

Transition minerals at any cost? Input to the United Nations Working Group on Business and Human Rights on just transition and the extractive sector’s impact on human rights

Contact Details:

Type of Stakeholder: Academic institution

In response to: Call for inputs: Extractive Sector, Just Transition and Human Rights

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Can we attribute responses to this questionnaire publicly? Yes.

The Institute’s work

The [Facts and Norms Institute](#) is an independent academic institution based in the Global South, with members present in all continents. The Institute’s mission is straightforward: to promote a rational, human rights-based approach to social issues.

Since its establishment, the Institute conducted research about varied human rights topics, including human rights and infectious diseases; torture and torture prevention; religious intolerance, violence, and racism; social participation; transitional justice and sustainable development; the role of non-state actors (particularly businesses) in transitional justice; the human rights of persons with albinism; criminalization of persons living in the street and in extreme poverty; the protection of lawyers; the human rights of indigenous and rural communities to water and sanitation; militarization of indigenous and *quilombola* land; human rights and internet shutdowns; mercury, artisanal and small-scale gold-mining and human rights; adequate housing and climate change; contemporary forms of slavery and the informal economy; technology and contemporary forms of slavery; and the present submission concerning extractive sector, just transition and human rights.

Summary

1. Introduction	2
1.1. Methodology	2
1.2. Assumptions	2
2. Question 02	3
3. Question 10	7
4. Question 13	10
5. Question 21	13

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1. Introduction

The [United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises](#) issued a “Call for Inputs” on “[Extractive sector, just transition and human rights](#)” to prepare a Report to be presented to the 78th session of the General Assembly in September 2023. In this Call for Inputs, the [Working Group](#) proposed a set of 21 questions.

The [Facts and Norms Institute](#) has respectfully selected the questions 02, 10, 13 and 21 to provide inputs to the [Working Group](#). Each question is concisely answered in a dedicated topic. This document addresses the issue of contemporary slavery and child labor in the Democratic Republic of the Congo – DRC – analyzing possible contributions of the adoption of anti-blending clauses in ore sales contracts. This document also addresses land dispute issues in Brazil regarding some of the most vulnerable populations such as the indigenous peoples and peasants and the contribution that human rights-based impact and risk assessments and due diligence practices may be able to offer. Recommendations are provided at the end of the document, pursuant to question 21.

1.1. Methodology

This document was based on desk research. Comprehensive qualitative analysis of legislation, news publications, policy reports, academic and research articles, NGO reports and Governmental sources have been considered, as well as previous work from the [Facts and Norms Institute](#). Part of the reasoning behind the answer to question 13 derives from the reanalysis and remodeling of the dataset elaborated in the research by Owen et al. available for open access¹.

1.2. Assumptions

During the last decades the international community gradually came into a quasi-consensus understanding that we are increasingly facing the beginning of a set of environmental crises as a consequence of human polluting and devastating activities. Among such crises, maybe the most prominently quasi-consensus is that the average temperature of the planet is rising due to the increase of the greenhouse effect as a result of human-caused elevation of the concentration of CO₂ – and other “greenhouse gases” – in the atmosphere. As a consequence, the climate is changing and will continue to do so at increasing rates and to worsen effects. The main cause for that is the use of fossil fuels to generate energy. The only way to reduce and revert the warming is the reduction of

¹ Owen, J. R., Kemp, D., Harris, J., Lechner, A. M., & Lèbre, É. [Fast track to failure? Energy transition minerals and the future of consultation and consent](#). Energy Research and Social Science, 89. July, 2022

the concentration of greenhouse gases in the atmosphere. Thus, reducing emissions and capturing those gases becomes a global priority.

