Avoided Deforestation (REDD) and Indigenous Peoples

Experiences, challenges and opportunities in the Amazon context

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Avoided Deforestation (REDD) and Indigenous Peoples: experiences, challenges and opportunities in the Amazon context

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Summary

Introduction

Concern with negative effects of climate change on the world's economy and society is nothing new, although it has grown considerably in past years. The United Nations Framework Convention on Climate Change (UNFCCC), signed in 1992[1] by 165 countries, including Brazil, made clear the need to progressively reduce emissions of greenhouse gases, a responsibility shared by all countries. Since then, the international community has sought ways to fulfill this obligation, and the Kyoto Protocol (1997)[2] defined a framework of targets for reduced greenhouse gas emissions to be met by 2012 by industrialized countries, in addition to creating market mechanisms to facilitate this process.

In 2009, Brazil, along with more than 70 other countries, acknowledged the need to make profound cuts in greenhouse gas emissions. The commitment was made to limit emissions by 2020 in order to contribute in a measurable manner to keep global warming under 2ºC. Just before the Conference of the Parties in Denmark (COP 15), the Brazilian government announced the additional voluntary target of reducing between 36.1% and 38.9% of projected emissions by 2020 based on 2005 emissions and passed Law 12,187/2009, which establishes the National Climate Change Policy (Política Nacional sobre Mudança do Clima – PNMC).

Both at the national and international levels, new measures for control and reduction of emissions from deforestation and forest degradation (REDD) have emerged, since deforestation is responsible for between 15 and 20% of global emissions and over 70% of Brazil's emissions. Even without reaching a global agreement, the Copenhagen Conference made progress toward defining how an international REDD system could work, and it is likely that any multilateral agreement – or even bilateral agreements among the main polluting countries – will include measures of this type, since they are a relatively inexpensive and beneficial way of reducing emissions.

The Amazon stands out in this context as the largest tropical rainforest on the planet and as well as the area most threatened by deforestation. In Brazil, 20% of the Amazon has been cleared, and nearly half of its forest (approximately 350,000 km^2) was torn down in the past 20 years.[3] In other Amazon countries, pressure is not as intense, although it is growing, since the

[1] By March 8, 2010, 194 countries had signed the UNFCC. http://unfccc.int/kyoto_protocol/items/2830.php.

[2] The Kyoto Protocol was ratified by Brazil on August 23, 2002, and became effective on February 16, 2005. 188 countries which signed the Climate Convention have ratified the Protocol so far.

[3] Apud IBGE. Indicadores de Desenvolvimento Sustentável: Brasil 2010. Rio de Janeiro, IBGE, 2010.

Amazon region is currently the preferred location for agricultural, mineral and energy expansion in South America. It is highly likely that many REDD projects connected to a global agreement will be developed in the Amazon, as can already be seen with pilot initiatives related to the so-called voluntary market.

Avoided Deforestation and Indigenous Lands

Any analysis of avoided deforestation or maintenance of forest stocks in the Amazon must take into consideration indigenous lands, where a significant part of remaining forests is located. The fact that they occupy approximately 25% of the Amazon has attracted the attention of indigenous peoples who have rights over these lands, as well as government agencies, non-governmental organizations, and companies interested in carrying out REDD projects. On the one hand, these projects can reduce global emissions and make it possible for companies and countries to achieve their goals. On the other hand, they can also create financial and institutional conditions for indigenous people to manage their territories in environmentally and socially sustainable ways.

So far, there are few REDD experiences in indigenous lands, in Brazil or other countries, and various fundamental questions have not yet been properly analyzed or answered. Among them is the question of ownership of credits generated from forest maintenance or recovery activities, since in each country the legal framework for these lands is different. This book presents important legal assessments by Biviany Rojas Garzón, Erika Yamada and Viviane Otsubo on this topic, both for the Brazilian context and other countries.

But indigenous lands cannot – and should not – be regarded as mere carbon reservoirs, since they are much more than that. They are cultural spaces which sustain livelihoods that are adapted to the inherent diversity of tropical forests and that are therefore compatible with and beneficial to the maintenance of forests and the equilibrium of ecosystems which provide essential environmental services. Therefore, as Márcio Santilli explains, rather than installing monitoring stations, it is more important to create conditions for indigenous people to implement their own territorial management projects consistent with their peculiar forms of seeing and understanding the world. No deforestation can be avoided in uninhabited lands.

Another relevant topic concerning REDD in indigenous territories is in regards to the social agreements which are required for projects to promote monitoring and sustainable use of the territory. Since most lands are multicultural, being home to peoples, clans, and families with various degrees of autonomy, in spite of a shared territory, any project involving the entire

territory requires social arrangements which are anything but trivial, especially for these peoples. The experience of the Surui (or Paiter) in Rondônia, described in the article by Almir Surui, Beto Borges and Jacob Olander, serves as a reference for reflections about other cases.

In summary, this book published by the Instituto Socioambiental, with support from partner institution Forest Trends, seeks to provide a source of information and reflections which can be useful for the discussion and implementation of REDD projects in indigenous lands, in Brazil, and other Amazon countries.

Brasília, September 20, 2010

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Indigenous Lands and the Climate Crisis

Márcio Santilli

It is difficult to accurately establish the multiple interactions between challenges and opportunities which the climate crisis has in store for indigenous peoples and their territories. In all continents, indigenous and aboriginal people and tribal communities have historically been involved in disputes over land and natural resources with other people, colonizers, companies, and nations, making it difficult to define the precise extension of the land they effectively occupy in most cases and countries.

However, it is certain that the contribution of indigenous people to the climate crisis was minimal, yet they are often included in the roster of populations which are assumed to be the most vulnerable. It is also certain that there is significant presence of these peoples in developing countries, which have the largest areas of native tropical forests, and that there is an important overlap between indigenous lands and forest carbon stocks. In their own way, indigenous cultures also maintain relations, albeit mythical and metaphorical, with the looming global climate crisis.

It is estimated (IPCC, 2007) that activities related to inappropriate land use account for approximately 18% of current global carbon emissions, although more recent studies show that this percentage dropped to 12% in 2008 (Le Quere *et al.*, 2009). Deforestation and tropical forest fires are responsible for a large share of this, given the vast amount of carbon in the forests. Furthermore, if existing forest stocks were destroyed and corresponding emissions were released into the atmosphere, the climate crisis would be severely aggravated. Thus, official acknowledgement and protection of indigenous lands, as well as appreciation of the value of distinct forms of occupation of forest territories, with low impacts, are fundamental elements to provide guidance for policies and mechanisms such as REDD, which link forests and climate.

Nevertheless, we should always bear in mind that the relation between forests and climate is not limited to the issue of carbon stocks. The very existence of tropical forests itself is associated with rainfall patterns. These forests provide a large part of the available sources of potable water and house great biodiversity which, in turn, exerts permanent influence on processes related to carbon stocks in soils. For example, it is the extremely particular dynamics of Amazon rainfall, which increases during its course through the forest, that supplies the main

[1] Coordinator of the Policy and Law Program/ISA.

agricultural regions and metropolitan areas of Brazil's Center-South, Northern Argentina, Uruguay and Paraguay, by means of "Flying Rivers", which is also the name of a project involving a large number of researchers (see: http://www.riosvoadores.com.br/).

Estimates of these carbon stocks indicate the importance of their impact on climate and can also be used as variables to determine monetary values in compensatory projects in carbon markets and international grants for forest protection. But it should be remembered – with necessary estimates – that behind these stocks there are complex processes which affect climate and which add value to any project results.

With regard to indigenous lands, specifically, fundamental cultural values – even those affected by acculturation processes – favor conservation of forests and will play a crucial role in determining their future availability. Therefore, even if the value of projects is established based on market fluctuations relative to carbon stocks, it should be kept in mind that what matters for climate is long-term conservation of these stocks, at costs which are, at the very least, the real cost of any project. And, of course, conservation cannot be achieved in indigenous forests without the direct involvement of its inhabitants.

Forest Carbon in the Amazon

When talking about the Amazon, it is wise to first agree on its boundaries. The Amazon basin has a total area of 6.5 million km^2, 60% of which are located in Brazilian territory, and the remainder is in Bolivia, Peru, Ecuador, Colombia, Venezuela, and Guyana. A large variety of forest phytophysiognomies covers this basin which are mapped, researched, and classified in varying manners in each country and traditional culture. Dense rainforests – most commonly associated with the image of the Amazon tropical rainforest – cover 60% of the basin's total area and 39% of its area in Brazilian territory (considering only the dense rainforests in the Legal Amazon) (Armenteras & Morales, 2008). It is also connected with tropical forests in neighboring river basins, such as the Orinoco (Venezuela) and others in Suriname and French Guyana.

The boundaries of the Brazilian Legal Amazon are established by political and juridical conventions, covering, in addition to the total area of the Amazon basin in Brazil, territories located in the southern state of Mato Grosso and the western state of Maranhão, in addition to most of the Araguaia-Tocantins basin, considered independent of the Amazon basin. The area monitored by the National Institute for Space Research (Instituto Nacional de Pesquisas Espaciais - Inpe) in order to calculate deforestation rates in the Amazon corresponds to the part of Brazilian Legal Amazon which is covered by dense rainforest and other associated formations, also known as

"Amazon biome," which does not include Cerrado and pre-Amazon regions, the Roraima savanna and other parts which are in the Amazon basin.

Carbon stock estimates in the Brazilian Amazon are the result of mapping and the extension of different forest phytophysiognomies occurring in the basin, and amounts of carbon per hectare found in scientific research carried out in each phytophysiognomy. Mapping may be done in varying scales, methodologies and classification criteria, but in Brazil official forest cover maps produced by IBGE are used as the main reference.

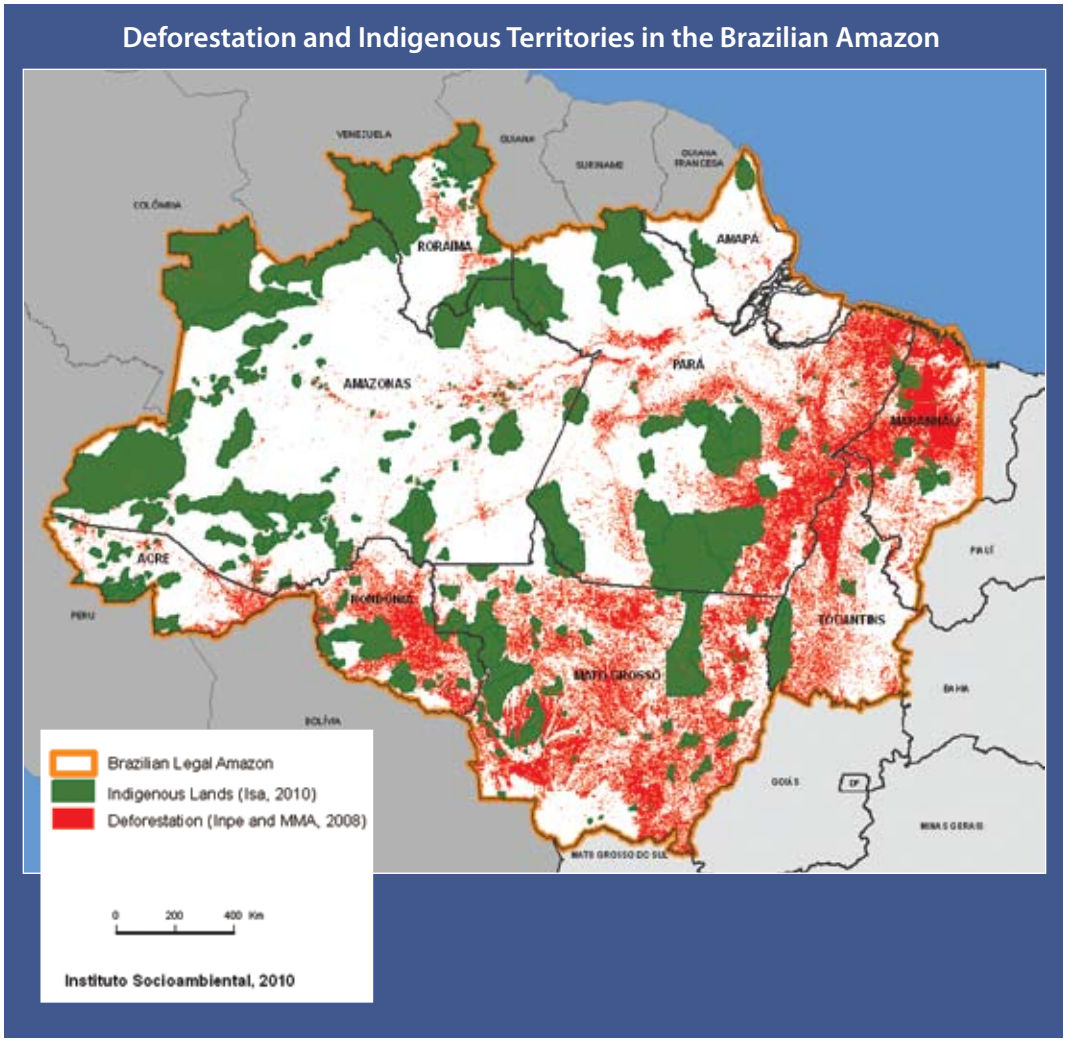
There are also different levels of accumulated knowledge about each phytophysiognomy, as well as different numbers of carbon stock measurements in each phytophysiognomy, in addition to different measurement methodologies (which, for example, may or may not consider underground carbon stocks accumulated in plant roots). With caveats duly noted, forest carbon stock in the Brazilian Amazon – in the Amazon basin and in Brazilian territory – is estimated at 62 Gigatons of carbon (GtC), which corresponds to the total volume of global emissions for a period of over two years, considering 2007 levels (EIA, 2009).

In order to calculate Amazon forest carbon stocks for REDD and the like, it is prudent to consider numerical averages or variation ranges resulting from different measurements and methodologies. Components which make advances in scientific knowledge possible should also be included in the scope of these projects, as well as periodical assessments of existing stocks in the specific locations in which these projects are carried out. For a preliminary calculation of compensation values, especially for projects aimed at the carbon market, adoption of more conservative figures found in serious studies about existing stocks are recommended.

Indigenous Lands in the Brazilian Amazon

Indigenous lands with some level of official recognition by Brazilian government cover a total area of 110 million hectares, which correspond to approximately 13% of the total area of Brazil. There are also approximately two hundred outstanding demands by indigenous people for land listed in the federal indigenous agency, although these have not yet been recognized and demarcated, having no defined perimeter or area.

Approximately 98% of indigenous lands in Brazil are located in the region known as the Brazilian Legal Amazon, where 60% of the Brazilian indigenous population lives. The others live in the country's Northeast, Southeast and Center-South, often crammed into tiny areas, which account for less than 2% of the total area of indigenous lands. Indigenous lands cover 22% of the total area of the Brazilian Legal Amazon (Figure 1).



Source: Instituto Socioambiental, 2010

Considering these facts, it can be said that, from the standpoint of a planetary scale of the climate crisis, stocks of forest carbon in the Amazon are what matters most. However, it should be taken into consideration that indigenous lands, as well as *quilombo maroon* community lands and areas occupied by other traditional populations make up mosaics of protected areas, even in other regions and biomes of the country, and the importance of environmental and climate services rendered by these continually forested areas may go beyond the regional scale.

On this note, other protected areas which are part of the SNUC – National System of Conservation Units (Law 9985, of 2000) – and are located in the Legal Amazon have a total area of

approximately 13 million hectares, or 25% of the total area of that region, with 3% of the system's area overlapping with 7% of the indigenous lands located there. In many Amazon sub-regions, indigenous lands make up large mosaics with direct- and indirect-use conservation units, both of which are managed by the federal as well as state governments.

Historical deforestation which has accumulated within indigenous lands in the Amazon is not substantial and affects less than 2% of the area. Part of this deforestation is associated with certain forms of indigenous occupation of the territory – areas used for construction and expansion of villages, clearing of land for agriculture – and part is due to non-indigenous occupation in the past, prior to official land recognition processes, or current occupation resulting from ongoing invasions.

To be sure, it is not by avoiding historical deforestation in indigenous lands that consistent actions to guarantee the future of the vast carbon stock in these lands can be developed. Wrongly degraded areas located in these lands can and should be recovered, but the main focus should be on preventing patterns of deforestation that have been observed in other parts of the Amazon from reaching indigenous lands.

Indigenous lands in the Amazon are affected in various ways by processes of colonial occupation, agricultural frontier expansion, and implementation of large infrastructure projects. In other words, indigenous lands (as well as conservation units and other forested areas) located along the "arc of deforestation" (including Eastern Pará, Northern Mato Grosso, and Central Rondônia) have forest carbon stocks and other environmental services which are exposed to greater pressures and are therefore subject to a higher level of future risk.

Therefore, it may be concluded that indigenous lands located in regions under greater pressure are better suited for development of REDD-type projects, which have reducing deforestation as their main objectives. In this case, these would be projects which intend to prevent, for decades, the regional deforestation pattern from penetrating indigenous lands.

Nevertheless, reducing deforestation, in spite of benefitting climate and offering other immediate positive results, is a limited-time objective, since it is hoped that, in the not-so-distant future, deforestation in the Amazon will be limited to legally permitted levels. The greater challenge, both in the short and long run, is ensuring perennial carbon stocks in the Amazon and indigenous lands for the future.

In this strategy, the importance of indigenous lands in more remote regions grows, more markedly so along the borders between Brazil and other Amazon countries, not only because of the vast area and large forest carbon stocks contained therein, but also because they make up

corridors with other protected areas located in neighboring countries. It is, supposedly, in these more remote Amazon regions that chances are greatest for development of human and economic occupation models which are more compatible with future sustainability of the region.

One should not forget that opportunities for financial support now available are framed in terms of climate change, which already affects and stands to affect far more forest regions and, even more so, indigenous lands. Important variations in rainfall patterns may affect biodiversity, integrity, and conditions for reproduction of forests in the long run. Scientific models point, for example, to a tendency toward "savannization" – transformation of the tropical forest into a savanna – in the eastern Amazon. In the context of the climate crisis, impacts – and costs – are more certain than access to occasional opportunities.

Several communities have been noticing the effects of climate change, markedly those related to changes in annual rainfall distribution which result in disorientation regarding traditional agricultural calendars, with losses in production and threats to food security. Perception of these changes by indigenous people is particularly significant in lands located in more remote regions, distant from agricultural frontiers, highways, large cities, and deforestation. Since there are no immediate local factors which can explain recent climate change effects, it is more likely that they are the result of larger-scale factors. However, whatever the cause may be, impacts of climate change on indigenous lands need to be taken into consideration in REDD strategies and other approaches, since they will exert various forms of influence on future sustainability of the respective carbon stocks.

Thus, opportunities for financial support resulting from the relationship between forests and climate, such as REDD, should not become perverse incentives. They should not be concentrated exclusively in critical regions, even if reduced deforestation is the priority in the short run, since it would imply that a region needs to be under imminent threat to deserve support for forest conservation. And, even in these at-risk regions, the intention is not only to contain the expansion of deforestation, but also to guarantee conditions for conservation in the long run for all existing carbon stocks.

Carbon Stock Estimates in Indigenous Lands

Carbon stock estimates are based on projection of official cartographic data regarding forest cover in polygons of indigenous lands demarcated in the region. They also take into consideration different sources of data and methodologies used in quantification of carbon stock according to forest physiognomy.

The tables below display data regarding approximate carbon stock in twelve indigenous lands, located in the Brazilian Legal Amazon, including the largest ones and the Tembé and Sete de Setembro Indigenous Lands, where efforts are ongoing for the formulation of REDD-type projects.

The following table contains data produced by the Amazon Environmental Research Institute (Instituto de Pesquisa Ambiental da Amazônia – Ipam), based on Saatchi *et al.*, 2009, and data produced by many researchers, gathered and cross-referenced by Arnaldo Carneiro. The researchers are: Ottmar *et al.*, 2001; Barbosa & Ferreira, 2004; Barbosa & Fearnside, 2004; Barbosa & Fearnside, 2005; Nogueira *et al.*, 2008; and Fearnside *et al.*, 2009.

Table 1. Carbon[1] in Indigenous Lands of the Legal Amazon

Indigenous Land	Area (ha)		tC/ha		Total carbon (tons)	
	Carneiro, A. 2009	Saatchi *et al* 2009	Carneiro, A. 2009	Saatchi *et al* 2009	Carneiro, A. 2009	Saatchi *et al* 2009
Yanomami	9.589.302	9.523.037	149	111	1.432.598.612	1.057.057.107
Vale do Javari	8.561.824	8.516.001	148	131	1.264.825.726	1.115.596.131
Alto Rio Negro	8.034.176	7.979.953	150	125	1.201.268.666	997.494.125
Menkragnoti	4.928.083	4.907.539	141	81	694.721.947	397.510.659
Trombetas/Mapuera	4.002.902	3.984.974	155	134	619.695.304	533.986.516
Kayapó	3.307.878	3.293.920	123	84	407.685.159	276.689.280
Waimiri-Atroari	2.602.964	2.591.312	151	149	392.191.734	386.105.488
Tumucumaque	3.069.940	3.053.109	126	117	386.346.228	357.213.753
Mundurucu	2.397.454	2.387.301	107	107	256.179.665	255.441.207
Xingu	2.646.405	2.636.116	89	69	234.674.949	181.892.004
Alto Rio Guamá	280.416	279.164	153	120	42.788.995	33.499.680
Sete de Setembro	244.196	243.225	149	106	36.285.040	25.781.850
				Total	**6.969.262.025**	**5.618.267.800**

[1] Above ground biomass carbon values.

Carbon stocks found in the Legal Amazon may reach the figure of 62 GtC, which are distributed unevenly according to the different phytophysiognomies. These stocks exist in larger amounts in the central Amazon, in what is called dense forest, decreasing progressively toward the outskirts where seasonal forests which have connections to outlying *cerrado* formations are

predominant. Carbon stocks vary from 185 t/ha in the dense forest, to 170 t/ha in the seasonal forest, and a low of 6 t/ha in *cerrado* grasslands.

As mentioned above, differences among figures are due to differences in methodologies and are particularly significant for estimated stocks in less-frequently studied forest formations, such as *campinarana*, *cerrado* and transition forests between the Amazon and other biomes. In any event, neither the order of magnitude of carbon stocks in these lands, nor their relevance to global climate is affected by these differences. The total estimated carbon stock for indigenous lands which have been recognized in the Brazilian Amazon is 14 GtC (considering only above ground biomass carbon), which corresponds to the total volume of global emissions for a period of six months.

If, hypothetically speaking, indigenous peoples who inhabit these lands were to decide to make use of them by suppressing forest cover in up to 20% of the area, which is legally possible, they would incur future emissions of 2.8 GtC, which would represent 460% of the total volume of emissions Brazil intends to reduce up to 2020 (currently at 0.61 GtC; MCT, 2009) and with an average drop of 37%, it would be 0.41 GtC in that year, according to targets voluntarily registered with the United Nations.

It should be noted that the largest indigenous lands, or polygons surrounding these lands, have areas larger than some independent countries and have carbon stocks and other climate services also at a country scale. This means that "local" projects developed in these lands have significant potential climate benefits, which sets them apart from local – or pilot – projects developed under Clean Development Mechanism or by means of other sources of financial support.

According to the Brazilian Constitution, indigenous lands belong to the nation, being destined for permanent possession by indigenous people, and natural resources in the soil, rivers, and lakes in these areas are reserved for exclusive use by indigenous people. Indigenous uses and customs are known, but there is no juridical figure for self-management of their lands (which is the case in Colombia and other countries). Indigenous lands are part of territories of municipalities and states (in addition, obviously, to national territory), but are not specific federal units and are not entitled to automatic transfer of federal funds as are municipalities and states.

In theory, state management of indigenous lands is the responsibility of the National Indian Foundation (Funai) which has legal responsibility for identifying and demarcating them, monitoring their boundaries, and defending (with support from the police) indigenous assets and rights. There is permanent military presence in many lands, especially those located in frontier regions. Other federal institutions have specific responsibilities regarding indigenous demands, such as those regarding health care and basic sanitation.

In practice, the main decisions regarding management of these lands are made by local leaders or indigenous organizations, which have also increased their presence and participation in local divisions of public organizations in order to protect and promote current and future use of carbon stocks and long-term conservation of environmental and climate services rendered by these lands.

Other Environmental and Climate Services

The importance of indigenous lands to climate goes beyond their specific boundaries. In many regions of the Amazon, they are part of even larger mosaics or corridors of protected areas, which prevent expansion of deforestation in critical regions and foster alternative occupation and development models in remote regions. Existence of these large protected areas, eligible for long-term protection, will be fundamental for preservation of the complex rainfall pattern in the "green ocean" and to prevent future fragmentation of the continuous forest due to expanding deforestation.

Rain reaches the Amazon by means of trade winds, which bring moisture from the Equatorial Atlantic Ocean, but it is the humid forest which reproduces and amplifies rainfall. This cycle reaches the Andes Mountains, which change its direction toward the central-western, south-eastern and southern regions of Brazil, as well as Paraguay, Uruguay, and Northern Bolivia. Rupture in this cycle has the potential to impact not only the health of the forest, but also the main continental cities and agricultural regions.

Marcos Wesley/ISA, 2005

Demini village, Yanomami people, Amazonas, Brazil.

The Amazon River accounts for approximately 20% of the total volume of freshwater which reaches seas and oceans. In addition to water from melting Andes glaciers, an important part of its sources are located in northern frontier and central plateau regions. The (substantial) presence of indigenous lands in these regions and along the main headwaters, as well as corridors and mosaics, make them fundamental producers-consumers of these water resources. Indigenous lands and conservation units cover more than 40% of the total Brazilian Legal Amazon area.

In addition to production and conservation of water, indigenous lands play a relevant role in conserving the biodiversity of the Amazon. There are relevant overlaps among indigenous lands, national parks, and biological reserves, in which areas with endemic species are located. Indigenous lands are also present in large numbers in areas that connect the Amazon and *cerrado*. Traditional knowledge about biodiversity is a fundamental source for scientific research. The immense cultural diversity in the Amazon is directly related to its immense biological diversity.

In sum, indigenous territories cannot be considered mere carbon stocks. They are the spaces in which these peoples will develop their future livelihoods and REDD projects or payment for environmental services, which require long-term conservation of these climate and environmental services, should never overlook this fact.

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Forest Resources in Indigenous Territories and REDD Projects in the Amazon Basin

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Over the last few decades, the majority of countries which share the Amazon Basin have begun to recognize and demarcate both indigenous territories (IT) and Natural Protected Areas (NPAs) thanks to which there are now important consolidated corridors that maintain the Amazon biome. These territories represent, whether intentional or not, the commitment of the different Amazon countries to conservation and reservation of at least a part of this biome, as well as the recognition of the lifestyles of the indigenous communities which live there. The total of **officially recognized ITs** is currently calculated to cover **25.3% of the region** and as a whole, **NPAs and ITs** represent an area equal to **41.2% of the total surface of the Amazon**,[1] which conveys the dimension and importance of the Amazon Rainforest especially for the conservation of carbon sinks in the fight against global warming.

This document summarizes a study Instituto Socioambiental (ISA) conducted in 2009 with the support of the Environmental Defense Fund (EDF); the study examines the applicable legal framework for the eventual implementation of Reduced Emissions of Greenhouse Gases from Deforestation and Forest Degradation (REDD) projects in indigenous territories in the countries of the Amazon Basin. The principal objective of the study was to respond to the question "*Can indigenous people in the region be the direct beneficiaries from REDD projects in their territories*?" The analysis focused on six countries which together make up more than 80% of the basin: Bolivia, Brazil, Colombia, Ecuador, Peru and Venezuela. The complete study can be found here: *http://www.socioambiental.org/banco_imagens/pdfs/reddamazoniafinal.pdf*.

Regarding the Assumptions and Operative Concepts of the Study

To carry out this study we assumed that ***REDD mechanisms*** *are a group of activities whose objective is to stimulate the reduction of emissions and concentration of greenhouse gases (GHGs)* ***caused by the deforestation and degradation of native forests. These activities will, eventually, generate carbon credits.***

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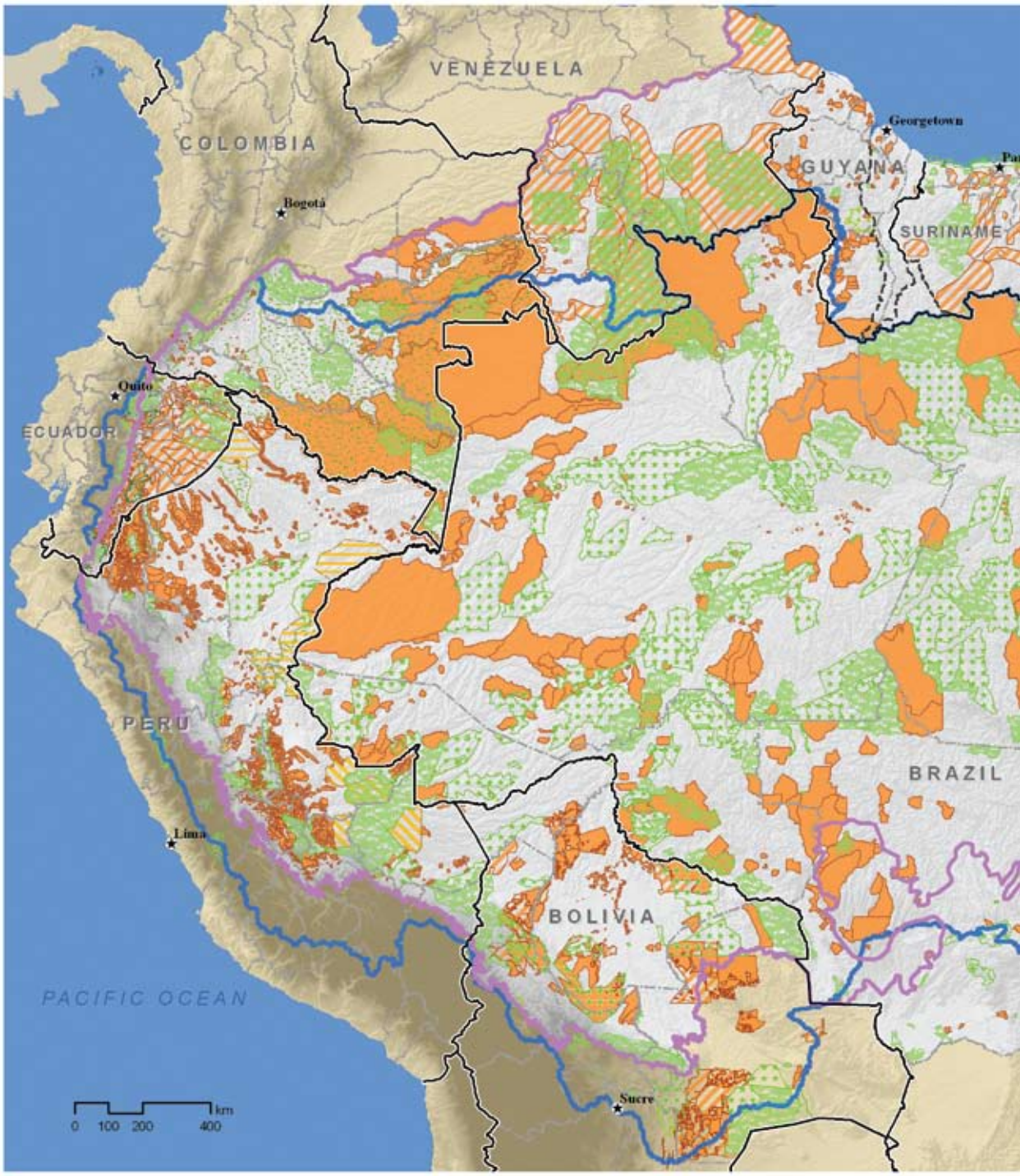
[1] Consolidated data by RAISG www.raisg.socioambiental.org.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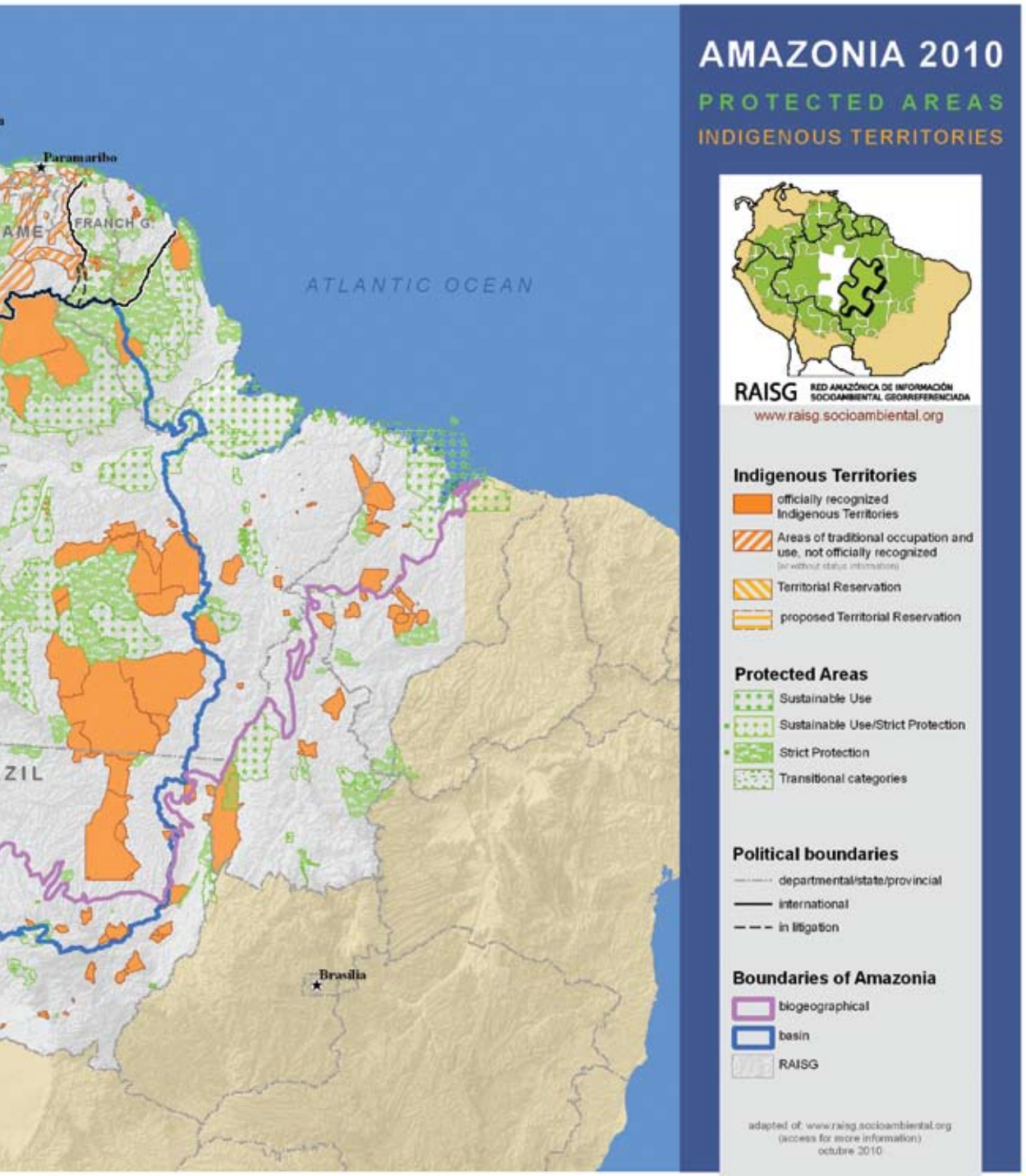
AMAZONIA 2010
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Protected Areas
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Strict Protection
Transitional categories
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Boundaries of Amazonia
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Given the absence of legal definitions about the nature and rights of carbon credits from REDD mechanism activities, the present study assumes that these carbon credits are necessarily linked to the implementation of at least 3 types of activities: 1) activities oriented toward avoiding land use change in forests, 2) activities designed to recuperate degraded areas, and 3) activities related to the maintenance of native forests, independently or not of the existence of the immediate threat of deforestation.[2] We understand that these activities can only be carried out by those who have the legal usufruct rights over native forests, whether as full owners or solely enjoying usufruct rights without a legal title to the land, which is fundamental to determine the ownership of the carbon credits derived therein.

