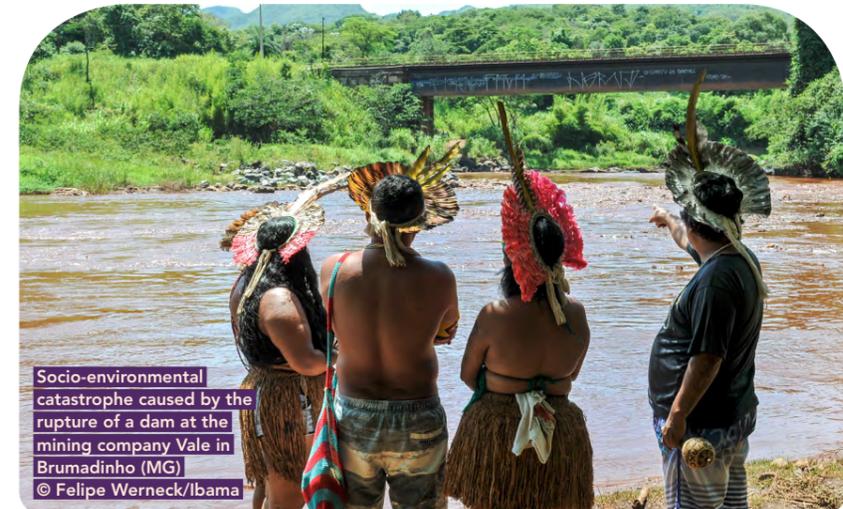
**The accession process provides a critical opportunity for the OECD to identify and assess these gaps and prompt the necessary reforms to bring Brazil into line with OECD values, standards and obligations before, and as a condition for, accession.**

This paper examines existing gaps in Brazil’s protections of indigenous peoples rights through the lens of three case examples that demonstrate the human and societal impact of those gaps. Based on this analysis, the paper makes recommendations for changes in Brazilian laws, policies, and practices necessary to close the gaps

## 2 Prominent cases

and address the associated human impacts. **Conectas, OECD Watch, and FIDH urge the OECD, its member states and technical committees to make compliance with these recommendations a condition since *qua non* for accession. They also urge the OECD, member states and technical committees to take the views and observations of civil society organisations and other experts into account in their decision-making process regarding Brazil's accession.**

The report is structured in five sections. After the introduction, section 2 presents prominent cases that exemplify Brazil's failure to protect indigenous peoples' rights. Section 3 analyses the gaps in Brazilian laws, policies, and practices that lead to the rights violations highlighted in these cases. Section 4 discusses OECD committees, initiatives, and instruments relevant to the issue of indigenous peoples' rights. Finally, section 5 concludes by identifying both the reforms Brazil must adopt to close the gaps analysed, and recommendations for actions the OECD and its member states should take to ensure rigorous terms for Brazil's accession and a transparent and participatory review process.



### 2.1 The violation to the right to FPIC by indigenous peoples in cases of dam collapses in Minas Gerais

On 5 November 2015, Brazil experienced the world's biggest mining dam disaster when the "Fundão" structure broke, dumping some 63 million cubic meters of ore tailings into the Doce River Basin. The collapse of the dam, the responsibility of Samarco Mineração S/A (a joint venture of companies Vale and BHP) caused the death of 19 people, destroyed more than 300 homes, and devastated the ecosystem along more than 600 kilometers to the Atlantic Ocean, affecting more than 40 municipalities in the states of Minas Gerais and Espírito Santo.

Inhabiting the margin of the Doce river, 137 Krenak families experienced the death of the river, which became inundated with the residue-laden mud. The Doce river was considered sacred for the Krenak and was the site of rituals and intergenerational cultural shared values, besides serving as a source of water and food.<sup>5</sup> A similar fate was suffered by around 1,342 families of the Tupiniquim and Guarani peoples, inhabiting indigenous land in the shoreline of the state of Espírito Santo along the right margin of the Doce river estuary.

Unfortunately, the case of the Krenak, Tupiniquim, and Guarani peoples is quite similar to that of the Pataxó and Pataxó Hã-hã-hãe indigenous peoples, who were affected just over three years later by a different breach of a dam owned by Vale S.A. in the city of Brumadinho, also in Minas Gerais. The disaster killed 272 people, of whom eight have still not yet been found. The waste mud traveled the Paraopeba river and ran over 300 kilometers until it arrived at the Três Marias dam, affecting 26 municipalities.<sup>6</sup>

At least 25 indigenous Pataxó and Pataxó Hã-hã-hãe families, of the Naô Xohã settlement, were affected by the breach.<sup>7</sup> Inhabiting the margin of the Paraopeba river near the municipality of São Joaquim de Bicas, this people had arrived at the territory in 2017 and fishing was the basis for its food. With the contamination caused by the waste, many fish died in the river and the use of its waters for any purposes has been forbidden since then. As such, fishing activities, crop irrigation, cloth and dish washing, bathing, and traditional rituals have not occurred properly. As expressed by deputy chief Célia Peixoto, "the Pataxó people came from a drop of water that fell on the earth, our relationship with water is very strong. The dead river gives us much grief."<sup>8</sup>

The cases are notable not just for the severity of the damages and violations of human rights caused, but also because they significantly illustrate the violation to the right to FPIC of indigenous and tribal peoples, pursuant to Convention no. 169 of the International Labor Organization (ILO). Beyond the absence of consultation and consent prior to the installation of developments that affect them, these and many other affected communities have not been consulted on and offered consent to the reparation measures. Since 2016, a public civil lawsuit against Samarco, Vale S.A., and BHP led to creation of Terms of Transaction and Adjustment of Conduct defining the creation of the Renova foundation responsible for implementing remedial social-environmental and social-economic programs and actions.<sup>9</sup> On 4 February 2021, the Córrego do Feijão mine levee, Vale S.A., the State of Minas Gerais, and Justice institutions entered a settlement for the reparation of social-environmental and social-economic damages within a collective lawsuit.<sup>10</sup> Unfortunately, the negotiation of these settlements did not include contributions from the affected indigenous communities and their texts do not establish how these communities would be involved in decision-making and implementation of reparatory measures.