Since the reliance in the fossil fuels for energy generation is enormous and the demand for energy is increasing², the only way to reduce emissions and increase energy supply is through a major shift in the energy markets worldwide. This shift to a model that does not emit greenhouse gases is complex, expansive and takes time. The process of shifting to such model has been coined “energy transition” or simply “transition”. Thus, energy transition materials or “ETMs”, are required at enormous quantities in order to generate clean energy and electrify factories, urban and rural areas, and roads, etc. The list of ETMs is long and dynamic, and as sub-set of it is the list of “critical minerals”³. This list is also increasing as new transition technologies are developed. As defined by the European Union, the list of critical minerals totaled 14 in 2011, 20 in 2014 than 27 in 2017. The United States Department of Energy also has an increasing list. For the purposes of the present document, we’ll consider a comprehensive list of 44 critical minerals⁴ that combines both sources⁵.

The increasing demand for these minerals puts pressure on investors, creditors and mining companies to boost production and on governments to loosen regulations and fast-track projects. Prices of some of these minerals are expected to increase 9,13% on average, some of them rocketing 23% increase until the end of the decade⁶.

2. Question 02

02. Are you aware of any measures, both mandatory and voluntary, at national, regional, and international levels to foster business respect for human rights in the extractive sector, especially in the context of energy transition plans, programs and activities? If so, are these measures effectively enforced and do they provide the necessary coverage in light of evolving circumstances, including energy transition plans? Is greater clarity necessary in some areas of law and policy? What measures may reasonably correct this situation?

² See, v.g., passim, International Energy Agency. [World Energy Outlook 2022](#). IEA, November 2022.

³ Raphael J. Heffron. [The role of justice in developing critical minerals](#). Extractive Industries and Society, 7(3), 855–863. July, 2020.

⁴ They are: Bauxite, Cerium, Chromite, Chromium, Cobalt, Copper, Dysprosium, Gallium, Germanium, Graphite, Heavy Mineral Sands, Ilmenite, Indium, Iron Ore, Lanthanides, Lanthanum, Lead, Leucoxene, Lithium, Magnesium, Manganese, Molybdenum, Neodymium, Nickel, Niobium, Praseodymium, Rutile, Samarium, Scandium, Selenium, Tantalum, Tellurium, Tin, Titanium, Tungsten, Vanadium, Ytterbium, Yttrium, Zinc, Zircon, Iridium, Platinum, Silver, and Rare Earth Elements.

⁵ Owen, J. R., Kemp, D., Harris, J., Lechner, A. M., & Lèbre, É. [Fast track to failure? Energy transition minerals and the future of consultation and consent](#). Energy Research and Social Science, 89. July, 2022

⁶ Aran Ali; Alejandra Dander. [The Future Value of Disruptive Materials](#). Visual Capitalist. 14 Dec. 2022.

There is an energy transition plan currently active in Brazil. This topic explains how it came to be, analyzes its coverage and provides a set of adjustments.

In the last year of his term, the former president of Brazil signed into Federal Law 14.229/2022⁷ and enacted a presidential decree⁸ creating the Just Energy Transition Program [Programa de Transição Energética Justa] and, its respective collective decision body, the Just Energy Transition Council [Conselho de Transição Energética Justa]. Even though the name of the program and the council do not hint at a specific geographic designation or economic sector, the articles of law and decree greatly restrict this initiative. In fact, the Program's only scope is the carboniferous (coal mining, producing and consuming) region in the State of Santa Catarina, in the south of Brazil. This kind of restriction is an odd choice considering that, as above mentioned, the name of the Program and Council have no hint towards such a narrow scope. Naturally, this may simply be a stylistic choice in naming a narrow initiative with a general name. However, this might also shed light on the understanding of the former government that only this specific mineral and region should be considered on just transition discussions, to intentionally limit the possibilities of advancing the matter – as written into law.

The Just Energy Transition Council is composed of 9 members. Five of them representing the State: 4 ministries⁹: Mining and Energy; Environment; Regional Development; and the President's Office of the Chief of Staff [Casa Civil da Presidência da República]; plus the Office of the Governor of Santa Catarina. The remaining four members represent the Association of Municipalities in the Carboniferous Region of Santa Catarina [Associação dos Municípios da Região Carbonífera]; the Coal Extraction Industry Employers' Union of Santa Catarina [Sindicato da Indústria de Extração de Carvão do Estado de Santa Catarina]; the Brazilian Association of Coal [Associação Brasileira do Carvão Mineral]; and the Inter-State Federation of Workers of Coal Extraction Industry [Federação Interestadual dos Trabalhadores na Indústria da Extração do Carvão no Sul do País]. Only one workers' organization is part of the Council, and no Human Rights organization (neither government nor civil society) is part of it.