Thus, **carbon credits** are legally defined **as incorporeal goods, derived from the certification of a reduction of emissions from GHGs which originate from one or more recuperation or conservation activities in native forests, the owners of said carbon credits are necessarily those who have the legal capacity to carry out the aforementioned activities, in other words, those who can legally decide the use and destination of the soil and the forest resources which exist therein**.

In light of this, we conclude that in order to identify if indigenous people can be the direct beneficiaries of eventual REDD mechanisms in their territories, **it is fundamental to have clarity about the ownership and rights of use and enjoyment of forest resources in indigenous lands, as well as the limitations to exercise said rights in the domestic legislation of each of the countries considered in this study**.

From this, we conclude that the recognition and protection of the rights of indigenous people over their territories and forest resources are indispensable to the analysis of the ownership of eventual carbon credits originating from the application of REDD mechanisms in their territories.

Indigenous Territories and Climate Change in the Amazon

At present, a vast majority of forested areas across the globe are inhabited by indigenous people and local communities who have coexisted with the forest for a long time, and without

[2] Conservation activities in native forests, independent of the existence of the imminent and immediate threat of deforestation, is the most recent dimension discussed internationally regarding the activities related to the maintenance and increase in forest cover on the planet. This conservationist dimension has been identified as REDD PLUS. More information regarding REDD+ is available at: http://unfccc.int/methods_science/redd/items/4531.php.

a doubt have a lifestyle that has demonstrated to be inclusive of forest land uses and which also depends on the preservation of the forests to survive and reproduce their traditions, culture, and social organization. Because of this, the people who live in the forests should be the principal beneficiaries of any initiative in this area, both with regards to economic compensation as well as for maintaining forest land use.

The international debates about this topic and their respective progress have been harshly criticized for the lack of direct participation by forest communities, a fact that largely discredits the agreements and decisions of the governments relating to REDD mechanisms which necessarily involve the lives and territories of these populations. Up to now, however, they have not actively participated in the discussions and negotiations.

However, it is also necessary to recognize that the content and rules for the application of REDD projects have not yet been defined internationally, and it should be clarified that the real consequences of REDD project implementation will be defined by the domestic legislation of each country that incorporates the agreement and defines the rules of national implementation, in accordance with the legal and institutional contexts which already exist in each country. Because of this, even though it is undeniably necessary and important that the people who live in the forests have a voice and vote in the realm of international negotiations, it is fundamental that these communities are prepared for

Beto Ricardo/ISA, 2008

Baniwa Community from Tucumã-Rupitã, Alto Rio Içana, AM, Brasil.

internal debates on this issue, preferably creating their own regulatory initiatives and proposals which guarantee respect for their territorial rights, direct access to the benefits derived from REDD activities, as well as their political rights to self-determination and a guarantee that the State will comply with their obligation of consulting and obtaining the free, prior and informed consent of indigenous peoples before implementing administrative and legislative decisions which directly affect them.

The incorporation of domestic regulations relating to REDD in indigenous territories in the Amazon Basin will necessarily require the consideration of the recognized and consolidated rights of the indigenous people in the entire region.

In the Amazon Basin, the large majority of the countries currently are signatories to international norms that recognize and protect the rights of the indigenous and similar people[3] such as: **Convention 169 of the International Labour Organization** regarding indigenous and tribal people in independent countries (hereafter ILO C169), the **United Nations Declaration on the Rights of Indigenous People** (hereafter UNDRIP)[4] and the **American Convention on Human Rights** (hereafter ACHR), which have been widely interpreted by the Inter-American Court and Commission for Human Rights as guaranteeing the rights of indigenous and tribal people on the continent, among other Human Rights instruments recognized to varying degrees by all countries in the basin.

In the Amazon, almost every country has already ratified the ILO C169 (with the exception of the Guyanas and Suriname), and the vast majority, except Colombia, approved the UNDRIP in September 2007. All countries in the basin ratified the ACHR and recognize the Jurisdiction of the Inter-American Human Rights System (hereafter IHRS).[5] By contrast, in other regions of the world indigenous people do not have a legal body of recognized rights of the same dimension and institutional establishment as on the Latin American subcontinent.

[3] "Indigenous and similar people" is an expression used by the Inter-American Human Rights Court (hereafter IHR Court) to refer to those groups which, though not indigenous, have cultural, social and economic characteristics which that set them apart from the majority of the national population, and which constitute them as cultural minorities who enjoy the same distinct rights that are granted to indigenous peoples. See the case of Saramaka Párr. 80.

[4] By a vote of 143 in favor and 4 against, with 11 abstentions, the General Assembly of the United Nations adopted, on September 13, 2007, the United Nations Declaration on the Rights of Indigenous People (http://www.un.org/News/Press/docs/2007/ga10612.htm).

[5] The Inter-American Human Rights System (hereafter IHRS) includes the Inter-American Commission on Human Rights (hereafter ICHR) and the IHR Court, which have a large and established case law regarding the fundamental rights of indigenous people in the region. The IHRS requires all American States to comply with human rights norms in their particular interpretation for indigenous people as collective subjects of fundamental rights.

For the above reasons, the current study considered it to be fundamental to systematize and present the principal jurisprudential rules regarding the origin, nature, content and reach of territorial rights of indigenous people that are in force in the Amazon region. Therefore, the complete version of this study includes the entire analysis of said norms and regional jurisprudence. In this summary, we only briefly present the conclusions of the country-by-country legal analyses relating to current indigenous and environmental legislation in each country, which will be fundamental for evaluating the implementation of eventual REDD projects in indigenous territories.

Bolivia

Bolivia[6] is, without a doubt, the country in the Amazon Basin which currently not only has the most complete and grantor legislation referring to territorial rights of indigenous people, but is also one of the nine countries in the world beginning to implement REDD+ pilot projects in their territories. In addition to recognizing the traditional rights to land and natural resources, Bolivian legislation amply recognizes that indigenous management and autonomy strengthen the self-governance of their territories. Due to this, as well as the favorable political situation of the current government, it is possible to say that Bolivia is the Amazon country with the largest possibility of successfully implementing REDD projects in indigenous territories and that benefits from these projects directly reach the people who live there.

In Bolivia, the **indigenous, original, and agrarian nations and people are collective owners of their lands and territories** according to the terms recognized by the New Political Constitution of the Bolivian State of February 2009[7] (hereafter NPCBS) and by the principal human rights instruments relating to indigenous people that are recognized and incorporated in the Bolivian legal order as a part of the bloc which is constitutionally binding.[8] Therefore, it is possible to affirm that the **"indigenous people have the right to the lands, territories, and resources**

[6] For the execution and analysis of the Bolivian legislation, the extensive and patient explanations of the indigenous lawyer Miguel Vargas, delegate of the legal area of CEJIS, Region La Paz, were invaluable.

[7] NPCBS of 2009. Article 30.I. Indigenous, original, and agrarian nations include all human communities who share cultural identity, language, historic traditions, institutions, ownership and worldview, whose existence dates to before the invasion of the Spanish. II. In the framework of unity (?) of the State, and in agreement with this Constitution, indigenous, original and agrarian nations enjoy the following rights: (…) VI. The collective titling of lands and territories.

[8] NPCBS. Article 410. I. All people, natural and legal entities, as well as public bodies (entities/groups?), public functionaries and institutions are subject to the Constitution. II. The Constitution is the supreme law of the

which they have traditionally owned, occupied or otherwise used or acquired." (Article 26 of UNDRIP, in Bolivia incorporated as law 3760 of 2007). Additionally, Bolivian legislation recognizes the "legal personality of **Indigenous Communities, Indigenous Peoples, Peasant Communities** and neighborhoods" (Law Nº 1551/1994).[9]

The property which is referred to in article 394 of the NPCBS are the Original Community Lands or OCLs, which were already recognized by law in 1996 and is the legal concept through which the process of collective titling of indigenous lands in Bolivia has been developed. The Service Law of Agrarian Reform (Law Nº 1715 of October 18, 1996) which, although it predates current Constitution, applies to everything which does not contradict the constitutional text, defines OCLs as "the geographic spaces which constitute the habitat of **indigenous and original people and communities**, to which they have traditionally had access and where they maintain and develop their own forms of economic, social, and cultural organization, to ensure their survival and development. **They are inalienable, unseizable and imprescriptible**."

One of the principal innovations the new Constitution introduced relating to the recognition of the indigenous territorial rights was establishing the possibility of creating mixed titles which combine collective titles with individual property titles. Thus, in the third paragraph of the same article 394, the NPCBS points out that: "Communities can be titled recognizing the complementarities between collective and individual rights, respecting the land unit with identity." This concept aims to respect and conserve the territorial unit of the community, despite the existence of individual titles, which were previously acquired and which many indigenous families, mostly from the highlands, do not want to give up.[10] The internal

Bolivian legal system and has primacy over any other statutory provision. *The constitutional bloc is composed of international treaties and agreements regarding Human Rights and the norms of Community Rights, ratified by the country.* (Emphasis by author.)

[9] Law of Popular Participation. 5th Article (Registry of Legal Personality): I. The registry of the legal entity of peasant communities, indigenous peoples, and neighborhoods in the Provincial Section shall be made according to jurisdiction, by order of the Prefecture or Sub-prefecture, in favor of the Basic Territorial Organization presented in community documents such as Book of Acts, acts of assemblies, act of possession which designates their representative or authorities, and/or respective regulations, according to the nature of the petitioner, and previous positive resolution from the corresponding Council or Municipal Board. If the requirements set forth above are fulfilled, the appropriate administrative authority cannot deny the registration and is responsible for any action or omission that violates the provisions established in the present article.

[10] "This arrangement awoke susceptibility among indigenous organizations from the lowlands, who, with indivisible collective property rights recognized by the INRA law, protect their territories from parceling and selling which tend to arise in difficult economic situations." (CEJIS)

compatibility for this type of properties will be subject to the jurisdiction's own indigenous authorities in each case.[11]

About Rights Relating to Forest Resources in Indigenous Lands

The right to use and dispose of existing natural resources in indigenous territories is a core right for the indigenous people of Bolivia who have been denouncing the existence of forest concessions to third parties in their territories for more than 20 years;[12] for this reason, the exclusive ownership of the communities over renewable natural resources is one of the unquestionable rights in the current constitutional charter.

In this sense, article 388 of the NPCBS expressly indicates that: "**Indigenous, original and agrarian communities situated within forest areas will hold the exclusive right to its use and management, according to the law**." In addition, the NPCBS declares natural resources as belonging to and under direct, indivisible and imprescriptible domain of the Bolivian people, minimizing the obligation of the State to administer them.[13]

Specifically relating to forest resources, the political Charter points out that natural forests and forest soils are strategic in nature for the development of the Bolivian people, although this does not prevent the State from recognizing forest use rights in favor of communities and private operators.[14] The same constitutional rule states that "the conversion of land with forest cover to agricultural or other uses will proceed only in the spaces legally assigned for such, according to the planning policies and in accordance with the law."[15] In this sense, subsequent legislation shall define the limits of forest exploitation and use in a manner which guarantees the conservation of the soils and bodies of water for the long term with the definition of the areas,

[11] Several types of concepts regarding indigenous people have been coined in Bolivia, the principal conceptualization refers to indigenous peoples themselves and original people, both of which can include the adjective "peasant". While normally they refer to indigenous peoples as those who live in the lowlands in the Amazon region and in the Eastern Chaco region, the original people are identified as those who live in the highland regions of the Altiplano Region and the valleys of Bolivia. The concept of original people was proposed to differentiate between the colonial conceptualization of indigenous people that was introduced in Bolivia at the time of the Spanish invasion..

[12] Solely before the ILO, Bolivian indigenous organizations have presented three different claims relating to logging by third parties in their territories. See complete claims on the official page of the ILO: http://www.ilo.org/ilolex/spanish/newcountryframeS.htm.

[13] NPCBS. Article 349.

[14] NPCBS. Article 386.

[15] NPCBS. Article 389.

which Bolivian legislation calls "**ecological easements,**"[16] which have existed since 1996, though these easements are rarely implemented. That is to say, in Bolivia the availability and autonomy of forest resource use by indigenous people is not absolute and should be reconciled with the environmental obligations which apply to all types of private property,[17] however there are no clear rules regarding this compatibility.

Even though legislation prior to the NPCBS recognized the exclusive exploitation right of forest resources on behalf of indigenous people,[18] forest concessions granted in the 1980s remain in force until today. Many of the mentioned concessions were challenged in court, and the respective case law which has been consolidated argued principles of legal certainty for not reversing the concessions.[19]

[16] NPCBS. Article 389. II.

[17] NPCBS. Article 358. "*The rights of use and utilization over natural resources must abide by the Constitution and the law. These rights are subject to periodic inspection of compliance with technical, economic and environmental regulations*. Non-compliance with the law will cause the reversal or cancellation of the use or utilization rights." (Emphasis by author.) In the case of indigenous territories, non-compliance with technical, economic and environmental regulations cannot cause the reversal or cancellation of rights under Article 394 which states that indigenous territories are irreversible; however, this does not mean that they are exempt from the stated obligations.

[18] Article 32. (Authorization of use on private property and original community lands) II. Guarantees to indigenous people the exclusivity of forest use in original community lands duly recognized according to article 171 of the Political Constitution of the State and Law No 1257 which ratifies Convention No 169 of the International Labour Organization.

[19] "Although constitutional reforms introduced the explicit recognition of indigenous people and their capacity to make the most of their values, territories and customs, these must be coordinated with national law which incorporates it and contains provisions that, independently of the discussion about temporality of the origin of community land rights, should be adequately reconciled; these provisions include: the rights of individuals to work and engage in commerce, industry or any other lawful activity under conditions that do not undermine the collective good, to formulate requests, to private property provided it meets a social function, the recognition of the goods of original domain of the State such as the soil and subsoil with all of its natural wealth, whose regulation and conditions of adjudication to private individuals is defined by law; they should also be in line with international instruments such as C169 of the ILO, recognized as a Law of the Republic on June 11, 1991, which expects that the measures adopted to implement the agreement should be interpreted in a flexible manner and take into account the local conditions of each signatory country. From the above, the General Superintendent of the Regulation System of Renewable Resources (Sirenare) and the Forest Superintendant were established with the powers conferred by law L. Nº 1700 (forest law). DS. No 24453, Law Nº 1600 of the Sectorial Regulation System and the articles 60 and 61 of DS. Nº 24505 modified by DS. Nº 24786, have successfully delivered the administrative resolutions challenged in the demand, working under our legal norms, without violating constitutional regulations or any laws." 200005-Sala Plena-1-059 versus the Attorney General of the Republic, President of the Central Indigenous Peoples of Beni and others – SEEN IN ROOM: The demand for judicial redress

Thus, the guarantee of special rights granted in indigenous territories before the new rules took effect seems to take precedence over constitutional reforms and the validity of international regulations such as ILO C169. In the understanding of Bolivian judges, forest concessions superimposed on indigenous territories were perfectly in line with the current law when they were issued, making the retroactive application of the new legal framework impossible.

It remains to be seen how the new constitutional court interprets the forest concessions that were allocated for a period of 40 years or more and that are currently at the midpoint of this period. Article 30.17 of NPCBS guarantees the indigenous peoples' right to autonomous territorial management and to the exclusive use and utilization of renewable natural resources existing in their territories "**without prejudice to rights legitimately acquired by third parties**." It is probable that this subtle exception in the constitutional text which guarantees the rights of third parties enables Bolivian judges to justify the maintenance of the forest concessions which are currently superimposed on indigenous territories; however, there is no established case law regarding this aspect.

With regard to the overlap of natural protected areas and indigenous territories, the Constitution itself recognizes that "Where an overlap of protected areas and indigenous, original and agrarian territories exist, **the shared management will be subject to the rules and procedures of the indigenous, original and agrarian nations and people themselves**, respecting the purpose for which the areas were created" (Article 385 II). This means that there will necessarily be co-management agreements between the indigenous and environmental authorities. The aforementioned constitutional provision should prevent indigenous people from being forced off their lands for environmental conservation.

With respect to the question whether or not the Bolivian State can unilaterally dispose of natural resources in indigenous territories without securing the free, prior and informed consent of the affected people, it is important to mention that Bolivia formally guarantees indigenous peoples' right to consultation and consent, both through incorporating UNDRIP as a domestic law, as well as through the NPCBS itself which guarantees the right to "mandatory previous

made by Ernesto Noé Tamo, Hugo Dicarere Méndez and José Tubusa Matarero, President, Vicepresident, and Secretary of Natural Resources of the Central Indigenous People of Beni, against the Attorney General of the Republic. Page 4. Other decisions in the same sense are: 200005-Sala Plena-1-057 Guarayos Native People v. Attorney General of the Republic Board of Central Indigenous Community Concepcion, Director of the Indigenous Center Paiconeca of San Javier and Center of Organization of 200005-Sala Plena-1-058 v. General Attorney of the Republic Subcentral Indigenous Council of Multiethnic Indigenous Territories.

consultation" in its articles 30.15[20] and 352.[21] Even with the existence of the aforementioned legal provisions from the highest ranking legal authority, the indigenous people of Bolivia continue to demand, almost daily, the adequate application of this right, and that the State obtain the consent of the people before performing any type of natural resource exploration in their territories.

However, it should be mentioned that the government of President Evo Morales has been trying since 2005 to implement the right of consultation through its regulations. That year the law of hydrocarbons (Law Nº 3058) was implemented which includes an exclusive Title referring to the right to consultation and participation of indigenous, agrarian and original people.[22] In 2007, the government issued the rules for consultation and participation of indigenous and original people and agrarian communities in hydrocarbon activities through Supreme Decree Nº 29033.

According to the Bolivian legislation, the product of the prior consultation processes with indigenous people should be incorporated both into decisions regarding the viability of an enterprise as well as into its environmental assessment. Thus, administrative decisions that ignore the "Acts of Understanding" signed by the government and the indigenous people can be legally annulled.

The Bolivian legislation regarding prior consultation is, without a doubt, the most complete and consistent regulation in the region. However, there have been repeated complaints and demands of the indigenous movements relating to the lack of their application and enforcement by the indigenous government itself, which is important to take into consideration in an institutional evaluation regarding the right to consultation in Bolivia.

[20] NPCBS. Art. 30, II, 15, II. In the framework of the unity of the State and in accordance with this Constitution the indigenous, original and agrarian nations and people enjoy the following rights: (…) 15. To be consulted through appropriate procedures, and in particular through their institutions, every time that legislative or administrative measures are planned that are likely to affect them. In this context, they will respect and guarantee the right to mandatory previous consultation by the State in good faith and in collaboration, regarding the exploitation of the non-renewable natural resources in the territory where they live.

[21] NPCBS. Article 352. The exploitation of natural resources in a certain territory will be subject to a process of consultation with the affected population, convened by the State; the consultation will be free, prior and informed. The public participation in the process of environmental management is guaranteed and will promote the conservation of ecosystems in agreement with the Constitution and the law. *In the case of indigenous, original and agrarian nations and people, the consultation will take place respecting their own norms and procedures*. (Emphasis by author).

[22] For the Bolivian legislation regarding consultation, see: http://www.socioambiental.org/inst/esp/consulta_previa/?q=o-que-e/experiencia-america-do-sul/bolivia and at: http://www.socioambiental.org/inst/esp/consulta_previa/?q=node/29. For a critical analysis of the current legislation and the criticism of the lack of implementation, see: http://www.cejis.org/.

With regard to the specific legislation about carbon credits and climate change in place in Bolivia, it is worthwhile to point out that Bolivia is a signatory state to all pertinent international agreements and that it, like only a few Latin American countries, has implemented the requirements for the execution of emissions offset projects within CDM mechanisms.

However, indigenous people claim to have been totally excluded from all national debates regarding climate change and the definition of the rules referring to the mitigation, adaptation and compensation of emissions. They complain that they were not included in the elaboration of the National Plan for Climate Change or in the Institutional Framework on Natural Disasters which makes decisions referring to the control of GHG emissions in the country. Despite this, there is currently a REDD pilot project with indigenous people in the Bolivian Amazon led by CIDOB[23] and the Indigenous Committee for Natural Resources.

In conclusion, Bolivian legislation guarantees indigenous people's exclusive control and use of the forest resources which exist in their lands. That is to say, the beneficiaries from eventual REDD projects in indigenous lands can only be the indigenous people themselves, in that the GHG emissions reductions will depend on the autonomous decisions that the indigenous people make regarding the use of their forest resources and on the activities that they themselves decide to carry out in their territories.

In fact, the execution of the project called "Sub-national Indigenous REDD Project in the Bolivian Amazon," is the first indigenous REDD pilot project of which we are aware. Its realization is part of a strong alliance between national, regional, and local indigenous organizations which involves 1500 local communities, and has been done in collaboration with public, municipal and national authorities, as well as with international cooperation agencies which have already made 3.7 million dollars available for the project.[24]

For now, the Amazonian REDD project is being executed and no doubt its application and evaluation will be an important example for this type of initiative throughout all of the Amazonian Basin and to reassess the political arguments that are beginning to be placed internally in Bolivia regarding the origin of the funds to finance it.

It is worth noting that, in addition to the current Bolivian legal structure, which is very favorable and guarantees indigenous rights, in this country, initiatives such as the one mentioned

[23] See http://www.cidob-bo.org/gti/.

[24] For more information on the project, see: http://www.whrc.org/policy/REDD/Reports/RudyGuzmanProgram_Indigena_de_REDD_en_la_Amazonia_Boliviana.pdf.

are also facilitated by the strong and consolidated indigenous movement, which is an important particularity to consider when comparing the possibilities for the implementation of similar initiatives in other countries in the region.

Brazil

In the Amazon Basin, Brazil has the largest percentage (60%) of the biome under its jurisdiction. The territory recognized as the Legal Amazon in Brazil[25] includes nine states: Tocantins, Maranhão (in part), Pará, Amapá, Mato Grosso, Rondônia, Acre, Amazonas, and Roraima, covering an area of approximately 5,217,423 km^2 corresponding to about 60% of the Brazilian territory. Besides the legal Amazon, the Amazon forest is the largest of the ecosystems in the country occupying almost half of the entire national territory. The deforestation pressure of the Amazonian forest is especially high here compared to the rest of the basin, and in fact, deforestation is the direct cause of approximately 75% of the GHG emission in the country.[26] Both Indigenous Lands and Conservation Units (CUs) are currently fenced off and are under strong pressure from the advance of the agricultural frontier which promotes forest land use change for agricultural and livestock economies.[27]

In this important Brazilian biome, indigenous people play a leading role. The majority of the Indigenous Territories (ITs) in the country are concentrated in the legal Amazon: t**here are 405 areas, equivalent to 1,084,665 km^2, representing 20.7% of the Amazon territory and 98.61% of all the ITs in the country**. Because of this, indigenous people in the Brazilian Amazon are fundamental actors in any discussion about natural resource use and definition of social and economic development options in the region.

Brazil is one of the first countries in the Amazon Basin to recognize and protect the territorial rights of indigenous people. The Federal Constitution of 1988 (hereafter FC) recognizes the original rights over the lands which the indigenous people traditionally occupied as well as their social organization, customs, languages, beliefs, and traditions (Chapter VIII of the FC).

[25] This term refers to a political, not biogeographical, definition of the Amazon region in Brazil.

[26] On generating sources of GHG in Brazil, see: http://wwf.org.br/natureza_brasileira/reducao_de_impactos2/clima/mudancas_climaticas/

[27] This part of the present study is based on the legal concept elaborated by the lawyers Erika Yamada and Raul do Valle from the Socioenvironmental Policy and Law Program of Instituto Socioambiental (ISA) completed for Brazil in parallel to the production of this regional study.

In the same way, the **Brazilian political charter declares indigenous lands inalienable, unseizable, and imprescriptible**, explicitly guaranteeing the real use rights to the riches of the soil, the rivers and the lakes existent therein to the indigenous people.[28] In the Brazilian legislation, the bare ownership of indigenous territories remains with the Federal Union,29 with the only objective of protecting and guaranteeing the exclusive possession of the indigenous people over their lands.[30]

Even though the legal system in Brazil does not recognize the bare ownership of indigenous people over their territories, it gives them the inherent powers of control through guaranteeing them the exclusive usufruct of the natural resources and their permanent possession in an imprescriptible and inalienable manner.

On this particular legal form of property and ownership of indigenous territories in Brazil, Professor Dalmo de Abreu Dallari notes that: "If it is true that by failing to be owners, Brazilian Indians cannot dispose of the lands that they traditionally occupy, it is equally true that the Union, although owner, does not have the power of disposition. And the indigenous groups permanently enjoy, and with all amplitude, the possessory rights over their lands."[31]

It is important to clarify that the **exclusive usufruct rights of indigenous people** over the natural resources in their territories is different from the common institution of usufruct referred to in the civil code.[32] The recognized right of indigenous people is characterized by collective ownership and is not limited in time or conditional on the lifetime of its first owners. Thus, the real indigenous usufruct right should be understood as the right to dispose, administer, distribute, and control the natural resources of their territories according to their uses, customs, and traditions to guarantee their survival and reproduction, subject to the economic, social, and cultural development options of each village.

Even though **indigenous lands are property of the Union**, the state cannot freely dispose of them. That is to say, the Union cannot use them for means that are not for the permanent habitation of the indigenous people. Additionally, they are inalienable lands and their concession to third parties is not possible under any title or pretext (art. 231, §2nd). In Brazil, **there is no**

[28] 1st paragraph of article 231 of the FC.

[29] FC, Article 20, No XI.

[30] SILVA, José Alfonso. *Positive Constitutional Law Course*. São Paulo: Editor Malheiros, 2006, Ed. 27, p. 855.

[31] DALLARI, Dalmo de Abreu. *Reconhecimento e proteção dos direitos dos índios (Recognition and Protection of the Rights of Indians)*. Brasilia: Senado Federal, v. 28, n.111, jul/sept. 1991, p. 319. Free translation.

[32] Civil Code, Law 10.406/2002, Title VI of Usufruct.

legal risk that these lands can be subject to a forest concession to private companies, which is expressly pointed out in the public forest management law.[33]

Additionally, **the FC prohibits that indigenous people are removed from their lands** except in case of epidemics that could place the population at risk, or in the interest of the country's sovereignty, provided that the National Congress authorizes thus and guaranteeing, in any case, indigenous people's immediate return once the risk which justified their transfer ceases.[34]

In this way, even though the Brazilian State does not recognize the indigenous people's full ownership , for all practical effects, the legal formula that holds legal title to the property (inalienable) in the hands of the Union and guarantees the permanent usufruct and possession rights (imprescriptible) of the indigenous people, it is the same as the full recognition of inalienable, imprescriptible and unseizable property, as this is the case in other countries in the region.

On the other hand, it is important to highlight that in the Brazilian legislation, **the indigenous people, as well as their social and economic organizations have full civil capacity to carry out legal negotiations, indigenous communities may also have rights and obligations**.

The new civil code (law 10406 of 2002) altered concept of indigenous people as being relatively incompetent as mentioned in the previous civil code of 1916, and which still mentions the Indian Statute (law 6001 of 1973)[35] the new civil code recognizes in Article 4 §1 that indigenous people are no longer considered incompetent and that special legislation will be responsible for defining the specific capacity in order to address specific collective and individual ownership rights and responsibilities of indigenous people.

[33] Public Forest Management Law *(Ley de Gestión de Florestas Públicas)*. Law Nº 11.284, of March 2, 2006. The Annual Plan of Forestry Granting (APFG), proposed by the management body and defined by the grantor, *will contain a description of all the public forests to be submitted to the processes of concession in the year they apply*. Art. 11. The APFG for forestry concessions will consider: (…) IV – *the exclusion of indigenous lands*, the areas occupied by local communities and areas of interest for the creation of conservation units for integral protection. (Emphasis by author.)

[34] FC, 5th Paragraph, Article 231.

[35] Article 42 of the Indian Statue, still without explicit revocation, establishes that the National Indian Foundation (FUNAI) will manage indigenous patrimony, unless it is demonstrated that the "tribal group" who owns that patrimony has "effective capacity" for this management. This constitutes part of the tutelary politics which the Brazilian State exerts towards indigenous people, which predates the FC of 1988, but to the extent that FUNAI remains and the indigenous rules are still, even 20 years later, not updated, many of the tutelary and paternalistic behaviors continue to be developed based on this relationship.

Since a new Indigenous Peoples Statue has not yet been issued, the legal reference to which the 2002 civil code refers does not exist and as such, the rule of legal capacity of indigenous people must adhere to the rules and principles established in chapter VIII of Title VIII which deals with the officially recognized rights of indigenous people as collective subjects.

Environmental Legislation and Indigenous Lands

In Brazil, the issue of territorial rights of indigenous peoples is inevitably associated with the current legal environmental framework. In the Brazilian legal system, indigenous people are legal subjects who have the power to dispose of the natural resources existing in their lands. The only exceptions to this rule are mineral and hydraulic exploration in indigenous lands. Both activities are anticipated in the constitutional text; however, until now the necessary legislation to release the realization of these activities within indigenous lands as required in the FC, paragraph §3 of article 231 has not been enacted.[36]

The principal comparative advantage of indigenous territories in the Brazilian Amazon in comparison with indigenous territories in neighboring countries relates to the fact that, since the laws that permit mineral and hydroelectric exploitation inside the perimeter of indigenous lands have not been regulated, they do not currently face threats from such projects. However, large hydroelectric projects in the Amazon region are beginning to consolidate independently from the territorial rights of the indigenous people as is evidenced in the case of Belo Monte Hydroelectric Exploitation in the Xingu River, State of Para.[37]

The Brazilian Constitution determines that the use of water resources in indigenous lands, as well as mineral prospecting and exploitation can only be done with the previous authorization of the National Congress, as noted in Article 231§3,[38] which provides that the National Congress

[36] Unfortunately, even though the necessary legislation for the exploitation of mineral and hydroelectric exploitation in indigenous lands does not exist, the Brazilian State has been promoting the realization of hydroelectric infrastructure works within or affecting indigenous lands, without respecting the constitutional rights of these people, including the right to free, prior and informed consent. See, for example, the case of Belo Monte Hydroelectric Plant in the Xingu River which directly affects indigenous people in the Xingu River watershed and is ready to be given on concession without having met the requirements of the indigenous legislation. For more information about the case, see: http://www.socioambiental.org/esp/bm/index.asp.