The agreements reached also excluded some indigenous people from identification as being among those impacted by the levee breaches. The Kaxixó people, for example, live in the municipality of Martinhos Campos and rely on another river called the Pará as their source of water and sustenance. Following the levee collapse and contamination of the Paraopeba river, municipalities in the region began drawing on water from the Pará to replace their lost water supply. The Kaxixó people assert that the city's over-use of the Pará river, initially resulting from the levee collapse, reduced the flow of the Pará river causing a loss of their way of life, leisure, and cultural activities. Additionally, the increase in the flow of fishermen and tourists, prevented from using the Paraopeba river, was another cause of the aforementioned damages. The Kaxixó claimed reparations along with other communities impacted by the Brumadinho collapse but have not been considered by the mining company Vale S.A as a people affected by the collapse of the Córrego do Feijão mine levee.<sup>11</sup>



Doce River, by Krenak Indigenous Land  
© Leticia Aleixo/ Clínica de Direitos Humanos da Universidade Federal de Minas Gerais



Second vigil at Praça dos Três Poderes in Brasília to accompany the vote on PL 490 of the time frame in the Supreme Court. Mobilization of indigenous people at the Acampamento Luta Pela Vida (Fight for Life Camp)  
© Leonardo Milano/Amazônia Real

## 2.2 The case of the Guarani-Kaiowá people, the Indigenous Land Guyraroká and the timeframe (marco temporal) thesis

The unjustified delay in administrative proceedings for indigenous land demarcation and the advent of legal obstacles, such as the “timeframe” (marco temporal) thesis, constitute acts perpetrated by the Brazilian government that promote violations to the rights of these populations. The case of the Guarani Kaiowá people clearly illustrates how the lack of effective land ownership and demarcation policies can result in ongoing violation of indigenous people’s right to land and self-determination – and lead to or intensify severe conflicts between indigenous peoples, owners of rural properties, and unauthorized third parties (miners, lumberjacks, etc.).

The struggle of the Guarani Kaiowá for the demarcation of the Indigenous Land of Guyraroká has taken place since at least 2001, when anthropologic reports were first produced at the National Indian Foundation (FUNAI) demonstrating the ancestral territorial bond of that indigenous people with the land. The delay, in itself, is a violation by the Brazilian government of article 67 of the Interim Constitutional Provisions Act, which establishes that “the Federal Union will conclude the demarcation of indigenous lands within five years after the Constitution is enacted.”<sup>12</sup>

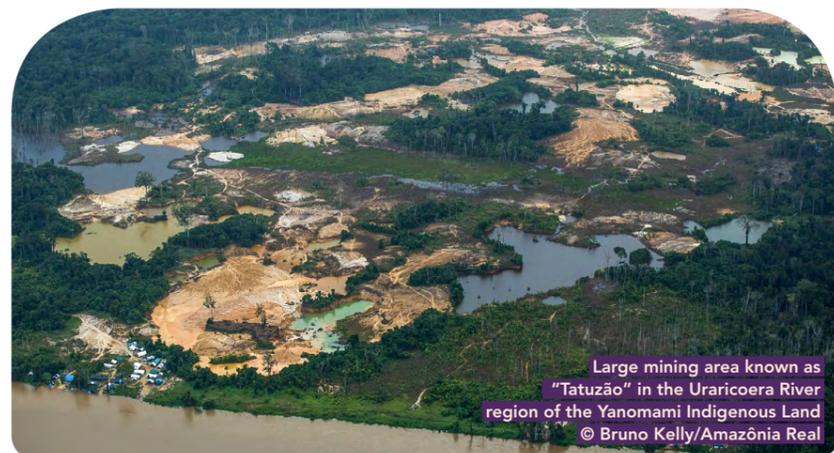
In 2009, the Minister of Justice signed Declaratory Ordinance no. 3,219, determining the demarcation of the Guyraroká indigenous people’s lands.<sup>13</sup> The issuance of an ordinance by the Ministry of Justice is normally the penultimate stage in the process of demarcation and concession of a deed to an Indigenous Land, prior only to ratification by the President of the Republic and registration with a notary office on behalf of the Federal Union for usufruct by the indigenous community. However, a farmer owning land within the Guyraroká Indigenous region filed a writ (MS 29,087) against said ordinance.

In 2014, in the context of the aforementioned writ, the 2nd Panel of the Federal Supreme Court (STF) annulled the ordinance in question, basing said decision on the so-called “timeframe” thesis. According to this thesis, only indigenous land that had been occupied by the indigenous people at the time of the enactment of the 1988 Constitution could undergo demarcation. This understanding disregards the compulsory displacements to which indigenous peoples have historically been subjected in Brazil, rendering the possibility that they occupied their ancestral lands on October 5, 1988 as highly unlikely or even impossible. This timeframe ignores the ties that traditional communities have with their territories, their ways of life, and their cosmogony, violating their rights of property and self-determination.