The mentioned pieces of legislation are primarily focused on securing energy supply and conditioning the transition in the region to alternate sources of energy and point to a horizon of complete shutdown of coal thermoelectric operations by 2040, as per article 4, paragraph 1 of [Federal Law 14.229/2022](#). However, as per paragraph 5, item 6 of the same article, the Council may explore other uses of coal and as well as the maintenance of coal thermoelectric operations provided such operations reach effective net-zero by 2050. This is a contradictory legal mandate in itself. The law prescribes that the Council

⁷ Brasil. [Lei Federal 14.229 de 05 de Janeiro de 2022](#). Diário Oficial da União, Brasília, 06 Jan. 2022.

⁸ Brasil. [Decreto 11.124/2022 de 07 de Julho de 2022](#). Dispõe sobre o Conselho do Programa de Transição Energética Justa e o Plano de Transição Justa. Diário Oficial da União, Brasília, 08 Jul. 2022.

⁹ First-level executive bodies in the Federal Government.

shall take the measures to assure the complete termination of coal thermoelectric activities in the region by 2040 as it also allows the same Council to work towards a coal-active net zero operation in the region by 2050. This raises some unanswered questions: (i) what about this gap decade? Can the Council simply not meet the complete shutdown deadline by 2040 then only nearing 2050 reach net zero? Could it simply do nothing to reduce coal use than buy carbon credits in 2049-2050? (ii) since the Council's scope is – by force of law – narrowed down to a region of the State of Santa Catarina, could it simply move the coal thermoelectric power plant to other parts of the State or to a neighboring one to reduce the emissions in its geographic scope? The current wording of the law leave open these two possibilities.

On the last week of the former presidency, the Council approved the Plan of Just Transition [Plano de Transição Justa]¹⁰ as annex to Resolution n. 04 of 27 December 2022¹¹. Even though there is no mention of key terms such as “business and human rights”, “human rights”, “Guiding Principles”¹² etc., there are references to the Paris Agreement and the UN Sustainable Development Goals (SDGs). Each of the 13 specific objectives of the plan are referenced to the respective SDGs.

These 13 objectives focus primarily on the monitoring and mitigation of environmental impacts on one hand and maintenance of the economic activities, infrastructure and energy generation on the other. However, the human rights of workers and members of the communities get little to no attention whatsoever. Objective 5, for instance, titled “Economic Development” is centered on the idea of economic reorganization of the region but the actions proposed are shy in systematically facing the issues of social, economic and cultural rights in the region with a human rights lens.

Even though – as above mentioned – key terms such as “business and human rights”, “human rights”, “Guiding Principles” etc., are not mentioned in the document, Objectives 7, 8 and 9 deal with rights related to work, decent employment, etc. Objective 7's actions can be read as a sort of human rights due diligence process, including action 7.3.1. which determines the execution of a kind of human rights risk and impact assessment. However, these actions fail to adequately reflect the Guiding Principles and the best practices internationally developed in the last years. Among all the 76 actions, some active transparency is set to take place, however no grievance mechanism is proposed and no action remediation/reparation other than environmental in nature is mentioned.

¹⁰ Brasil. Conselho do Programa de Transição Energética Justa. [Anexo I – Plano de Transição Justa – Resolução n. 4, 27 de dezembro de 2022.](#)

¹¹ Brasil. Conselho do Programa de Transição Energética Justa. [Resolução n. 4, 27 de dezembro de 2022.](#)

¹² United Nations. Office of the High Commissioner for Human Rights. [United Nations Guiding Principles on Business and Human Rights.](#) UN Doc. HR/PUB/11/04. 2011.