[37] To see the complete information about the Belo Monte and how it affects indigenous people of the Xingu River, enter: http://www.socioambiental.org/esp/bm/index.asp.

[38] Brazilian Constitution. Art. 231, §3 (The use of water resources, including energy potential, research and exploration of mineral wealth in indigenous lands can only take effect with the authorization of the National

has the duty (and exclusive competency)[39] to consult the indigenous communities potentially affected before authorizing such ventures.[40]

Despite the constitutional declarations and doctrinal interpretations, there is not clarity regarding the true extent of the autonomy of indigenous people with regards to the management of their natural resources. The infra-constitutional legislation, which refers to the management of natural resources and the legal regimen applicable to indigenous people,[41] has not been revised and updated with the constitutional framework of 1988, which permits the coexistence of many norms which conflict with the new constitutional provisions. This causes ambiguous interpretations, principally, regarding the rules for economic uses that are different from traditional uses, which indigenous people carry out in their territories.

Thus, the currently one finds law which defines indigenous lands as **permanent preservation areas** in which, according to modifications included in 2001,[42] **indigenous communities can carry out the exploration of forest resources limited to a sustainable forest management regime for their subsistence needs.**[43] Thus, even though indigenous lands are considered permanent

Congress, and after the affected communities have been consulted, thus assuring their participation in the results of the exploration, in the form of the law).

[39] Brazil, Federal Regional Tribune of the 1st Region, Report of Judge Selene Maria de Almeida Interlocutory Appeal No 2006.01.00.017736-8/PA, Federal Public Ministry v. IBAMA et al., State of Pernambuco, 2006, page 6 "The Consultation is done directly with the community involved in the construction project. The National Congress has the exclusive competence to carry out the consultation, as only it has the power to authorize the work. Article 231, §3 of the FC/88 conditions the authorization to hearsay.

[40] This is the only instance in which the FC refers to an institution similar to the consultation. In fact, once ILO Convention 169 and UNDRIP were ratified and incorporated, the consultation mechanism which is referred to in the 3rd paragraph of article 231 should be interpreted in terms of the right to consultation and free, prior and informed consent of which these international instruments speak.

[41] The current indigenous rights law is called the Indian Statute which was issued in 1973 under the conception of the tutelary State regime relating to the indigenous people and the Brazilian State. Currently, a bill which seeks to update the indigenous rules in the new constitutional framework; however, this bill has been in the National Congress for more than 14 years.

[42] Article 3-A: The exploration of forest resources in indigenous lands can only be done by indigenous communities under a sustainable forest management regime and to meet their subsistence needs, as stated in Articles 2 and 3 of this Code. Article included by the Provisory Measure No 2.166-67 of August 24, 2001 in the Forest Code, Law 4771 of 1965.

[43] The definition of the Sustainable Forest Regime according the Brazilian legislation is limited to the "administration of the forest to obtain economic, social and environmental benefits, respecting the supporting mechanisms of said ecosystem for management and considering, cumulatively or alternatively, the use of multiple wood species, multiple non-forest products and sub-products as well as the use of other goods and services of natural forest." Item VI of the 3rd Article of law 11.284 of 2006.

environmental protection areas, the cutting and commercialization of native woods is permitted, provided that a "**sustainable forest management plan**" is established for the exercise of said activity and in strict compliance with the environmental restrictions in the region.[44]

Additionally, Article 46 of law 6001 of 1973 (current Indian Statute) modifies the forest code on harvesting in indigenous lands through a special law: **the cutting of wood in indigenous lands considered to be permanent preservation "is conditional on the existence of use programs and projects on the respective lands for agricultural, industrial or reforestation exploration**."

With regards to the Brazilian legislative framework, it can be concluded that, in the same way that the State cannot impose the specific activities through which indigenous people exercise their exclusive usufruct, neither can indigenous people avoid their environmental obligations involving the use of natural resources for activities that are not considered traditional. Thus, in the development of non-traditional commercial activities, the indigenous people should maintain the native forest cover at the percentage that the law requires for each biome.[45] For the Amazon region, this means that both traditional activities as well as non-traditional activities should keep a ratio of at least 80% of native forested area and 20% of non-forest use areas.

In sum, the usufruct of the forest resources is exclusive for indigenous people; the Brazilian State is prohibited from granting forest concessions to third parties in indigenous lands and the execution of non-traditional economic activities are conditional on compliance with the national environmental legislation.

In this line of thought, according to the Brazilian legislation, indigenous people have the exclusive control over the natural resources which exist in their territories, and do not depend on the authorization or permission from any public body in order to use the resources in a traditional manner. At the same time they must comply with the environmental obligations in their territories for the execution of non-traditional activities and economic exploration. Thus, given that indigenous people are the exclusive usufructaries of forest resources, the economic benefit

[44] A comprehensive legal analysis regarding the application of environmental restrictions to the economic activities done by indigenous inside their lands was carried out by Mathias Baptista, Fernando. "A gestão dos recursos naturais pelos povos indígenas e o direito ambiental" in Lima, Andre, *O Direito para o Brasil Socioambiental*. Sergio Antonio Fabris, Editor: Porto Alegre, 2002.

[45] In this way, the indigenous lands in the Amazon biome must maintain 80% of native forest cover in their territories, 35% of forest cover in the indigenous territories located in the *cerrado* biome within the region defined as the Legal Amazon and 20% of native cover in the remaining biomes in the country. Forest Code, Law 4771 of 1965, article 16.

derived from them, such as from the conservation of said resources, falls to them, for example, in the case of potential REDD projects in their territories which involve native forest recuperation and conservation activities. The Brazilian legislation does not include a special rule regarding the ownership of ecosystem services which come from the maintenance of native forests, much less a specific regulation on the legal nature of carbon credits.[46] However, the ownership over any type of ecosystem services derived from the maintenance and management of natural resources by indigenous people in indigenous lands is unquestionable.

Colombia

Colombia is one of the countries with the highest level of recognition and legal development for indigenous rights in the entire Amazon Basin region. However, the large majority of indigenous territories titled in the Colombian Amazon overlap with environmental protection areas. In Colombia, even though the environmental holdings are large in size, a consolidated legal institution guarantees the people of the Colombian Amazon the full exercise of their territorial rights.

The Colombian legal system recognizes the **inalienable, unseizable and imprescriptible collective property of the territories traditionally occupied by indigenous people**[47] **as a fundamental right**.[48] Said recognition has constitutional status[49] and is duly regulated in common law[50] and administrative acts which guarantee the demarcation and titling of the collective territories.[51] In addition, the Colombian State has guardianship actions (or protection actions) to

[46] Brazil ratified and incorporated all of the international laws relating to climate change. As part of the countries not committed to binding targets, Brazil has been a receiver of CDM projects for the emission of carbon credits for Annex I countries without the existence of internal legislation which defines both the legal nature as well as the tributary regime applicable to these projects.

[47] The collective properties of indigenous people are called Indigenous Reservations (*Resguardos Indígenas*) in Colombian legislation, defined as "*a legal and socio-political institution of a special character, formed by one or more indigenous communities who with a collective property title enjoys the guarantees of private property, own their territories and govern the use of such and its internal life through an autonomous organization covered by indigenous jurisdiction and its own regulatory system*." Article 21 Decree 2164 of 1995.

[48] The protection which article 63 of the 1991 Political Constitution establishes in determining that the indigenous territories are inalienable, unseizable and imprescriptible should be interpreted in the sense that said restrictions were established by the constituent so that the demarcated or delimited areas such as indigenous reservations, remain intact and intangible and, therefore, cannot be altered by the legislature, let alone by the administration that enables this.

[49] Article 63 and 329 of the 1991 Political Constitution (PC).

[50] Law 160 of 1994.

[51] Decree 2164 of 1995.

guarantee the protection of the indigenous property which is considered to be a fundamental right as it is directly connected to the right to the physical and cultural survival of the indigenous people.[52]

The constitutional charter recognizes that the indigenous authorities are competent both to govern their territories as well as freely manage its natural resources (article 329 and 330 of the PC of 1991), and to govern according to their internal regulations and social organization (article 286 of the PC of 1991). The Indigenous Reservations (hereafter IR) are currently the only legal institution which refers to the collective property of the traditional indigenous territories.[53]

The right to full use and enjoyment of the forest resources in indigenous territories is explicitly constrained by the environmental obligation to comply with the ecological function of the property. According to Colombian law, IRs are subject to the provisions regarding the protection and preservation of renewable natural resources, according to the uses, customs, and culture of the indigenous people.[54]

This explicit obligation which refers to the IRs extends to all types of indigenous territories recognized in the Colombian legal system such as **indigenous reserves, communal lands of ethnic groups and indigenous parcels**,[55] to the extent that the national legislation equates the concept of Indigenous Reservations with what the ILO Convention 169 named "defined territory" and which includes all types of territory traditionally used by indigenous people without distinction of property title.[56]

[52] "The fundamental rights of indigenous communities should not be confused with the collective rights of other human groups. The indigenous community is a collective subject and not a simple sum of individual subjects which share the same diffused or collective rights or interests through the exercise of the corresponding popular actions. Among other fundamental rights, indigenous communities are entitled to the fundamental right of subsistence, which follows directly from the right to life consecrated in article 11 of the Constitution." Constitutional Court of Colombia, Judgment T-380 of 1993 Reporting Judge (R.J): Eduardo Cifuentes Muñoz.

[53] Before the Political Constitution of 1991 and expedition 160 of 1993, in addition to the indigenous reservations, there were so-called Indigenous Reserves which were defined as vacant lands occupied by indigenous people. At present, the 5th paragraph of article 85 of law 160 and the 2nd article of decree 2164 of 1995 state that reserves should be treated as indigenous reservations for all legal purposes.

[54] Article 25 of Decree 2164 of 1995.

[55] All of these names for indigenous territories existed prior to the 1991 Constitution. Law 160 of 1994 and decree 2164 of 1995 order that both parcels as well as indigenous reserves are recognized as indigenous reservations, this being the legal institution in Colombia which fully recognizes the collective rights over the territory traditionally occupied by the indigenous people.

[56] Article 13 and 14 of Law 21 of 1991 which ratifies ILO Convention 169.

On the other hand, the Colombian legal system recognizes indigenous people and communities as collective subjects with fundamental rights,[57] which in turn are represented legally and extra-judicially by their traditional authorities. The law defines **traditional authorities as those "members of the indigenous community who exercise, within the structure of the respective culture, a power of organization, government, management or social control."**[58]

Traditional authorities already incorporated in the law are the indigenous councils, recognized in law 89 of 1890[59] **and the Traditional Indigenous Authority Associations** (TIAAs) recognized as organizations of indigenous authority representation in Decree 1088 of 1993.[60]

It is worthwhile to note that the Colombian legal system has been categorical in affirming that indigenous authorities do not have omnipotent power to dispose of the natural resources in indigenous lands by themselves, as they are always subject to the ultimate decisions of the communities and people they represent. Thus, the Colombian Constitutional Court points out that "The right to collective property of the renewable natural resources which are found in their territories does not grant an all-embracing power to the representatives of the respective indigenous communities to freely dispose of them. The autonomy of the indigenous authorities in the management of their own issues, especially in regard to the use of natural resources, should be exercised with full responsibility. **The indigenous community can always argue the ultra vires doctrine against acts of their authorities who have illegally or arbitrarily disposed of the**

[57] Currently, the Constitution itself explicitly mentions indigenous communities in articles 96, 171, 246, 329 and 330 and defines them as "the set of families of Amerindian descent who have awareness of identity and share values, features, uses or customs of their culture, as well as forms of government, management, social control or their own normative systems which distinguish them from other communities, having property titles or not, or being unable to legally prove them, or whose reservations were dissolved, divided or declared vacant. Article 2 Decree 2164 of 1995.

[58] Article 20 Decree 2164 of 1995.

[59] The law defined Indigenous Council as "a special public entity whose members are members of an indigenous community, elected and recognized by them, as a traditional socio-political organization *whose function is to legally represent the community, exercise authority and perform the activities attributed to them by the laws, uses, customs and internal regulation of each community.*" (Emphasis by author.)

[60] TIAAs are defined as "entities of Public Law of special character with juridical status, and with separate patrimony and administrative autonomy", and which do not compromise the autonomy of the communities and their associated authorities. Among the objectives of the TIAAs is to "advance industrial and commercial activities, whether directly or through agreements made with natural persons or legal entities," which means that this has a legal status that includes both the traditional character of the authorities of each community, and also acts as a legal institution for activities not necessarily traditional, as could be the realization of REDD project for the emission and commercialization of carbon credits belonging to indigenous communities possibly associated with TIAAs. Decree 1088 of 1993.

natural wealth included in their territory, and who, therefore, should be stripped of all binding power."[61]

Aloisio Cabalazar/ISA

Traditional hut in Puerto Ortega, Pira-paraná, Colombia.

With respect to the ownership of the forest resources in indigenous territories, it is necessary to clarify that in principle, the general rule in the Colombian legal system states that renewable natural resources, such as native forests, belong to the State.[62] However, when native forests are within an indigenous territory, an exception is made to this rule according to the constitutional principles that recognize and protect the collective property ownership of the territories and natural resources traditionally used by the indigenous people, and without which the conditions for physical and cultural survival of the people who depend on the forests as a principal source of food and shelter would be seriously compromised.

The recognition of this right over renewable natural resources prevents the Nation from exercising any right of disposition over forest resources located in IR. The Colombian law states that forest harvesting done by indigenous communities in indigenous territories is governed by

[61] Judgment Nº T-380 of 1993.

[62] While the renewable natural resources in Colombia are property of the Nation, at the regional level their administration falls under the purview of Autonomous Regional Corporations, the authorities of large urban centers, and the environmental authorities in the districts of Barranquilla, Santa Maria and Cartagena. In accordance with numeral 9 of article 31 of Law 99 of 1993, these entities are equipped to grant environmental concessions, permissions, authorizations and licenses required for the use, harvesting or mobilization of renewable natural resources or for the development of activities which affect or could affect the environment, grant permissions and concessions for forestry, as well as concessions for the use of surface and subterranean water, and establish hunting and sport-fishing bans. According to articles 8, 63, 79 subsection 2, 80, 102, 330 paragraph of the PC of 1991 and article 42 of the National Renewable Natural Resources Code. National Renewable Natural Resources Code, law 2811 of 1974. Article 42. Renewable natural resources and other environmental elements regulated by this Code which are found within the national territory belong to the Nation, without prejudice to the rights legitimately acquired by individuals and the special norms regarding vacant lands. See: http://www.secretariasenado.gov.co/senado/basedoc/decreto/1974/decreto_2811_1974.html.

"**the special norms which regulate the administration, management and use of renewable natural resources by these communities**",[63] which basically leads us back to ILO Convention 169, the current norm pertaining to the exclusive right of indigenous people in the administration, management and use of natural resources.

Thus, in the Colombian legislation, the possibility for indigenous people to obtain permission and authorization from the Regional Environmental Authority to carry out forest harvesting for traditional activities in their territories is excluded. Consequently, it is not necessary to formalize agreements regarding the use, management, and harvesting of the forest resources that indigenous people use in a traditional manner. **It is also not permissible for the State to authorize the exploitation of forest resources by third parties in these territories given that these resources do not belong to them** and can put the conditions for the survival of the indigenous people which depend on them at serious risk.[64]

This does not mean that indigenous people are exempt from compliance with the environmental obligations which correspond to them as collective owners of their territories.[65] According to the national legislation, "**Indigenous Reservations are subject to comply with the social and ecological function of the property**, according to the uses, customs and culture of the community. Likewise, in accordance with said uses, customs and culture, **they remain subject to all the provisions regarding protection and preservation of the renewable natural resources and the environment."**[66]

The environmental restrictions and obligations that must be met in indigenous territories are defined in the environmental legislation as those related to the maintenance of plant cover

[63] Article 44 Decree 1791 of 1996. "The forest uses intended to be performed by *indigenous communities in areas of indigenous reservations* or reserves or by black communities as covered in law 70 of 1993 *will be governed by the special norms which regulate the administration, management, and use of renewable natural resources by these communities*. The aspects which are not expressly foreseen in specific norms are subject to the compliance as specified in this Decree."

[64] "[…] a reservation is not a territorial entity but a form of collective land property. Said collective property as defined by ILO Convention 169 *gives indigenous people the right to participate in the utilization, administration, and conservation of the existing natural resources in their lands*. […]"

[65] "This collective property is treated as private property and, consequently, its administration rests with its owners and, additionally, exercising the powers of local self-government, they can determine the terms of land use, including the preservation of the renewable natural resources". LABORDE Ramón. "*Los Territorios indígenas traslapados con áreas del sistema de parques naturales en la Amazonía colombiana: situación actual y perspectivas*." Public Policy Document Nº 23, National Environmental Forum, p 3.

[66] Article 87 Law 160 of 1994 and Article 24 Decree 2164 of 1995.

on the banks of rivers and in land slopes as defined in each region, as well as obligations which refer to the prevention and control of forest fires (Articles 184, 202, 206 and 244 of the Legislative Decree 2811 of 1974).

In cases of overlap with natural protected areas[67] and IR the Colombian law briefly mentions the most common cases regarding National Natural Parks (NNP); however, it does not elaborate on the implementation of special regimes for these cases. Likewise, Article 7 of Decree 622 of 1977 indicates that: "The declaration of a National Natural Park is not incompatible with the constitution of an indigenous reserve; so when for reasons of ecological and geographical order, it is necessary to include all or part of an area occupied by indigenous groups inside the System of National Natural Parks, the corresponding studies will be jointly advanced by INCODER and the Colombian Institute of Anthropology, with the intent of establishing a special regime which benefits the indigenous population and which will respect the permanence of the community and their right to the economic use of the renewable natural resources, observing technologies that are compatible with the objectives of the Parks System noted for the respective area."[68]

With relation to forest use by indigenous people in areas overlapping with NNP, in principle they are generally limited to those survival activities which are not against the objectives of the conservation of the area.[69] This means that the traditional activities of use and enjoyment of natural resources are permitted, but it needs to be clarified to what extent the indigenous people can define the economic, social and cultural development in their own territory beyond the environmental limitations and the activities considered to be traditional in this overlapping context.

In this regard, it is important to consider that, on one hand, the conservation of the areas considered strategic by the Colombian State, cannot be superimposed on the right of the indigenous people to define their own priorities of economic, cultural and social development (Article 7 of the ILO Convention 169), and that, on the other hand, whatever the indigenous people decide regarding the renewable natural resource use , their decision should respect the

[67] In the Colombian Amazon, almost all of the indigenous territories overlap with the Amazonian Forest Reserve created by the 2nd law of 1959, and 4.2% of indigenous reservations overlap with National Natural Parks (NNP).
[68] The indigenous reserves to which Decree 22 of 1977 refers are matched by the Article 2 of Decree 2164 of 1995 to the concept of indigenous territory incorporated in ILO Convention 169 and to the communal lands of ethnic groups considered unseizable, imprescriptible and inalienable in Article 63 of the 1991 PC.
[69] Articles 12 and 15 Decree 1791 of 1996. In the National Natural Parks, the activities of felling, burning and planting, hunting, fishing are prohibited, as well as forestry, agricultural, industrial, mineral, petroleum or hotel activities or any other activity which goes against the objective of conserving the area.

framework of ecological function and the environmental obligations of the property, which prevents indigenous peoples, even if they wanted to, from completely changing the forest land use in the overlapping territories.

Cases of indigenous territories overlapping with NNP will have to be included under the idea of promoting conservation and forest cover maintenance and will have to form part of the group of incentives to comply with the necessary conditions for the conservation function of these areas. Eventually, resources derived from REDD projects, in these cases, should help ensure existing economic pressures so that the people living in these areas can continue to conserve forest resources as they have done up to now.

Finally, the most important legal consequence of the overlap between IRs and NNPs is the impossibility of carrying out an exploration of subsoil resources in the area of NNP, which guarantees that indigenous territories located in these areas are exempt from this type of territorial expropriation,[70] which is becoming a growing threat in the Colombian Amazon.[71]

With regard to the overlap between **Forest Reserves and Indigenous Reservations**, the current law is not as explicit as in the case of overlap with NNPs. However, it declares the possibility for the creation of reservations inside forest reserves, allowing the possibility that they are not exclusive institutions, and for this reason they should harmonize their ecological, as well as their cultural, function. To this respect, law 160 of 1993 in the 6th paragraph of Article 85 points out that "the territories traditionally used by nomadic, semi-nomadic or indigenous people who practice shifting cultivation for hunting, gathering or horticulture which may be **located in forest reserve areas** according to this law can **only be designated as the indigenous reserves**, but the **occupation and harvesting** should also be submitted in addition to the **procedures established by the Ministry of the Environment and the current regulations regarding renewable natural resources.**"

It is possible to interpret that in the case of the overlap of reservations with forest reserves, in addition to the same exceptions of traditional use of the natural resources which are in place in the case of overlap with NNPs, forest reserves are a type of protected areas much

[70] Judgment C-649 of 1997. Constitutional Court.

[71] The general regime of the NNPS (National Natural Park System) is not applicable to indigenous territories, except in the case of the authorization of exploration and exploitation of subsoil resources belonging to the State or commercial or industrial renewable natural resource permissions. Thus, members of indigenous communities in overlapping areas have been conducting the management, use and harvesting of their natural resources in an uninterrupted and peaceful manner, without the limitations set forth under this rule." LABORDE, Ramón. "*Los Territorios indígenas Traslapados con áreas del Sistema de Parques Naturales.*" In: Public Policy Document Nº 23, publication of the National Environmental Forum. December 2007.

less restricted than a NNP, making the implementation of non-traditional activities possible in its interior without detracting from the environmental objectives of the area.[72]

As a matter of fact, the legislation permits the separation of areas from the reserve in order for non-forestry activities to be implemented. When indigenous people want to carry out non-traditional economic activities in the overlapping territories, they can solicit the regional environmental authority for the separation of a part of the forest reserve inside their territory with the objective of implementing economic uses other than forest uses, while demonstrating that the protective function of the reserve is not being affected. Article 210 of the RNRC states that "If in areas of forest reserves, for reasons of public utility or **social interest**, it is necessary to implement **economic activities that imply removal of forest or land use change or any other activity different from the rational harvesting of forests** in areas of forest reserves, the affected zone should be duly demarcated and separated from the reserve. **It is also possible to separate from the forest reserve the premises whose owners demonstrate that their soils can be used in operations other than forestry provided that they do not harm the protective function of the reserve**."

This means that, in indigenous territories that overlap with forest reserves, indigenous people can legally change the forest use of their land for other types provided that they meet with the constraints of environmental regulation; this implies that, to comply with the ecological function of the property, indigenous people cannot change the forest use of their entire territory, as it is necessary to define an area to be separated from the forest reserve. The proportion of said area should be agreed upon between the Regional Environmental Authority and the indigenous people.

In addition, the laws pertaining to Forest Reserves, establish that any infrastructure project to be implemented in such an area should guarantee that it does not conflict with the conservation of renewable natural resources; this constitutes an additional guarantee for the preservation of the natural resources that belong to the indigenous people who live there.[73]

[72] Article 207 of the Renewable Natural Resources Code (hereafter RNRC) points out that "*The forest reserve area can only be used for permanent rational use of forests that exist therein or are established and, in any case, should guarantee the recuperation and survival of the forests.*" (Emphasis by author)

[73] Article 208 Legislative Decree 2811 of 1974. "Ways, reservoirs, dams or buildings and the implementation of economic activities inside of forest reserve areas, will require prior licensing. The license will only be granted when it has been proven that *the execution of the works and the exercise of the activities do not conflict with the conservation of the renewable natural resources of the area.*" (Emphasis by author.)

The law permits and stimulates reforestation and forestation activities in degraded areas in indigenous territories that overlap with forest reserves, in Article 231 of RNRC.

Finally, it is important to point out that in the Colombian legislation the right of indigenous people to collective property is not an absolute right and that the State can limit the use and enjoyment of renewable natural resources that exist in the indigenous territories to exploit subsoil natural resources and implement infrastructure projects considered to be of environmental interest, while any opposition of indigenous people on the decision has no binding force.

Simultaneously, the Colombian legislation recognizes the right of previous consultation as a fundamental right of indigenous people. "It is foreseen when seeking to implement natural resource exploitation in indigenous territories, the participation of the community in the decisions that will be adopted to authorize said exploitation. Thus, the fundamental right of the community to preserve integrity is guaranteed and effected through the exercise of another fundamental right, namely the right of participation of the community in the adoption of the aforementioned decisions."[74]

However, the right of indigenous people to be consulted about the exploration of natural resources has not been regulated and the existing jurisprudence agrees that the right to be consultation does not imply that the indigenous people have the right to veto a government decision. The internal norms and jurisprudence pertaining to this issue are extensive and all conclude that the final decision of legislative and administrative measures which affect indigenous peoples lies with the State.[75]

In relation to the exploitation of subsoil resources which can affect indigenous people's right of use and enjoyment of the forest resources in their territories, it first needs to be confirmed

[74] Judgments SU 039 of 1997 and T-652 of 1998.

[75] "When reaching an agreement or compromise is not possible, the decision of the authority should be devoid of arbitrariness and authoritarianism; should be objective, reasonable and proportionate to the constitutional aim which demands of the State the protection of the social, cultural and economic identity of the indigenous community. In any case, they must find the necessary mechanisms to mitigate, correct or restore any possible effects taken by authorities could produce possibly to the detriment of the community or its members. Therefore, the value of consultation of information or notification which is done with the indigenous community regarding a natural resource exploration or exploitation project. It is necessary that they comply with the mentioned guidelines, that they present compromise or agreement forms with the community and that finally they manifest, through their authorized representatives, their conformity or unconformity with said project and the manner in which it affects their ethnic, cultural, social and economic identity." Judgment SU 039 of 1997.

that the subsoil resources belong to the State and that the State can exploit them directly or through third parties, to whom the State can grant exploitation rights, which basically guarantees the right of non-binding consultation for the inhabitants.

With specific relation to mineral exploitation in indigenous lands,[76] it is now permitted in Colombia in areas defined by law as indigenous mineral zones; these are areas inside indigenous territories in which the exploration mineral wealth is possible[77] by the indigenous communities themselves, who have the priority right of exploration, which can be exercised by them or by third parties which they contract to carry out partial or total explorations in their territories.[78] Individuals can only access the indigenous mining zones if the community desists to exercise their preferential contractual right to explore mining resources of their territories.[79]

In conclusion, in Colombia indigenous people are collective owners of their lands and the natural resources which exist therein. Except in a few n cases in which the use and enjoyment of the renewable natural resources by indigenous people in their territories is limited, they have

[76] According to Article 5 of Law 685 corresponding to title 1 regarding general regulations of the Code, minerals of any class and location in the soil or subsoil in any form are the exclusive property of the State without consideration of the property, possession or tenancy of the corresponding terrain belonging to other public entities, individuals, communities or groups. Therefore, it should be considered that, for the protection of ethnic groups, the law defines indigenous territories as areas owned in regular and permanent form for a community or indigenous group in accordance with the provisions of Law 21 of 1991 and other laws which modify, expand or substitute it.

[77] Law 685 Article 122. Indigenous Mineral Zones. The 1st subsection was declared Conditionally Enforceable by the Constitutional Court through Judgment C-418-02 Speaking Magistrate Dr. Álvaro Tafur Glavis; "under the understanding that in the marking and delimitation process of indigenous mining zones should comply with the paragraph of Article 330 of the Constitution and Article 15 of ILO Convention 169 approved by Law 21 of 1991" that is to say, for the declaration of these indigenous mining zones, it will be necessary to carry out prior consultation with the directly affected people.

[78] Law 685, Article 125. Concession. The concession will be granted on request of the community or indigenous group and in favor of them and not the people who compose it. Their participation in the mining jobs and in their projects and yields and the conditions for how they can be substituted in said jobs within the same community, will be established by the indigenous authority which governs them. This concession will not be transferrable in any case.

[79] Once mining zones are declared, the law does not allow indigenous people to deny the existence of mineral exploration in their territory. However, when marking off indigenous mining zones, the law provides that the people themselves can indicate *restricted indigenous areas* that can be excluded from exploitation, as Article 127 of law 685 mentions that "the indigenous authority will demarcate within the indigenous mining zone the areas that cannot be subjected to mining explorations or exploitations because of special cultural, social, and economic meaning for the community or aboriginal group, according to their beliefs, uses, and customs." Therefore, the indigenous people in Colombia only have the option of excluding small areas inside of their territories from mineral exploitation.

the use, enjoyment, control, administration and regulation over the forest resources which exist in their territories; this allows them to implement activities relating to REDD projects that are oriented toward avoiding deforestation and the conservation of the native forests in their territories. At the same time, Colombian legislation recognizes indigenous authorities' full legal competency to represent their people and communities, without any administrative or patrimonial restriction, which allows them to directly implement valid legal deals.

REDD project activities, such as forestation, reforestation, conservation and maintenance of forested areas, avoiding deforestation and land-use change for agricultural activities or other activities different from forest uses are not against the current legislation and to the extent that they are voluntary and initiated by the indigenous people, they constitute an option for free and conscious development and are perfectly legitimate according to the law.[80]

Ecuador

Ecuador is one of the countries in the Amazon basin with the largest difficulties in establishing politics and judicial institutions, which makes a reliable long-term legal analysis difficult. The current Constitution was issued in 2008 and its implementation is still in progress. Because of this, the Ecuadorian legal framework is contradictory and ambiguous with regards to environmental, as well as forestry and indigenous, matters.

It is necessary, however, to recognize that the current Ecuadorian government is especially enthusiastic about the possibilities of international cooperation to promote the conservation of areas with high biodiversity in the country such as the Amazon. In fact, Ecuador is a proponent of projects related to international compensation for not exploiting petroleum reserves in the Amazon; the government views this as an alternative to decreasing GHG emissions from burning fossil fuels. This is an especially important initiative for countries such as Ecuador, for which petroleum exploitation is a significant source of public revenue.[81] However, indigenous people directly affected by these proposals have participated neither in their elaboration nor in any public debate and therefore strongly question these plans. In Ecuador, as in the other countries

[80] Colombia ratified all of the international instruments regarding climate change and the Kyoto Protocol which took effect 2005. The Colombian legislation does not prevent indigenous people from being the owners and direct beneficiaries of carbon credits derived from the reduction of GHG emissions from REDD projects.

[81] See complete information about the Yasuni project on the website of the Ministry of Foreign Relations of Ecuador: http://www.yasuni-itt.gov.ec.

in the region, national legislation which will govern REDD projects and its compatibility with indigenous legislation is yet to be defined.

The State Political Constitution (hereafter SPC) guarantees the right of the people, communities, and indigenous nationalities to "conserve the **imprescriptible property of their community lands, which will be inalienable, unseizable, and indivisible**" (art. 57.4) and to "**maintain the possession of their lands and ancestral territories**" (art. 57.3). This means that in Ecuador the right of indigenous people to the collective ownership of their territory is fully recognized.[82] In the current Constitution, four different collective subjects are identified as holders of indigenous collective rights: **1) communes, 2) communities, 3) villages and 4) indigenous nations.** All forms of political and social organization recognized and promoted by the state have full autonomy to define their representative structures.[83]

The actual political Charter is more ambiguous with regards to the right of usufruct and control of natural resources in indigenous lands, than with regards to property rights. Thus, the SPC guarantees in numeral 6 of article 57 that indigenous people have the right to "**participate in the use, usufruct, administration and conservation of renewable natural resources on their lands**." In principle, this constitutional regulation, together with international instruments,[84] should be sufficient to confirm that indigenous people have the right to control and administer the natural resources which exist in their territories. However, the fact that the cited numeral 6 refers to a right of "**participation**" in the use, administration and conservation of the natural resources, leaves open the possibility that indigenous people are not the only legitimate owners of the regulation rights these resources, this will be further defined by legislation posterior to the Constitutional Charter which is being prepared in the Ecuadorian Congress.

[82] Even though article 57 does not explicitly define "community lands" or "ancestral territories," it is possible to interpret that it refers to the concept of indigenous territory as defined in Articles 13, 14 and 15 of ILO Convention 169 and Articles 26 and following of UNDRIP, since the title of the cited article makes reference to the respective international norms.

[83] § 9, 10 and 15 of Article 57 of the SPC states that indigenous people have the right to: "9. Conserve and develop their own forms of coexistence and *social organization and of generation and exercise of authority* in their legally recognized territories and community lands of ancestral possession. (…) 15. *Construct and maintain organizations that represent them*, and that pluralism and cultural, political and organizational diversity. *The State will recognize and promote all forms of expression and organization*. (Emphasis by author.)

[84] The title of cited article 57 indicates that the collective rights of indigenous people, according to the constitution, should be interpreted "in conformity with the pacts, agreements, declarations and other international human rights instruments."

One of these bills relates to the expedition of the Environmental and Water Code[85] which is currently under discussion and has provoked controversy regarding its constitutionality, both in its reference to the rights recognized by indigenous people,[86] as well as the same environmental protection principle that was incorporated in the 2008 Constitution.[87]

The current legislation, the law of Forestry and Conservation of Protected Areas and Wildlife of 2004, guarantees that the forest areas in indigenous territories are exploited exclusively by the indigenous people who own them, on authorization by the Ministry of the Environment.[88] This same law points out that **indigenous people have the exclusive right to use of forest resources other than wood and the wildlife in their lands of their domain or position**.

