Indigenous Community Conserved Areas in Brazil

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1. Introduction

Brazil's ecosystem is perhaps the most diverse and important to the global environment, and it is also one of the most threatened and fragile. The rainforests of the Amazon Basin are habitat for more species than any other ecosystem, and their plant life alone decides global patterns of weather and carbon emissions and absorption.[1] The Amazon Basin is also home to thousands of indigenous peoples who identity with hundreds of unique and distinct tribes. Both the ecosystem and the indigenous peoples are intertwined in a way that is quite different from the relationship between modern industrialised peoples and the environment. Indigenous peoples lack the technologies and infrastructure to disassociate their members and their way of life from the natural environment, and thus they rely on the ecosystem for their subsistence and survival. When one destroys the environment of Brazil's Amazon, one destroys the indigenous civilisations as well.

International and domestic measures introduced in the past 20 years seek to protect indigenous peoples and their lands from commercial exploitation and destruction. These measures have been partially successful at achieving their goals, but there are stronger factors that threaten to make them meaningless. Brazil's failure to enforce protected areas reflects an absence of rule of law in this developing country. The size of the protected areas themselves, roughly 12 percent of the country's land mass, poses a barrier as well. The topography of theotected areas, lush, dense rainforest where river transportation is limited, further diminishes enforcement. Moreover, contradictions between Brazilian constitutional principles and statutes have yet to be resolved. These contradictions have to determine whether Brazil truly wants to protect indigenous peoples and their lands or subject them to forced acculturation and development.

2. Measures

Indigenous and Community Conserved Areas

One of the most innovative recent developments in international law to protect indigenous peoples and their environment are Indigenous and Community Conserved Areas (ICCAs).[2] The philosophical idea behind these conserved areas is that indigenous peoples have lived in relative harmony with their ecosystems for millennia. Evidence for this is that indigenous areas are relatively undeveloped and pristine. The International Union for Conservation of Nature states this is a conscious choice of indigenous peoples that must be

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[1] Brasil, *International Union for Conservation of Nature* (2006) <http://www.iucn.org/about/union/commissions/ceesp/topics/governance/icca/ceesp_icca_legislation/>.

[2] Indigenous and Community Conserved Areas, *International Union for Conservation of Nature* (2009) <http://www.iucn.org/about/union/commissions/ceesp/topics/governance/icca/index.cfm>.

respected. 'They [indigenous peoples] have done this for a variety of purposes, economic as well as cultural, spiritual and aesthetic.'[3] (This is a possible self-serving delusion by modern environmentalists that is addressed in more detail under **Issues**).

These conservation areas are similar to wilderness parks programs established by modern governments, though the ICCAs have the distinction of preserving ecosystems for the use of indigenous peoples, not outsiders. In some cases, these areas are recognised by governments, and thus they have legal protection. In other cases, these areas are recommended for legal protection by indigenous representatives and others in the environmental movement, and thus they are the focus of political and legal activity. For example, before these areas are designated for protection, economic interests in logging, mining and oil exploration will often seek to limit the environmental protections that are finalised in the ICCAs.[4]

One of the important issues related to ICCAs is that they have more than just environmental protection in mind. They also seek to preserve cultural artifacts and systems of indigenous peoples. Thus, one can see how both environmental protection and indigenous rights have coalesced in the promotion of ICCAs. The values reflected in ICCAs are thus environmentalism, cultural preservation of indigenous ways and artifacts, and voluntary conservation by indigenous peoples, with significant assistance from government and nongovernmental organisations. This voluntary conservation by indigenous peoples also includes legal authority given to the people and/or their representatives to manage the ICCAs.[5]

Given these values, there are different impacts of ICCAs that go beyond environmental protection of the area concerned. These include establishing ways for indigenous and other local peoples to coordinate their activities and lifestyles in an ecologically sustainable manner that also promotes cooperation rather than conflict. Indeed, these conflicts became a central focus of concern in governance and maintenance issues surrounding ICCAs, as will be discussed later in the **Issues** section.