Reasonably there are some adjustments that can be made that would better align the Plan and the Council to the International Human Rights Law provisions and best practices on Business and Human Rights. These adjustments are presented below:

Scope, name, and composition

Considering the utility of having a framework and a body to discuss and arrange the processes of just transition in Brazil, it is an interesting solution to establish a National Just Energy Transition Program, and a Council and a Plan. This might be done by reforming the current Just Energy Transition framework, widening its scope or by establishing a new one altogether. The national council should include human rights organizations, from the State and from civil society. Civil society ones should be selected by a nation-wide transparent procedure and hold positions in the Council for a fixed term. Business entities and financial institutions should also hold fixed-term positions in the Council following a nationwide transparent selection procedure.

Since the Program, Plan and Council are named Just Energy Transition [Program, Plan, Council] and are established so by federal legislation, to avoid misinterpretations, the names should be adjusted either to National Just Energy Transition [Program, Plan, Council] to reflect its nation-wide scope. If no national framework is put in place, then the current should be renamed in a manner to reflect its actual narrow scope.

Objectives and Actions

Specifically considering the Jus Energy Transition Plan [for the Carboniferous Region of Santa Catarina], the objectives should be respecified in order to directly reflect the UN Guiding Principles on Business and Human Rights (UNGPs) and the International Labour Organization Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All¹³, such as:

- Modify article 4th, paragraph 2nd of [Federal Law 14.229/2022](#) in order to include the Ministry of Human Rights and at least one position for a human rights' civil society organization. Set both business interests institutions and civil society organizations positions to be fixed term and transparently selected.
- Set a group of actions in Objective 9 (or in a 14th Objective) for the establishment of a Non-State Based Grievance Mechanism (UNGP 28) for the Carboniferous Region's coal industry and transition actions. Such grievance mechanism should be adequately designed to receive requests, complaints, suggestions and other

¹³ International Labour Organization. [Guidelines for a just transition towards environmentally sustainable economies and societies for all](#). International Labour Organization, 2015

inputs from members of the community and other stakeholders and be accessible in terms of language, structure and device, as well as transparent and predictable.

- Revise actions in Objective 7 or set a specific objective in order to design a comprehensive human rights due diligence and gender-responsive human rights risk and impact assessment to have both a well-defined baseline and an adequate follow-up framework.

Mandate of the Law

Considering the possible conflict of the mandates to the Council as set out in article 4th, paragraph 1 and paragraph 5, item VI, of [Federal Law 14.229/2022](#), the legislation should be revised in order to clarify the ambiguity of termination of coal activities by 2040 vs the coal-active net-zero by 2050, respectively. Maybe setting both deadlines to 2040 would reduce the risk of the ineffectiveness of the mandate of the Council.

The means for assessing net-zero as set in the same article 4th, paragraph 5, item VI, and elsewhere in [Federal Law 14.229/2022](#) also need clarification in order to avoid simply allowing the Council to reach its objective by moving the carbon emitting activities to far or neighboring regions that are only out of its geographic scope.

3. Question 10

10. Are human rights provisions, for example in existing concessions, contracts, and bilateral investment treaties, effective in encouraging businesses in the extractive sector, including investors, to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?

The answer to this question centers on the ability of businesses and private sector regulators, as well as stock exchange normative aspects, to provide incentives to the respect of human rights. As an example of that a brief analysis of the situation of contemporary forms of slavery in cobalt mining in the Democratic Republic of the Congo and strategies to counter and end these violations is provided.