Article 39 of the forestry law states that the exclusive right of forest resource use belongs to indigenous people and should be understood according to Articles 83 and 84 of the PC of 1998.[89] It is important to highlight that in the previous Political Constitution, the right to inalienable, unseizable and imprescriptible collective property of indigenous territories was already guaranteed, the reason for which was that the mentioned provisions could be considered compatible with the principles of the new constitution,[90] however, this should be confirmed

[85] See the text of the bill in: http://www.asambleanacional.gov.ec/index.php?option=com_docman&task=cat_view&gid=935&dir=DESC&order=date&Itemid=188&limit=10&limitstart=10.

[86] To see a complete analysis of how the mentioned bill limits the reach of indigenous people, see: http://clavero.derechosindigenas.org/?p=1705.

[87] See criticism regarding the content of the bill for limiting indigenous rights and defining the State as exclusive owner of any ecosystem service produced in Ecuadorian territory in: http://www.accionecologica.org/index.php?option=com_content&task=view&id=1146&Itemid=1

[88] Art. 37 – Except for the provisions in the present chapter, the productive forest areas of the State that are found in community lands of the indigenous, black or Afro-Ecuadorian people, *which will be exclusively used by them, upon authorization of the Ministry of the Environment subject to what is laid out in this law*. (Forestry and Conservation of Natural Areas and Wildlife Law. Codification 17, Official Registration Supplement 418 of September 10, 2004). (Emphasis by author.)

[89] Art 39 – Indigenous, black or Afro-Ecuadorian communities have the *exclusive right to the use of forest products other than the wood and the wildlife in the lands of their domain or possession*, in agreement with Articles 83 and 84 of the Political Constitution of the Republic. (Forestry and Conservation of Natural Areas and Wildlife Law. Codification 17, Official Registration Supplement 418 of September 10, 2004). (Emphasis by author.)

[90] SPC 1998. Art. 83 – Indigenous people who self-define as nationalities with ancestral roots, and the black or Afro-Ecuadorian people form part of the Ecuadorian State, unique and indivisible. *Art. 84*. The State will recognize and guarantee to the indigenous people, in accordance with this Constitution and the law, respect for the public order and human rights and the following collective rights: (…) 2. Conserve the imprescriptible property of the community lands which will be inalienable, unseizable and indivisible, except the power of the State to declare its

by the new Constitutional Court through declaring the validity of norms preceding the new Constitution.[91]

The same is true with respect to the laws regarding the areas of overlap between indigenous lands and natural protected areas. The law of environmental management, although prior to the SPC, orders the consultation of the indigenous people who are in conservation unit areas in order to define the management and the applicable regime in said areas.[92] The law does not mention anything about its administration or the extent of indigenous participation in the decisions referring to the compliance with environmental objectives. However, due to the current indigenous legislation in Ecuador, the applicable norms in these situations should be compatible with the recognition of full rights over the territory and the natural resources of article 57 of the EPC of 2008.

One point that continues to be controversial and ambiguous in the Ecuadorian indigenous legislation refers to the legal effects of the right to consultation and free, prior and formed consent of indigenous people. Article 57.7 of the SPC observes that in the case of not obtaining the consent of the consulted community, it will proceed according to the Constitution and the law.

Based on the previous statement, part of the Ecuadorian doctrine interprets that, as there is no current applicable law, and since the Constitution itself, in the title of Article 57 points to the rights of the indigenous people, it should be interpreted in accordance with the pacts, agreements, declarations and other international instruments for human rights. It is only possible to understand Article 57.7 in the terms of the right to free, prior and informed consent. That is to say, §7 of Article 57 should be harmonized with Articles 19 and 32 of the UNDRIP, which guarantee the right to free, prior and informed consent of the indigenous people regarding any legislative or administrative measure capable of affecting them. For now, this is a possible interpretation of

public utility. These lands will be exempt from the payment of property tax." (Emphasis by author). The content of the cited articles is different from the equivalent text in the SPC of 2008 for the phrases highlighted in red, which, evidently, were repealed in the current legal order of Ecuador.

[91] http://www.tribunalconstitucional.gov.ec/

[92] Law of Environmental Management, 2004-019. Art. 13. – The provincial councils and municipalities will dictate sectional environmental policy subject to the Political Constitution of the Republic and the present Law. They will respect the national regulations regarding the Patrimony of Natural Protected Areas to determine land use and will consult the representatives of indigenous people, Afro-Ecuadorians and local populations for the delimitation, management and administration of conservation and ecological reserve areas.

the constitution which still has not been consolidated. It will be the legislative development and constitutional law which determine the real content and extent of consultation with indigenous people.[93]

Article 90 of the mentioned law refers to the obligation of performing consultations with indigenous people according to Article 398 of the SPC,[94] which refers to the right of all Ecuadorian citizens to participate in decisions relating to environmental impacts that may affect them. In this way the mining law intends to circumvent the specific legislation for indigenous people which guarantees the right to free, prior and informed consent, reducing it to an environmental consultation with less binding power and informational in nature.[95]

Finally, with relation to the rules relating to climate change, Ecuador has ratified all of the applicable international norms and is an enthusiastic participant in the international conferences. In fact, it is one of the countries in the Amazon region which has tried to put proposals regarding the valorization of natural forests on the negotiation table. The SPC of 2008 itself also refers to the responsibility of the Ecuadorian State to reduce GHG through its voluntary commitment to limit the deforestation of natural forests and adopting measures for their conservation.[96]

However, in this country there is no current legislation that regulates the legal nature of carbon credits, which does not preclude that they may be object of legitimate legal transactions.

[93] Regarding the techniques for avoiding the consultation of indigenous people in the Mining Law, see: http://clavero.derechosindigenas.org/?p=1705.

[94] Art. 398 – Any state decision or authorization which could affect the environment should be consulted with the community, who will be fully informed in a timely manner. The individual consultant will be the State. The law will regulate the previous consultation, citizen participation, the period, the individual to be consulted and the valorization and objection criteria regarding the activity submitted to consultation. The State will value the opinion of the community according to the criteria established in the law and the international human rights instruments. If through the aforementioned process of consultation a majority opposition of the respective community results, the decision to execute the project or not will be made by a duly reasoned resolution of the corresponding superior administrative body in accordance with the law.

[95] The degree of discordance between the new mining law and constitutional rules is so strong, that the CONAIE has already demanded its unconstitutionality before the Constitutional Court. Said action will constitute one of the first that the new court will have to decide to define the extent of indigenous people's right to consultation, both regarding their participation in legislative matters that affect them, as well as regarding the consultation of natural resources exploitation in their territories. To see the request to declare the mining law as unconstitutional and approval of the request, please see: http://www.socioambiental.org/ist/esp/consulta_previa/?q=node/37.

[96] SPC 2008. Art. 414. – The State *will adopt adequate and cross-cutting measures* for the mitigation of climate change through the *limitation* of greenhouse gas emissions, *deforestation*, and atmospheric contamination; *will take measures for the conservation of forests* and vegetation, and will protect the population in risk. (Emphasis by author.

The government seems to be interested in stimulating the production and commercialization of carbon credits. In this sense, the current National Policy of Climate Change states that the State will promote "**the interest of private, public, and community organizations and of civil society to identify projects and submit them to the processes of qualification, selection and approval to participate in the carbon market.**"[97]

It is important to point out, however, that the SPC of 2008 seems to indicate the intention of the Ecuadorian State to nationalize "ecosystem services",[98] including "carbon absorption".[99] Thus, Article 74 of the Constitution states that ecosystem services will not be susceptible to appropriation and that the State will regulate their production, provision, use and exploitation.

For now it is possible to confirm that the execution of REDD projects by indigenous people and communities in their territories is legally viable. According to the legislation analyzed, they not only have ownership over the forest resources in their territories, but they also have political autonomy over their regulation and administration, which facilitates the development of contractual agreements for activities of avoided deforestation, recuperation of degraded areas, and the maintenance conservation areas.

At this point in time, the constitutional interpretation and the development of the jurisprudence by the recently created Constitutional Court[100] will be decisive in defining the real extent of indigenous people's recognized rights with regards to the natural resources which exist in their territories. It is worthwhile to remember that the principal threat to indigenous territories in the Ecuadorian Amazon is the exploitation of petroleum in their lands, given that this resource is considered property of the State and its exploitation is done independently of the territorial rights of indigenous people, which has received criticism from numerous sides.

[97] Climate Change Strategy (2006) http://www.bvsde.paho.org/bvsacd/cd68/EcuClima.pdf.

[98] SPC 2008. Article 74. "People, communities, villages and nationalities will have the right to benefit from the environment and the natural riches which will permit them a good life. The ecosystem services will not be susceptible to appropriation; their production, provision, use and exploitation will be regulated by the State."

[99] National Biodiversity Policy and Strategy of Ecuador 2001- 210 – "1. Capturing international financial resources to direct them to the unmet needs of key regions, ecosystems, species, sectors or groups: debt for nature swaps, global payments for goods and ecosystem services (for example, carbon capture, royalties for the use of genes) and capture of donations."

[100] SPC 2008. Art. 427. – The constitutional provisions are interpreted by the wording that best suits the Constitution in its entirety. If in doubt, they will be interpreted in the way that most favors the full force of the rights and better respects the will of the constituent, and in agreement with the general principles of the constitutional interpretation.

Since there is not a specific law regarding the ownership of carbon credits, their ownership can be considered as linked to the group of activities and the forest resources that generate them. Therefore, in principle, indigenous people can promote REDD activities in their territories and can consider themselves as the direct beneficiaries of the credits produced. Once concrete legislation regarding this matter has been enacted, it will be necessary to evaluate the constitutionality of these rights for the indigenous people and nations of Ecuador; this will constitute the legal context in which the new legislation regarding carbon credits and ecosystem services in general should be considered.

Peru

Peru is the country in the Amazon Basin with the most precarious recognition and application of indigenous rights, after the Guyanas and Suriname. Unfortunately, the situation of indigenous people in Peru is currently very critical with respect to territorial and natural resource use and enjoyment rights. Forest resources and lands declared by law as having "forestry potential", they are not actually titled to indigenous people, but are granted through use concessions. Additionally, for the demarcation of native community lands,[101] the Peruvian State does not apply the criteria of use and traditional occupation of the territory as referred to both in ILO Convention 169[102] and in the UNDRIP, even though both international instruments are part of the national legislation.[103]

Because of the abundance of existing provisions under different constitutional orders, the Peruvian regulations regarding indigenous, environmental and forest rights are difficult to understand; because there are not only large numbers of them, but they are also ambiguous and contradictory. Diverse legal forms of tenure exist in Peru which are exercised by indigenous people in those lands which have been and are their traditional territories (in property, in usufruct, in natural park areas, in fiscal lands), and there are also significant disparities of legal guarantees

[101] Article 89 of the Constitution recognizes agricultural communities' and native communities' legal status, autonomy in their organization, in communal work and in the use and free disposition of their lands.

[102] Peru ratified ILO Convention 169 in 1994 in the same Constituent Congress which approved the current PC, which is why some Peruvian indoctrinators believe that Convention 169 is subordinate to constitutional rule. The same constitutional jurisprudence is beginning to consider Convention 169 as a rule of constitutional rank in record 03343-2007 as a result of a lawsuit filed by the San Martin regional government against Repsol, Petrobras and others on February 19, 2009. Para. 31.

[103] 10th Article. Law Decree 22175 of May 9, 1978.

that they will be able to uphold their ownership. As Roque Roldan points out, the ambiguities in the Peruvian legislation "represent a serious problem for communities in the exercise and defense of their rights, and even for the authorities who should address these requirements."[104]

With respect to climate change, Peru has ratified and incorporated both the UNFCCC and the Kyoto Protocol (KP), and politically promotes the implementation of CDM projects in their territory. However, there is no legislation which regulates the generation and commercialization of carbon credits, except a few provisions in the forestry legislation which identify carbon sequestration as a type of ecosystem service from the forests. However, the implications of carbon credit generation and commercialization by private or community entities are not defined anywhere in the law, much less specifications for carrying out these activities in territories with tenure regulations that differ from those of indigenous territories in Peru.

Regarding the Territorial Rights and the Forest Resources therein

Since the 1993 Political Constitution, indigenous territories ceased to be inalienable, conserving only the imprescriptible character defined by the previous legal regime, which guaranteed their inalienability, unseizability, and imprescriptibility from 1930 until 1993. This means that the possession of the titles to territories of so-called native and agricultural communities do not have any guarantee of permanency held by indigenous communities which recognize their ownership and that the land can be sold or expropriated in ordinary processes executed in real security as any other type of guaranteed patrimony.

The State recognizes the legal status of **native communities** and defines them as communities which have their origin in the tribal groups of the Jungle and Jungle Border Region.[105] Because of this, indigenous people from the Amazon region are identified by the Peruvian legislation as a type of native community.[106] Subsequent to this legislation, the land law of 1995 (law Nº 26.505), the vast majority of provisions approved in 1978 remain in force and introduce a difference between **coastal rural communities** (10th article) and **rural and native**

[104] ROLDAN, Roque. *Manual para la Formación de Derechos Indigenas*. Abya Yala Editions. Quito, Ecuador, 2004.

[105] Article 7, Law Decree 22175 of May 9, 1978, known as "Law of Native Communities and Agrarian Development in the Jungle and Jungle Border Regions."

[106] According to the law, these communities constitute a group of families linked by the following elements "language or dialect, cultural and social characteristics, common and permanent tenancy and usufruct of the same territory, with nucleated or dispersed settlement" Article 8, Law Decree 22175 of May 9, 1978.

communities of the sierra and jungle (11th article), with the objective of defining different legal rules for the transfer of the lands in each one of these communities. Thus, for the rural and native communities of the sierra and jungle, more demanding criteria are established when transferring lands than for the coastal communities.

The same law from 1995 also aims to stimulate the economic organization of indigenous people and states that "Rural Communities and Native Communities are free to adopt, by majority agreement of their members, the business organizational model decided in Assembly, without being subject to compliance with any previous administrative requirement."[107] Likewise, Article 89 of the Political Constitution establishes the autonomy and freedom of the communities in the use "and free disposition of their lands", which, together with other legal provisions of lower rank, means that the indigenous communities can establish agricultural or mortgage pledges over their territories to conduct any commercial activity.

Thus, for disposition, assessment, or lease of the lands of **jungle native communities**,[108] the legislation permits that said activities can be carried out with the verification of an affirmative vote by two-thirds (2/3) of the members of the Community, gathered in General Assembly for this reason.[109] In conclusion, **indigenous people in Peru can easily transfer and divide their lands and special legislation promotes the incorporation of the indigenous population in all commercial activities**.

On the other hand, indigenous lands with native forest cover or with "forestry potential", as indicated in the law, are not transferred to indigenous people under ownership rights but as use concessions, given that the State considers itself owner of all forest resources, including those located in indigenous lands.[110] Article 11 of Law Decree 22175 establishes that "**the part of the territory of Native Communities that are lands with forestry potential will be ceded to them in use, and their utilization will be governed by the applicable legislation**." This means that, in addition to indigenous people not having ownership over their forest resources, the use concession of forest land granted to native communities is not subject to any specific laws, but to common rules regarding forest exploration.

The **fundamental law for the sustainable harvest of natural resources** establishes that "rural and native communities **have preference** over the sustainable harvesting of the natural

[106] Article 8, Law of Lands.

[107] Name given to the indigenous people of the Peruvian Amazon region.

[108] Article 11, Law 26505 of 1995, Law of Lands.

[110] Law Decree 22175 of May 9, 1978.

resources in lands to which they have the title, **except for areas that are explicitly reserved by the State or that have exclusive rights for excluding third parties.**"[111] At the same time, the forestry law specifically prohibits granting concessions to third parties in native or rural community lands;[112] this allows for the interpretation that indigenous people have the right of exclusive use over forest resources on their lands, which would be of more consequence with the current international norms in Peru; however, the current legislation in Peru leaves room for many contradictory interpretations.

However, since the indigenous people directly exploit forest resources-- according to the Article 43 of the forestry law of 2001 and Article 11 of law decree 22175 of 1978 which indicate that the **legal regime that applies to native forest logging is the same forestry law** and not special rules regarding indigenous people --, it is possible to affirm **that forest harvesting by native communities is subject to the elaboration and approval of forest management plans**.

These plans should be subject to approval by the appropriate authority, and the request to carry out forest management should be accompanied by "a certified copy of a community certificate where they agree to carry out said harvest."[113] These rules do not distinguish traditional use activities from forest harvesting. Still, the demand such a community agreement for carrying out the said harvesting is noteworthy, as it is a legal requirement, in the studied legislations, that only exists in Peru.

Overlap between NPA and Native Community Lands

The law is ambiguous regarding the restriction of rights of use and enjoyment of natural resources and also about the existence of the **overlap between protected areas and native community lands**. Legislation appears to favor environmental regulations over indigenous people's special rights of ownership and use of natural resources.

On one hand, Article 54 of the Environmental Code (Legislative Decree Nº 613/1990) establishes that the Peruvian State recognizes native and rural communities' ownership rights of

[111] Law 26821 of June 10, 1997. Article 18.

[112] Supreme Decree 014-2001-AG of August 4, 2001. Article 43. – Forests in native and rural community lands are those located within territory that belongs to native and rural communities. Their use is subject to the provisions of the law and present regulations. *Forest concessions are not granted to third parties in native or rural communities.* (Emphasis by author)

[113] Law 27308, Forestry Law of Wild Fauna. Article 12 and Article 149 of the Supreme Decree 014-2001-AG of August 4, 2001.

the lands that they possess and that are inside of natural protected areas (NPAs); but, on the other hand, Article 18 of Law Decree 22175 of May 9, 1978 establishes that native communities residing inside of the limits of National Parks can remain there, without property titles, provided that they do not violate the principles that justify the establishment of said conservation units. Additionally, Article 31 of Law 26834 (1997) regarding natural protected areas states that "the administration of the protected area will give priority attention to ensuring the traditional uses and lifestyles of the ancestral native and rural communities that live in natural protected areas and their surroundings, respecting their self-determination, **to the extent that said uses are compatible with the purposes of the same**. The State promotes the participation of said communities in the establishment and attainment of the purposes and objectives of natural protected areas."

If we consider the most recent law of those mentioned above, it is evident that Peruvian legislation favors the environmental conservation of areas which overlap with indigenous lands and subjects the participation of indigenous people to the attainment of the purposes and objectives of each NPA. It is worthwhile to point out that the Peruvian legislation does not mention anything regarding indigenous participation in the administration and management of the NPAs that are part of indigenous territories, thereby disregarding their rights of government and autonomy.

Finally, since current indigenous and forest legislation in Peru is confusing, it is unlikely that indigenous people are able to implement and be the direct beneficiaries of eventual REDD projects in their territories. In theory, native and rural communities can carry out non-timber forest harvesting in their territories if a management plan has been approved by INRENA, which will include the activities related to what Peruvian law considers the lending of the ecosystem service of carbon sequestration. However, these activities are subject to the regulations of the forestry law which have not yet been issued.

The Peruvian State has ratified and incorporated all of the international rules regarding climate change. Even though no specific national legislation exists regarding the generation and commercialization of carbon credits, the Peruvian government has publicly expressed in diverse public policy instruments, its intention to promote the forest carbon market as a development alternative for the Amazon region itself.

At the same time, though not dealing specifically with carbon credits, the forestry law, which has been in force since 2000, defines the "absorption of carbon dioxide"[114] as a forest

[114] Law 27308 of July 2000. Forestry and Wild Fauna Law. Article 2. Definition of forest resources, wild fauna and ecosystem services.

ecosystem service which implies that activities related to this ecosystem service are subjected to the granting of a forest concession in the form of "forest concession with non-timber purposes", according to Article 10.2 of the forestry law.[115]

Even though there is no regulation that specifies the laws for so-called non-timber harvesting, according to Article 12 of the same forestry law, native and rural communities can harvest forest and non-forest resources in community lands if a management plan that guarantees the sustainable harvesting of said resources has been approved by INRENA.[116]

At this point in time, the law that applies to non-timber harvesting has yet to be defined. Still, this type of provision only affirms the ownership of the State over forest resources, which will eventually hinder indigenous people from being the direct beneficiaries of REDD projects in their territories, given that the legislation permits that they can be concessionaries, and not owners, of the forest resources, and therefore will not have full legal rights to execute avoided deforestation and conservation activities in native forests, except apparently, carbon sequestration activities for the recuperation of areas that are concessions.

As there is no clarity regarding the legal norms for non-timber forest concessions, and since they fall under a concessionary system and are not owners, indigenous people have few possibilities of being the direct beneficiaries of REDD mechanisms in the Peruvian Amazon.

Venezuela

Venezuela is one of the countries in the region that has taken the longest to recognize the existence of indigenous people in its territory, and therefore also to develop and guarantee their differentiated rights. However, the current problem in this country is not the lack of legislation

[115] Thus, the cited law establishes that: "(…) 2. Forest concessions with non-timber purposes. Harvesting with commercial and industrial purposes of *non-timber forest resources* is performed under the specific conditions that the present Law establishes in its regulations, in the following manner: (…) b. *Concessions for ecotourism, conservation, and ecosystem services*. Concessions in lands with capacity of greater forest use or in protection forests for the development of ecotourism, conservation of wild species of flora and fauna, *carbon sequestration and other ecosystem services* are granted by the competent authority under the conditions established in the regulations. The size of the unit of exploitation and the procedure for its promotion are determined by technical studies through INRENA and approved through ministerial resolution by the Ministry of Agriculture." (Emphasis by author.)

[116] Law 27308 of July 2008. Forestry and Wild Fauna Law. Article 12. Harvesting of forest resources in community lands. Native and rural community lands, prior to the harvest of their timber and non-timber resources of wild fauna with industrial and commercial purposes, should have their management plan approved by INRENA, according to the legal requirements to ensure the sustainable harvest of said resources. The appropriate authority will advise and assist, on a priority basis, Community and Rural communities with this purpose.

and legal instruments to guarantee the most extensive charter of recognized indigenous rights in the region. From the Bolivarian Constitution to the fundamental law of indigenous people and communities, and the law of indigenous habitat and land demarcation, the Venezuelan legislation, from a conceptual perspective, is very complete and coherent. However, there are many questions regarding the institutional capacity of the Venezuelan State to implement the mentioned legal provisions. It has been more than ten years since the Bolivarian Constitution was enacted, and the advances in the demarcation of indigenous lands are truly insignificant, which is considered by many specialists as an indicator of the precarious implementation of the Venezuelan indigenous legislation.

With regards to the international instruments relating to climate change, Venezuela has participated and ratified both the UNFCCC and the Kyoto Protocol. However, in international forums, Venezuela has expressed disagreement with the implementation of compensation of mechanisms which help Annex I countries of the Kyoto Protocol meet their obligatory goals, because the State considers these instruments as a way in which industrialized countries to evade their responsibilities of relating to the real reductions of GHG in the atmosphere. Therefore, Venezuela does not participate in CDM projects and, for the same reason, denies its participation in REDD mechanisms as compensation of obligatory GHG reductions.

Indigenous Lands and Forest Resources

Since the Bolivarian Constitution of 1991 (hereafter BC), the Venezuelan State widely recognizes indigenous people's original rights over their habitat,[117] the land which they have traditionally occupied for generations, and the lands which are necessary for the development and the guarantee of their lifestyles. In addition, Article 119 of the BC defines indigenous peoples' collective ownership of their territory as inalienable, unseizable, imprescriptible and non-transferrable.[118]

[117] An innovative concept in the regional legislation regarding indigenous lands is the idea of indigenous habitat as a territorial unit which guarantees the necessary conditions for the life and development of indigenous people and communities. In 2005, with the issuance of the Fundamental Law of Indigenous People and Communities (hereafter FLIPC), the positive definition of Indigenous Habitat is included for the first time in the history of Venezuelan law as "the group of physical, chemical, biological and socio-cultural elements which constitute the environment in which indigenous people and communities operate and which permits the development of traditional forms of life. This includes the soil, water, air, flora, fauna and in general all material resources necessary for guaranteeing the life and development of indigenous people and communities." (Article 3, num 5 of FLIPC).

[118] Constitution of the Bolivarian Republic of Venezuela. Article 119. The State recognizes the existence of indigenous people and communities, their social, political, and economic organization, their cultures, uses and

The BC and the law clearly and fully recognize the legal status of the indigenous people and communities as groups with rights and obligations that are duly represented by their **legitimate authorities** (Art. 260 BC).

The Article 7 of the FLIPC recognizes the legal status of "indigenous people and communities with the purpose of exercising their collective rights provided in the Constitution of the Bolivarian Republic of Venezuela, treaties, international pacts and agreements signed and ratified by the Republic, and other laws."[119] The identification of the legal, judicially and extrajudicially, representative of indigenous people and communities depends on each group's internal order and organization according to their uses and customs, without any other limitations than those established in the BC and the FLIPC. However, the law explicitly defines the concept of **Legitimate Authorities** as "the people or collective institutions that one or more indigenous people or communities designate or establish according to their social and political organizations and for the functions that said people or communities define according to their customs and traditions."

These legal recognitions do not force the legal entity of the indigenous people and communities to depend on any type of posterior administrative act, such as the inscription of statutes or others. In effect, the Venezuelan legislation sets itself apart from other countries' legislations in the region by being especially clear and explicit about the recognition and exercise of indigenous peoples' and communities' legal status, which facilitates their independent and autonomous execution of legal business. So, the same fundamental law supports the chartering of businesses and the development of economic activities on behalf of the people and communities with full patrimonial status.

In addition to the explicit rights recognized in the Venezuelan legal system, both the BC and the indigenous legislation explicitly incorporate as indigenous peoples' and communities' rights all

customs, languages and religions, as well as their habitat and original rights over the traditionally occupied ancestral lands which are necessary to develop and guarantee their lifestyles. It corresponds to the National Executive, with the participation of the indigenous people, to demarcate and guarantee the right of collective ownership over their lands, which are inalienable, imprescriptible, unseizable and untransferrable, according to what is established in the Constitution and the law.

[119] All of the Venezuelan indigenous legislation refers to, indistinctly, indigenous people and communities, assimilating them as different groups which are predicated the same rights. For example, the law defines collective property as "*the right of each people and community* to use, enjoy, take pleasure in and administer a material or immaterial good *whose ownership belongs in an absolute and indivisible form to every and each one* of its members, with the purpose of preserving and developing the physical and cultural integrity of the present and future generations" Art 3rd num 12 of the FLIPC. (Emphasis by author.)

those recognized "in international treaties, pacts and conventions" to assure "their active participation in Venezuelan National life, the preservation of their cultures, their exercise of free determination in internal matters and the conditions which makes this possible" (Article 1 of the FLIPC).

Consequently, and through a strict normative analysis (which does not evaluate institutional capacity and the extent to which the norms have been implemented), one can affirm that in Venezuela sufficient legal instruments exist to implement public policies about the recognition of regional indigenous territories that exceed the scale of the area strictly titled as collective property.

Even though the Constitution itself defines a period of two years from its taking effect to complete the demarcation of the indigenous habitat to which Article 119 refers, as of August 2008, only 35 indigenous lands were demarcated according to the new constitutional rules. Of these lands, none is located within the Amazonian state of Venezuela.[120]

In principle, and formally, the Venezuelan indigenous legislation is sufficiently respectful of indigenous peoples' civil liberties to protect their autonomous use and enjoyment of the forest resources in indigenous habitats and territories. However, there are important practical restrictions. Thus, indigenous peoples' and communities' harvesting of forest resources for commercial purposes requires special authorizations. Also, apparently the harvesting of forest resources by third parties in indigenous people's lands can be authorized which, as we will see, contradicts the current indigenous norms.

Renewable Natural Resources in Indigenous Lands

As a general rule regarding the use of renewable natural resources in indigenous lands, the law states: "Indigenous people and communities have the **right to decide and assume in an autonomous manner** the control of their own institutions and ways of life, **their economic practices**, their identity, culture, rights, uses and customs, education, health, worldview, protection of their traditional knowledge, **use, protection and defense of their habitat and lands and, in general, of the everyday management of their community life on their lands** to maintain and strengthen their cultural identity." The law also indicates: "**Indigenous people and communities have the right to participate in the administration, conservation and utilization of the environment and the natural resources which exist in their habitat and lands**." (Article 5. FLIPC. Emphasis by author.)

[120] To read criticism of the slow and complex process of demarcation in Venezuelan indigenous lands: http://www.aporrea.org/ddhh/a69361.html

This means that indigenous people and communities can freely dispose of, and decide the economic base of, their territories and the development priorities that they freely choose. According to the Venezuelan legislation itself, the freedom to elect the forms of use, enjoyment, exploitation and administration of indigenous lands, as well as the definition of the model from which to develop their own economic practices can only have the limitations established by the BC and specifically applicable laws.

Constitutional restrictions refer exclusively to "**the territorial integrity of the Nation and compliance with the social function of all ownership rights**." Meanwhile, the FLIPC points out that the limits for the definition for the economic model to be developed in indigenous territories will be "**local sustainable development**" (Article 122); this imposes on indigenous property, in addition to the social function, the obligation of meeting an environmental function, which implies compliance with the restriction of common use of all property, provided that they are not in contradiction to the differential rights recognized for indigenous people.

In indigenous habitat and lands where there are areas decreed to be under special administration (**NPAs or Special Sustainable Development Zones**),[121] compatible with indigenous property **agreements and mechanisms of coordination with the competent State authorities should be established**, that place conditions on the exercise of indigenous autonomy over the management of their natural resources.

It should be emphasized that the law of forests and forest management of 2008 has not explicitly prohibited forest harvesting by third parties in indigenous lands, which would be consistent with the current indigenous legislation. On the contrary, the law establishes the possibility of granting concessions to third parties in indigenous lands and in Article 67 refers to the **necessity of consultation to grant permissions and concessions for native productive forest management in demarcated indigenous lands.**[122] This contradiction is the most evident legal

[121] Fundamental Law for Territorial Zoning. Nº 3.238 of 1983. Regarding Zoning Plans of the areas under Special Administration Regime. Article 15. – Areas under special administration include areas of national territory which are subject to a special management regime according to special laws which, in particular, are the following: 1) National Parks; 2) Protective Zones; 3) Forestry Reserves; 4) Special Security and Defense Areas; 5) Wildlife Reserves; 6) Wildlife Refuges; 7) Wildlife Sanctuaries; 8) Natural Monuments; 9) Zones of Touristic Interest; 10) Areas subject to a special administrative management as stated in International Treaties.

[122] Article 67 of the Decree law about Forests and forest management (6.070 of 2008) points out that: "indigenous communities will be duly consulted by the appropriate body *in the case of permissions or concessions for the management of native productive forests solicited by third parties, in their community origin lands*, demarcated as such according to the rules which govern the matter." (Emphasis by author.)

limitation for implementing eventual REDD projects whose direct beneficiaries are exclusively indigenous people in this country, since there is no legal security regarding the disposition of the forest resources located in indigenous lands.

It is remarkable that Article 67 refers to a concept of indigenous territoriality that does not coincide with the rest of the Venezuelan legal zoning regulations which refer to **indigenous lands** and not to "**demarcated community origin lands**" which makes the integral interpretation of forestry and indigenous legislation difficult. It is not possible to assimilate the concept of lands used in the forestry law with that in Article 119 of the CB, since the latter refers to the original rights of the indigenous people over their **traditionally used habitat and lands** and since demarcation is an explicit declaratory act and NOT part of the territorial right of indigenous people and communities.

Additionally, anticipating this type of regulatory conflict, the FLIPC itself includes a principle of legal interpretation which points out that **the law applicable to indigenous territories and habitat is that which is most favorable to the guarantee and protection of the constitutional rights recognized to them**.[123] In this sense, indigenous people's right of autonomy to freely decide the development of their economic practices, the use and enjoyment of their natural resources, recognized in the BC and Articles 3.14, 5 and 122 of FLIPC, is sufficient to guarantee the possibility for indigenous people to develop conservation and recovery projects for forest resources, including in cases where they overlap of these with conservation units or other designation, be it economic or military.

Due to the fact that the Law of Forests and Forest Management is especially recent, it will be necessary to wait for court rulings on its constitutionality, since the apparent possibility of the Venezuelan State to grant "permissions" and concessions to third parties to explore the forest resources in indigenous lands contradicts all of the indigenous regulations currently in force in the country, including those of constitutional nature.

Overlap between Indigenous Lands and Natural Protected Areas

A particular fact regarding indigenous lands in the Venezuelan Amazon has to do with **the high percentage of overlap of indigenous lands with National Parks and Natural Monuments**

[123] FLIPC. Article 2. Matters pertaining to indigenous people and communities are governed by the Constitution of the Bolivarian Republic of Venezuela and in the international treaties, pacts and conventions that the Republic signed and ratified, as well as the present Law whose application does not limit other rights guaranteed to these people and communities, in standards different to these. *Those standards which are most favorable to the indigenous people and communities will be preferentially applied*. (Emphasis by author.)

which amounts to 33% of the total of the indigenous lands in the Amazon region.[124] The situation is even more complicated by the fact that the Venezuelan legal system has no legal norms pertaining to indigenous territories in this situation.

The current legislation regarding NPAs in Venezuela originated prior to the BC and does not include regulations which refer to the existence of indigenous territories which overlap with NPAs. The fact that the BC recognizes rights of ownership of indigenous territories as original rights should have retroactive effects over the constitution in said areas of environmental conservation; however, until now, no such regulation has been considered.