Despite the ideal of conservation, some ICCAs are in fact disappearing because of illicit, or recognised and allowed, encroachment by commercial interests, particularly logging, grazing and oil interests.[6] This phenomenon reflects the fact that the governments that manage these areas continue to suffer from weak central governments, corruption, neo-colonial structures of inequality, and the transformation of the indigenous way of life as modern civilisation intrudes.

Brazil's Measures

By 1993, Brazilian federal policy was required to achieve 'full demarcation of traditional Indigenous lands'.[7] This policy remained unrealised by 2001, although 87 percent of identified indigenous territories had been demarcated by the end of that year. This was an

[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] L Valenta, 'Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil' (2003) 38(3) *Texas International Law Journal* 643.

important step forward in determining what lands deserved to be protected. By identifying and mapping (demarcating) indigenous lands, Brazilian federal policy took an important step forward in determining that these lands deserved either protection, or at least some type of management to protect indigenous peoples and their culture, which of course would require some level of environmental protection as well.

Remarkably, this demarcation effort concluded that 12 percent of Brazil's land mass is identified as indigenous lands, and 95 percent of these lands were within the Amazon basin.[8] Unfortunately, the demarcation of indigenous lands was met by a backlash from commercial interests and local non-indigenous communities, primarily settlers, who engaged in human rights violations against indigenous peoples out of resentment that commercial livelihoods would be threatened by these demarcations. This issue is discussed in detail in the **Issues** section.

In regard to Brazil specifically, ICCAs have been recognised by the government, as part of the 'National System of Conservation Units'.[9] There are two categories of protection: Total Protection and Sustainable Use. Total Protection severely limits commercial activities, whether for local, indigenous or commercial interests. These areas are rare and limited in size. The second category is called 'Sustainable Use Reserves', and as this term implies (though does not always reflect) these areas are characterised by stricter environmental and indigenous protections.[10] Both categories are described by the government as: 'long-term agreements that are made with local and traditional communities to have the right to manage, use and monitor resources in areas of state land ownership'.[11]

Most territory is organised under two sub-categories of the 'Sustainable Use Reserves' category that determine vastly different modes of environmental and indigenous cultural protection. The first sub-category is 'Extractive Reserves', and this allows for the greatest amount of development and natural resource utilisation.[12] The term itself implies that the environmental resources of these areas may be used for significant commercial activities, and thus one must question whether such a designation should qualify as a true ICCA, or indeed as sustainable. Indeed, these areas are managed by 'extractive traditional communities, where their main subsistence is based on extraction of natural resources'.[13] Note how Brazilian law recognises a type of indigenous culture not reflected in the International Union for Conservation of Nature's idealised notion of ICCAs. Under the idealised notion of indigenous culture, there is harmony and symbiosis between culture and ecosystem, a concept that is challenged by the extractive qualities of some indigenous cultures in Brazil.

On April 13, 2006, Brazil adopted a federal decree, the 'National Plan for Protected Areas,' which 'contemplates Indigenous and afro-descendants' lands as part of this national system in recognition of their contribution to biodiversity and socio-biodiversity'.[14] However, the International Union for Conservation of Nature's analysis of designations of Brazil's ICCAs notes that some are not 'labeled as protected areas but their importance for

[8] Ibid.
[9] Brasil, above n 1.
[10] Ibid.
[11] Brasil, above n1, 1.
[12] Ibid.
[13] Ibid
[14] Ibid.

biodiversity conservation is recognized and they are an integral part of the National Plan'.[15] In other words, the decree recognised lands that are desirable for protection but failed to provide legal protection.

These varying definitions create some ambiguity over what an ICCA actually means, in practical terms, for environmental and indigenous protection. The example of Brazil suggests that the definition of what constitutes an ICCA varies depending on the government's legal definition. In other words, just because a non-governmental organisation has designated an area as an ICCA, and the government has supported this designation, there is no guarantee that this designation results in legal or practical environmental and indigenous protection for lands and people within these areas. Brazil divides these areas into categories that result in dramatic differences in environmental and indigenous protection. Indeed, in some cases, the ideals of the ICCA fail to be reflected in the reality of how these areas are governed, managed and used.