Cobalt is one of the critical minerals important for energy transition. The mineral is primarily used to produce batteries for phones, other smart devices and electric vehicles¹⁴. Considering the production data in 2022, more than 70% of all cobalt is extracted in the Democratic Republic of the Congo – DRC¹⁵. Most of it is mined by formal large-scale transnational mining companies, but around 20% of it is extracted by informal

¹⁴ M. Hawkins. [Why we need cobalt](#). Applied Earth Science: Transactions of the Institutions of Mining and Metallurgy, 110(2), 66–70. 2001

¹⁵ Lauren Kelly. [Top 10 Cobalt Producers by Country \(Updated 2023\)](#). Investing News Network. 23 Feb. 2023.

small-scale producers and artisanal miners. Concerns and evidence of child labor and contemporary forms of slavery of these miners – both artisanal and company-employees – have arisen for the last decade¹⁶. Violations to the rights to life, health, dignity of workers and protection of children are among the many evidenced in DRC¹⁷.

Of course, measures should be – and have been – taken by the government of DRC to directly prevent and avoid human rights violations. Businesses are also increasingly required by their investors to observe and protect human rights. However, the negative impacts of informal mining are much harder to eradicate because of the fragmentary and informal nature of the activities. There is a role to be played by businesses in this gap. Lessons arising from the DRC cobalt situation may also be applied to other transition-minerals and other countries in the present and in the future.

Buyers and other cobalt suppliers have the ability to contribute to the situation as they do not support violations and as they close the door to evasive tactics from violators. Cobalt clients that produce and supply technology consumer products have been under growing scrutiny and have been faced with several human rights allegations and lawsuits in different jurisdictions. Big tech companies like Alphabet/Google, Meta/Facebook, Apple, Microsoft and Dell as well the electric vehicles giant Tesla presently face judicial claims of negligence and facilitation of forced labor in DRC because of their dependance on the cobalt extracted¹⁸.

Many are the challenges for the effectiveness of these measures, such as supply chain tracing and practical compliance and accountability mechanisms. However, for any of those to be effective, the evasion from such controls must be reduced as much as possible.

Cobalt, like many other minerals, comes in varied concentrations of ore and gangue and it is commonly traded at a specific reference ore/gangue ratio. If a client buys a high concentration lot it may be able to sell it at a premium accounting for that above-reference concentration, the same applies to below-reference lots where a discount is applied. However, in practice, many contracts do not allow for premiums and discounts or – even if they do – tend to be less profitable to the seller than the material sold at reference levels of concentration. Thus, it is very common for mining companies and for traders to blend ore from different sources in order to achieve reference ore/gangue levels. Mining companies frequently buy specifically higher or lower ratio material to mix

¹⁶ Nima Elbagir, Dominique van Heerden, & Eliza Mackintosh. [Dirty Energy: The clean energy revolution hinges on the Democratic Republic of Congo - where conflict, corruption, and child labor are rife](#). CNN, 2018

¹⁷ Amnesty International. "THIS IS WHAT WE DIE FOR"? Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt, 2016.

¹⁸ Business & Human Rights Resource Centre. [Lawsuit against Apple, Google, Tesla, and others \(re child labour, DRC\)](#).

with their own mined one in order to reach reference concentration levels before selling. Traders may also do so using blending facilities in ports or other logistic hubs.

This blending happens for achieving ore/gangue reference ratios but also to evade trade restrictions such as sanctions, import/export bans and supply chain tracing. This is important in the case of cobalt because of its current supply chain. Since approximately 80% of cobalt extracted from DRC is done so by regular mining companies, strict control over these businesses' direct activities is quite straightforward, especially considering that few companies control most of the extraction market¹⁹. Cobalt Institute and London Metal Exchange restrictions can have great impact there. However, the other 20% are mined by a myriad artisanal and small-scale informal mining companies. These are harder to track and account for regarding labor conditions.

Thus, in order to help clients and markets to responsibly source their ore, some mining companies have already begun implementing contractual restrictions when hiring shipping or selling to traders or even directly to clients. These restrictions work as “anti-mineral-laundering” clauses, requiring that buyers do not blend their ore with any other material from any other source or to do so only using another certified source²⁰.