Current laws regarding NPAs prohibits a wide range of extractive activities in Natural Parks and Monuments which range from hunting animals and small-scale agriculture to mineral exploitation in said areas[125] which will have to be made consistent with legislation subsequent to the BC and the FLIPC itself. This emphasizes the necessity of the Venezuelan indigenous institution to foment the exercise of joint responsibility between the State and Indigenous People over areas where NPAs and indigenous territories overlap, indicating the necessity of establishing regimes of co-administration.[126]

Even though the legal structure of the indigenous legislation in Venezuela is almost complete and coherent with the most recent international instruments regarding indigenous rights, the degree of implementation, the development of a bureaucratic and administrative infrastructure to execute their application should be taken into consideration in a more complete analysis of this issue since there is not yet evidence of their application.

[124] See map of protected areas and indigenous territories in the Amazon basin: www.raisg.socioambiental.org/

[125] Article 12. Only Paragraph. Within National Parks, hunting, slaughter or capture of specimens of fauna and the destruction or collection of examples of the flora, except when such activities are carried out by park authorities or by order or under the surveillance of the same, or for research duly authorized by the Ministry of Agriculture (Ministerio de Agricultura y Cría) is prohibited. Article 12. The following are prohibited uses inside of national parks: 2. *Mining and the exploitation of hydrocarbons*. (…) Article 16. The following are uses prohibited or incompatible with *natural monuments*: 1. Agricultural cultivation in general, the commercial or subsistence raising of domestic animals, agroforestry or agro-silvo-pastoral activities, and commercial aquaculture. 2. *Mining or exploitation of hydrocarbons*. (Emphasis by author.)

[126] Of the Competencies of the National Institute of Indigenous People (NIIP) – Article 146. The competencies of the National Institute of Indigenous People (NIIP): (…) 9. Strengthen the practice of joint responsibility between the State and the indigenous people and communities in the field which concern the conservation and management of the environment and the natural resources, national parks and protected areas as well as the sustainable development in indigenous habitats and lands foreseen in the present law and other laws.

REDD in Venezuela

Since REDD mechanisms have been introduced in the international legislation as a part of the compensation mechanisms to facilitate that countries with obligatory goals can meet their obligations, Venezuela maintains its position NOT to apply compensation mechanisms in its territory, and in this context, the implementation of REDD projects to produce compensation credits in Venezuela would not be possible.

The Venezuelan State declared that: "The Bolivarian Republic of Venezuela supports the Kyoto Protocol, with the important difference not to implement the Clean Development Mechanisms in its national territory, since its economic incentives favor the environmental crisis and the capitalist model, without significantly diminishing the real volume of greenhouse gas emissions."[127]

It is important to clarify that, if eventually the Venezuelan State approves the implementation of REDD mechanisms in its territory; indigenous people have legal ground to exercise their full legal capacity and effective control over the forest resources in their territories and to be the direct executors and beneficiaries of this type of project. Yet, it will be the manner in which the REDD mechanisms are defined in the international legislation, and the position of the Venezuelan State with respect to incorporating these aspects into the national legislation, which will determine if the implementation of REDD mechanisms in the Bolivarian Republic of Venezuela is viable or not.

Conclusion

There has been much international criticism with regards to risks associated with the valuation of the forests as carbon sinks, to the detriment of the communities which depend on the forests and have, directly and indirectly, conserved them up to now. Such risk of territorial expropriation should be inadmissible in the Amazon Basin region when referring to indigenous people, since the current legal structure and protection in countries such as Bolivia, Brazil, Colombia and Ecuador should make the arrival of expropriation highly difficult, as well as the denial of the legitimate owners, the indigenous people, receiving the benefits derived from the conservation of the forests. However, the fight for the consolidation of the specific rights in the formal regulations is still ongoing in the whole region and REDD mechanisms, if they are well-

[127] Climate Change. Position of the Bolivarian Republic of Venezuela before the 15th Reunion of the CDS.

harnessed, can be interesting instruments to consolidate the indigenous territorial governability in the region.

The situation of each country, as well as its processes of administrative and bureaucratic implementation of indigenous territorial rights is very distinct. However it is possible to identify some common elements to nurture a discussion of a more regional nature. For example, countries such as **Ecuador** and **Bolivia**, who have recently approved Constitutional Charters which widely recognize indigenous territorial rights and political autonomy, are at the forefront of true opportunities to harmonize their current laws pertaining to forest resources and indigenous territories. For now principally, the current rules guarantee the control of indigenous people over land use and the management of their natural resources. It remains to be seen what said principles mean for the incorporation of international rules regarding climate change, and the generation and commercialization of carbon credits in the post-2012 regime in each one of these countries.

In the case of **Peru**, the situation of indigenous territorial rights is truly complex. On one hand, there is total incongruity between the international norms ratified by this country and the domestic indigenous legislation. According the current internal legislation, they do not recognize the property rights of indigenous people over forest resources in their lands, or offer any type of guarantee for the permanence of native communities' ownership of collective property. In fact, the official policies of the Peruvian State currently promote the transfer of indigenous lands and the elimination of communal property. Peru is the country in the Amazon region which offers the least amount of protection and guarantees with regards to the territorial rights of indigenous people (with the exceptions of the Guyanas and Suriname which do not have any specific legislation in this regard).

In countries such as **Colombia** and **Brazil**, the rights of indigenous people seem to be more consolidated. The control and access to forest resources in their territories is legally less discussed than in the other countries analyzed. However, both countries lack clarity regarding the rules regarding environmental resources and their use and enjoyment rights by indigenous people, both regarding areas that overlap with conservation units (which include everything from Forestry Reserves to Natural Parks), and the type and quantity of intangible areas for conservation that should respect indigenous people as collective owners who have the fundamental right to the use and enjoyment of their territories and natural resources.

In **Venezuela**, the territorial rights of indigenous people are not a problem of legal cohesion, but of administrative application. Currently it is not possible for indigenous people

to implement REDD projects with because the Venezuelan government has publicly expressed its disagreement with the application of compensation mechanisms that avoid the absolute compliance with obligatory goals on the part of Annex I countries. Additionally, in relation to the territorial rights of indigenous people in Venezuela, the implementation of current indigenous norms has been a serious problem for more than a decade. On the other hand, there is no clarity regarding the harmonization between indigenous rights and the current forestry legislation. The ancestral lands of a very high percentage of indigenous people in the Venezuelan Amazon overlap with NPAs without any rules that govern this situation.

Finally, it is necessary to recognize that in many countries national laws and administrative practice of adopting international agreements are inconsequential, as the Peruvian case explicitly exemplifies. It is not possible to confirm that the rest of the countries have acceptable levels of normative coherence between the international instruments ratified by them, their internal norms and their administrative practices. Because of this, among other reasons, it would be naïve to believe that adopting international agreements by itself guarantees the effectiveness of indigenous rights. However, it is not possible to ignore that the existence of these international agreements represents an important frame for the internal political debate which each country will have to face in the definition and distribution of the costs and the benefits derived from the implementation of REDD mechanisms.

It is important to understand that the international instruments regarding human rights of indigenous people are an important legal frame, but not sufficient to warrant that the implementation of REDD mechanisms also guarantees the territorial rights of indigenous people. The consolidation of the indigenous peoples' territorial governance of the will define case by case the rights and obligations the indigenous people and other traditional populations who currently live there derive from the maintenance of the Amazon forest.

Comparison of Rights of Indigenous People and REDD Mechanisms in the Amazon Basin

	Do indigenous people (IPs) have guaranteed ownership over the lands they traditionally have occupied?
Bolivia	**Yes**. In Bolivia IPs have the collective, indivisible, inalienable, imprescriptible, indefeasible, and irreversible right to ownership of their lands. The constitutional right is guaranteed in the international norms which shape the Constitutional Bloc of this country.
Brazil	**Yes**. The FC recognizes the original rights of IPs over their territories. The bare ownership of ITs belongs to the Union, but the IPs have the imprescriptible rights of permanent possession and exclusive usufruct of the riches of the soil, rivers and lakes on their lands, excluding the subsoil and hydroelectric uses. By constitutional provision, ITs are inalienable and the rights over them are imprescriptible and indefeasible.
Colombia	**Yes**. IPs in Colombia have the collective, inalienable, indefeasible, and imprescriptible right to ownership of their territories. This constitutional right is reinforced by ILO C169 which explicity forms part of the Constitutional Bloc of this country.
Ecuador	**Yes**. Ecuador recognizes the indivisible, imprescriptible and inalienable property right of community lands. There is a constitutional guarantee and explicit incorporation of ILO C169 and UNDRIP in the Constitutional Bloc of Ecuador.
Peru	**No**. Native communities' ownership rights can be transferred and seized.
Venezuela	**Yes**. The Venezuelan State recognizes the collective, inalienable, imprescriptible, indefeasible, and nontransferable right of indigenous people over their territories.
	Do IPs have the right to full use and enjoyment of the forest resources in their territories?
Bolivia	**Yes**. IPs have the right of ownership over the natural resources which exist in their territories, within the limitations of applicable environmental laws. Currently, it is not possible to grant new forestry concessions to third parties within ITs.
Brazil	**Yes**. IPs have the right of exclusive usufruct over the natural resources in their territories. It is not possible to grant forestry concessions within ITs through explicit statutory exception.
Colombia	**Yes**. The use and enjoyment rights over natural resources by IPs are limited by the environmental obligations which must be met in indigenous territories.
Ecuador	**Yes**. IPs have the exclusive usufruct right of the natural resources in their territories, limited only by obligations resulting from environmental regulations which apply to every type of property in Ecuador.
Peru	**No**. The State does not recognize IP ownership over forest resources in their territories. Peru only recognizes use concessions in favor of the IPs over the lands with "forestry potential" on the condition that they are used exclusively for survival.
Venezuela	**Yes**. IPs have rights over the natural resources in their territories. However, there is a lack of clarity about the exception forestry permissions and concessions to third parties within ITs that do not overlap NPAs are prohibited.

	Can IPs dispose of the forestry resources in territories that overlap with NPAs?
Bolivia	**Yes**. For these cases, the Constitution itself anticipates a shared management between the environmental authorities and the IPs. However, the use of natural resources is restricted to instances that are compatible with the objectives and conservation of the particular NPA.
Brazil	**Yes**. The law and the Constitutional Tribunal recognize the existence of a "double charge" of the areas that are ITs and conservation units at the same time. However, there is no specific national regulation regarding the harmonization of indigenous rights and conservation objectives. The right of the IPs of exclusive usufruct over NRs in their lands is a constitutional right.
Colombia	**Yes**. Even though up to now, legislation regarding joint administration for overlapping areas does not exist. Depending on the type of NPA, the overlap can generate significant restrictions over the use and enjoyment of NRs by IPs. In areas which overlap with NNPs, the exploitation of subsoil resources is not possible; this implies a better guarantee for the permanence of the forest cover in these territories.
Ecuador	**Yes**. However, there is not yet legislation which regulates the implications of overlapping areas. The new Constitution includes/refers to international jurisprudence which states that it is impossible to impose national conservation interests on the self-determination rights of IPs.
Peru	**No**. There is current legislation which points out the impossibility of recognizing indigenous ownership in conservation units. However, and differently than in other countries in the region, apparently it deals with exclusive legal concerns in the Peruvian legislation.
Venezuela	**Yes**. It is a very common legal situation in the ITs of the Venezuelan Amazon that still is not regulated in a consistent form between the BC of 1999 and the FLIPC. It is important to verify the regulations that apply once the ITs in the Amazon region are demarcated with what is expected to be a very high percentage of overlap with NPAs.
	Do IPs have full legal status to autonomously carry out legal business?
Bolivia	**Yes**. "Original indigenous people and rural communities" have full legal status.
Brazil	**Yes**. The FC of 1988 recognizes "the Indians, their communities and organizations" as rights holders. The legislation in the country recognizes that IPs, represented by their communities and organizations, have full legal status.
Colombia	**Yes**. The State recognizes the legal status of indigenous communities as represented by their traditional authorities, individually incorporated by the Indigenous Councils or organized in TIAAs with full legal status.
Ecuador	**Yes**. The Constitution of 2008 recognizes indigenous communities, communes, people and nationalities as holders of collective rights with full legal status and patrimonial autonomy.
Peru	**Yes**. The Constitution and legislation recognize full legal status of native and rural communities, identified as the indigenous people of the forest and the sierra respectively.
Venezuela	**Yes**. The Venezuelan State recognizes the legal status of the indigenous people and communities as having full legal capacity and patrimonial autonomy.

	Can the State unilaterally dispose of NR in the ITs without necessarily obtaining the consent of the affected IPs?
Bolivia	**Formally no**. However, there are strong and continuous demands by indigenous organizations for the adequate application of the right to consultation and free, prior and informed consent for the exploration of NRs in ITs. This right is recognized in the NPCBS and in the law, but is still rarely implemented in the country.
Brazil	**Yes**. Even though Brazil ratified Convention 169 and UNDRIP, there have not been any legislative or regulatory developments regarding the consultation and consent and up to now there is no evidence of its application in the country.
Colombia	**Yes**. Except for cases which compromise the physical and cultural survival of indigenous people, the understanding of the constitutional jurisprudence is that the decision to explore NRs in ITs belongs to the State, which has to consider the content of any consultation with IPs, but is also not obligated to comply.
Ecuador	**Yes**. Recent legislation is contradictory and ambiguous regarding the extent of the right to consultation and consent by IPs. While the SPC points out that the consultation of IPs should be guided by the parameters of the respective international legislation, the new mining law ignores the binding power of the right to consultation.
Peru	**Yes**. Even though there have been various efforts to regulate the right of consultation in this country, there still is no regulatory law and its implantation is lacking. The non-application of the right to consultation is the principal source of current indigenous uprisings in the Peruvian Amazon.
Venezuela	**Formally no**. According to the FLIPC, after exhausting various procedures oriented towards reaching agreements of a contractual nature between the IPs and the State, the IPs can deny their consent with binding value. The law guarantees that the breach of the agreement can be appealed through legal action. However, there is no notice yet of the application of these provisions in Venezuela.
	Could the IPs in the Amazon carry out REDD projects in their territories and benefit directly from the carbon credits derived from them?
Bolivia	**Yes**. In Bolivia, IPs have the exclusive right to the use of forest resources in their territories, in addition to the full and legal autonomy to carry out the legal acts which they consider to be necessary for the execution of their development plans. The country ratified and incorporated the international legislation regarding climate change, but there is still no infra-legal legislation which defines the legal nature of the emission and commercialization of carbon credits. Even so, Bolivia is currently carrying out its first pilot project regarding REDD in ITs in the Amazon. The project is being coordinated by the national indigenous organization CIDOB.
Brazil	**Yes**. IPs have the exclusive usufruct right of the NRs in their territories, including the native forests present there. The national legislation does not prevent that IPs directly carry out legal business relating to the conservation and recuperation of the forest resources in their territories. However, no specific legislation yet exists regarding the generation and commercialization of carbon credits.
Colombia	**Yes**. IPs all have recognized and guaranteed property rights, as well as administration and control of the forest resources in their territories. The State recognizes the legal status, full capacity and patrimonial autonomy of indigenous people in their diverse representations. The principal ambiguity over the exercise of these rights relates to the laws that apply to the management of forest resources in areas which overlap with NPAs; and even though the country ratified and incorporated the international norms regarding climate change, they still have not developed any regulatory legislation regarding the generation and commercialization of carbon credits.

Ecuador	**Yes**. However, it will be necessary to wait for the legal development of Article 74 of the new Political Constitution of Ecuador which states that ecosystem services will not be susceptible to appropriation and that the State will regulate their production, provision, use, and harvesting. There is no law yet in this sense and for now the government fully recognizes the rights of the IPs over the forest resources in their territories. Additionally, they recognize the legal personality of the IPs and full legal status.
Peru	**No**. IPs do not have right to the ownership, nor the full disposition of forest resources in their territories. The legal regulations in Peru limit indigenous rights to the domestic use of the forest resources under the form of use concessions. While the mentioned regulations are contrary to all international agreements regarding indigenous rights incorporated by Peru, since they are currently in force, IPs would not be able to be the direct beneficiaries of activities that involve control and management of forest resources in their territories.
Venezuela	**No**. Even though there is legal recognition of indigenous territorial rights, its implementation has been rare; there are currently very few demarcated and titled lands. On the other hand, the current government has decided against the adoption of mechanisms that are geared towards avoiding that Annex I countries meet the entirety of their obligatory GHG reduction goals, as stated in international agreements. Therefore, the implementation of REDD mechanisms in this country will depend on the definition of their legal nature at COP 15 as well as the subsequent continuity or change of the Venezuelan political position with respect to the generation and commercialization of carbon credits.

A legal opinion on the ownership of carbon credits generated by forest activities on Indigenous Lands in Brazil

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Erika Magami Yamada**

The present legal opinion analyzes the legal viability of carrying out forest carbon projects that generate carbon credits on indigenous lands. We focus on activities of reduced emissions from deforestation and forest degradation (REDD), plus maintenance of carbon stocks and forestation of threatened or degraded areas within indigenous lands in Brazil. This chapter aims to clarify the matter of indigenous ownership of forest carbon credits generated by such activities. We conclude that there is a possibility that indigenous peoples might directly benefit from the commercialization of carbon credits generated by such forest projects since they are recognized as the genuine owners of rights over the lands, as well as their natural resources and the benefits resulting from them, including carbon credits.

Introduction

Concern over global climate change and its adverse effects on society and the world economy is nothing new, yet is has significantly grown in recent years. The United Nations Framework Convention on Climate Change (UNFCCC), ratified by Brazil and 165 other countries in 1992,[1] clearly expressed just how important it has become to progressively reduce greenhouse gas emissions (GHGs), a responsibility shared by all signatory countries. Ever since then, the international community has been searching for ways to comply with this obligation. The Kyoto Protocol (1997)[2] defined a set of GHG reducing goals for industrialized countries to meet by 2012 and it created market mechanisms to help reach these objectives.

Aforestation and reforestation, reduced emissions from deforestation and forest degradation and forest conservation activities on indigenous lands are able to directly contribute

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[1] By March 08, 2010, 194 countries had signed the United Nations Framework Convention on Climate Change (UNFCCC).http://unfccc.int/kyoto_protocol/items/2830.php.

[2] The Kyoto Protocol was ratified by Brazil on August 23, 2002 and entered into effect on February 16, 2005. As of date, 188 of the Climate Convention's signatory countries also ratified the Protocol.

to reductions in GHG emissions and concentrations in the atmosphere.[3] These activities can even be subjected to the certification, or generation, of carbon credits, within the Clean Development Mechanism (CDM) established in Article 12 of the Kyoto Protocol (Reforestation and Afforestation) and on the voluntary carbon market. This could serve the future mechanism of Reducing Emissions from Deforestation and Forest Degradation (REDD) together with the role of conservation, sustainable management of forests, and enhancement of forest carbon stocks in developing countries (REDD+).[4]

This chapter analyzes the legal aspects of carrying out projects for reducing greenhouse gas emissions by means of avoided deforestation, conservation, or reforestation on indigenous lands in Brazil. It also intends to clarify the matter of ownership of the carbon credits generated by projects of this nature and whether indigenous peoples are recognized as owners and could therefore directly benefit from the commercialization of such carbon credits.

Contextualizing the Carbon Market and Forest Activities

The carbon market is a generic term that is used to name the negotiation systems of GHG emissions reductions certificates.[5] This market is constituted on one hand by the offer of carbon credits coming from activities that lead to GHG emissions reductions or that remove CO2 from the atmosphere, as exemplified by forest projects. On the other hand, there is a demand for these credits by companies and governments that need to attain emissions-reduction goals.

[3] In December 2007, resulting from the 13th Conference of the Parties in Bali, the 2/CP.13 Decision was published "Reducing emissions from deforestation in developing countries: approaches to stimulate action" FCCC/CP/2007/6/Add.1 which recognizes the release of GHGs from deforestation and forest degradation and establishes various actions to be taken by member States to reduce emissions from deforestation and forest degradation in developing countries, such as training, technology transfer, exploration of actions, activity demonstrations, and the mobilization of resources to support such efforts.

[4] In December of 2009 at the 15th Conference of the Parties in Copenhagen, the States discussed the insertion of the Mechanism for the Reducing Emissions from Deforestation and Forest Degradation (REDD+) in the Copenhagen Accord. It is important to note that the States had previously committed themselves, among other things, to deepening studies on the role of conservation, sustainable forest management and increased forest carbon reserves in developing countries.

[5] The Brazilian Emissions Reduction Market corresponds to a group of institutions, regulations, project registry systems and negotiation centers that are being implemented by the BM&F/BVRJ, in conjunction with the Ministry of Development, Industry and Foreign Trade (MDIC). The BM&F, for example, already includes several CDM projects, although there is no CDM forest project registered to date. Also, it is important to note that BM&F has already auctioned one set of credits originated on voluntary bases in 2010.

These goals can be mandatory (established by national legislations as a form of compliance with Kyoto Protocol stipulations for Annex I countries)[6] or voluntary. Therefore, the carbon market is divided into the "official" and the "voluntary" carbon market, determined by the two types of carbon credit demands, depending on whether companies have the legal obligation to reduce emissions or whether companies voluntarily assume reduction goals without being obligated to do so by their governments.

A carbon credit is nothing more than a certificate, issued by an authorized organization, verifying that a particular activity led to a reduction in GHG emissions or to the capture of GHGs. This certificate is able to circulate as a credit title and its ownership may be ceded to third parties, subject to, or free of, charges.

In the Kyoto Protocol and official markets, these certificates are called Certificate of Emission Reductions (CERs) and are issued by the Executive Board of the Clean Development Mechanism (CDM), which is organized under the United Nations (UN) system. The CERs represent the removal or non-emission of one metric ton of carbon dioxide equivalent by a particular undertaking that may be generated by: 1) a change in technology that leads to less fossil fuel consumption or to less GHG emissions, or 2) forestation and reforestation activities.

On the voluntary market, other certificate types can serve as a transaction unit, namely Voluntary Emission Reductions (VERs). These credits can be generated by activities that contribute to avoided deforestation and forest degradation in developing countries, as will be discussed in relation to the REDD mechanism below. On the voluntary market, credit acquisition aims either to neutralize GHG emissions or to reach the goals voluntarily set for the companies or countries not included in Annex 1.

REDD Mechanism: Reduced Emissions from Deforestation and Forest Degradation

Despite the fact that deforestation is responsible for approximately 15% of the world's GHG emissions and that it primarily occurs in developing countries like Brazil,[7] the Kyoto Protocol

[6] Kyoto Protocol of the United Nations Framework on Climate Change (adopted December 11, 1997 and entered into effect on February 16, 2005), Art.2 and Annex I.

[7] It has been calculated that 58% of all GHG emissions coming from Brazil originate from deforestation. According to the National Emission Inventory published in 2006, 1.2 $GtCO_2e$ are released annually into the atmosphere caused by fires to open up plantation areas, from carbon used for metallurgy, or to provide raw material for wood products. *Pathways to a Low-Carbon Economy for Brazil*, McKinsey & Company, 2009, p. 9.

did not establish any mechanism to stimulate the reduction of deforestation, as done for other sources of emissions. This is because the idea of including tropical rainforest conservation as part of an international climate agreement initially provoked opposition for fear that it might lead to releasing developed countries from their obligation to reduce their industrial emissions. Other concerns arose regarding the technical aspects of forest carbon monitoring and considering that such a mechanism could threaten the sovereignty of developing countries with forests.[8]

However, since 2005 there have been improved discussions and proposals focused on creating a reduction mechanism for GHG emissions coming from deforestation. Reservations about potentially negative consequences for the countries involved have also been taken into consideration.[9] This mechanism was initially called the Tropical Deforestation Emission Reduction Mechanism (TDERM), which later came to include the possibility of tackling the GHG emissions caused by forest degradation (intensive logging, for example), as well as including measures for conservation and for increasing carbon stocks in forests. Thus, TDERM came to be known as REDD+ (Reducing Emissions from Deforestation and Degradation), the term currently used.

Summarizing, the REDD+ mechanism attempts to contribute to a reduction in deforestation – and to the consequent reduction in GHG emissions – in tropical countries, by means of financial and technological incentives.[10]

The major idea behind the REDD+ mechanism is that developing countries (including Brazil among) are able to verifiably reduce their national deforestation levels in comparison to a pre-established historical average, and adjust for national circumstances, should be financially compensated for their efforts.[11] This also occurs when some countries decide to adopt clean technologies even though they are not under any obligation to do so.[12] Therefore, projects that avoid or reduce deforestation in a certain region or place should also benefit from said financial compensation.

[8] ANDERSON, Anthony B., *Redução de Emissões Oriundas do Desmatamento e Degradação Florestal (REDD): Desafios e Oportunidades* (Reducing Emissions from Deforestation and Forest Degradation: Challenges and Opportunities), Mudanças Climáticas (Climate Changes), ANDI, 2009.

[9] The item, reducing emissions from deforestation in developing countries first appeared at the 11th Conference of the Parties in Montreal (COP11), December of 2005. *Report of the Conference of the Parties on its eleventh session, held in Montreal from November 28 to December 10, 2005*. FCCC/CP/2005/5, paragraphs 76–84.

[10] Bali Action Plan, Decision 1/CP13 and Decision 2/CP13, FCCC/CP/2007/6/Add.1

[11] In the last SBSTA recommendation approved by COP15 " it was noted that national circumstances include those of countries with specific circumstances, such as high forest cover and low rates of deforestation." FCCC/SBSTA/2009/8, paragraph 30.

[12] SANTILLI, Marcio et al. "Tropical deforestation and the Kyoto Protocol: an editorial essay". In MOUTINHO & SCHWARTZMAN, *Tropical Deforestation and Climate Change*, 2005.

The UNFCCC has not yet incorporated the REDD+ mechanism as an official emissions reduction mechanism, which means that for now there are no official rules regarding its functioning and its credits circulate only on the voluntary market. However, since 2007, as expressed in the Bali Action Plan, there is a consensus that, even without an established format, a new climate agreement should include a mechanism that serves forest concerns.[13]

Today there are several initiatives in various parts of the world which aim at implementing concrete projects for reducing deforestation and trying to obtain resources on the voluntary carbon market. Although it is not an official mechanism, REDD+ is already a reality and has generated projects, contracts and, in rare cases, payments for REDD+ activities. For indigenous lands, where the threat of deforestation is obvious from the expansion of deforested areas all around them, this may be an important financial mechanism, contributing financially to strengthen and support indigenous people's activities of fiscalization and protection of lands and natural resources, which are of utmost importance to indigenous peoples.

Reforestation

In addition to avoided deforestation, reforestation activities are capable of generating carbon credits since they contribute to diminishing GHG concentrations in the atmosphere. As forests grow, they absorb CO_2 from the atmosphere and store it in the form of biomass. This capacity for absorption is commonly called "carbon sequestration".

Reforestation activities, differing from those of REDD+, are regulated within the scope of the Clean Development Mechanism.[14] For this reason, they are able to generate carbon credits that are tradable on the official market. However, for many reasons not possible to cover in detail here, only a few reforestation projects actually gained recognition from the CDM Executive Board, and as a result only a few managed to generate these credits called CERs.[15]

[13] This is because 1) the remote sensing technology available today has improved a great deal compared to the 1990s; and 2) the scientific evidence on the magnitude of anthropic climate change is demanding quick and significant emissions reductions in order to limit the mean global temperature increase to 2º C.

[14] Article 12 of the Kyoto Protocol (1997) and Decision 5/CMP.1 *Modalities and procedures for afforestation and reforestation project activities under the clean development mechanism in the first commitment period of the Kyoto Protocol,* FCCC/KP/CMP/2005/8/Add.1, p.61.

[15] World Bank data from 2007 indicated that only 1% of the CDM goals refer to the forest sector, corresponding to only 0.2% of the CERs issued. On the other hand, forest projects on the voluntary market are estimated to represent 36% of the total carbon volume negotiated in the year. *Mercados de Cabono – Situação dos projetos florestais* (Carbon Markets – The Situation of Forestry Projects), Brazilian Foundation for Sustainable Management, 2008. http://www.fbds.org.br/IMG/pdf/doc-303.pdf.

On the other hand, there is a growing voluntary market for GHG emissions reductions from reforestation activities, notably based on the disposition of some companies to "neutralize" their past emissions. Although they are not official, these projects should go through additional auditing and certification processes in order to verify and measure the absorption of GHGs, as done with REDD projects. For indigenous lands with previously degraded areas, especially if since before the year 1990 (the deadline for recognizing the additionality of GHG emissions reductions according to the Kyoto Protocol), this may also serve as an important market, which could even help financially with the recuperation of areas that are important to the territory's environmental equilibrium.

Can Reforestation and/or Reduced Emissions from Deforestation and Forest Degradation Activities (REDD+) be Carried out on Indigenous Lands?

To the extent that the effects of climate change are becoming more obvious to society in general, the role that indigenous lands play in stabilizing the climate has also been more and more acknowledged because indigenous peoples are known for conserving large forest areas within their lands., notably so in Brazil, the world's largest producer of GHG emissions from the deforestation of tropical forests, where indigenous lands have been providing an important service as barriers that contain Amazonian deforestation. Also, indigenous lands preserve valuable forest areas and other biomes in other regions of the country. Estimates show that in the regions of Mato Grosso and Rondônia, deforestation is almost ten times greater outside of legally protected areas, such as indigenous lands and conservation units, than inside these areas.[16]

According to data from the Amazon Institute of People and the Environment (Imazon), which monitors Amazon deforestation rates on a monthly basis, less than 1% (1 km^2) of the verified deforestation in June of 2009 (150 km2), occurred on indigenous lands. By contrast, within protected areas – areas created specifically for biodiversity conservation – deforestation during the same month came to 32 km2, or 21% of the total.[17] Additionally, data from the National Institute for Space Research (Inpe), collected up to 2008, indicates that indigenous territories total

[16] FERREIRA, Leandro Valle; VENTICINQUE, Eduardo and ALMEIDA, Samuel. "O desmatamento na Amazônia e a importância das áreas protegidas" (Deforestation in the Amazon and the importance of protected areas). In *Revista de Estudos Avançados* 19 (53). Institute of Advanced Studies (IEA/USP), 2005.

[17] See: http://www.imazon.org.br/novo2008/publicacoes_ler.php?idpub=3609.

more than 100 million hectares of the Amazonian region and 98.8% of these are preserved.

It is therefore obvious that the existence of demarcated indigenous lands contributes to avoiding and containing deforestation, with an associated reduction in GHG emissions. This evidence caused these lands to be distinguished by Decree 5758/2006 as constituents of the National Strategic Plan for Protected Areas. Therefore, if REDD+ activities came to be carried out in this country, indigenous lands should be among the main beneficiaries, both due to the carbon stock in these areas and the role they play in effectively inhibiting deforestation. However, could projects of this nature be developed on these lands?

Marisa G. Fonseca/ISA, 2009

Deforestation surrounding the Xingu Indigenous Park: 99% of forests inside of indigenous lands are conserved.

The land as a space for cultural reproduction

To answer this question, we first must consider whether REDD+ activities and reforestation projects may be developed on indigenous lands, or if, in some way, these projects go against the objectives and special-use regime of indigenous lands in Brazil.

The Brazilian Federal Constitution (1988), in accordance with main fundamental rights instruments, including the International Labor Organization (ILO) Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (2007), recognizes indigenous customs, languages, beliefs, traditions and social organization. It rejects the discriminatory idea of a gradual but mandatory assimilation of indigenous people and their cultures into a non-indigenous way of life.[18] As Juliana Santilli points out, the Brazilian constitution's multicultural perspective values

[18] The Federal Constitution of 1988 validated the original right of indigenous peoples over the territories traditionally occupied by them (Art. 231, heading). The lands traditionally occupied by them "inhabited by them in a permanent manner, used in their productive activities, indispensable to the preservation of the environmental resources necessary for their well-being and to their physical and cultural reproduction, according to their uses, customs and traditions " (Art. 231, heading). According to the Constitution, it is an obligation of the Brazilian State to demarcate indigenous lands (which foresees the identification and physical delimitation activities) and

the co-existence of diverse cultures and ethnic groups within one national territory, not in any order of preference or importance. However, as the author highlights:

> "The influence of multiculturalism is not only present in the protection of the cultural manifestations and creations of the diverse social and ethnic groups that make up Brazilian society, but also permeates the constituent legislator's attempts to secure special territorial and cultural rights to indigenous peoples and quilombolas (...) it is useless to protect quilombola and indigenous cultural manifestations without securing the conditions for their physical and cultural survival."[19]

According to the Brazilian Federal Constitution, indigenous lands are recognized as lands that "are inhabited by indigenous peoples on a permanent basis, are utilized for their productive activities, are indispensable for preserving the environmental resources necessary to their well-being and to their physical and cultural reproduction, according to their uses, customs, and traditions" (Art. 231, §1). The Brazilian Constitution recognizes a direct relationship between the security of territorial rights and the physical and cultural survival of indigenous peoples, with the right to land being a necessary condition for maintaining their uses, customs and traditions, or in other words, their existence as ethnic groups that are culturally differentiated from the rest of the population. In this case, the Supreme Court (STF) Justice Celso de Mello highlights the legal relevance of recognizing indigenous lands in Brazil:

> "The legal importance of this official recognition (of indigenous lands) – which is rendered in the presidential decree of administrative ratification of the demarcated area in question – lies in the fact that lands traditionally occupied by indians, although they are part of the Union's patrimony (FC, Art. 20, XI), are found to be affected, as a result of constitutional application, for specific ends uniquely aimed at the legal, social, anthropological, economic and cultural protection of indians,

to protect them (which foresees the removal and indemnization of non-indigenous occupants, the fiscalization of frontiers and the administrative registration of invaders). These activities are regulated by the Indian Statute (Federal Law 6001/73). Article 26(1) of the UN Declaration on the Rights of Indigenous Peoples recognizes that "Indigenous Peoples have the right to lands, territories and resources they traditionally possess and occupy or have by other means utilized or acquired."