One of the beneficial aspects of Brazilian legislation impacting indigenous areas is that it calls for significant participation of indigenous peoples in the establishment of ICCAs.[16] This includes specific legal provisions, such as the right to genetic resources and traditional knowledge through prior informed consent.

For example, genetic resources refers to the use of species, both plant and animal, in the protected area that might be valuable for extraction for medical or other purposes. Drug companies, for example, are constantly searching for new biochemicals in the rainforests to synthesise for use in the development of new medications. Indigenous peoples who hold ownership over lands where such species are found have the right not just to control the extraction of these species but also the extraction of their genetic information. This provision in Brazilian law rightly anticipates the potential that commercial interests will lay claim to genetic property and its extraction without actually extracting the material. If the law only protected indigenous rights to species, commercial interests could extract genetic information without providing compensation to or subject to the regulation of indigenous overseers of the ICCA.

Brazilian law's protection of traditional knowledge in ICCAs is also a valuable contribution to environmental law. This conflicts with several areas of commerce, including tourism and world trade. For example, indigenous peoples and their lifestyles are the subject of significant curiosity by travelers from the modern industrial world who will pay a premium to experience these peoples and their culture. By assigning legal ownership of traditional knowledge to indigenous peoples, Brazilian law prohibits exploitation of indigenous peoples, their culture and their cultural artifacts by tourism companies.

In the trade arena, Brazilian law also assigns legal ownership of traditional knowledge in the form of trade goods produced by indigenous peoples. The first level of protection prevents the expropriation of these goods by commercial interests who then export them for sale abroad. The second level of protection establishes legal ownership for the benefit of indigenous peoples to profit from the sale of those cultural artifacts they intend to export for sale. Ownership of protected lands remains with the state.[17]

[15] Ibid.
[16] Ibid.
[17] Ibid.

Indigenous populations are participants based on contractual agreements with the government. The terms of the contracts determine the level and nature of participation, including governance, maintenance, preservation and defence of protected lands and resources. Paradoxically, Brazilian law maintains state ownership of these lands despite claiming that its 'guiding protocols' are to 'assure the territorial rights of afro-descendents communities and indigenous peoples as an instrument for the conservation of biodiversity'.[18] One must question how territorial rights can best be served if land ownership remains with the national government rather than indigenous peoples themselves. Certainly, the national government remains the central and most influential party as long as it maintains ownership.

According to a legislative analysis, conducted by the International Union for Conservation of Nature, weaknesses in Brazilian law include; the failure to designate all indigenous peoples lands as protected areas; the lack of awareness by indigenous peoples and their representatives of what is being conserved, and what mechanisms exist to assist in conservation; and a benefit sharing system that might not fully protect genetic and traditional knowledge rights.[19] Nevertheless, the International Union for Conservation of Nature concluded that the National Plan for Protected Areas is 'a huge step in Brazil to consolidate a range of social dimensions as integral to the effective management and maintenance of a National System of Protected Areas'.[20]

International Bodies and Law

In 2007, Brazil signed the United Nations' *Declaration on Rights of Indigenous Peoples*, which of course is a non-binding resolution that 'sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education, and other issues'.[21] Due to the non-binding nature of this agreement, the declaration has minimal impact, unless it is incorporated into the policies and law of governments. The Organization of American States proposed a similar declaration.