Therefore, cobalt producing companies should adopt anti-blending clauses in their selling contracts. These clauses act by requiring purchases, traders and refineries to never blend their cobalt ore with ore from different sources or to do so only using another certified source. This would protect the integrity of the ore and make possible the tracing of its origin and routes by clients. This provision by ore producers helps the clients downstream avoid buying cobalt that was extracted using child labor and contemporary slavery mixed with well sourced ore, blended and sold in bulk. As with any such clause, this one needs monitoring and compliance mechanisms to produce its intended effects.

Some companies have already begun implementing human rights due diligence in their value chain in order to identify negative impacts such as contemporary slavery and supply chain controls to reduce that impact. Stock markets and metal exchange centers can also support this by requiring this clause to be inserted in the contract of companies trading in their platforms. London Metal Exchange, the largest of its kind in the world – requires their trading companies to apply the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas²¹.

¹⁹ Lauren Kelly. [Top 10 Cobalt Producers by Country \(Updated 2023\)](#). Investing News Network. 23 Feb. 2023.

²⁰ Even though a complete blending ban would tend to be more effective at first glance it might not be possible. Since artisanal miners and small-scale mining operations generate income to some of the most vulnerable people and simply a complete ban on their products may backfire and cause other negative human rights impacts.

²¹ London Metal Exchange. LME Policy on Responsible Sourcing of LME-Listed Brands, 2023.

Many other initiatives and organizations such as the Cobalt Institute work at the business level to address and reduce the negative impact on human rights caused by the cobalt industry. One of these initiatives is the Cobalt Industry Responsible Assessment Framework which work as a set of guidelines for businesses, including mining companies²².

However, neither of these guidelines do specifically prescribe an anti-blending clause even though it recommends – in some cases – the monitoring of the supply chain. Nevertheless, some mining companies have been adopting such clauses in specific contracts with traders and other mining companies upon which initial allegations indicate possible risk of “mineral laundering”.

In December 2022, DRC issued a general ban on copper and cobalt exports, with the possibility case authorization by the Ministry of Mining²³. This is likely to reduce sales of cobalt, especially the direct sales from artisanal and small-scale mining companies. In one hand this may help by reducing direct access of cobalt produced with child labour and contemporary slavery to markets. On the other hand, this puts more pressure on illegal routes and markets as well as may create a large volume of ore to be laundered via blending, making anti-blending clauses even more necessary.

4. Question 13

13. Should concessions, contracts, and legislation require all business enterprises producing, purchasing, processing, and distributing transition minerals to apply and implement human rights-based impact and risk assessments and due diligence standards, including gender-responsive HRDD and heightened HRDD for conflict-affected areas? If so, how could such processes ensure meaningful participation of impacted communities, particularly vulnerable and historically excluded groups?

Yes, for many reasons. The current moment of steep increase in the demand for transition minerals imposes a set of incentives for fast-tracking mining projects related to such materials. This is a new fold of the long push and pull between prioritization of strategic projects and careful preparatory work. This is nothing new in itself. It is very common – or even intrinsic to large scale endeavors – that part of the preparatory work consists of some risk assessment that is prior or concomitant to resource gathering. On one hand there is an urgency because of pressing need for this or that nature, such as economic,

²² Cobalt Institute. [Cobalt Industry Responsible Assessment Framework \(CIRAF\)](#). Access in 23 May 2023.

²³ Hanif Muhammad. [Zimbabwe, DR Congo ban lithium, cobalt exports - How it impacts battery, EV industry in Indonesia?](#). Indonesia Business Post, 14 Feb. 2023.

political, military or energy transition and the other hand the need to adequately foresee financial, political, environmental and social/human rights impacts.

In order to demonstrate that, this answer draws from issues of land use relations, conflicts and risks to peasants and indigenous lands in Brazil, which are particularly vulnerable and historically excluded groups.

Refining from the dataset gathered by [Owen et al.](#)²⁴, half of the listed critical minerals are found and are currently under one of the 129 mining projects or active operations in Brazil²⁵. Out of these, 91 of them are on or near peasant lands²⁶, 4 are on or near indigenous lands²⁷ and other 21 are on or near both [peasant and indigenous lands]. A considerable set of these indigenous lands are located in the Amazon Region.