In view of the impediment to demarcate their traditional lands, the Guarani Kaiowá filed a termination lawsuit (AR 2686) before the STF in 2018, in an attempt to annul and overrule the effects of the judgment rendered on the aforementioned writ. In addition to the allegation of inapplicability of the timeframe thesis, the community claimed a violation to its access to justice, since they were not consulted at any moment during the process of annulling the demarcation, notwithstanding the fact that the court was aware of the anthropological report that demonstrated the importance of the land for that people and its ancestral occupancy.<sup>14</sup> The claim is inexplicably still pending, along with other legal cases of the same nature, delays that interfere with the entire demarcation dynamics of indigenous lands in Brazil.

After at least 20 years of struggle to regularize the Guyraroká Indigenous Land, the unjustified delay in the administrative proceedings to demarcate and grant the people its deed violates their rights to ancestral property and due process. The Inter-American Human Rights Court has held, in similar cases, that the extension of legal proceedings to over 11<sup>15</sup> or 13<sup>16</sup> years is incompatible with the principle that a court should hear a claim within a “reasonable term.”<sup>17</sup>

Unfortunately, the Guarani Kaiowá case also illustrates the context of violence to which these peoples are subjected. According to the Inter-American Commission on Human Rights itself, the threats, harassment, and other acts of violence committed by landowners and their employees against the Guarani Kaiowá reflect a “high level of conflict” between the indigenous people and third-party occupants of the land or people acting under their orders. The Commission even granted injunctions in the context of the case in 2019,<sup>18</sup> forcing the Brazilian government to make efforts to protect the life and integrity of this people. The Commission’s decision on the precautionary measure illustrates the context of violence: **“The Commission notes with particular concern that, according to the Requesters, community members whenever they would go out to hunt or fish in the vicinity, farm employees would fire gunshots over their heads, which they described as “common practice” that “happens all the time.”**<sup>19</sup>



Large mining area known as “Tatuzão” in the Uraricoera River region of the Yanomami Indigenous Land.  
© Bruno Kelly/Amazônia Real

## 2.3 Omission in fighting advances of the COVID-19 pandemic among indigenous peoples

The COVID-19 pandemic took on alarming proportions in Brazil. The country currently has one of the highest death tolls among countries with large populations. According to data from the Oswaldo Cruz Foundation Observatory, if the world posts a rate of 497 COVID deaths per million inhabitants, in Brazil, that rate amounts to 2,364 deaths per million inhabitants – 4.7 times higher than the global rate.<sup>20</sup>

The COVID-19 pandemic has taken a particular toll on indigenous people. Official data do not properly reflect the extent of the pandemic among these groups, because cases among indigenous peoples are under-counted. First, they are under-reported. Second, there are also methodological divergences in the way reported cases are accounted for, because the Indigenous Health Secretariat (SESAI) has not been counting cases inflicting indigenous individuals who live in an urban setting or outside of indigenous settlements.<sup>21</sup> Surveys by civil society entities, such as the Brazilian Articulation of Indigenous Peoples (APIB), suggest up to twice the number of deaths among indigenous people as compared to that disclosed by the government.<sup>22</sup> As of July 27, 2021 (the last month APIB collected such records) a platform for monitoring impacts of the COVID-19 pandemic on indigenous people in Brazil,<sup>23</sup> which compiles data from APIB, Brasil.io, and SESAI, indicated 57,357 indigenous individuals with confirmed cases and 748 deaths.

Against this context, the federal government has taken few and insufficient measures to contain the situation. According to Open Knowledge Brasil,<sup>24</sup> the government’s indigenous immunization plan is inadequate because it badly underestimates the number of indigenous people in the country: it estimates around 413,749 indigenous people, while Brazilian Geography and Statistics Institute data from 10 years ago indicate that there were 896,917 indigenous individuals at that time. Further, Open Knowledge Brasil has revealed contradictory numbers in official sources regarding indigenous immunization statistics, showing the Indigenous Immunization panel posted, on March 11th, 85 thousand doses more than the number presented in OpenDataSUS.

A survey made by the Institute of Social and Economic Studies pointed out that, up to early December 2020, FUNAI had spent only 52% of the funds designated to fight the coronavirus among indigenous peoples.<sup>25</sup> Meanwhile, FUNAI has failed to prevent illegal actions in indigenous territories such as deforestation<sup>26</sup> and mining.<sup>27</sup> Contact with trespassing illegal miners and loggers, as well as contact with health officials when seeking federal emergency aid in cities because of illegal activities, are the three major causes of viral contamination among indigenous peoples.<sup>28</sup>

Three cases have been submitted to the Inter-American Human Rights Commission highlighting how failures in healthcare, the sizable presence of unauthorized third parties in indigenous territory during the pandemic, and indigenous peoples’ isolation and physical vulnerability to non-indigenous illness worsen the risk of infection and death amongst Brazil’s indigenous people. These cases have resulted in the grant of injunctions in relation to the following indigenous peoples: Yanomami and Ye’kwana;<sup>29</sup> Munduruku;<sup>30</sup> and Guajajara and Awá of the indigenous land of Araribóia.<sup>31</sup> All of them are isolated or only recently contacted, making them even more susceptible to the severe development of non-indigenous illnesses. The Commission has determined that the Brazilian State should make the necessary efforts to protect the rights of these peoples and provide proper healthcare in terms of availability, accessibility, acceptability, and quality.