The Inter-American Court of Human Rights has proven to be an important forum for environmental and indigenous activists to assert protections that provide at least public relations pressure on governments to abide by their own laws and international agreements.[22] For example, the Court decided in 2001 in favor of an indigenous group in Nicaragua against development policies of the Nicaraguan government in the case of *The Mayagna Community v Nicaragua.* It held that government policies violated domestic law and international agreements 'under factual circumstances similar to those present throughout much of Brazil'.[23]

In 1988, the Brazilian Constitution adopted provisions to protect indigenous peoples and lands as a result of pressure from the Inter-American Commission of Human Rights, which faulted the Brazilian government for failing to protect the Yanomani tribe from incursions

[18] Ibid 2.
[19] Ibid.
[20] Ibid 3.
[21] United Nations Adopts Declaration, *United Nations* (13 September 2007) <http://www.un.org/apps/news/story.asp?NewsID=23794>.
[22] Valenta, above n 7.
[23] Ibid 646.

by an estimated 45,000 miners, who created 'both an environmental and a human health disaster'.[24] This shows at least some attempt by domestic political institutions to respond to regional and international pressure. Unfortunately, these constitutional provisions were met with 140 amendments in the three years after introduction that were 'largely addressed at repealing the rights given Indians in respect to their lands and natural resources'.[25]

The 1992 *Convention on Biological Diversity*, sponsored by the United Nations and signed by Brazil, also requires legal protections for indigenous peoples' traditional knowledge and natural resources.[26] Of course, the Convention is also nonbinding and thus requires support from domestic legal and political institutions. Nevertheless, the Convention does provide basic principles that are important for protection of indigenous culture and lands, particularly protection of traditional knowledge, prior informed consent and benefit sharing of genetic resources.

3. Issues

Lack of Enforcement of Existing Brazilian Law and Policy

Scholars have noted the 'disconnect' between existing statute, decrees and resolutions in Brazilian law and the reality of protections for indigenous peoples, their land, and their resources.[27] Indeed, the effort to demarcate indigenous lands in Brazil was met by a backlash that led to human rights abuses and natural resource exploitation and destruction.[28] Despite its stated interest, and even with the passing of laws, the Brazilian government has been unable or unwilling, or both, to stop environmental and cultural destruction. Scholars have identified several causes for this phenomenon in Brazil:

- The rule of law in Brazil suffers from corruption in politics, business and the judiciary.[29] This phenomenon is certainly not unique to Brazil. In fact, norms that inhibit corruption in the modern industrial world took many decades to instill, and the problems with corruption in the developing world are not much different from the problems with corruption in modern industrial nations at the dawn of the Industrial Revolution. Until ethical norms evolve in Brazil's political, business and legal circles, the problem of corruption will continue to stymie efforts to use the law to protect the environment and indigenous peoples.

- There is a lack of resources to enforce the law.[30] Like most developing countries, Brazil lacks public revenue to support a strong, stable and professional class of government regulators and law enforcement officers to enforce existing laws. Moreover, the vast territory that has been demarcated is so great that not even the wealthiest of nations could ensure full and effective monitoring of natural resource utilisation by commercial interests, settlers and indigenous peoples themselves. Lastly, the nature of the Amazon rainforest makes it particularly ill-suited to

[24] Ibid 647.
[25] Ibid.
[26] Malgosia Fitzmaurice, 'The Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge' (2008) 10(3) *International Community Law Review* 255.
[27] Valenta, above n 7.
[28] Ibid.
[29] Ibid.
[30] Ibid.

enforcement. Thick forests and river transportation severely limit the ability of enforcement to protect the environment and indigenous culture.

- The rule of law is shaped by socioeconomic inequalities that favor resolutions in favor of commercial interests rather than indigenous peoples and environmental activists.[31] For example, those who hold political and judiciary power in Brazilian government represent the socioeconomic elites of Brazilian society, which benefit from the continued commercial exploitation of the Amazon Basin, or at least are indifferent to the values of environmental and indigenous protections. There 'is a general sense of absence of rule of law within Brazilian society particularly as between the 'haves' and 'have-nots''.[32]

On the positive side, the rule of law has improved considerably after the Constitution was amended to place land disputes involving indigenous lands in the federal rather than the state courts.[33] The state courts are more likely to be influenced by corruption and favoritism toward commercial interests than the federal courts.