Having this in mind, the human rights-based impact and risk assessment and human rights due diligence standards must be required for all new or expansion projects and operations of transition minerals. Part of the assessment must include land rights for indigenous communities and peasants. The pressure for fast-tracking the social-environmental studies must not trump the rights of indigenous and peasants to land.

Even though gold itself is not considered a critical mineral for energy transition, the example of what happened with predatory artisanal gold mining in Brazil is a worrisome indication of what can happen in indigenous lands in Brazil and elsewhere if the demand for any of these minerals raises their price to a level that makes it as profitable as gold.

As a brief example: the impact of illegal artisanal mining in the indigenous lands of the Yanomami people in Brazil²⁸. The Yanomami live in a legally demarcated indigenous land in the Brazilian Amazon. Their land is rich in gold which had been increasingly illegally mined by predatory artisanal miners and small-scale mining enterprises. These activities where not only illegal to be conducted in indigenous lands, but also caused grave

²⁴ Considering all critical minerals and all counties, 775 projects or active operations are on or near peasant lands, 1880 are on or near indigenous lands, and other 884 are on or near both peasant and indigenous lands. See: Owen, J. R., Kemp, D., Harris, J., Lechner, A. M., & Lèbre, É. [Fast track to failure? Energy transition minerals and the future of consultation and consent](#). Energy Research and Social Science, 89. July, 2022

²⁵ Cobalt, Copper, Graphite, Iron Ore, Lanthanides, Lead, Lithium, Magnesium, Manganese, Molybdenum, Nickel, Niobium, Tantalum, Tin, Titanium, Tungsten, Vanadium, Zinc, Platinum, Silver, and Rare Earth Elements.

²⁶ According to the definition provided in Article 17.1 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP). See: United Nations. Human Rights Council. [United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas \(UNDROP\)](#). UN Doc. A/HRC/RES/39/12, 28 Sep. 2018.

²⁷ According to the definition established in Article 26.1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). See: United Nations. [United Nations Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#). UN Doc. 61/295. Resolution adopted by the General Assembly on 13 Sep. 2007, UN Doc. A/RES/61/295. 2007.

²⁸ Vanessa Buschschlüter. [Brazil expelling illegal miners from indigenous lands](#). BBC News, 9 Feb. 2023.

environmental damage. Critical water sources and fisheries used by the Yanomami have been contaminated with mercury and their hunting grounds have been disrupted²⁹. The combined lack of enforcement of environmental protection laws, lack of adequate health services and the impact of illegal mining has caused steep increase in malnutrition cases and deaths in the indigenous land to a point that the Brazilian's Supreme Court has ordered in 2023 an investigation on the former president Jair Bolsonaro and staff under the claim of genocide³⁰.

The [Facts and Norms Institute](#) has submitted an input to the United Nations tackling the issue of environmental and human rights impacts in Brazil³¹. In the document "*Mercury, Artisanal and Small-scale Gold Mining and Human Rights: input to the United Nations Special Rapporteur on Toxics and Human Rights regarding Brazil, India and Peru*" the issue of impact on indigenous peoples' lands was demonstrated to be critical. The situation of the Yanomami and the impact of mercury land lack of adequate governmental action have been thoroughly demonstrated in the document.

Alongside with mining land disputes, peasants and indigenous peoples are pressured in Brazil by agrobusiness land use, which pushes peasants to worse quality land or even render them without land. According to the Landless Rural Workers Movement, 250 thousand peasant families currently don't have access or pacific hold of land to work and live³².

Therefore, States should be urged prevent fast-tracking of socio-environmental studies and human rights impact assessments for projects simply because their intended substance is a critical mineral. These studies and assessments can be prioritized, but never disregarded nor dismantled. Peasants, indigenous peoples and other traditional communities are historically excluded and made vulnerable and the push for energy transition and should not re-victimize them, rather it should provide them opportunities for development.