The omission on the part of the government to do this was also dealt with in the judicial sphere with ADPF 709 (an action against the violation of a constitutional fundamental right), which sought protective and healthcare measures for indigenous peoples in the context of the pandemic. On July 8, 2020, Rapporteur Justice Roberto Barroso made a preliminary order for the development, with community-level involvement, of plans to contain invaders in reserves; erect sanitary barriers for indigenous communities in isolation or that were recently contacted; ensure broad access to the Indigenous Health Subsystem; and prepare a strategy to fight and monitor COVID-19 amongst indigenous people.<sup>32</sup> However, the fact that the death toll is still high suggests that this judicial decision has not yet been complied with.<sup>33</sup>

Although the pandemic is a new scenario, requiring intensive and specific measures to assure health and life, it brings old problems to the surface and exposes the continued jeopardy in which the indigenous peoples in Brazil live. The absence of an effort against the disease that takes into consideration specific characteristics of traditional communities reiterates the violations to these peoples’ culture, such as the burial of Yanomami children who died as a result of the virus in Roraima, in blatant disregard of their specific funerary rituals,<sup>34</sup> accelerating their extinction.<sup>35</sup>

# 3

## Legal and policy gaps

The cases described above result from a range of legal and policy gaps in Brazil that are described in more detail below.

### 3.1 Threats to indigenous land demarcation processes

As previously mentioned, the Temporary Constitutional Provisions Acts determined that the Federal Union should conclude the demarcation of indigenous lands within five years as of the enactment of the Constitution, which took place in 1988. Similarly, these acts established the obligation of the Government to issue land deeds to the remaining members of Quilombola communities. In 2021, however, not only have these peoples and communities not received reparation for the damages they suffered historically, but the government has, through omission and intentional action, continuously disregarded the constitutional orders.

The delay began in prior administrations but has become more severe since President Jair Bolsonaro came into power. On the first day of his term in office, the President issued a Provisional Measure to lessen the independence and power of FUNAI. The measure removed FUNAI from the purview of the Ministry of Justice and transferred jurisdiction over the identification, delimitation and demarcation of indigenous lands, which used to belong to FUNAI, to the Ministry of Agriculture, Livestock and Supplies.<sup>36</sup> This attempt was interrupted by National Congress and once again by the Federal Supreme Court (STF),<sup>37</sup> after a new provisional measure was issued with the same content.<sup>38</sup>

The government has also been fulfilling its promise<sup>39</sup> to not demarcate even a single centimeter of indigenous land. Beyond that, the Ministry of Justice even asked FUNAI to review, in the first half of 2019, 27 past delimitation and demarcation cases.<sup>40</sup> This tactic necessitates an extension of the period to conclude the administrative proceedings, which have already been pending for decades. Data from the Indigenist Missionary Board (CIMI) show that, in 2019, 829 indigenous land demarcation applications had some or another aspect pending (causing delay). Out of these 829 lands, around 536 had not undergone any arrangement in terms of regularization by the government.<sup>41</sup>

The legislative framework is not favorable to the matter, especially after the recent approval of Draft Bill (PL) no. 490/07 by the Constitution, Justice and Citizenship Commission of the Lower House of Representatives. The text changes issues related to indigenous land demarcations, seeking, for instance, to legally consolidate the timeframe thesis<sup>42</sup> and prohibit the expansion of already demarcated lands. Further, it allows installation of military bases, units, and outposts, expansion of transportation modes, and exploration of strategic energy alternatives in indigenous lands, regardless of consultations with the communities involved or the federal indigenist body with jurisdiction over the matter.<sup>43</sup>

The fact is that the fragile and receding policy for the demarcation of indigenous lands in Brazil heightens the vulnerability of indigenous peoples and consequently increases the frequency of trespass and attacks against their members, especially with the purpose of illegally exploiting resources on indigenous lands. A CIMI-produced report entitled “Violence Against Indigenous Peoples in Brazil – 2019 data” categorizes as “violence against heritage” both the aforementioned 829 instances of omission and lethargy in regularizing indigenous land and 35 instances of trespass, illegal exploration of resources, and damage to heritage.<sup>44</sup>



### 3.2 Exploration of natural resources in indigenous lands

During the first months of the Bolsonaro administration, the subject of using protected indigenous lands for economic purposes was brought back into discussion. At its baseline, the Federal Constitution protects indigenous lands from exploitation. Articles 231 paragraphs 3 and 76, paragraph 1 of the Federal Constitution allow exploration and extraction of minerals on indigenous lands only if several conditions are met: if the activity is authorized by law by Congress and undertaken through consultation with the affected communities and if the results of exploration are publicly shared. In April 2019, Congressman General Peternelli, a member of the President's party at the time (*Partido Social Liberal*, PSL-SP, the Social Liberal Party) filed a request before the Lower House of Representatives to establish a Special Commission for an opinion on PL 1610/1996. PL 1610/1996 is a draft bill to legalize and regulate the exploration and use of mineral resources in indigenous lands without the above-stated conditions.

Discussions on the draft bill largely did not advance.<sup>45</sup> <sup>46</sup> Unsuccessful in moving the discussions forward, Bolsonaro and his allies attempted a new strategy. On February 5, 2020, the Executive Branch presented Draft Bill PL 191/2020 to the Lower House.<sup>47</sup> Draft Bill 191/2020 goes even further than PL 1610/1996, proposing not only permission for mineral resource surveys and collection, but also exploration of hydrocarbons in particular, as well as the use of water resources to generate electric power within indigenous lands.