[19] SANTILLI, Juliana. *Socioambientalismo e novos direitos* (Socio-environmentalism and new rights). São Paulo, Peirópolis, 2005, pp.79/80.

> indigenous groups and tribal communities. The political Charter, in reality, in its Art. 231 §1, created a bound or reserved ownership destined, on one hand, to guarantee indians the rights they were constitutionally granted (FC, Art. 231, §§ 2, 3 and 7) and, on the other, to provide indigenous communities the well-being and the conditions necessary for their physical and cultural reproduction according to their uses, customs and traditions." (RTJ 93-1291 – RTJ 101/419). (STF – RE 183.188-0/ MS, Opinion of Reporter Justice Celso de Mello, p.19-22)

The jurisprudence of the Inter-American System of Human Rights that Brazil subscribes to follows this same line of reasoning. The Inter-American Court of Human Rights has been emphasizing that the right to ownership as provided for in the Declaration on the Rights of Man and in the American Convention of Human Rights, for indigenous peoples, is collective and should consider the manner in which the lands are being occupied, which is directly influenced by indigenous customs and traditions. The agencies of that human rights system understand that the protection of indigenous lands and indigenous territorial rights is essential because the relationship indigenous peoples have with their lands is unique and constitutes a base for social, cultural, and economic collective rights and for securing the existence of these peoples.[20]

Article 13 of Convention 169 of the ILO also supports this idea. It establishes that governments must respect the significance of the special relationship indigenous peoples have with their lands in addition to the preservation of indigenous cultures and spiritual values. Article 15(1) of the same Convention states that "the rights of the interested peoples to the natural resources found on their lands shall be especially protected and these rights include the right of these peoples to participate in the use, administration, and conservation of said resources."

[20] The main jurisprudence on property rights over indigenous territories can be found in the Court's following decisions: *Case of the Saramaka People vs. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C, nº 172; *Case of the Saramaka People vs. Suriname* – Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C, nº 185; *Case of the Mayagna Community (Sumo) Awas Tingni*; *Case of the Sawhoyam Indigenous Community and Case of the Yakye Axa Indigenous Community vs. Paraguay*. Merits, Costs and Damages. Judgment of June 17, 2005. Series C nº 125. And in the Commission: *Case of the Yanomami People vs. Brazil*. Resolution nº 12/85, in Case nº 7615 of March 5, 1985. And *Case of Maia de Toledo People vs. Belize*. Judgment of October 12, 2004. All of these cases are available at this website: www.corteidh.or.cr.

In accordance with this international normative, the Brazilian constitution guarantees indigenous peoples ample control over the natural resources on their lands. The Brazilian Federal Constitution proclaims in Article 231 the original right of indigenous peoples over their lands, as well as the permanent tenure and exclusive usufruct of the natural resources found there. According to the understanding of the Brazilian Constitutional Court:

> "The lands traditionally occupied by Indians are under the of the Federal Union. The areas covered by them are inalienable, unseizable and imprescriptible. The Political Charter, with the bestowal of dominion granted to the Union, created a bound or reserved ownership, which is intended to guarantee to the Indians the exercise of the rights they were constitutionally awarded (FC, Art. 231, §§ 2, 3 and 7), thus attempting to provide indigenous communities with the well-being and conditions necessary to their physical and cultural reproduction, according to their uses, customs, and traditions." (RE 183.188, Rep. Just. Celso de Mello, Judgment 10-12-96, DJ of 14-2-97).

Thereby, it can be concluded that indigenous land tenure cannot be threatened by REDD+ activities and that the only activities permitted on indigenous lands will be those that: a) respect indigenous peoples' ways of life and traditions and therefore cannot be contrary or harmful to them; and b) respect indigenous peoples' interests and aspirations and therefore are carried out by the indigenous themselves or with their permission.

This is why reforestation or REDD+ activities on indigenous lands may only occur when undertaken by indigenous peoples themselves or when expressly supported by them and as long as the activities do not jeopardize their ways of life or the cultural aspects characterizing them as an ethnic group. The question yet to be answered is: Would these environmental activities threaten the physical and cultural survival of these peoples?

In our opinion, no. As previously stated, the demarcation of indigenous lands specifically aims to protect the integrity of the natural resources that would otherwise be partly, or completely, consumed or degraded by third parties in detriment to indigenous peoples. As long as planned and desired by the indigenous community, REDD+ activities meet this objective and help protect the forest resources that are indispensable to the indigenous way of life. Activities that threaten the physical and cultural survival of these peoples are illegal.

If well-planned, REDD+ activities would not interfere with the peoples' traditional activities, such as gathering and hunting, opening up areas for new villages and crops, or any other activities central to the way of life and physical survival of Brazilian indigenous peoples.

Despite the growing external threat of deforestation, these indigenous ways of life correspond to an extremely low deforestation rate in indigenous lands,[21] and it is precisely for this reason that they should be valued. According to data collected by Inpe up to 2008, only 13,226 km^2 of the Amazon region's almost 700,000 km^2 of deforestation took place on indigenous lands (which total approximately 1 million hectares in the Amazon), while only around 2,400 km^2 of deforestation may be linked to indigenous activities. It is also important to note that more than 93% of the deforestation identified within indigenous lands was discovered to have an external origin; therefore, the ancient and traditional use of indigenous lands has little to do with the deforestation that the world is now trying to avoid and contain.[22]

In some areas, evidence shows that indigenous lands are more vulnerable to deforestation whenever there is an easier access to the area by third parties. This is mostly true for areas located at the agricultural frontier advancing in the Amazonian region and as exemplified by the Xingu river basin. Therefore, fiscalization and protection activities on these indigenous lands and conservation units are important to contain deforestation. Forest conservation initiatives on indigenous lands can and should be indicated as significant alternatives for strengthening indigenous control over lands and resources and, in parallel, they can be instrumental for keeping illegal deforestation in check.

The same may be said regarding reforestation projects. In cases where, upon demarcation, indigenous lands have incorporated areas that were deforested by previous occupants – a typical situation when there are delays in delimiting and protecting the indigenous lands – reforestation may serve not only as a source of income for these populations, but also as a way of environmentally recuperating these areas and recovering the conditions necessary for sustaining the indigenous population.

Thus, according to environmental criteria, it has been established that forest activities generating GHG emissions reduction certificates are completely compatible with the legal ownership of indigenous lands and since there is no rule within Brazilian legislation that prohibits their realization for any reason, these activities are perfectly permissible and in many cases desirable.

[21] When comparing deforestation within the Legal Amazon, on and off indigenous lands, it is possible to verify that the deforestation on indigenous lands and caused by their ways of life is truly minimal.

[22] This conclusion was reached after analyzing satellite images of deforestation in the Amazonian region, which included the geometric patterns and contiguity of deforestation on indigenous lands, together with other external deforestation, roads, settlements and private properties. *Atlas of Deforestation on Indigenous Lands*, Instituto Socioambiental, October 2009.

Indigenous Peoples as Protagonists of Reduced Emissions from Deforestation and Forest Degradation and Reforestation Activities

Another point worth noting is the ethical and legal need to guarantee action and participation by indigenous peoples in all kinds of projects and activities carried out on their lands. Initiatives on indigenous lands will only be possible, if indigenous peoples are involved as decision-makers. Indigenous peoples must not be treated as objects or mere indirect beneficiaries of projects or activities.

In accordance with the constitutional and international principles of human rights, indigenous peoples have recognized their right to control their lands as part of their social autonomy.[23] The right to self-determination guarantees indigenous peoples the administration and control over their lives, including the control over their lands, within the structure of the State.

When considering the principles established in international treaties of which Brazil is a signatory country and considering those existing in the Brazilian constitution, (not including the constitutional exceptions (Art. 231, §3), it becomes clear that neither third parties nor the State may carry out any type of work, projects or activities within indigenous lands, if they are not of interest to indigenous peoples or explicitly authorized by them.

The Brazilian Constitution affirms this through a specific provision for cases of third-party territorial use without the indigenous peoples' consent: it declares null and void the "acts striving for the occupation, dominion, and tenure of the lands referred to in this article, or the exploitation of natural resources of the soil, rivers, and lakes found therein" (Art. 231, §6). Thus, another determining factor for undertaking REDD+ and reforestation activities on indigenous lands is that the people consulted for negotiation are the true owners of the areas, representing their communities or organizations. Third parties occupying indigenous lands cannot benefit from REDD+ and reforestation activities developed there. According to Brazilian constitutional norms, a third party could not carry out deforestation on indigenous lands, if it were not in partnership with, or in service to, the peoples living there.

In addition, considering that the general environmental law is respected, the State could not impose limitations to the right of indigenous peoples to deforest areas that are indispensable

[23] Federal Decree nº 5051/04 transformed the ILO Convention 169 into federal law (ratified by Brazil on July 25, 2002) which recognizes the aspirations of indigenous peoples to control their institutions, ways of life and economic development in addition to respecting their desires to maintain and develop their identities, languages and religions within the structure of the State in which they live, and establishes in its Articles 6, 7, 14 and 15, the indigenous right to self-determination and participation.

Ayrton Vignola, 2009

Ikpeng women collect seeds in the forest near the village in the Xingu Indigenous Park.

for their physical or cultural survival.

Therefore, another key element for any forest project on indigenous lands is the direct and active participation of indigenous communities and organizations as beneficiaries and right holders. In other words: only indigenous peoples may create or carry out such projects or activities of REDD+ or reforestation, even when this occurs in collaboration with third parties such as State agencies. Partnerships in no way disqualify the indigenous ownership of the project and of the benefits derived.

Who Would Be the Owner of Benefits Derived from REDD+ and Reforestation Projects on Indigenous Lands?

The Ownership of Carbon Credits

As seen in the previous section, one of the benefits derived from REDD+ and reforestation activities can be carbon credits. Carbon credits are tradable certificates that represent an amount of GHGs that ceased to be emitted or that was absorbed by certain activities (for example, REDD).

Different authors have discussed the legal nature of the carbon credit, focusing on emission reduction certificates (CERs) and classifying them alternatively as commodities, merchandise, services, pure tangible goods or derivatives, incorporeal assets and securities. In Brazil, several researchers judge that, in terms of their intrinsic characteristics which are exemplified by the fact that they are certificates of a purchase and future sale of carbon credits, the CERs would be assets that could be likened to securities because they are intangible goods which need to be in circulation.[24] However, an understanding exists that in order for them to

[24] GRAU NETO,Werner, "As controvérsias a respeito da natureza jurídica dos certificados de reduções reduzidas – CER, também conhecidos como créditos de carbono" (Controversies in regards to the legal nature of certified emissions reductions– CERs, also known as carbon credits) in *Congresso Internacional de Direito Ambiental – Mudanças climáticas, biodiversidade e uso sustentável de energia* (International Congress of Environmental Law – Climate Changes, biodiversity and sutainable energy use), São Paulo: Imprensa Oficial do Estado de São Paulo, 2008, p.525.

be considered a security under Brazilian law and subject to regulation by the Securities and Exchange Commission, it is first necessary to issue a normative act explicitly defining CERs in a way that submits them to the regime of Law nº 6.385.[25] Therefore, although they possess the general characteristics of securities, CERs cannot be considered securities in Brazil because they are not specifically defined by law as such. This situation could change if Bill nº 493/2007 were to be approved, which specifically designates them as such.[26] In addition, decisions regarding the taxes that would be applicable to the commercialization of CERs will also depend on the legal definition of the carbon credit.

In view of the various possibilities for legally classifying carbon credits and the lack of regulation, the Brazilian tendency is to make a lato sensu classification of CERs as incorporeal or intangible assets, negotiable by means of assignment. The conclusion, thus, is that a stricto sensu definition of the legal nature of CERs is unnecessary in the present evolutionary stage of the domestic legal system, as long as they are granted tax exemptions that would ensure an adequate competitiveness in the Brazilian market.[27] The same rationale is applicable to other carbon credit certifications outside the CDM.

As far as the present opinion is concerned, and in the absence of specific regulations in the Brazilian legal system, carbon credits (CERs or others, like VERs) may be understood as legal goods – since they have economic value and are able to constitute the object of legal transactions – whose ownership is directly derived from the acknowledgment of the right to control the resources and activities that will lead to the reduction or emission of GHGs. This is what occurs, for example, with emission reductions derived from the change of an energy matrix, such as the

[25] SOUZA, Clóvis S. and MILLER, Daniel S.. *Protocolo de Quioto e o Mecanismo de Desenvolvimento Limpo (MDL); as Reduções Certificadas de Emissões (CERs), sua Natureza jurídica e a regulação do mercado de valores mobiliários no contexto estatal pós-moderno* (The Kyoto Protocol and the Clean Development Mechanism; Certified Emissions Reductions (CERs), their legal nature and regulating the securities market in the post-modern state context), CVM 2003.

[26] Bill whose objective is to arrange the organization and regulation of the carbon credit market on the Rio de Janeiro state Stock Exchange.

[27] MACHADO FILHO, Haroldo and KERLAKIAN SABBAG, Bruno, "Classificação da Natureza Jurídica do Crédito de Carbono e Defesa da Isenção Tributária Total às Receitas Decorrentes da Cessão de Créditos de Carbono como Forma de Aprimorar o Combate ao Aquecimento Global" (The Classification of the Legal Nature of Carbon Credits and the Defense of Total Tax Exemption for the Revenues Resulting from the Cession of Carbon Credits as a Way of Improving the Fight against Global Warming), in Congresso Internacional de Direito Ambiental – Mudanças climáticas, biodiversidade e uso sustentável de energia (International Congress of Environmental Law – Climate Changes, biodiversity and sutainable energy use), São Paulo: Imprensa Oficial do Estado de São Paulo, 2008, p.811.

construction of a hydroelectric power plant in an area supplied by diesel power plants. In this case, the owner of the hydroelectric power plant will be the owner of the CERs since he is the initiator, or owner, of the activity that generated the reduction.

When REDD+ or reforestation activities are carried out on indigenous lands with a subsequent generation of CERs or VERs, these shall be the property of the indigenous people because they are the ones responsible for such activities and hold the exclusive right to use the forest resources found on indigenous lands. This understanding meets the general orientation that has been adopted within the scope of the Climate Convention, the Kyoto Protocol, and the CDM Executive Board.28

Carbon Ownership in Projects Undertaken on Indigenous Lands

Although indigenous lands are property of the Brazilian State (Union)[29] and protected as public lands, they are unavailable, meaning that the State cannot utilize them for purposes other than the permanent habitation of indigenous peoples. These lands are also inalienable, that is, indigenous territories cannot be sold, leased, conceded, or transferred to third parties under any reason or pretense (Art. 231, §2). This prevents, for example, that indigenous peoples are forced from their lands, with the constitutional exceptions of disasters and epidemics that put the population at risk or for the sake of the country's sovereignty.

This restriction is based on the indigenous peoples' constitutional right to permanent tenure and exclusive usufruct of the riches from the soil, rivers, and lakes found on indigenous lands. This is considered to be a sui generis legal arrangement within the Brazilian system, because – although it does not recognize that indigenous peoples have ownership over their lands – they are given all the powers inherent to governing those lands. This arrangement has been instrumental since it allows for indigenous social organization,[30] which translates into the peoples' right to self-determination.[31]

With regards to the ownership and tenure of indigenous lands, Professor Dalmo de Abreu Dallari clarifies that "if it is true that for not being owners, Brazilian indigenous peoples

[28] Apud http://www.cdmrulebook.org/513.

[29] Article 20 of the Federal Constitution.

[30] SILVA, José Afonso da. *Curso de Direito Constitucional Positivo* (Positive Constitutional Law Course), São Paulo: Publisher Malheiros, 2006, Ed.: 27, p. 855.

[31] ILO Convention 169 (ratified by Brazil on July 25, 2002) and UN Declaration on the Rights of Indigenous Peoples (approved by the UN General Assembly with a favorable vote from Brazil in 2007).

cannot dispose of the lands they traditionally occupy, it is equally true that the Union, although the owner, has no power of disposition. And indigenous groups may permanently and fully enjoy all the tenure rights over these lands."[32] Thus, the permanent tenure and the exclusive right to use held by indigenous peoples leads to a de facto ownership right.[33] It means that the Union is the bare owner of the lands, whose utility will be solely and exclusively reverted to the indigenous peoples inhabiting them, so that they are able to survive physically, to preserve their special relationship with the land and their cultural identity, and to be respected in their choices and customs.[34]

Thus, the Union cannot make concessions over indigenous lands or natural resources found therein, unless they are in accordance with the decisions and interest of the indigenous peoples themselves. The only exceptions to this rule are the possibility of mineral and hydroelectric exploitation on indigenous lands, both of which are provided for in the constitution (Art. 231, §3), although they are not yet regulated. In any case, the consultation of indigenous peoples is necessary. Confirming this understanding, Federal Law nº 11.284/06, which regulates the use, management, and concession of forests situated on public lands, explicitly determines "the exclusion of indigenous lands, areas occupied by local communities, and areas considered for the creation of conservation units with integral protection" from the Annual Plans of Forest Concessions, which are those that indicate the areas to be submitted to forest concession (Art. 9 c/c Art. 11, IV).

Therefore, there is no risk that indigenous lands become State forest concessions to private companies. Also, indigenous lands are not going to be used for public purposes other than the protection of indigenous peoples. For instance, indigenous lands cannot be made available for population resettlement programs which would obviously interfere with indigenous tenure over the territory and, subsequently with the integrity and management of the natural resources therein. Since according to the Brazilian legal system, indigenous peoples are the only subjects with the power to dispose of the natural resources found on their lands, with the aforementioned

[32] DALLARI, Dalmo de Abreu. *Reconhecimento e proteção dos direitos dos índios* (Recognition and protection of indian rights), p. 319, Brasília: Senado Federal, v. 28, nº111, Jul/Sept. 1991.

[33] CRETELLA Jr. José. *Comentários à Constituição de 1988* (Commentaries on the Constitution of 1998). Rio de Janeiro: Forense Universitária, 1993, vol. VIII, p.4567.

[34] Especially the jurisprudence of the Inter-American Commission and Court of Human Rights and the UN Convention on the Elimination of all Forms of Racial Discriminationº Anaya, S. James, "The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples", 12 Law & Anthropology: Int'l Y.B. *Legal Anthropology* 127 (2005).

cases as the only exceptions to this rule. Therefore, it is not up to the Federal Government alone to judge the relevance of REDD+ or reforestation projects on indigenous lands. The development of activities on indigenous lands is to be decided by indigenous peoples and guided by the constitutional law. For the same reason the Union does not hold ownership over carbon credits or other benefits generated by such activities.

It follows then, that indigenous peoples are the sole owners of the forests situated in their territories. Therefore, only they may decide what to do with this resource, taking into consideration environmental legislation, which means that only they can chose to carry out REDD+ or reforestation activities in their lands. Consequently, indigenous peoples would be responsible for the forest activities they choose to be relevant and they would be the owners of the carbon credits or other benefits deriving from such activities.

The Role of Funai and Environmental Agencies in Protecting Forests on Indigenous Lands

Regarding REDD+ projects carried out on indigenous lands, a highly relevant question regards the role played by the State. The State, through the Brazilian National Indian Foundation (Funai) and other environmental protection agencies, such as the Brazilian Institute of Environment and Renewable Natural Resources (Ibama) and state agencies, works for the protection of the natural resources of indigenous lands. So, does the State's role in protecting forests on indigenous lands elevate it to the position of co-owner, together with indigenous peoples, over the carbon credits derived from REDD+ activities?

The public authority, through its various agencies, has the legal duty to inhibit and punish invasion and environmental degradation on indigenous lands. Considering the fact that the monitoring of illegal deforestation inside and outside indigenous territories falls upon the State, could suggest the possibility that carbon credits belong to the State.

This is not the case according to our understanding. As previously remarked, since indigenous lands are specially protected areas and belong to the public, they must be protected not only by the communities themselves, but also by state-run agencies that are responsible for protecting indigenous patrimony (Funai and the Federal Police) and, in cases of environmental degradation, by those responsible for protecting the environment (Ibama, the Federal Police, and state environmental agencies), according to the constitutional rules of Articles 231 and 225. Thus, the government assumes the constitutional power and duty of protecting forests situated on indigenous lands.

Article 34 of the Indian Statute (Federal Law nº 6001/73) and Article 1 of Law 5371/67[35] confer to Funai the power to oversee and protect the use of natural resources found on indigenous lands, with the objective of guaranteeing the exclusive usufruct of the resources to indigenous peoples. This protection is initially related to the combating of illegal actions committed by third parties on indigenous lands, such as timber theft or any form of trespassing. Along these lines, Federal Decree 5758/06 establishes the National Strategic Plan for Protected Areas (PNAP) and defines its general objective "to establish a national program for the conservation and sustainable use of the biological diversity found on indigenous lands". Some form of cooperation among the involved agencies should exist in order to satisfactorily protect indigenous patrimony (Funai and the Federal Police) and to conserve the environment (Ibama and state environmental agencies – OEMAs) with the goal of formulating and implementing an environmental conservation program on indigenous lands.

Analyzing this conjecture carefully, we conclude the following: according to the stated legal principles, the state police's scope of action regarding indigenous lands should focus on illegal deforestation carried out by third parties or, in some cases, by indigenous individuals. Traditional activities developed by indigenous peoples are protected by law and can be developed free from restraints; therefore, the prohibition of deforestation is restricted to the cases of non-traditional practices by indigenous peoples.

Thus, it should be the State's responsibility, theoretically, to prevent third parties from stealing or in any way degrading the natural resources on indigenous lands. However, this responsibility is not exclusive to indigenous cases. Conversely, as set forth in Art. 225 of the Brazilian Constitution, as well as in Federal Law nº 6938/81 (Law of the National Environmental Policy), it is the public authority's obligation to oversee the use of environmental resources and prevent illegal activities anywhere in the national territory, including on private lands, supporting each person's right to an ecologically balanced environment. The consolidated

[35] Art. 1 – The Federal Government is authorized to create a foundation, with its own patrimony and legal personality, under the terms of the civil law, denominated "National Indian Foundation", with the following purposes:
I – to establish guidelines and to ensure compliance with indigenist policies, based on the principles listed below: (...); b) security of permanent tenure of the lands they inhabit and the exclusive usufruct of the natural resources and all the utilities therein; (...)
II – to manage the indigenous patrimony, towards its conservation, extension and appreciation; (...)
VII – to make use of the police power in reserved areas and in matters related to indigenous protection.

jurisprudence of the Superior Court of Justice, as demonstrated by the following precedent, expresses similar views:

> CIVIL PROCEDURAL. ENVIRONMENTAL. INTERLOCUTORY APPEAL IN PUBLIC CIVIL PROCESS. LEGITIMICY OF SÃO PAULO STATE TO BE PLACED AS DEFENDANT. OPINION APPEALED ACCORDING TO THE STJ JURISPRUDENCE. SUMMARY 83/STJ. OFFENSE TO ART. 535 OF THE CPC REJECTED.
>
> 3. The conclusion registered a quo by the Court is aligned with the jurisprudence of this Superior Court of Justice, oriented towards recognizing the standing to be sued aspect of the legal entity of public law to be placed in a process aimed at accountability for damages caused to the environment as a result of omissive conduct regarding the duty to supervise. Equally, it is consistent with the constitution, which sets forth, in Art. 23, VI, the shared competency of Union, states, the Federal District and municipalities with regards to the protection of the environment and the fight against any form of pollution. And also, Art. 225, (heading) also of the FC, which establishes every person's right to an ecologically balanced environment and imposes on the government and the collectivity of the obligation to defend and preserve it for present and future generations (AgRg no Ag 973577 / SP).

It is therefore incumbent on the public authority to protect any and all forests within Brazilian national territory, its responsibility being not only to regulate their use, but also to exercise its police power to restrain and prevent illegal usage. For example, if an individual clears an area illegally, he will be subject to criminal and administrative charges, and the activity, if discovered in time, may be embargoed by the administrative authority and all the equipment used in the criminal act will be subject to seizure, as per Federal Law 9605/98. For this reason, the State has been improving deforestation monitoring techniques, making use of even more sophisticated technologies in order to remotely identify new deforestation and punish those responsible.

In this sense, there is no difference between the inspection carried out on indigenous lands and that carried out in other areas of the country. The State's obligation to prevent invasions and deforestation exists for both indigenous lands and private property. Thus, if the state's act of monitoring were enough to confer the State (Union, states and municipalities) the ownership, albeit partial, of carbon credits derived from REDD+ activities on indigenous lands, then the same should occur on private areas. Such a consideration is unreasonable since this monitoring

is a legal obligation and there is no additionality whatsoever by the State. Along these lines, Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples affirms that, "indigenous peoples have the right to environmental conservation and protection and to the productive capacity of their lands or territories and resources. The States shall establish and execute assistance programs for indigenous peoples to secure this conservation and protection, without any type of discrimination."

Thus, by enforcing its obligation to oversee the environment, neither the municipalities, federal states or the Union are granted rights to the natural resources found there – nor to the activities and products, as in the case of carbon credits or other benefits. Additionally, the lack of resources and the absence of joint and integrated efforts by the public authority compromise the satisfactory execution of supervision and protection activities for indigenous lands by the State.

The Brazilian Federal Court of Auditors (TCU) verified during an operational audit that Funai does not have enough police power to control illegal activities on indigenous lands. Such power has not yet been regulated and it is currently the state or federal police who exercise said power, depending on the circumstances. According to the TCU, the lack of articulation among the various institutions responsible for environmental monitoring on indigenous lands and the lack of resources for this purpose limit the fulfilment of their duties with irreversible consequences to indigenous peoples: "7.12 (...) the exercise of protecting indigenous lands carried out by the main responsible institutions (Funai, DPF and Ibama) amasses the operational deficiencies of each agency together with the difficulty of working in an articulated manner; and 7.13. (…) Predatory actions have occurred for decades, with damaging and irreversible consequences to the communities. Failure to provide assistance to communities is also indicated as a cause of the invasions."[36]

For this reason, due to indigenous peoples' desire to protect their lands as a way of preserving their cultures and livelihoods, indigenous peoples frequently take on the responsibility of environmental protection tasks through their own organizations, with support from civil society entities and sometimes with some backing from the State. On some indigenous lands in Brazil, the indigenous peoples themselves are responsible for the direct supervision of their territories, contributing human and financial resources to an undertaking that is actually the State's responsibility.

In the Indigenous Park of Xingu, for example, indigenous peoples organized into associations like the Xingu Indigenous Land Association (Atix) have been developing partnerships with Funai and other organizations with the objective of developing a model for the protection,

[36] TCU Judgment, 1226/2008 – Plenary, DOU June 30, 2008.

Acervo/ISA

Border supervision expedition in the Xingu Indigenous Park brings together indigenous people from Atix and Funai staff.

inspection and monitoring of the land's boundaries and immediate surroundings. They undertake activities such as: the consolidation and operation of eleven surveillance stations; revitalization and cleaning of demarcation tracks; expeditions to check for trespassing; training the indigenous surveillance station heads; monitoring and mapping occupation vectors of the surroundings; mapping deforestation dynamics of the Xingu River headwaters region; and contributing to the political coordination between the Park's leaders, the environmental organizations (Ibama and Sema), and local governments.

It may be concluded that, in spite of the State's fundamental importance in the environmental protection of indigenous lands, the role that Funai and the environmental agencies play in monitoring the use of natural resources within indigenous lands does not award them the right to obtain part of the carbon credits eventually generated by REDD+ activities on these lands. Therefore, there is no law that allows Funai or any other organization to participate in the negotiation of these activities or benefits. However, since partnerships between the State and indigenous peoples are necessary for the State to successfully fulfill its tasks (especially those of monitoring indigenous lands), it is recommended that carbon projects unite the efforts of both indigenous peoples and the State and, as currently done, in partnership with Funai and other competent agencies.

Can Indigenous Peoples Commercialize Carbon Credits?

As explained, the carbon credits or other benefits resulting from forest activities carried out on indigenous lands belong exclusively to the peoples inhabiting such lands and not to the

State or to third parties. Since carbon credits are negotiable goods with economic value and derived from the existence of forests on indigenous lands in addition to the exclusive power the indigenous peoples have to enjoy them, these credits are civil accessories to a principal. As inferred from Art. 92 of the Brazilian Civil Code, carbon credits can be considered accessories derived from the forest (or from reforestation) found on indigenous land. The forest, on the other hand, is the central asset, belonging to the indigenous peoples traditionally occupying the indigenous lands. Thereby, the carbon credits also belong to the indigenous peoples.

Here the question regarding the capacity of indigenous peoples to autonomously conduct legal business transactions with these assets arises, a matter still unresolved within the Brazilian legislation.

The civil capacity of indigenous peoples was not always widely recognized, and the belief in an alleged incapacity of indigenous people still influences many relationships today. The previous Brazilian Civil Code (Law 3071/16) treated indigenous peoples as relatively incapable (Art. 6, III) and the Indian Statute (Law 6001/73) submitted them to a State tutelary regime under which the national State was the legal guardian of all indigenous peoples in the country. The Indian Statute later validated the private guardianship figure instead of public guardianship. Professor Marés concludes that this guardianship brought dire consequences because it created an instrument of oppression and abuse that the State used against the indigenous people. Indigenous patrimony was often managed by a tutor who had no responsibility or commitment to the indigenous people, but acted more in the name of other so-called public interests.[37] Additionally, inherent in the idea of guardianship is the idea that indigenous people should be integrated into the national society and that one day they would cease to be Indians. The Constitution of 1988 changed this situation, by recognizing indigenous peoples' ways of social and cultural organization, without imposing a transitional regime towards a non-indigenous way of life. This guarantee even justifies indigenous control over their lands and natural resources.

In this multicultural spirit, the New Civil Code (Law 10406/02, Art. 4, §1), replaces the 1916 Civil Code, altering the condition of indigenous peoples as relatively incapable, but leaves it to a special law to define this rule. The special law that effectively deals with the matter continues to be the Indian Statute, which still retains many of the aspects of guardianship based on alleged incapacity. For example, an old rule inserted into the Indian Statute that has not yet

[37] SOUZA FILHO, Carlos Frederico Marés. *O Renascer dos Povos Indígenas para o Direito* (The Rebirth of Indigenous Peoples to the Law), Curitiba:Juruá, 1999, p.104.

Beto Ricardo/ISA

Indigenous groups have the right to commercialize, with complete autonomy, carbon credits derived from projects undertaken in their territories.

been formally revoked, stipulates that the federal indigenous organization (the Brazilian National Indian Foundation, created by Federal Law nº 5371/67) is responsible for managing indigenous patrimony unless it can be proven that the "tribal group" that owns the patrimony has the "effective capacity" to manage the land on their own (Indian Statute, Art. 42, head).

Although there is no Federal Supreme Court decision on the constitutionality of this norm, it is practically unanimous in the national doctrine that this rule goes against the Constitution of 1988. Guardianship as stated in the existing legislation still presupposes the relative incapacity of the indigenous and purports passing their patrimony on to the State. On the other hand, the Brazilian Federal Constitution of 1988 explicitly recognizes the indigenous peoples' forms of social organization, without judging – as was the case in the prior constitutional regime – these forms of social organization to be inferior. The old tutelary regime, which permitted the State's intervention into every act of the indigenous people's civil life, was tacitly revoked by the new constitutional regime, which appointed the State to protect indigenous belongings and with the idea of public guardianship still in effect. Many authors reached the same conclusion, among them Villares, who writes:

> "Under the auspices of the old Civil Code (...) in general, the Indians were considered to be relatively incapable (...). This situation persisted until the Federal Constitution of 1988, and its Art. 232 purposely recognized Indians, their communities, and organizations as having procedural capacity, or in other words, the possibility to be a legitimate party able to enter into court to defend their rights and interests (...). According to the illustrious jurist Humberto Teodoro Júnior, 'as a general rule, the capacity that the party must possess in order to go to trial is the same capacity

required for the acts of civil life, that is, practicing legal acts of substantive law (CC, Arts. 9 and 13)' and 'the only people without procedural capacity are those that are not civilly apt enough to practice substantive legal acts, such as minors and the mentally ill' (...), Thus, if the Federal Constitution of 1998 recognized their procedural capacity, this also implied recognition, in a broad manner, of the full legal capacity of the indigenous people, their communities and their organizations."[38]

This understanding is reinforced by the right to self-determination, recognized by Convention 169 of the ILO, incorporated into the national legal order by the power of Decree 5051/2004 and reinforced by the UN Declaration on the Rights of Indigenous Peoples. The right to self-determination refers to indigenous peoples' right to control their lives and communities and to participate in all decisions that affect them within the governing structure of their national unit and within the territorial integrity of each country. Therefore, this right substitutes the old regime's idea of guardianship because it aims to protect indigenous peoples' autonomy. Article 15.1 of ILO Convention 169 recognizes indigenous peoples' right to participate in the use, administration, and conservation of the natural resources found on their lands. Such participation should be understood according to Article 26.2 of the UN Declaration on the Rights of Indigenous Peoples, which moves away from the idea of the State as manager of indigenous patrimony by recognizing that "indigenous peoples have the right to possess, utilize, develop, and control the lands, territories, and resources in their possession by way of traditional property or any other form of occupation or use, just as those that have acquired them in another way."