This is why human rights-based risk and impact assessment, and human rights due diligence standards must be required to carefully attend to land use issues and landholding rights. Among the aspects of such assessments and procedures the free, prior and informed consent (FPIC) of indigenous and traditional communities must be taken

²⁹ Clare Roth. [Como pode o garimpo provocar mortes por desnutrição?](#). DW, Deutsche Welle Brasil. 28 Jan. 2023.

³⁰ Paulo Roberto Netto. [STF manda investigar autoridades da gestão Bolsonaro por genocídio](#). UOL News. 30 Jan. 2023. Access in 23 May 2023.

³¹ Henrique Napoleão Alves; Victoria Ruiz Ledesma; Samyuktha Banusekar; Tádzio Peters Coelho. [Mercury, Artisanal and Small-scale Gold Mining and Human Rights: input to the United Nations Special Rapporteur on Toxics and Human Rights regarding Brazil, India, and Peru](#). Facts and Norms Institute, 2022.

³² Victor Ohana; Alisson Matos. "[Muitos conflitos vão pipocar no governo Lula](#)", diz diretor do MST na Bahia. Carta Capital. 3 Mar. 2023.

into consideration. FPIC was established internationally in the Indigenous and Tribal Peoples Convention, 1989, prepared and signed under the auspices of the International Labour Organization and referred to as ILO Convention n.169. Even though it has only been ratified by 24 up to date³³, it serves as international standard setting and some of its provisions have been mirrored by domestic legislation.

Specifically, in the Brazilian case, the FPIC and other land use standards have been recently put in place and do offer heightened protection and awareness to private and public sector actors. Therefore, the use of UNDRIP, UNDROP and FPIC standards in human rights due diligence is paramount to properly direct efforts of impact assessment and remedy in the context of transition mineral projects.

5. Question 21

21. Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would help further advance a just and human rights-based energy transition in the extractive sector? Any other comments or suggestions about the forthcoming report are also welcome.

Deriving from answers to questions 02, 10 and 13, we respectfully present 3 recommendations: one to the State of Brazil and two to businesses.

Brazil should revise the Just Energy Transition Program in order to better align it to Human Rights standards: including human rights' civil society organizations in the Just Energy Council; establishing fixed-term positions and transparent selection procedures for both business interests institutions and civil society organizations; creating a non-State grievance mechanism for Just Energy Transition; and set in the Just Energy Transition Plan the actions for comprehensive human rights due diligence and gender-responsive human rights risk and impact assessment.

Companies should uphold the respect for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) in the context of transition mineral feasibility and implementation studies as well as project monitoring. Specifically concerning land, States always identify land pressure and dispute issues, especially considering peasants and indigenous peoples arising in connection with mining activities. The pressure for fast-tracking projects of transitions mineral should not be used to fundament legislation that may violate rights of peasants and indigenous peoples.

³³ International Labour Organization. [Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 \(No. 169\)](#). International Labour Organization. 12 May 2023.

Alongside with upholding UNDRIP and UNDROP, human rights risk and impact assessment and due diligence standards should also incorporate free, prior and informed consent (FPIC) requirements in harmony with International Labour Organization Convention n. 169 for indigenous peoples and traditional communities and, to the extent possible, for peasants as well.

Mining companies and ore traders of cobalt should include an anti-blending clause in their sales contracts to avoid “mineral laundering” when well sourced ore is blended with not certified material which makes feed-tracing much harder and may be used to hide and incorporate minerals produced using child labor or contemporary slavery. This has been done by some mining companies and should be enhanced. This may also spread from cobalt to other minerals that are connected to widespread human rights violations in well-defined points of origin.

On a general comment for the forthcoming report, we respectfully suggest that it carry the recommendation for all Member States to establish of a National Justice Transition collective body for consultive and deliberative purposes. Such a body should be connected to the National Human Rights Institution – where they are in place and active – and should incorporate and reflect the National Action Plans – where they exist. Such a body should coordinate the relevant participation procedures and grievance mechanisms and oversee remediation actions related to impacts caused by the Just Transition measures.