According to a Public Notice of the 6th Chamber of the Federal Prosecution Office, the bill does not comply with the provisions of ILO Convention no. 169 by not ensuring prior consent of the indigenous communities affected. The Public Notice acknowledged that “[the] presentation of Draft Bill PL 191/2020 and statements in support of mining by some authorities at least partially explain the growth of this illegal activity in indigenous lands, which threatens communities near the prospecting areas.”<sup>48</sup>



### 3.3 Increased land grabbing and reduced enforcement against land grabbing

In a context of threats to indigenous territorial rights, conflicts have become more severe in indigenous lands due to the invasion of prospectors. Data from the report on “Violence Against Indigenous Peoples in Brazil – 2019 data” point to an increase in recorded “possession invasions, illegal resource exploration, and damages to heritage”, which increased from 109 cases in 2018 to 256 cases in 2019. The 2019 number is more than twice that from 2018, representing an increase of 134.9%. These events took place in at least 151 indigenous lands of 143 peoples in 23 states.<sup>49</sup>

A situation that serves as an example of the systematic attacks against indigenous peoples when it comes to land and heritage was the attack against the headquarters of the Munduruku indigenous women’s association, which opposes illegal mining, in March of 2021 in the state of Pará. According to the association, illegal miners and representatives of an enticed indigenous minority went to their headquarters and destroyed the facade and furniture of the building. They also allegedly set fire to association documents and other materials.<sup>50</sup> The action occurred a few days after the arrival of wheel loaders (a type of tractor to remove sand and other materials) in the Munduruku people’s territory, hired by a group of prospectors.<sup>51</sup> The region is of the utmost importance for this people and is at risk due to the mining activity, which may destroy the Cururu river and consequently suppress the Mundurukus’ traditional way of life.<sup>52</sup>

In the legislative sphere, the risk of land grabbing has become more severe in view of Draft Bills no. 2633/2020, of the Lower House of Representatives<sup>53</sup> and no. 510/2021 of the Federal Senate.<sup>54</sup> Both bills, known as the “land-grabbing draft bills,” attempt to change the Property Regularization Law<sup>55</sup> to offer a sort of “amnesty” for land grabbers and invaders who irregularly occupied and exploited Federal lands even where they are used by traditional, indigenous, and Quilombola communities. Land grabbers and invaders will not be punished for committing those crimes and for illegal deforestation of protected areas. If approved – especially in tandem with legislative proposals that seek to alter the indigenous land demarcation procedures, facilitate the exploitation of natural resources, and simplify environmental licensing – will represent a severe regulatory setback. When added up, the consequences will be devastating for communities and for nature itself.

On April 16, 2020, FUNAI issued Normative Instruction no. 9, which regulates the request, analysis, and issuance of Limit Recognition Declarations.<sup>56</sup> This document is responsible for certifying that private rural property limits respect the territorial limits of ratified indigenous lands, indigenous reservations, and regularized indigenous domain lands. However, the instrument, which revokes Normative Instruction no. 3, of April 20, 2012, does not

address lands claimed by indigenous peoples under administrative proceedings that are still pending;<sup>57</sup> Federal lands assigned to indigenous usufruct; and reference areas of indigenous peoples living under voluntary isolation. These omissions generate legal uncertainty regarding those lands. The new instrument also extinguishes the Administrative Certificate which formerly identified whenever third-party property boundaries overlapped with regularized indigenous lands or those in the process of demarcation. In this sense, the Normative Instruction declares that FUNAI should not “produce documents that restrict the possession of private property in face of studies to identify and outline indigenous lands or establish indigenous reservations,” in a blatant policy to restrict the rights of indigenous peoples.

According to the Federal Prosecution Office,<sup>58</sup> the Normative Instruction contradicts the very nature of the right of ownership of ancestral lands as an original right of indigenous peoples, since it gives private property priority or precedence in relation to indigenous lands. Furthermore, this instrument, as well as the aforementioned “land grabbing draft bills,” did not undergo a process for FPIC with the indigenous peoples involved, pursuant to Convention no. 169 of the ILO, the United Nations Declaration of Indigenous Peoples’ Rights, and the decisions of the Inter-American Human Rights Court.

Civil society fear that harmful policies implemented through non-legislative acts such as the aforementioned Normative Instruction will be passed into future legislation, consolidating the persistent violation of indigenous people’s right to ancestral land.



### 3.4 Violence and criminalization of indigenous peoples

Indigenous peoples have suffered an increase in violence: there were 277 reported cases of violence against indigenous persons recorded in 2019, among which almost half (133) were assassinations and homicides.<sup>59</sup> Attempts at violence and death threats were recorded 58 times. One of the targets of this violence was the Guarani Kaiowá people, which, in January 2020, was the target of a violent operation that lasted 16 hours and left seven indigenous individuals injured from rubber bullets and firearm casings.

In June 2020, two Yanomami indigenous youths were killed in their own land.<sup>60</sup> The homicides took place near an illegal heliport and were committed by two prospectors. It is estimated that approximately 20 thousand prospectors live illegally in Yanomami lands.<sup>61</sup> In July 2019, chief Emyra Wajãpi was murdered after the invasion

of the Mariry settlement in Amapá by 50 prospectors.<sup>62</sup> The Wajãpi's territory has already been demarcated, but, since it is rich in gold, it is extremely sought after by prospectors, who simply ignore the demarcation.