In addition to the international laws and constitutional principles that indicate the end of civil guardianship for indigenous people, it is clear that these people and their organizations have vast experience in autonomously practicing legal business, without the assistance from Funai or any other public agency. For example, indigenous people from many parts of the country organize themselves into associations in order to manage their collective and individual patrimonies (by selling arts and crafts, honey, plants, the administration of projects, etc.) without the need to obtain authorization or assistance from any state body. This demonstrates that these people have the full and effective capacity to manage their patrimony, which the State explicitly recognized by contributing funds to indigenous associations by means of pilot projects and as exemplified by the conventions signed by the National Environmental Fund (FNMA), among others.

[38] VILLARES, Luiz Fernando. *Direito e povos indígenas* (Rights and IndigenousPeoples). Curitiba, Juruá, 2009, p. 60.

This repeated practice created what the Civil Rights doctrine refers to as common law. The common law is also a source of law[39] and can be defined as the group of rules that originate from a generalized social practice over time, which is incorporated with the animus or conviction of obligation by a determined society. Since contracts and other civil acts undertaken by indigenous people are generalized and repeated, with no objection from society or the State, we can confirm that a legal recognition exists regarding the full civil capacity of indigenous people, corroborating statements made in the Federal Constitution.

Therefore, even though Art. 42 of the Indian Statute is understood to be in effect, indigenous peoples and their organizations should not need to solicit authorization from Funai, or any other agency, in order to exploit or stop exploiting their forests, or to sell or not sell carbon credits resulting from the correct management and protection of the forests. However, although it is not a requirement, we suggest that Funai be informed about any new project in a timely manner.

On Activities Undertaken with Non-Indigenous Partners

Another issue emerging from the analysis of indigenous peoples' capacity regarding the ownership and negotiation of benefits derived from forest projects on their lands is the possibility of carrying out such projects in partnership with non-indigenous people or even with indigenous people from other regions. This could lead to the creation of a joint- ownership regime formed with the existing titles. To illustrate this, we shall consider a real case study.

For some time, there have been doubts as to whether the indigenous are able to market the natural resources on their lands and if the Constitution would only guarantee their use for subsistence or for direct consumption, forbidding their appropriation by third parties, even when consented and onerous.[40] This doubt resulted from an ambiguous interpretation of the constitutional text, which linked exclusive usufruct to exclusive consumption. By stating that

[39] Law Decree 4657/42, Art. 4. (Law of Introduction to the Civil Code).

[40] It is set forth in Article 3-A added to the Forest Code (Law 4771/65) through Provisional Order 2166/2004 that the exploitation of forest resources on indigenous lands may only be carried out by the indigenous communities through sustainable logging, to meet their subsistence demands, pursuant to Articles 2 and 3 of said Code. Nevertheless, there has been a consolidated understanding that the indigenous exploitation of resources on their lands is not limited to the traditional activities directly linked to their livelihood. The principle of non-discrimination, ratified by the Federal Constitution of 1988 regarding indigenous peoples, is applicable here since it recognizes the autonomy of indigenous societies' social organization, respecting and protecting their assets.

indigenous peoples could only have use of the natural resources, the Constitution was interpreted to mean that they could not sell such resources, nor turn them over to a third party. However, such reasoning distorted not only the notion of usufruct but also the very concept of the constitutional text which, far from imposing unreasonable restrictions or excessive guardianship, sought to guarantee indigenous communities the possibility of using the resources on their lands as they see fit, avoiding the possibility that third parties might take possession of them as has been the case since the beginning of the national territory's colonization.

Article 24 of the Statute of the Indian (Federal Law 6001/73) determines the framework for the exploitation of natural resources on indigenous lands and guarantees indigenous peoples their exclusive usufruct. It comprises the right to ownership, use, and perception of all the possible functions of their occupied lands, including products resulting from the economic exploitation of natural resources. On this point, renowned Professor Marés clarifies that the notion of exclusive usufruct of indigenous lands and their natural resources does not forbid the indirect use or the provision of external and contracted labor to exploit the territory's resources. He highlights the collective nature of said indigenous exclusive usufruct right: "Exclusive usufruct only means that it is nontransferable to any individual and that the products resulting from any use or work or income shall always be shared, belonging to the indigenous community that may collectively use them."[41]

Today, there is no doubt that in Brazil indigenous people, as other citizens, may market the goods produced on their lands if they also observe the general rules concerning environmental protection that apply to everyone. In the case of the Forest Management Plan for the indigenous land Xikrin of Catete in the state of Pará,[42] the President of Funai submitted an opinion confirming that the indigenous people could indeed exploit their natural resources in non-traditional ways. The president of the State indigenous body stated that the Xikrin management project truly represented an alternative to illegal and predatory exploitation of the forest riches found in indigenous areas. He explained, "The constitutional text did not intend to restrain indigenous communities in economical straitjackets, withholding from them all possibilities of obtaining a minimum level of autonomy through their own means and resources."[43] Therefore, saying that

[41] SOUZA FILHO, Carlos Frederico Marés. *O Renascer dos Povos Indígenas para o Direito* (The Rebirth of Indigenous People to Law), Curitiba:Juruá, 1999, p.122.

[42] Indigenous Land Xikrin of Catete, ratified by Presidential Decree nº 384 of December 22, 1992.

[43] Ruling from the President of Funai from April 12, 1996, in Process 1376/96, item 3, p.93.

indigenous peoples are prohibited from commercializing their resources – including carbon credits generated by forest projects – would represent an unjustified discrimination, which is prohibited not only in the Brazilian Constitution (Article 5), but also in ILO Convention 169, the UN Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights. Indigenous peoples have the right to free, prior and informed consent regarding decisions on matters pertaining to them. In this same report, Funai states that, although indigenous usufruct differs from common civil usufruct, it also (to regular civil usufruct) retains the essential nature of material right and therefore admits the constitution of a personal right upon itself (...) and here lies the possibility of renouncing the exercise of usufruct, be it free or onerous."[44]

Therefore, if the projects on indigenous lands are to be executed by indigenous peoples in economic partnership with third parties, there might be, by contractual arrangement and free, prior and informed consent, a division of the credits generated by common activities, as in any other partnership based on the economic use of forest resources. As previously seen, the protection of indigenous lands in Brazil, with the guarantee of permanent tenure and exclusive usufruct, is crucial to ensure the physical and cultural survival of indigenous peoples, and should always respect their social organization, customs, and traditions, in addition to their self-determination. Thus, this special protection must not restrict indigenous peoples' rights and freedoms in any way, let alone affect their decision-making power and control over their property.

This, however, in no way implies the shared use of forests, which is exclusive to indigenous peoples by constitutional determination. No partnership may presuppose that the control over forest use be carried out by anybody other than the indigenous communities, nor may it ever prohibit them from using or inhabiting such areas. Indigenous peoples can voluntarily hand over their right to deforest and develop areas for an alternative use of the soil, as will be seen below, but they cannot contractually commit to the cessation of their traditional activities (such as hunting, fishing, clearings for planting and villages or houses etc.), particularly when the contracts are long-term and involve future generations. Under no circumstances can the forest or indigenous lands be offered as collateral to guarantee the contract's fulfillment, because these are unalienable, unseizable, and unavailable for third party use as seen above and by express constitutional determination.

[44] Ruling from the President of Funai from April 12, 1996, in Process 1376/96, item 5, p.93

Indigenous Collective Ownership

Finally, with indigenous land being recognized as land where the permanent tenure has been held by one or more peoples traditionally inhabiting such lands, the ownership over the exclusive usufruct of the natural resources must also be collective. Article 40.II of the Indian Statute (Law 6001/73) states that the tenure and usufruct of lands exclusively occupied by indigenous groups or communities define the ownership of indigenous patrimony. Thus, any forest project that generates carbon credits or other benefits can involve one or more indigenous groups or communities, depending on which indigenous land(s) are chosen for the implementation of said projects.

In this case, the different indigenous groups or communities involved may decide on the form of indigenous collective ownership or co-ownership of the rights over said resources and benefits derived from them. The choice of the benefit-sharing manner will solely depend on the style of representation and organization of the indigenous groups involved. It may be defined, for example, based on a division of the tasks that culminate in the generation of carbon credits, or based on the location of the forest and groups within the indigenous territory, or according to the social arrangement that indigenous groups or communities have entered into, or based on any other collective form of ownership in order to guarantee that the benefits are distributed among the groups in a way that is harmonious with indigenous principles, values, and traditions.

Depending on the social arrangement of the peoples and communities involved in implementing forest carbon activities on indigenous lands, it is possible to divide benefits among the different groups, but not among the individual group members. Ownership over the lands and natural resources is always collective in the case of indigenous lands and so should be the ownership of benefits derived. This hypothesis is similar to the concept of homogenous individual rights, because it refers to ownership by various identifiable groups, who themselves bear the characteristics of trans-individual collective representations. Collective indigenous representation could therefore occur through associations, legal entities, or representatives indicated by the different indigenous peoples and communities involved.

Thus, the collective ownership of carbon credits generated on indigenous lands can have various possibilities of dividing the corresponding benefits. In the case of carbon credits originating from REDD+ activities and considering the baseline proposal of the legal reserve from the Forest Code together with the consequent supervision of the land's entire area in order to verify additionality, we would be able to conclude that all indigenous peoples bearing the rights over these lands are the owners of said credits.

The reason for this is that, in order for REDD+ to be duly computed, monitoring indigenous activities in the entire indigenous area, from fire control to clearing fields for planting or building villages; and monitoring the forests throughout the entire area of one or more indigenous lands is necessary. These measures would avoid the limitations imposed on the indigenous way of life by guaranteeing the freedom of choice regarding the use of the soil throughout the territory, for example, while also keeping indigenous lands from being sub-divided by use-restrictions based on non-indigenous perspectives. However, we believe that questions about the best way to distribute benefits coming from such activities may still arise. One of the options for dealing with such questions would be to link these benefits not only to the ownership of the credits and forests, but also to the responsibility and execution of the activities that contribute to emission reductions. These benefits would therefore be proportionally distributed among all those involved, according to the understanding of the indigenous groups involved.

Also, regarding forest recuperation activities, a division of carbon credit benefits could exist based on the recognition of ownership over natural resources held by an indigenous people or community, depending on an internal arrangement, and taking into account the responsibility for the activities and area designated for the reforestation project.

In general, the collective interest of indigenous people – mutually joined as indigenous people or peoples of the same land –resembles stricto senso collective right in as much as they are individuals united by a social relationship (traditionally occupying the land) and the object

Ana Laura Junqueira/ISA, 1996

Assembly of the Federation of Indigenous Organization in Rio Negro (Foirn), S. Gabriel da Cachoeira, AM. REDD projects within indigenous territories require collective decision-making.

of their interest is indivisible (Law 8078/90, Art. 81, II). Therefore, it would still be possible to distinguish the ownership held by different groups from within the same indigenous people, if they occupy different lands or areas within indigenous lands that are contiguous. So, collective ownership entails the division by peoples, groups or communities, depending upon the indigenous organizational structure.

In case there is a multiplicity of indigenous groups or peoples on the same indigenous land, the collective representation for enjoying the rights over the natural resources (as, for example, carbon credits from forest projects) shall follow the indigenous social form of organization, respecting the indigenous uses, customs, and traditions, as set forth in Arts. 231 and 232 of the Federal Constitution. It is possible that in such a case, a peculiar situation of collective rights arises: from the point of view of the individuals in relation to their people, and between the peoples identified as holding the ownership over the land and its natural resources. (Law 8078/90, Art. 81, II and III).

Some Concerns Regarding REDD+ Projects

In the international debate on the REDD+ mechanism, various opinions exist regarding the impacts that said mechanisms have on indigenous peoples' rights. It is certain that climate change will directly and disproportionately affect indigenous peoples.[45] Therefore, indigenous organizations are making an effort to keep the new REDD+ mechanism from becoming a perverse incentive to benefit those responsible for deforestation and producing unfair results for indigenous peoples.[46]

Based on the reflections of indigenous organizations, it is essential that indigenous peoples participate in the process of design and implementation of a REDD+ mechanism. Also, initiatives beyond REDD+ should be discussed and all of them should be based on the UN Declaration on the Rights of Indigenous Peoples. As stated in this chapter, the fundamental requirement for REDD+ or other forest mechanisms related to climate change is that it respects and promotes indigenous peoples' rights.

One of the major concerns regarding REDD+ is the threat that carbon credit negotiation poses to indigenous peoples' guarantees over their lands and resources. The reasoning behind

[45] See debates from the UN Permanent Forum on Indigenous Issues: http://www.un.org/esa/socdev/unpfii/en/climate_change.html.

[46] Tebtebba, Guide on Climate Change and Indigenous Peoples, Philippines, 2008.

this is that the legal systems in some countries, particularly in Africa and Asia, do not sufficiently recognize and protect indigenous peoples' rights over their traditional lands. Under a weak domestic legislation for indigenous land tenure protection, these peoples can be subject to significant abuse.[47] For instance, it is feared that the States would ignore indigenous ownership over their lands and resources as well as internationally recognized fundamental rights and then proceed to negotiate carbon credits deriving from forest activities without the due consultation and participation of the indigenous peoples inhabiting the lands. Due to the valorization of carbon in probable new REDD+ mechanisms, the possibility of increased speculation on indigenous lands is substantial and cause for concern. Such scenarios are disconcerting because they are often followed by a significant amount of conflicts and violence between indigenous peoples and speculators, as well as between indigenous groups themselves, trivializing the special relationship the indigenous have with the lands and natural resources.[48]

Regarding indigenous lands in Brazil, the indigenous peoples have constitutionally recognized original rights over their lands and resources, and permanent tenure with exclusive usufruct is offered to the indigenous peoples living there. The State has promoted administrative demarcation of indigenous land for the permanent and exclusive use by indigenous peoples. In order to guarantee the enjoyment of said rights, indigenous peoples have been developing important protection activities at their borders and other efforts towards environmental conservation. Therefore, according to the domestic legal ordering and including the de facto situation of indigenous lands, subject to forest projects generating GHG-reduction credits, and considering the restrictions placed on the exploitation of mineral and hydrological resources, the indigenous would not be subject to the State's interference regarding the decision-making that affects their lands.

The remaining questions concern the division of the activities and benefits between the indigenous lands and within the different communities. It must be taken into account that carbon credit ownership is collective and that the form of social organization of each society involved should be respected. It is therefore important that the criteria for dividing tasks and benefits be decided in collaboration with the people involved and that the mechanism's proposals value the collective aspect of the initiative. Proposals should also take into account the length of time

[47] Forest Peoples Programme, Indigenous Peoples' Rights and Reduced Emissions from Reduced Deforestation and Forest Degradation: The Case of the Saramaka People vs.Suriname, 2009. http://www.forestpeoples.org/documents/ifi_igo/suriname_saramaka_and_redd_judgment_ mar09_sp.pdf

[48] Tebtebba, Guide on Climate Change and Indigenous Peoples, Philippines, 2008.

required before the benefits may be reaped and provide ensure the fair distribution of resources for the activities involved. It is also important to define the roles to be played by Funai, other State agencies and private institutions as collaborators and partners, in accordance with the decisions made by the involved indigenous groups. A mechanism of indigenous consultation guaranteeing information and freedom to consent is also essential to guarantee that no indigenous right is violated.

Final Conclusions

Based on the above, we conclude the following:

a) There is nothing **within the scope of Brazilian national or international law that prohibits the undertaking of Reduced Emissions from Deforestation and Forest Degradation or reforestation activities on indigenous lands**, as long as these are in harmony with the traditional use of forest resources as executed by these peoples and respect indigenous peoples' rights. Such activities shall be endeavored by the indigenous peoples themselves and through broad internal accord and external consultation. No activities developed in indigenous lands have the prerogative to interfere in the indigenous peoples' ways of life or affect indigenous peoples' physical and cultural survival;

b) **Only indigenous peoples may be the owners of these types of activities or projects**, since only they have the power to use the lands in their territories, even though the lands are of State ownership, which in the case of indigenous lands, is considered bare ownership;

c) As a result, **it is not possible for third parties to carry out Reduced Emissions from Deforestation and Forest Degradation or reforestation activities and projects within indigenous lands**, nor can the Federal Government or any of its federal bodies do the same, for these lands are designated for permanent tenure and exclusive usufruct by indigenous peoples, as set forth by legal and constitutional provisions;

d) Since **indigenous peoples** are the only ones with the power to carry out REDD+ or reforestation activities and projects within indigenous lands, **they are thus the only possible owners of eventual carbon credits or other benefits derived from these activities**. Although no rule exists in the national legislation on the carbon credit market (CDM) it is safe to assume that the ownership of credits should be derived from the ownership/responsibility of the activities that generate a reduction in emissions, meaning the power of disposition over the land;

e) **Although Funai and other federal institutions (Ibama, Federal Police, etc.) possess special authority to protect indigenous lands** from invasions and any other types of trespassing that cause environmental damage, **they would not be able to claim ownership of carbon credits or other benefits derived from REDD+ activities or projects**, since these are not only derived from containing illegal deforestation, but mainly from the decision of the indigenous peoples themselves not to deforest. Indigenous lands are not untouchable areas and so the decision for the preservation of its forest resources is a result of indigenous peoples' choices. Referring to containing invasions and deforestation by third parties, the operation of public agencies stems from the regular exercise of administrative police power, the same power rendered to private lands or from other federative organizations, making the assumption that the State would be co-owner of all the carbon credits in the country derived from REDD+ unreasonable;

f) Even though they are not able to claim ownership of carbon credits derived from REDD+ activities or projects carried out on indigenous lands, **it is vital that these activities or projects include the support and partnership of Funai and other supervising organizations**, with the purpose of potentializing the monitoring and protection of their territories, as already the case on various indigenous lands in Brazil today;

g) **Nothing in the Brazilian national or international legislation refutes indigenous peoples and their organizations as the legitimate owners of emission reduction activities or projects and their ability to negotiate the credits derived from such activities**, since ILO Convention 169, the Federal Constitution, and the customary right all recognize the full civil capacity of indigenous peoples in addition to their right to self-determination, which means that **there is no need for any public organization to authorize or supervise such transactions**;

h) The carbon credits derived from forest projects developed on indigenous lands belong to the indigenous peoples, groups or communities that have permanent tenure with the right to exclusive usufruct over the resources from the area in question; **regarding the areas that are objects of study and that harbor different peoples and communities, a prior agreement must exist between the communities involved and the creation or use of one or more legal entities that may represent these peoples in legal affairs**.

This is the opinion.

Brasilia, April 2010.

The Surui project: Building Indigenous Peoples' Capacity for Informed Engagement with REDD Finance

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Introduction

The Paiter indigenous people, known as the Surui of Rondônia, a tribe that currently has approximately 1,300 members, made contact with Brazilians of European descent for the first time only 40 years ago. The four clans of the Surui tribe live within a territory of 248,147 hectares in the Amazon rainforest that straddles the border between the states of Rondônia and Mato Grosso in western Brazil. In the 1980s, the federal government intensified incentives for the exploitation of what was still a fairly unexplored region through a massive colonization project partially financed by a US $1.55 billion loan from the World Bank, the Northwest Brazil Integrated Development Program, or *Polonoroeste*, building the interstate highway BR-364 linking the capital cities of Cuiaba to Porto Velho and subsidizing economic development throughout the region (Borges, 1991). The result was an onslaught of timber and agricultural operations in the region which led to drastic deforestation; about 27,000 square kilometers, or 11% of the forests in the state of Rondônia alone were destroyed. While the Surui territory was demarcated in 1983, resulting in its conservation, the frontier of anthropic pressure now reaches its very border in alarming proportions.

Although protected by Brazilian law, in practice, these forests are under continued threat.Settled lands surrounding the boundary have been almost entirely deforested already, and lack of alternative income creates continuing pressure on the existing forests. The Surui have to date been successful at holding the line against deforestation pressures, with only 7,000 has cleared (Cardozo, 2008). However, the Surui are likely reaching a tipping point as illegal logging

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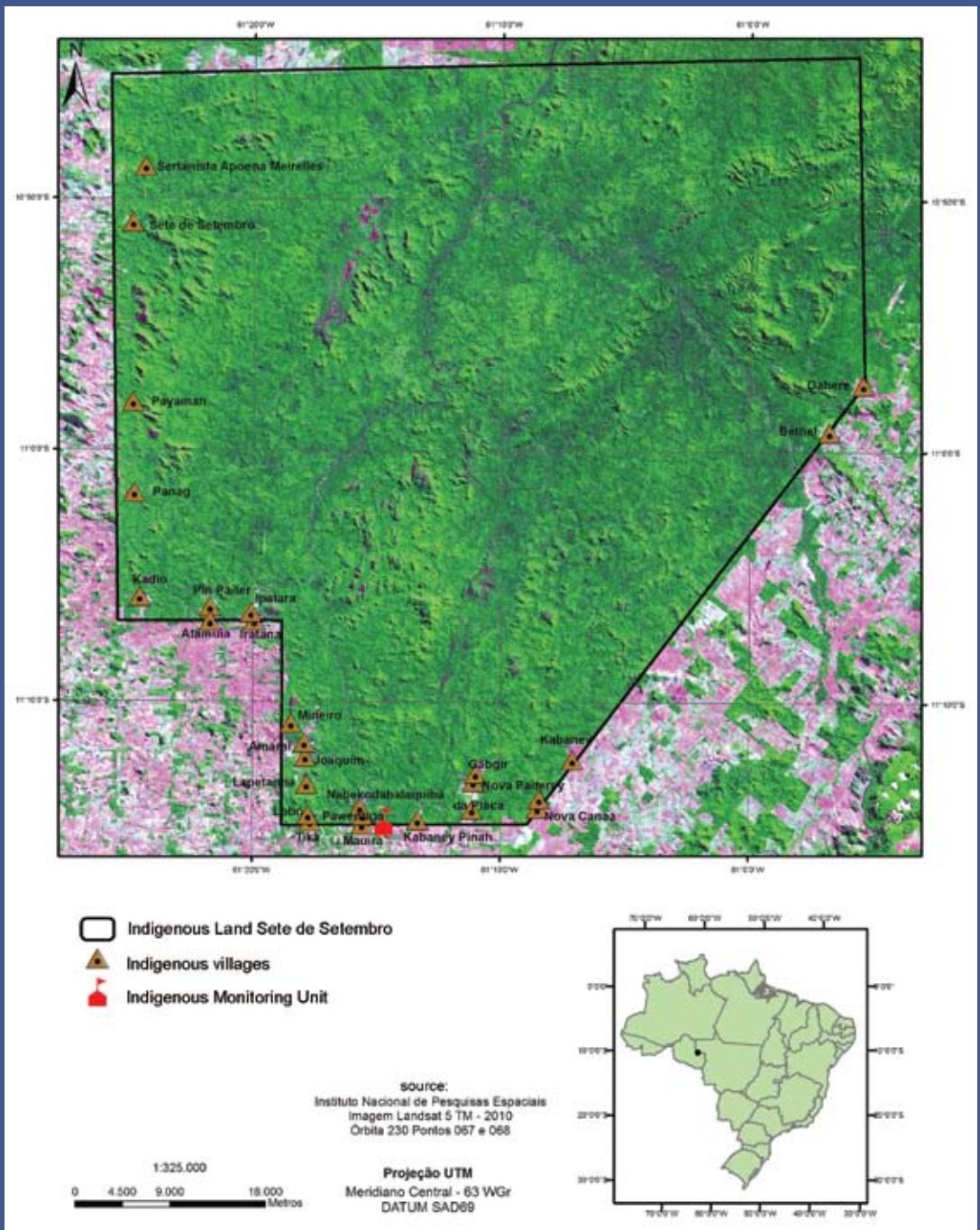
Surui villages in the Indigenous Land Sete de Setembro



has decimated much of their forest. Continued population growth (estimated at 4% per annum) and increasing need for income as younger Surui become more deeply enmeshed in dominant Western culture could represent a bleak future. With most of the surrounding forest already converted to agriculture or grazing lands, the Surui are under increasing pressure to open up their lands to similar activities – often through partnership or sharecropping arrangements that provide capital for forest conversion.

Forest carbon finance that recognizes the value of standing forest could tip the balance to maintaining this and other large tracts of indigenous forests in ways that favor biodiversity and cultural survival. However, as with any new mechanism or any engagement with markets by indigenous peoples, these sorts of REDD mechanisms are not without risk. Strong tenure rights, improved governance, informed decision-making, as well as the indigenous people leading the process, are essential, if these mechanisms are to strengthen, rather than further undermine, indigenous rights and their future as peoples.

The risk of other alternatives, however, is surely at least as great in the case of the Surui – loss of forests and territorial control driven by markets in products like beef, timber, and soy. Throughout the Brazilian Amazon's arc of deforestation, indigenous peoples are facing critical and probably irreversible decisions. The Surui have chosen to work with a group of institutional partners to explore the potential for REDD finance to contribute to protecting their forests, with important lessons for other groups across the Amazon.

Partnership for REDD

With the support of Associação de Defesa Etnoambiental Kanindé, Aquaverde and United States Agency for International Development (USAID), the Surui initiated a reforestation project in the Sete de Setembro indigenous territory, with the objective of recuperating 7% of the deforested area that was identified by Metareilá and Kanindé. In late 2007, Almir Surui, the internationally-recognized leader of the Surui, approached Forest Trends' Communities and Markets Program to seek support to increase the area of the reforestation. Forest Trends offered to assist the Surui in exploring the possibility of funding their reforestation efforts through carbon finance and began a feasibility assessment working with the Associação Metareilá do Povo Paiter-Surui (Metareilá Association), an organization representing the Paiter-Surui. While the initial focus was on generating credits through carbon sequestration from reforestation of the Surui territory using native-species reforestation, the feasibility assessment concluded that a REDD project was likely to prove a much more powerful tool for protecting the territory and its forests.

At that point, the Surui project was selected to receive intense technical project development support by Forest Trends' Katoomba Incubator Initiative (Katoomba Incubator) which provides comprehensive technical and financial support to bring promising projects with a strong community and biodiversity focus to market, while informing policy and building local capacity. The Incubator focuses primarily on communities and small to medium landowners, a sector that plays a critical role in providing ecosystem services but faces particular barriers and challenges to finance. By supporting these projects with technical and business know-how at an early stage, the Incubator enables communities and others to engage in an informed and equitable manner with market mechanisms, reducing risks and enhancing benefits for all participants.

In order to construct the REDD approach for the Surui project, the Metareilá Association and Forest Trends identified a series of partner organizations to assist in specific components of the project design. These organizations were selected based on their core expertise, proven reputation, as well as by their close association with either the Metareilá Association or Forest Trends, namely the Associação de Defesa Etnoambiental Kanindé, Equipe de Conservação da Amazônia (ACT Brasil), the Instituto de Conservação e Desenvolvimento Sustentável do Amazonas (Idesam), and, more recently, the Fundo Brasileiro da Biodiversidade (Funbio). This careful selection of project partners, in addition to bringing high-quality expertise to the design and implementation of the project, was among the key recommendations in a legal analysis to implement the project, where the Metareilá Association is the project proponent, and the other organizations described, including Forest Trends, are project partners.

A Memorandum of Understanding was created and signed by these organizations, explicitly describing their responsibilities and expectations with the Surui REDD project, representing an essential requirement for project design as well as for eventual certification under the Climate, Community and Biodiversity Standards. The Memorandum which describes the technical cooperation between the parties, also clearly states that all the rights to certified emission reductions (CERs), or verified emissions reductions (VERs), as well as any economic benefit from the payments for environmental services of the Surui people belong exclusively to the Surui people themselves. Moreover, the Memorandum states that any decision about the transfer or sale of the right to carbon credits will be formalized by a separate and specific contract, based on the traditional decision-making process of the Surui, including the participation and consensus of their representative clans, proposed and negotiated by the Metareilá Association, which is the legitimate project proponent and that operates in compliance with all appropriate legislation.

Reducing Risks: Framework for Project Development and Effective Indigenous Engagement in REDD

While the threats of deforestation are clear, present, and widely recognized throughout the Amazon, the REDD finance frameworks to address them are still taking shape, presenting both the Surui and any potential investors with an array of risks that make long-term commitments challenging.

Internationally there is a global consensus about the need for action to reduce forest loss, the need for significant financial flows, and the central role of national government-led approaches to setting baselines and monitoring emissions reductions. However, how finance will be distributed and flow to the communities and landowners on the ground is still to be determined.

Likewise, while there is frequent mention of the need to mobilize significant private finance, there is far less clarity on how the conditions and mechanisms to make this occur will be framed, and whether this is expected to occur through government securities, project-level direct investment or other vehicles. From an investor perspective, there are market, regulatory, and delivery risks associated with carbon markets, which are more pronounced for REDD (a new asset class not recognized to date under climate change agreements) and for an indigenous project in an area undergoing rapid cultural and economic change.

The Surui likewise face risks – with more significant consequences – in staking the future of their forests and local economies on REDD commitments in a climate of uncertainty. How does REDD compare to their other options? How does it align or conflict with their development aspirations as a people? What are equitable and sustainable terms in market and policy context where the only certainty is extremely dramatic change over the next few years?

This cumulus of risks for all parties tends to urge caution, and yet the imminent threats of deforestation require bold action and significant finance in the short term. This requires of the Surui that they build capacity to take informed decisions rapidly, and investing in a process for reducing the risks of potential transactions for all parties. For the Surui, only by fully understanding their rights, options, and the potential value of the resources under their control, can they effectively engage in and shape REDD finance. Many issues need to be worked through at a high level, in the UNFCCC negotiations, in Brazilian and other national policies, but these decisions – and certainly those of the Surui about their forests and their future – are best informed by looking at the specifics of local contexts.

The Surui have been working with the partners described above to build capacity, tools, and information to make informed decisions about whether and how to participate in REDD

mechanisms, be these market transactions or government programs. To this end, the Surui are engaged in a process built around five key activities, which are likely to be relevant to many indigenous communities considering REDD at the current juncture:

- Determining indigenous community rights and obligations with regards to land, forests, and carbon;
- Community consultation, participation and free, prior and informed consent;
- Strengthening the capacity of the Surui to reduce deforestation and make a long-term REDD commitment;
- Assessing the volume, cost, and value of emissions reductions;
- Structuring a deal and securing finance.

Determining Indigenous Community Rights and Obligations with Regards to Land, Forests and Carbon

Two interrelated issues of resource rights are central to REDD: tenure rights to land and forests, and the right to sign agreements governing carbon sequestration and storage.

Forest Trends commissioned landmark analyses at the request of the Surui to assess the questions relating to indigenous peoples rights to enter into agreements concerning emission reductions or removals taking place on their lands. After reviewing the Brazilian Constitution, laws, and regulations, and examining the legal treatment of other natural resources on Surui lands, lawyers at Trench, Rossi and Watanabe, an associated firm of Baker & McKenzie, (included in this book) concluded that the Surui have the right to engage in reforestation and REDD on their lands and the right to enjoy any economic benefits generated from such activities, including from the sale of credits for GHG emissions reductions and additional GHG sequestration.

A second key issue that projects and legal regimes need to address is the question of ownership rights over the lands in the project area. As many have pointed out, without clear tenure rights and demarcation, attributing emissions reductions to a landowner will be difficult, as will making necessary investments in forest management and conservation. In the worst case scenarios, the lure of forest carbon finance may drive disputes over forests and lands formerly seen as having little value. Based on the official demarcation of their territory, concluded on October 17, 1983 and signed by then-President João Figueiredo (Decree nº 88867), the Paiter-Surui have clearly been granted legal rights over their 248,147 has indigenous territory, named *TI Sete de Setembro*, ensuring the legal basis for entering into legal agreements governing their forests

Michel Pellanders/Hollandse Hoogte, 1989

Village in the Sete de Setembro Indigenous Territory, Rondônia.

Community Consultation, Participation and Prior Informed Consent

Since the beginning of the Surui carbon project there has been a concerted effort by the organizations involved to communicate all aspects of the project to the Surui, via their representative organization, the Metareilá Association, as new information and recommendations emerge. In turn, the Metareilá Association has worked within the social and political organization structure of the Surui people to discuss project development issues and priorities with the local communities, working with all four clans that represent the Paiter-Surui, namely Gameb, Gamir, Kaban, and Makor. As a result, the Surui embraced the carbon project, believing that it can provide continuation for their reforestation efforts and because of its consistency with the priorities established by their leadership, representing a real potential to support the implementation of their 50-year Development Plan (Associação Metareilá *et al.*, 2008). Therefore the initiative to start the project was their autonomous decision, and culminated in the signing of a cooperation agreement document in June of 2009 by all four clans through their respective associations. The agreement establishes that the clans will be working together to implement the carbon project, in alignment with their 50-year Plan, and that all economic benefits will be shared in a just and equitable way among the Surui communities (Associação Metareilá *et al.*, 2009).