Conflict between the Constitution and Statute

Scholars have noted the conflicts between the broader constitutional rights that uphold indigenous rights and environmental protection, at least in principle, and the actual statutes that reflect the law in practice. For example, the *Brazilian Civil Code* and the *Statute of the Indian* reflect the principles of integration of indigenous peoples into Brazilian society, rather than the preservation of indigenous rights.[34] The first article of the *Statute of the Indian* illustrates the paradox of both preserving and integrating indigenous peoples by expressing both goals in one statement. As scholars have noted, this statute has been interpreted to define preservation of indigenous peoples as protecting them from genocide, while integration is defined as transforming indigenous peoples into conformity with the national culture. This obviously departs significantly from the idea of preservation identified by the Constitution, which reflects preservation of indigenous culture, not just the lives of indigenous peoples.

The *Civil Code of Brazil* states the need for a process of tutorship to integrate indigenous people into modern civilization. Under the regime of tutorship, Indians have 'relative incapacity to practice the acts of civil life'.[35] This seriously erodes their political and legal power, since they can only establish political and legal rights on par with other citizens 'if and when the Indian becomes integrated into the civilization'.[36] These statutes established the *Foundation of the Indian*, a federal agency that is charged with integrating Indians, a process that continues until an Indian reaches the age of 21, appears before a court, shows an understanding of Portuguese, an ability to work, and knowledge of 'the customs of national society'.[37]

[31] Ibid.
[32] Ibid 646.
[33] Ibid.
[34] Ibid 647.
[35] Ibid.
[36] Ibid.
[37] Ibid.

Obviously, these goals and processes of tutorship are at odds with the goals of indigenous cultural preservation and the environmental protection of their lands. Brazil is conflicted between constitutional principles that honor indigenous culture and a statute that calls for the integration of indigenous peoples before they can exercise their political and legal rights as Brazilian citizens.

What If Indigenous Rights Conflict with Environmental Protection?

One of the underlying issues that environmentalists in the modern industrial world must recognise is that the philosophical foundation for ICCAs might be flawed. The fact that indigenous people live in relatively pristine and undeveloped natural environments might not be because of an overt and conscious decision by these peoples and their leaders to live in harmony with the natural world. Rather, this lifestyle might simply reflect the lack of technological advancement and innovation in these cultures, for reasons that might not be conscious decisions of the participants. This is an important distinction because indigenous peoples, in the right to self-determination, might decide to abandon environmental principles valued by activists. In such a case, *what value predominates – environmental protection or indigenous rights?*

Indigenous political and economic organizations, particularly in modes of production, limit technological innovation and thus leave the ecosystem in a pristine state. In fact, all humans descend from civilisations that once resembled indigenous cultures. These cultures do not necessarily reflect some heightened level of environmental consciousness among their members. If given the choice, many indigenous members might actually favour living in big suburban homes with giant landscaped yards, driving sport-utility vehicles, and engaging in recreational hunting of endangered species. Ascribing environmental awareness to indigenous peoples solely because their lifestyle leaves the environment pristine might be a case of environmentalists from the developed world imposing their own perspectives on these peoples.

Governance

How does one include indigenous peoples in governance, maintenance and enforcement of contractual agreements about which they lack knowledge because of language and cultural barriers? Indeed, how can a government obtain informed consent from indigenous peoples who lack awareness and understanding of the legal principles in such contracts? Are such contracts binding if the indigenous party cannot read? Indeed, the International Union for Conservation of Nature notes that governance by indigenous peoples has the greatest impact on whether protected areas preserve rights, responsibilities, and distribute costs and benefits justly.[38]

If indigenous peoples are not involved in governance, then who can argue that their rights and interests are being promoted? Indeed, environmental activists might prefer, in some cases, to establish a governance role for their institutions and organizations foremost, since they have a paternalistic attitude toward protection of indigenous peoples and lands that sees modern environmental organizations as the steward of both. Indeed, governance

[38] Governance as Key for Effective and Equitable Protected Area Systems, (February 2008), *International Union for Conservation of Nature* <http://cmsdata.iucn.org/downloads/governance_of_protected_areas_for_cbd_pow_briefing_note_08_1.pdf>.

requires sophisticated understanding of the following elements: environmental science, contractual law, and the principles of sustainability, economics, and land use.