The Inter-American Human Rights Commission has already demonstrated its concern over attacks against the indigenous population in Brazil. In a report published in 2021, the Commission expressed that, when visiting the country, it was informed "about successive attempts to criminalize [indigenous] leaderships."<sup>63</sup> A recent and illustrative example of this attempt was the opening of investigations by the Federal Police, at the behest of FUNAI, into indigenous leader Sônia Guajajara and APIB regarding alleged defamation against the Jair Bolsonaro administration and the disclosure of false data on the COVID-19 pandemic through the Maracá web series, which points to omission by the government in its efforts to fight and control viral contagion among the indigenous population. Similarly, an investigation was initiated against Almir Suruí in an attempt to criminalize the "Forest Peoples against COVID-19" campaign. These investigations reveal a tendency to persecute indigenous leaders that perform actions and initiatives that are critical of the federal Executive branch. The fact that these investigations were later classified<sup>64</sup> shows the level of secrecy with which they are being conducted.

A recent "Report on the criminalization and harassment of indigenous leaders in Brazil,"<sup>65</sup> produced by the Indigenous Peoples' Rights International in a partnership with APIB, reveals and organizes cases of attempts to silence and deny rights of indigenous peoples.<sup>66</sup> This study shows a criminalization pattern, encompassing practices such as harassment, suppression of rights, and denial of identity, beyond the technical-criminal sense.

This intimidation scenario extends to organizations that represent indigenous individuals – and, in a broader sense, civil society organizations. In 2019, at the start of the United Nations General Meeting, on September 24, 2019, the President claimed that Brazil was suffering from "radical environmentalism" and "outdated indigenism," and criticized acclaimed chief Raoni<sup>67</sup> in an attempt to delegitimize his leadership status. In 2020, Brazil's speech at the start of the UN General Meeting was similar in tone, characterizing indigenous peoples as those responsible for starting the Brazilian forest fires.<sup>68</sup>

A related alarming piece of data is the increase of suicides among indigenous peoples, reaching 133 cases in 2019.<sup>69</sup> Data from the Ministry of Health have shown that the suicide rate in this group is higher than the national average.<sup>70</sup> Experts believe that one of the main reasons behind these figures is the absence of land demarcation and the resulting conflicts, social dislocation, and stress this causes.<sup>71</sup>

### 3.5 Weakening of environmental bodies and those linked to the protection of the rights of traditional peoples and communities

The reduced inspections and fewer measures protecting indigenous communities partly result from a severe weakening of the institutional and budgetary capabilities of environmental protection bodies – such as the Chico Mendes Biodiversity Conservation Institute (ICMbio) and the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA) – as well as those related to the protection of the rights of traditional peoples and communities – such as FUNAI, Fundação Palmares, and the National Colonization and Agrarian Reform Institute (INCRA). This has occurred through the withdrawal of autonomy from these bodies, political interventions in their operation, reductions of budget and corresponding personnel and capacity, militarization of environmental protection, and pressure and persecution of public servants.<sup>72</sup>

Major budget cuts at environmental and indigenous bodies have made their work almost unfeasible. FUNAI's total budget for 2020, for instance, represented merely 0.02% of the Federal Government budget, and has been reduced on a yearly basis. Between January and May 2020, the lowest amount in the last ten years was allocated, in spite of the pandemic and the specific attacks against the rights of indigenous peoples.<sup>73</sup> For 2021, the government has also reduced the funds destined to indigenist policies, having vetoed around BRL 4 million that would have been allocated to FUNAI.<sup>74</sup>

According to CIMI, FUNAI's budgetary insufficiency is a historical issue, although it has been greatly deepened by the anti-indigenous bias of the current administration.<sup>75</sup> Thus, the budget cut is also aligned with the reorientation of the indigenist policy, "notable for its return to a militarized and assimilationist approach in the foundation."<sup>76</sup>

Fundação Palmares and INCRA are also examples of the compromising of budgets of important bodies for the protection of traditional peoples and communities. Fundação Palmares suffered with a reduction of 76.13% in its budget over 10 years,<sup>77</sup> while INCRA had its budget cut 44% over twenty years.<sup>78</sup> INCRA public servants also point out that, in the last few years, settlement policies have been abandoned, replaced with work focused on property regularization – which "seems to be very much linked to pressures from the agribusiness sector to recover these areas to use for mining, for lumber [...]."<sup>79</sup> Meanwhile, 2021 saw a reduction of over 90% in Quilombola land recognition and compensation actions, concession of credit to settled families, and land acquisition, while the monitoring of agrarian conflicts and field pacification were reduced by 82%.<sup>80</sup>

### 3.6 Reduction of participation by civil society

Indigenous peoples' rights have also been threatened due to the extinction during President Jair Bolsonaro's administration of hundreds of social councils and collegiate boards that had enabled popular participation.<sup>81</sup> At least three such councils or boards linked to indigenous peoples have been extinguished: the National Indigenist Policy Commission, the National Indigenous School Education Commission, and the Managing Committee for National Land Management and Environment Policy (PNGTAT). Similarly, indigenous representatives have lost their seats<sup>82</sup> in the new composition of the National Environmental Council.<sup>83</sup>

With these measures, dialogue between civil society and the government has been severely restricted, and with it civil society's capacity to fight the reduction of social policies. According to CIMI, "this is a concrete action through which the government demonstrates its unwillingness to establish dialogue with indigenous peoples, organizations and leaders."<sup>84</sup> For instance, due to the extinction of the PNGTAT Management Committee, the land management policy itself has not been implemented, which has caused severe hindrances to the sovereignty of lands due to the absence of definitions on the form of use.