The solutions identified in both the scholarly literature and nongovernmental organizations, which often oversee such governance issues, tend to recognise a cooperative mode of governance between indigenous representatives and the national government. Moreover, these indigenous representatives tend to be more integrated into the national culture. They are essentially conduits between their native peoples and the national government. These indigenous representatives become the managers in 'Co-Managed Protected Areas', under which the indigenous peoples enter a contract with the national government.[39] Governance often shares what are termed 'local communities', which often include non-indigenous settlers who have nevertheless longstanding roots on indigenous lands.[40] Thus, governance is never an entirely indigenous affair. At the best, cooperative governance establishes indigenous representatives, who are usually highly acculturated with national customs, and who share power with government and local interests.

There seem to be significant problems with this arrangement. Who can tell whether indigenous representatives actually represent their people's interests? Even if elected by democratic vote, the lack of democratic traditions in indigenous culture might make such votes a reflection of non-indigenous practices. They are an imposition of modern political traditions on native traditions, and they might not result in the best results when indigenous representatives are selected. As a result, governance does not reflect the interests of indigenous people.

4. **Summary**

Brazil's ecosystem is perhaps the most diverse and important to the global environment, and it is also one of the most threatened and fragile. International and domestic measures introduced in the past 20 years seek to protect indigenous peoples and their lands from commercial exploitation and destruction. These measures have been partially successful at achieving their goals, but there are stronger factors that threaten to make them meaningless.

One of the most innovative recent developments in international law to protect indigenous peoples and their environment are Indigenous and Community Conserved Areas, ICCAs. Despite the ideal of conservation, some ICCAs are in fact disappearing because of illicit or recognised and allowed encroachment by commercial interests, particularly logging, grazing and oil interests. This phenomenon reflects the fact that the Brazilian government suffers from a weak rule of law, corruption, neo-colonial structures of inequality, and the cultural preference for forced acculturation of indigenous peoples.

Brazil has made important steps toward recognising the rights of indigenous peoples and the preservation of their environments. The demarcation effort concluded that 12 percent of Brazil's land mass is identified as indigenous lands, and 95 percent of these lands were within the Amazon basin. Brazil adopted a federal decree, the 'National Plan for Protected Areas', which establishes varying levels of protection for indigenous lands. Unfortunately, these levels of protection include numerous provisions that allow for the extraction of

[39] Ibid.
[40] Ibid.

natural resources. Indeed, one of the protected indigenous activities is exploitation and export of natural resources. This departs from the ideal of environmental activists that only sustainable indigenous activities should be protected.

5. **Conclusion**

In conclusion, Brazil would benefit from two main developments in its legal system:

- Evolution of impartial, autonomous and professional political and legal institutions. The lack of rule of law in Brazil makes any international agreements or domestic laws meaningless. Until ethical norms evolve in Brazil's institutions, the viability of indigenous protected areas will be questionable, at best. The difficulty of enforcing activities on such a massive jungle environment is problematic on its own, let alone with the issues of lackadaisical enforcement as a result of unethical norms.

- Resolution of contradictions between constitutional principles and statutes. This contradiction likely reflects a widespread ethnocentrism in Brazilian culture. This allows the goals of integration to be superimposed on the constitutional principles of indigenous rights. Either remove or amend statutes that conflict with constitutional principles and other agreements, or statutes that promote indigenous rights. However, it will still take time for Brazilian ethnocentrism to diminish.

As one can see, both of these elements require a combination of legal and social changes to occur in Brazilian institutions and mindsets. This will take decades to evolve, and hopefully indigenous peoples and their lands will still exist when this evolution occurs.