### 3.7 The threat to the normative guarantee of FPIC of traditional peoples and communities

One of the strongest features of ILO Convention no. 169 is its requirement that states ensure FPIC to indigenous peoples in relation to use of their territories. As discussed, Brazil has ratified ILO Convention 169. But this status is in jeopardy. Also on the subject of participation and sovereignty, a congressman has proposed that the President of the Republic challenge Brazil's ratification of ILO Convention no. 169 through Legislative Decree Bill (PDL) no. 177/2021.<sup>85</sup> The proposal argues that Brazil's support of Convention no. 169 prevents the country's economic growth, mentioning as examples of "inconveniences" generated by Convention no. 169 the stoppage of major works like the Mar Azul terminal (Santa Catarina state) and BR 080, which crosses the states of Goiás and Mato Grosso.

According to a Joint Technical Notice by the National Association of Federal Prosecutors and the National Association of Labor Prosecutors, the argument around the stoppage of works "truly reveals the inability of government entities in establishing true spaces of participation for the affected peoples, as required by the current legal order."<sup>86</sup>

Furthermore, as stated in the justification for PDL 177/2021, "it is impossible to rule over a country with hundreds of indigenous lands with a degree of autonomy greater than that of the Federal States."<sup>87</sup> In practice, however, Convention no. 169 is repeatedly ignored, as illustrated by the previously mentioned case studies.

## Relevant OECD committees, initiatives, and instruments

Brazil's failure to ensure effective regulation, monitoring, investigation, punishment and remediation to safeguard the rights of indigenous peoples causes it not to be in alignment with many OECD instruments, commitments and values concerning this issue.

Twelve OECD legal instruments mention indigenous peoples and communities. These instruments address the following issues: the certification of forest reproductive material (Decision of the Council establishing the OECD Scheme for the Certification of Forest Reproductive Material Moving in International Trade, OECD-LEGAL-0355),<sup>88</sup> access to research data from public funding (Recommendation of the Council concerning Access to Research Data from Public Funding, OECD-LEGAL-0347),<sup>89</sup> stakeholder engagement in the extractive sector (Recommendation of the Council on the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, OECD-LEGAL-0427),<sup>90</sup> respect for indigenous peoples rights in the OECD Guidelines for Multinational Enterprises,<sup>91</sup> integrated management of coastal zones (Recommendation of the Council on Integrated Coastal Zone Management, OECD-LEGAL-0268),<sup>92</sup> capacity-building for civil society (DAC Recommendation on Enabling Civil Society in Development Co-operation and Humanitarian Assistance, OECD-LEGAL-5021),<sup>93</sup> financial literacy (Recommendation of the Council on Financial Literacy, OECD-LEGAL-0461),<sup>94</sup> and biodiversity (Recommendation of the Council on the Use of Economic Instruments in Promoting the Conservation and Sustainable Use of Biodiversity, OECD-LEGAL-0326).<sup>95</sup>

In general, these instruments express the idea that public policies should heed indigenous peoples' economic interests and respect their rights such as to self-determination and FPIC. Two key elements in the OECD's instruments and publications on indigenous people are an expectation for ensuring the FPIC of the communities and the special treatment of indigenous people in public policy. From an economic perspective, the Recommendation of the Council on the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector and the Recommendation of the Council on Integrated Coastal Zone Management confirm the need to take the interests and the forms of production of indigenous communities into account when dealing with extractive operations and the management of coastal regions. The Guidelines for Multinational Enterprises set standards from OECD states for multinational enterprises on responsible business conduct. The standards note that multinational enterprises can have impact on the full spectrum of human rights, including rights of indigenous people as enshrined in UN instruments, and they call on states to work to ensure that enterprises respect and avoid infringing on human rights. Both the Recommendation of the Council on Financial Literacy and the Recommendation of the Council on Access to Research Data from Public Funding call on countries to take the specific situation of indigenous peoples into account when formulating educational policies (on financial literacy, for example) and conducting research projects that require FPIC for the use of personal data. These two instruments also stipulate that the state must give special treatment to indigenous peoples for cultural reasons and due to their location, and strive to include the representatives of these peoples in the formulation and implementation of public policies with a wider scope that have impacts on indigenous peoples' way of life.

Of further note, the OECD has acknowledged the link between environmental protection efforts and involvement of indigenous peoples. In the Recommendation of the Council on the Use of Economic Instruments in Promoting the Conservation and Sustainable Use of Biodiversity, the OECD directly relates effective environmental protection, the rational use of biodiversity, and the reduction of greenhouse gas emissions to the participation of indigenous peoples in the conceptualization and implementation of environmental policies.

The OECD's position on certain issues expressed in its non-regulatory publications should also be considered. In relation to indigenous peoples, the OECD has a series of important documents that mainly address the situation of these groups in its member states. For instance, the OECD has published a series Linking Indigenous Communities with Regional Development.<sup>96</sup> The project and its publications are based on the premise that the

economic empowerment of indigenous communities is an important condition for their self-determination, and reciprocally that regional development is best achieved through fulfilment of indigenous peoples development potential. To strengthen them economically, essential public policies must be applied to indigenous peoples, once adapted appropriately, and indigenous community leaders should be assured the right to participate directly in the elaboration of such policies.

All of these documents and project show the OECD's own emphasis on assuring the rights of indigenous people, and ensuring that its members assure the rights of indigenous peoples in relation to development. Given this, during any process for considering Brazil's admission to the OECD, the Organisation should prioritise attention to how Brazil is handling indigenous peoples rights. The OECD should mark the gradual erosion of the country's policies on indigenous peoples, and consider how these result in Brazil's failure to meet its international law human rights obligations.

## Conclusion and recommendations for Brazil and the OECD

The gaps and failures on indigenous peoples rights referenced in this submission have not occurred only under the current Bolsonaro administration; many of them go back many years. **These gaps and failures are not only contrary to OECD instruments, standards and commitments, but an affront to the organisation's foundational values of respect for human rights, democracy and the rule of law.**<sup>97</sup> Crucially, commitment to upholding these values demonstrate what the OECD calls "like-mindedness" of candidate countries, an important consideration during accession.<sup>98</sup>

As mentioned, the OECD's instruments and publications on indigenous people prioritize both assurance of their right to FPIC, and the need for special treatment for indigenous people in public policy. To ensure both, projects and policies that are open to the direct participation of members of indigenous communities are needed. Specific bodies equipped with adequate financial and human resources for the implementation of policies geared towards these communities are equally important. Brazil has recently dismantled the mechanisms that guarantee these two aspects. The slowness of the land demarcation process, the advance of illegal economic activities on indigenous lands, the cuts to the budget of specialized government bodies and the mismanagement of the pandemic's impacts on indigenous people show Brazil is not protecting indigenous peoples' rights. By failing to intervene in the violations of indigenous spaces, the Brazilian government infringes on indigenous peoples' right to self-determination. Moreover, by allowing this vulnerable group to be affected by the COVID-19 pandemic much more severely than the average population due to lack of state assistance, the government shows its inability to adapt its emergency health policies to the specific situation of indigenous people.

## Recommendations for reform in Brazil

To address the gaps and failures on indigenous peoples rights described above, Brazil should as a matter of priority adopt a number of immediate reforms as well as abandon detrimental measures. The following is a non-exhaustive list of recommendations on reforms actions Brazil should take.

### Regulatory regime

- Abandon the deregulation movement that is manifested through bills and administrative orders that harm indigenous peoples' rights, the environment, and climate, such as draft bill 3729/04 (Environment Licensing), 2633/2020 ("Land Grabbing Draft Bill"), 1426/2020 (Legal Reserve), 490/07 (indigenous territorial rights), 191/2020 (mining in indigenous lands), Decree no. 9760/2019, and IBAMA Normative Instruction no. 7;
- Reject Draft Bills PL 1610/1996 and 191/2020 to prevent exploration of natural resources in Indigenous Lands.

### Budget, staffing and resources for relevant governmental bodies

- Strengthen indigenist bodies such as FUNAI, and other related governmental bodies such as IBAMA, ICMBio, INCRA, ensuring that they are empowered to perform their mandates, including by granting them technical independence and a proper and sufficient budget to maintain the staffing and activities needed to protect indigenous peoples' rights;
- Reinforce efforts to address the COVID-19 pandemic in relation to indigenous peoples, including by ensuring accurate statistics on the number of those affected, and granting indigenous people priority for vaccination, freedom from illegal invasions of indigenous territories, and access to quality health services.

### Enforcement

- Increase inspections of illegal invasions, land grabbing, illegal extraction of natural resources in Indigenous Lands, and threats to indigenous peoples;
- Assure the ability of administrative bodies and the Judiciary to act independently and diligently in applying sanctions to those who violate indigenous lands or safety, and resolve judicial cases on environmental destruction, deforestation and climate change, and indigenous rights.

### Land demarcation and land management

- Demarcate all indigenous land, including land not inhabited by indigenous people in 1988, within a reasonable schedule;
- Improve the land management and property governance system by:
  - Digitizing and publicizing cases;
  - Integrating other relevant systems such as CAR, SIGEF, the Federal Revenue Service, Real Estate Registry Offices, etc.;
  - Improving control mechanisms;
  - Providing legal security; and
  - Solving property conflicts.

### International commitments

- Fully implement ILO Convention no. 169 and the right to FPIC, commit not to approve PDL no. 177/2021.

## Recommendations for the OECD accession process

Taken together, the gaps and failures referenced in this submission demonstrate that Brazil is far from being in alignment with OECD practices, policies and standards and that at this moment in time, it is unfit for accession. The accession process provides a unique opportunity to achieve alignment, provided accession is unreservedly conditioned on Brazil addressing the legal and policy failures identified in this paper.

The authors of this paper OECD Watch, Conectas, and FIDH make the following asks:

### Of the OECD and each of the relevant technical committees:

- To carefully consider the research and reform recommendations presented in this paper during Brazil's technical review;
- To ensure the technical review process is transparent and participatory, actively seeking engagement of civil society, particularly in Brazil, to ensure its views are heard and reflected in the ultimate terms for Brazil's potential accession; and
- **To require Brazil to adopt the reforms recommended in this paper as a condition of accession.**

### Of current OECD member states:

- To ensure the OECD upholds its values on rule of law, human rights, and the environment by:
  - Ensuring the technical reviews of the relevant OECD committees are transparent and participatory;
  - Ensuring the relevant OECD committees require Brazil to adopt the reforms this paper recommends during its accession process; and
  - Granting Brazil membership only if it has implemented the domestic reforms necessary to meeting the OECD's values and standards.

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