This process of internal discussion and reflection by the Surui leading to their decision to implement the project was a rich experience of community consultation and participation that lasted close to two years. There were several internal meetings of the Surui leadership without the

participation of project partners, technical meetings with project partners, as well as community assemblies. In addition, an extensive process of 10 village-level information sessions covering 14 villages, led by ACT-Brasil and local Surui promoters also provided the opportunity in detail to discuss the nature of REDD and climate change mitigation finance, and the types of commitments they would be likely to entail. This process has been documented through an extensive archive of video footage as well as a detailed summary report prepared by ACT-Brasil (Ávila, 2009).

The signing of the cooperation agreement between the clans was a milestone in an extensive and carefully constructed, highly participative consultation process that embodied the principle of free, prior and informed consent, an important standard for respecting indigenous rights established in the United Nations Declaration on the Rights of Indigenous Peoples, acknowledged in the ILO 169 Convention, as well as a recommended best practice by the international indigenous rights community.

Strengthening the Capacity of the Surui to Reduce Deforestation and Make a Long-term REDD Commitment

The formal cooperation agreement of June 2009 signed by all four clans of the Surui to participate in the REDD project overcame initial hesitancy on the part of some clans and community members who had most directly benefited by illegal logging activities. However, it was further strengthened in a meeting of clan leaders formally stopping illegal logging activities – a moratorium and process of social control which has now held for six months – largely in anticipation of REDD finance providing alternative sources of income. Notably, the stakes are high for the Surui REDD project, as it is expected to replace the informal and unsustainable economy that the Surui were forced to adopt over the years, such as allowing illegal logging in their territory, a practice that was initially incentivized by Funai itself with the signing of contracts with logging companies in 1987 under the Presidency of Romero Jucá Filho (Borges, 1991).

Aware that illegal logging is causing the degradation of their forest resources and the resulting poverty that follows as experienced by other indigenous groups in the country, coupled with the consistent lack of services by governmental agencies, the Surui envisioned and wrote a 50-year comprehensive ethno-development program, led by Almir Narayamoga Surui among other leaders in partnership with Kanindé (Associação Metareilá *et al.*, 2008). This long-term development vision seeks to gradually improve the quality of life for the Surui people through a series of activities based on socio-environmental sustainability principles. It values and recuperates traditional knowledge and resource use, and fosters development of economic alternatives to promote conservation, food security, health, education, and cultural

revitalization. Therefore, the REDD project has been conceptualized within this framework of ethno-development, becoming a key activity to provide bridge financing for the development of additional income-generating activities, diversifying income streams based on more traditional forest commodities linked to established long-term markets. In addition, REDD financing will fund territorial surveillance, refinement, and monitoring of technical activities and strengthen the institutional capacity of the Metareilá Association and the other associations representing all four clans. It is clear that reducing the deforestation and degradation of the Surui territory is in a direct relationship with improving the communities' way of life and their ability to control their borders.

Based on this development vision and framework, the Surui REDD project has been designed through a collaborative partnership between the Metareilá Association, which is the project proponent, with a selective group of project partners, each with complementary and specific responsibilities, as follows:

➔**Associação Metareilá do Povo Indígena Surui** – The Metareilá Association is the official project proponent for the Surui REDD project. It is entitled to represent the Surui people in the design and implementation of project activities, including all external institutional relations. It provides the interface between the communities and project partners, co-designing and implementing specific project activities, such as ethno-zoning and reforestation with Kanindé, leading the socio-economic survey of the Surui communities, co-developing the overall project budget and the Surui Trust Fund with Funbio, and assisting ACT-Brasil, Idesam and Forest Trends with key information for inclusion in land-use mapping, carbon methodology, development of Project Idea Note (PIN) and Project Design Document (PDD), and other required information for project validation and verification purposes.

➔**Associação de Defesa Etnoambiental Kanindé (Kanindé)** – A partner of the Surui for 12 years, Kanindé along with ACT-Brasil, is leading the ethno- biological zoning, designing the reforestation plan and monitoring its technical implementation. Kanindé has also been instrumental in assisting the Metareilá Association in the identification of key project activities and associated budget, and supporting the Surui in the definition and construction of the Trust Fund with Funbio.

➔**Equipe de Conservação da Amazônia (ACT-Brasil)** – ACT-Brasil is assisting the Surui in the participatory planning process, as well as leading the mapping and land-use change modeling in collaboration with Idesam and Forest Trends. It also led the documentation

of the project's free, prior and informed consent process and provides anthropological expertise for the elaboration of the PDD. ACT-Brasil has been a long-standing partner supporting both local development and political engagement of the Surui. In that way, the organization has also provided legal assistance to Metareilá in the elaboration of the Memorandum of Understanding between the project proponent and its partners.

➔**Forest Trends** – Working closely with Metareilá, Forest Trends has led the overall project coordination, leveraging, to date, the bulk of investments for the Surui REDD project development. It commissioned two land-mark legal studies, based on reforestation and REDD, respectively, from the law firm Baker & McKenzie that concluded that the Surui have carbon ownership rights in their territory, a pre-condition for contract negotiations. Forest Trends is also identifying potential buyers for Surui carbon credits and recommending best contract arrangements for the Surui within a market approach, focusing on the voluntary carbon market. In addition, Forest Trends also works to create the local capacity within the Surui communities to understand the theme of payments for environmental services, particularly forest carbon.

➔**Instituto de Conservação e Desenvolvimento Sustentável do Amazonas (IDESAM)** – Idesam is developing the project baseline calculations and carbon stock estimates. This Brazilian organization was the key technical partner in developing the Juma project, the first REDD forestry project to achieve "Gold" certification status under the Climate, Community and Biodiversity (CCB Standards). Idesam is leading the writing of the Surui REDD Project Design Document.

➔**Fundo Brasileiro da Biodiversidade (Funbio)** – Funbio is a Brazilian non-governmental organization specialized in structuring and managing environmental trust funds. Funbio is working closely with the Metareilá Association to develop accurate budgets and financial projections to inform a financeable framework for the project, essentially identify overall transaction costs and break-even point. As importantly, Funbio is leading, in consultation with the Surui through Metareilá, the design and implementation of a transparent accounting system for the overall financial management and use of REDD proceeds, establishing a Surui Trust Fund.

Assessing the volume and value of emissions reductions

Regardless of how REDD finance is allocated – through markets or funds, through public incentives programs or markets, based on stocks or flows – indigenous peoples like the Surui can be empowered by information regarding the size and value of the assets they control. By understanding their contributions to fighting climate change and the costs of achieving this goal they are better positioned to negotiate and execute REDD finance.

Volume: To assess the volume of the carbon asset, Forest Trends, ACT-Brasil, Metareilá, and Kanindé have worked closely with Idesam to develop baseline models and carbon stock estimates that provide conservative, quantitative ex-ante estimates of emissions reductions potential. An initial iteration has been based on the region-wide SimAmazonia simulation model (Soares Filho *et al.*, 2006), providing useful indicative information. However, many of the drivers of deforestation in the Surui context are not readily captured by this region-wide model. Specific local factors – processes of social, cultural, and economic change within the Surui population – are determining factors that will shape how forests are maintained – or felled – in future. A model is currently under development by Idesam to describe these dynamics and provide conservative estimates of forest loss.

Conservative calculations based on these initial analyses indicate that the project should deliver at minimum 300,000 tCO_2 in reductions by 2012, rising to over 2 million tCO_2 cumulative by 2020.

Ultimately these methodologies and baselines will need to be either recognized (as 'nested' project activities) or replaced by benchmarks or reference levels at state or federal levels. It is becoming increasingly clear in Brazil and internationally that any site-specific action will need to be trued up with national or subnational accounts (Nepstad *et al.*, 2009). While these higher-level accounting systems are put in place, this project-level accounting, focused on the Voluntary Carbon Standard, provides conservative estimates to inform investment decisions for voluntary buyers and can provide useful input into these higher jurisdictional policies and accounting frameworks. Most critically they can form the basis for early finance to flow, through voluntary or pre-compliance investment, and address the deforestation threats that the Surui are facing today.

Value: Setting a price for these emissions reductions (or setting a value for the positive incentives the Surui should receive to contain deforestation, if non-market funding approaches are adopted) depends on a combination of implementation costs and opportunity costs for the Surui. Guided by the framework laid out in their 50-year Development Plan (Associação Metareila *et al.*, 2008), the Surui have identified priority short-term and long-term actions to reduce deforestation risks, requiring approximately $3 million over the course of the next 3 years, with additional long-term finance through the capitalization of an endowment fund or ongoing sale of emission reductions.

These represent the implementation costs of the project, including a significant share of finance that will be invested in long-term livelihood activities based on improvements in

agriculture and non-timber forest products. The long-term productivity and profitability gains, coupled with flows from carbon finance, need to be greater than perceived opportunity costs. Initial data on alternative land uses and the level of finance that the Surui have identified as needed to provide alternatives to deforestation indicate that the Surui project could be carried out within the current range of voluntary carbon market prices (Hamilton *et al.*, 2009 & Hamilton *et al.*, 2010).

However, this is not solely an economic calculation, since carbon finance for the Surui is also a mechanism for ensuring the survival of their society, culture, and forest – not simply a comparison of the relative economic returns from alternative land-use options.

Structuring a Deal and Securing Finance

The Surui Carbon project has been prepared to secure finance in the voluntary carbon market, since there is for the time being no compliance market that would recognize REDD emissions reductions generated by the Surui. However, the project ultimately aims to provide compliance-grade reductions as these mechanisms and markets mature.

The project is currently being discussed with a series of potential investors. Contacts and advice are being provided by the Katoomba Incubator and other partners, but the key decisions regarding commitments and terms rest with the Surui as the owners of the forests, as secured by their constitutional rights of permanent possession over their territory and exclusive usufruct and economic benefits thereof.

A key challenge is striking a balance between the immediate opportunity to reduce deforestation and the longer-maturing processes of regulatory certainty in Brazil and around the world. Different approaches and structures are being explored to allow for flexibility and equitable outcomes, to reflect uncertainty about future prices and value of these emissions reductions. Terms must simultaneously account for risks to investors – for example that project-based carbon transactions are not recognized by markets or regulators – while also allowing the Surui to ensure as large a share of future forest carbon value as possible.

While the focus has been on preparing the project for a voluntary market buyer, the nascent state of REDD policy and emissions markets means that public or government-mediated finance may play a predominant interim or long-term role. Brazil's Amazon Fund was created as a mechanism to channel international financial contributions in support of the country's voluntary commitment to reduce deforestation and could also potentially be an important source of non-market finance for projects like the Paiter-Suruí, as could emerging state-level initiatives (BNDES,

2009). The Surui are also engaging with state and federal processes to explore possibilities of securing comparable levels of finance to meet their goals as a people through non-market mechanisms.

Some Key Challenges & Opportunities

Rewarding stocks and flows

Indigenous communities own and manage 21.7% of the Brazilian Amazon's forests (Filho *et al.*,2009), and according to the Amazon Environmental Research Institute (Ipam), roughly 27% of the Brazilian Amazon's forest carbon stocks are found on indigenous lands, approximately 13 billion tons of carbon. However, indigenous communities have traditionally been responsible for a relatively small proportion of Amazon deforestation and greenhouse gas emissions. In general, this history of good stewardship works against indigenous communities, if positive incentives for REDD are based on methodological approaches that use historical trends to establish a baseline. To the extent that they have not generated emissions in the past, it can be argued that there is little potential to reduce emissions in future.

The moral and equity implications of this are troubling, a concern expressed by the Coordinating Body of Amazon Indigenous Organizations:

> We are concerned that the post-2012 REDD regime may be used to compensate those that have always cleared our forests: large producers of soy, cattle, and biofuels. We demand that REDD and other mechanisms for compensation for the reduction of carbon emissions prioritize rewarding and distributing benefits to the Peoples who conserve the forest and have resisted economic pressure to deforest (Coica 2009).

Though problematic, this focus on reducing future potential emissions is central to the overarching climate change objective – only by truly shifting the world's development trajectory onto a path that emits fewer greenhouse gases can we reduce the risks of catastrophic climate change. The emerging consensus around REDD+ which encompasses incentives for both emissions reductions and maintenance of existing forest stocks, provides a helpful broadening of the frame, but how incentives will ultimately be allocated, especially within countries, is still very much to be determined.

In the case of the Surui, there are real, demonstrable risks of deforestation and future emissions – because they are so clearly located on the jagged edge of the agricultural and ranching

frontier. These emissions reductions should be incentivized. At the same time, many indigenous communities with less accessible territories have less potential for an avoided deforestation project. Compliance market mechanisms will almost surely focus on emissions reductions, and it will require sound policy, public finance, and redistribution mechanisms to recognize and reward maintenance of forests with less immediate or evident deforestation threats.

Lowering transaction costs

Abatement costs from REDD are frequently described as low (Stern, 2007; Eliasch, 2008; McKinsey & Company, 2009) but actually securing those reductions may have higher-than-expected costs. Some of these may be attributed to project-level approaches that involve complex and expensive baseline modeling work, carbon stock assessments and development of validated Project Design Documents. These costs are likely to fall as standardized methodologies become prevalent and a growing number of service providers enhance supply and competition for this technical work. Even with costs that can rise to $300,000 - $500,000 or more per project, they are probably not prohibitive for medium-scale projects in a liquid market with greater regulatory certainty.

On the other hand, these technical design costs, repeated over many projects, are inefficient, time-consuming and still plagued by uncertainty. The adoption of standardized benchmarks or national or state-wide reference scenarios would be one of the most promising avenues, especially coupled with high-resolution remote-sensing based monitoring.

However, many costs are likely to be unavoidable under any approach to the extent that establishing and enforcing long-term agreements for forest conservation with collective landowners require a process of preparation, planning, and prior informed consent, structuring of strategies and financing that is transparent, effective and sustainable, and legal agreements to be established and enforced. In this sense, indigenous communities' eventual engagement with carbon markets is no different than more established markets for agricultural or forestry projects – making a long-term endeavor work, ensuring equitable terms and achieving sustainability requires a great deal of effort and dedication and probably ongoing, leveraged investments in capacity building.

Recognizing rights - and watching the accounts

Legal opinion clearly supports the rights of the Surui and other indigenous communities to the carbon and associated economic benefits from their forests. Achieving government recognition of this is important. However, how these emissions reductions are eventually tallied

will be critical, given that eventual climate change agreements, both under the UNFCCC and other bilateral or subnational instruments (e.g., proposed Waxman-Markey Bill in the United States, California ARB 32), place strong emphasis on national and subnational accounting frameworks as a condition for REDD finance. Project-level baselines and accounting frameworks can provide a useful interim mechanism to estimate and demonstrate emissions reductions potential, but ultimately how state or national schemes account for and allocate these emissions reductions will be critical. This has both the potential for positive outcomes – simplifying procedures and rewarding stock maintenance for areas that would otherwise be excluded – or negative results, if these mechanisms do not adequately reflect the risks and costs of avoiding deforestation by indigenous communities. Beyond rights, increasingly informed participation by indigenous organizations in defining these frameworks will be key to fairness and effectiveness.

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Legal Aspects of the Surui Carbon Project

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Introduction

This article summarizes the main legal aspects of Surui Carbon project[4] regarding whether the Surui Indians[5] of Brazil may legally be entitled to transact carbon credits for (i) Greenhouse Gas (GHG) emission reductions from reforestation and (ii) reduced emissions from deforestation

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[4] The Suruí is a Brazilian Indian group that currently has approximately 1,300 members, comprising four clans – Gamep, Gamir, Makor and Kaban (hereinafter referred to as Suruí Community) - in the Amazon Biome. According to information provided by Forest Trends, the objective of the project is to restore 1,500 hectares of Amazon Rainforest within the "Sete de Setembro" Suruí Indian lands, located between the municipalities of Cacoal (Rondônia state) and Aripuanã (Mato Grosso state). The project activities will sequester carbon dioxide, while protecting local biodiversity by restoring habitat, and contributing to the sustainable development of the Suruí by building local capacity to manage forestry operations and through the establishment of an information technology center within the Suruí land.

[5] Please note that the use of the terms "Indians" (as defined in the Longman Dictionary of Contemporary English, Longman, 1987, pg. 533, to refer to the group of native inhabitants of North, Central and South America) and "Indigenous Peoples" are indiscriminately used in several legal documents referred to in this work. However, this distinction is extremely important under the Brazilian Constitution, which uses the term "Indians" to regulate the protection of rights of the Brazilian Indians. See discussion in the decision ("Voto") of the Brazilian Supreme Court Judge Ministro Carlos Ayres Britto, in items 51-54 and 69, available at http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/pet3388CB.pdf, where the term "Indians" is indicated as the appropriate one to reflect the Brazilian Constitution's principles regarding the unity of the Brazilian nation formed by three major ethnic groups (Indians, White Colonizers and African-Americans). Whenever possible, we will use the term Brazilian Indians in the course of our analysis.

and degradation[6] (REDD) on their lands. It relies upon two legal opinions[7] commissioned by Forest Trends in their capacity of assisting the Surui Community in coordination with Associação Metareilá do Povo Indígena Surui (the Brazilian non-profit organization headed by Mr. Almir Surui, one of the Chiefs of the Surui Community).

Our legal analysis used as point of departure the international and national regime on climate change, in order to establish that there is no impediment to the direct participation of Brazilian Indians in the implementation of Greenhouse Gas (GHG) emissions reductions, sequestration or conservation projects.[8] In particular, we focused on market-based mechanisms such as the Clean Development Mechanism (CDM) under the Kyoto Protocol or projects under the unregulated voluntary carbon market. This initial analysis was complemented by the review of related international principles, soft law and conceptual developments such as the International Labor Organization 169,[9] the United Nations Declaration on the Rights of Indigenous Peoples[10] and The World Bank[11] which have increasingly recognized "indigenous peoples" rights for self-determination and their responsibility for protecting their lands, resources, and culture.

The confirmation of a lack of existing limitations for the participation of "indigenous people" in GHG projects under international regulations (and the related regulations for project development approval by the Brazilian Designated Authority under the Kyoto Protocol) set the stage for a thorough analysis of the Brazilian Legal Regime regarding Brazilian Indians' proprietary and self-determination rights. We looked at, in particular, the Brazilian Indians' constitutional rights and obligations in connection with the sustainable use and fruition of their lands and related natural resources, and the possible recognition of their ownership over carbon credits generated

[6] The proposed Suruí REDD Carbon project involves approximately 240,000 hectares of land.

[7] Our legal review was based on descriptions of the project provided by Forest Trends and assumptions herein stated. Our work did not include any legal due diligence of the project and this article should not be taken as legal advice with respect to the project.

[8] In light of the United Nations Framework Convention on Climate Change - UNFCCC and the Kyoto Protocol, and related national regulations devoted to its implementation in Brazil, such as the Interministerial Commission on Global Climate Change Resolutions.

[9] ILO Convention 169 – "Convention Concerning Indigenous and Tribal Peoples in Independent Countries", as ratified by Brazil on July 25, 2002 and internalized by Federal Decree Nº 5,502 on April 19, 2004.

[10] Adopted by the UN General Assembly in 2007.

[11] World Bank Operational Manual Statement (OMS) 2.34 of 1982, consecutively replaced by Operational Directive (OD) 4.20 of 1991 and Operational Polices (OP) and Bank Procedures (BP) of 2005, particularly OP 4.10.

from afforestation, reforestation, and forest conservation projects conducted on their land. This analysis examined the Brazilian Indians' constitutional rights[12] and relevant infra-constitutional legislation on Brazilian Indians[13] and environmental protection[14] as well as the emerging rules and principles on legal title over carbon credit projects in Brazil. Our legal analysis then focused on the particular aspects of the projects proposed by the Surui in their demarcated land, including their overall compliance with the legal regime mentioned above, and some requirements to be followed in connection with the proposed project design, implementation and governance, and certain aspects of its commercialization phase. Further analysis was conducted specifically with respect to the REDD[15] component of the project, including testing our major conclusions on the Surui's ownership rights over the carbon credits resulting from the project against some hypothesis regarding a future Brazilian National Policy on REDD.

In order to focus our analysis on the central issue of the Surui's rights on their demarcated lands, we assumed that:

(i) The lands that will be included in the proposed project area are within demarcated Indian lands that belong to the Surui, the boundaries of which are not subject to dispute;

(ii) Surui lands are not partial or integrally located in Conservation Units;

[12] See Articles 20, XI, paragraph 1; 225; 231; 232.

[13] See Federal Law Nº 5,371/67 (institutes the Brazilian Indian Foundation – Funai); Federal Law Nº 6,001/73 (Brazilian Indian Statute); Federal Decree Nº 1,141/94 (Measures of environmental and health protection as well as support to productive activities to Indians communities) as amended by Federal Decree Nº 3,799/01; Federal Law Nº 10,406/02 (Civil Code); Federal Decree Nº 4,645/03 (approves Funai's Statute); Federal Decree Nº 5,051/04 (turned into national law the ILO Convention 169).

[14] See Federal Law Nº 4,771/65 (Forest Code) and its Federal Decree Nº 5,975/06; Federal Law Nº 6,938/81 (National Environmental Policy); Federal Law Nº 9,985/00 (Conservation Units National System) and its Federal Decree Nº 4,340/02; Federal Law Nº 11,284/06 (Management of Public Forests) and its Federal Decree Nº 6,063/07; Federal Decree Nº 6,527/08 (Amazon Fund); Federal Law 12,187/09 (National Policy on Climate Change).

[15] REDD stands for "Reducing Emissions from Deforestation and Forest Degradation". This concept was first placed on the agenda of the Subsidiary Body for Scientific and Technological Advice (SBSTA) established under the United Nations Framework Convention on Climate Change (UNFCCC) in 2005 by Papua New Guinea (with expressions of support by Bolivia, the Central African Republic, Chile, Congo, Costa Rica, the Democratic Republic of Congo, the Dominican Republic and Nicaragua). It comprises a set of actions aimed at enhancing carbon stocks due through the sustainable management of forests, as referred to by Decision 2/CP.13 of the UNFCCC – United Nations Framework Convention on Climate Change (Decision 2/CP.13, FCCC/CP/2007/Add.1*, 8th Plenary Meeting, 14-15 December, 2007) and further developments under the UNFCC and the Kyoto Protocol.

(iii) Associação Metareilá do Povo Indígena Surui, the current representative organization for the Surui, is entitled to represent the four Surui clans (Gamep, Gamir, Makop and Kaban) according to clearly defined and documented limits in accordance with Surui's social and cultural proceedings of delegation of power;

(iv) The proposed project is technically and legally in accordance with Brazilian environmental regulations regarding the sustainable management of forests;

(v) Any economic benefits generated by the proposed project will revert to the Surui to be used for (a) forest management, and (b) compensation for opportunity costs associated with the proposed project;

(vi) The proposed project shall be validated and monitored by an independent entity.

The Brazilian Constitutional Regime

From a Constitutional Law standpoint, it is of central importance for this analysis to systematically review the Constitutional regime over Brazilian Indians' rights and obligations and its integration with the environmental principles and requirements established by the Constitution, which ultimately will govern the forest recovery and conservation objectives of the project.

The Brazilian Federal Constitution of 1988 has a special chapter on environmental issues, establishing in Article 225 the right of all to an ecologically balanced environment, which is a common good, essential to a healthy quality of life which both the Government and the community have the duty to defend and preserve for present and future generations. Further relevant requirements are established by federal laws in connection with the environmental protection of natural resources and, in particular, forest management.

With respect to the Brazilian Indians legal regime, the major rights Brazilian Indians have on the use of land and its natural resources are established in the Brazilian Federal Constitution, issued in 1988, and the Indian Statute, a Federal law issued in 1973 that remains in force with respect to its requirements that do not conflict with the 1988 Constitution. It is important to note that with the advent of Brazilian Federal Constitution of 1988, the Brazilian Indians rights were dramatically changed vis-à-vis the 1973 Brazilian Indian Statute, specifically regarding the increased autonomy of Brazilian Indians as entitled to independently exercise their rights guaranteed by the Constitution. As a result, the majority of the Brazilian Indians in Brazil have dramatically improved their ability to autonomously exercise their rights and obligations as Brazilian citizens. This is particularly evidenced by the increased proliferation of Brazilian Indian non-governmental organizations (NGOs), created by Brazilian Indians with the specific purpose

of representing their respective communities and as a preferred vehicle to exercise their legal rights as described by the 1988 Constitution.[16]

With regard to Brazilian Indians' land, Article 20, XI of the Brazilian Federal Constitution establishes that the land traditionally occupied by the Brazilian Indians[17] is the Federal Union's property.

This proprietary regime over Brazilian Indians' land is further regulated by Art. 231 of the Constitution, which also establishes fundamental rights on behalf of the Brazilian Indians:

> *Article 231 - The social organization, custom, language, belief and traditions of the Brazilian Indians*[18] *are recognized, and the original rights under the land which they traditionally occupy, having the Federal Union the competence of delineation, protection and respect to all its goods.*
>
> *First Paragraph: Lands traditionally occupied by the Brazilian Indians are those that they have inhabited permanently, used for their productive activity and their welfare and are necessary for their cultural and physical reproduction, according to their uses, customs and traditions.*
>
> *Second Paragraph: The lands traditionally occupied by the Brazilian Indians are destined to their permanent possession, having* ***the exclusive usufruct regarding the richness related to soil, rivers and lakes which exist inside them*** *(emphasis by author).*
>
> *Third Paragraph: The utilization* ***of water resources, including energy potential, the research and use of mineral resources*** *in the Brazilian Indians' lands can only be executed under* ***National Congress approval****, having heard the affected communities, granted to them the participation in the use, under the law dispositions (emphasis by author).*
>
> *Fourth Paragraph:* ***The lands mentioned in this article are inalienable, are not disposable and the rights under them are not prescriptive*** *(emphasis by author).*
>
> *Fifth Paragraph: It is forbidden to remove Indian groups from their lands except, "ad referendum" of Congress, in the event of an epidemic which represents a risk for their population, or in the interest of Brazilian sovereignty, after resolution by Congress,*

[16] This phenomena is very well described by the anthropologist Bruce Albert who identified in early 2000 more than 180 associations in the six States of the Northern Region of Brazil (Amazonas, Roraima, Rondônia, Acre, Pará and Amapá) and more than 250 in the so-called Legal Amazonia (which includes parts of the States of Mato Grosso, Tocantins and Maranhão), available at http://www.socioambiental.org/pib/english/orgsi/amazo.shtm.

[17] Referred to herein as "Indians lands".

[18] Please note that the original Constitution text uses the Portuguese term "indios" to refer to Brazilian Indians.

provided that immediate return as soon as the risk ceases shall be ensured under all circumstances.

Sixth Paragraph: Acts aiming at occupation, domain, and possession of the lands referred to in this article, or at exploitation of the natural riches of the soil, rivers, and lakes existing thereon, ***are null and void and of no legal effect****, except in the case of relevant public interest of the Republic, according to a supplemental act; such nullity and voidness shall not create a right to indemnity or to sue the Republic, except as to improvements derived from occupation in good faith in accordance with the law.*

Seventh Paragraph: The provisions of Article 174 (3) and (4) shall not apply to Indian lands.

The Federal Union's proprietary rights over the Brazilian Indians' land established by Article 20, XI of the Constitution are clearly restricted by Article 231 above, since the Union does not have the rights of fruition related to the property, e.g.,rights concerning the usufruct over the richness related to soil, rivers, and lakes on Brazilian Indian lands. As a result, as discussed below, these property rights have to be interpreted as a strategic instrument for the Government in order to assure the country's sovereignty along with securing to Brazilian Indians their original rights over the land as needed to survive and preserve their culture, as well as to protect Brazilian biodiversity and traditional knowledge as defined by Art. 231.[19]

Such "rights of fruition" are exclusively granted to the Brazilian Indians (with the exceptions of some limitations on the use of certain water and mineral resources, or exceptional circumstances of national interest to be established by supplemental acts, as established by the fourth and sixth paragraphs of Article 231), and, therefore, the Union's property rights are instrumental to protect Brazilian Indians' fundamental rights.[20] In light of this, the Brazilian Federal Constitution declares that the Brazilian Indians' land and its fruition belong to the Brazilian Indians, who have the exclusive usufruct of the soil and rivers. In this context, the irregular use of the Brazilian Indians' land by unauthorized people is considered invalid.[21] It is important to note that, even under the few constitutional exceptions regarding the Brazilian Indians' exclusive usufruct of their land;

[19] In that regard, an important proceeding to guarantee the Brazilian Indians rights over their land is the demarcation conducted by the Federal Union. Please see more information on the proceeding of demarcation at www.mj.gov.br.

[20] SILVA, José Afonso da. *Curso de Direito Constitucional Positivo [Course of Positive Constitutional Law]*. Editora: Malheiros, São Paulo, 2006, Ed.: 27ª, p. 855.

[21] Article 231, 6th Paragraph.

they are entitled to participate in the discussion process (the ultimate decision being approved by the National Congress) and to share in the economic benefits of approved activities.

In this context, the concepts of "usufruct" and "property" shall also not be interpreted in light of the Brazilian Civil Code[22] when referring to the Brazilian Indians. The concepts differ in the sense that the Union's property of the Brazilian Indians' land aims to protect the permanent possession over the lands by the Brazilian Indians. As a result, as pointed out by José Afonso da Silva, the possession of the lands occupied traditionally by the Brazilian Indians is not a simple possession regulated by the civil law, it is the so-called *possessio ab origine*, the permanent possession that is constitutionally guaranteed in Article 231, §§ 1 and 2, recognizing that the right of the Brazilian Indians to the land existed previously to its possession.[23]

Along the same lines, some authors even consider it as a "special legal regime" that guarantees to the Brazilian Indians the right of absolute use and fruition of the land as well as its natural resources;[24] or, as Professor Cretella Jr.states, the Brazilian Indians' rights of permanent possession and usufruct literally translates into a de facto property right.[25] In the same sense, some judicial decisions support the idea that the Civil Code possession right concept is not applicable to Brazilian Indians' lands.[26]

In this sense, based on the Constitutional Rights of Brazilian Indians, the proprietary regime of Brazilian Indians' land is of a hybrid nature: the Union holds formal property rights and the Brazilian Indians have the permanent possession and exclusive right to use the land and its natural resources. The Constitution clearly recognizes the Brazilian Indians' original rights over their land (which means that such rights are not granted by the Constitution, but formally

[22] Brazilian Civil Code, asserts in Article 1394 that a "usufructuary has the right to possess, use, administer and gather fruits".

[23] SILVA, José Afonso da. "Terras tradicionalmente ocupadas pelos índios" [The lands traditionally occupied by Brazilian Indians] in *Os direitos indígenas e a Constituição.[Indigenous Peoples Rights and the Constitution]*. Porto Alegre: Sergio Antonio Fabris Editor, 1993, p.49-50.

[24] NASCIMENTO, Tupinambá Miguel Castro apud TOURINHO NETO, Fernando da Costa. "Os direitos originários dos índios sobre as terras que ocupam e suas consequências jurídicas" [The Brazilian Indians original rights to their occupied lands and its legal consequences] in *Os direitos indígenas e a Constituição [Indigenous Peoples Rights and the Constitution]*. Porto Alegre: Sergio Antonio Fabris Editor, 1993, p. 39.

[25] CRETELLA Jr, José. *Comentários à Constituição de 1988 [Comments to the 1988 Constitution]*. Rio de Janeiro: Forense Universitária, 1993, vol. VIII, p.4567.

[26] Respectively, see TRF, 3ª Região, AgMS 93.03.107415/SP, rel. Juíza Salette Nascimento, 1ª Sessão, decisão: 16-11-1994, DJ2, 21-11-1995, p. 80208; TRF, 4ª Região, RcCr90.04.22095/RS, rel. Juiz Paim Falcão, 1ª Turma, decisão: 7-5-1992, RTRF, v. 10, p. 291, DJ2, 24-6-1992, p. 18662.

recognized as precedent to the formal organization of Brazil as a State) and the Union's ownership of the land as instrumental in allowing the Union to protect such Brazilian Indians' fruition rights.[27]

In light of the above, we conclude that the project activities related to sustainable management of the forests and the resulting economic benefits being reverted to the Surui are in accordance with the Constitution and legislation which reserves to the Brazilian Indians (i) the exclusive use and sustainable administration of the demarcated lands as well as (ii) the economic benefits that this sustainable use can generate. This is consistent with other precedents pertaining to benefits for Brazilian Indians such as the extraction of forest products, sustainable agriculture, sale of products/artifacts made of forest's raw material.

Our analysis also concludes that the concept of the project is also in accordance with the following Brazilian Environmental Laws: Federal Law Nº 4,771/65 (Forest Code) and its Federal Decree Nº 5,975/06; Federal Law Nº 6,938/81 (National Environmental Policy); Federal Law Nº 9,985/00 (Conservation Units National System) and its Federal Decree Nº 4,340/02; Federal Law Nº 11,284/06 (Management of Public Forests) and its Federal Decree Nº 6,063/0.[28] It goes without saying that the actual implementation of the project shall be in compliance with such legal requirements, including those related to sustainable forest management.

Ownership of the Projects' CERs or VERs

By identifying the Brazilian Indians' exclusive constitutional rights over the sustainable use of the demarcated lands, we conclude that the economic benefits of such use, such as the payments for carbon credits deriving from CDM or voluntary market transactions, belong to the Surui. A pre-condition for the fulfillment of this economic benefit guaranteed by the Brazilian Constitution is the recognition that ownership of any CERs (Certified Emission Reductions under the Clean Development Mechanism of the Kyoto Protocol) and VERs (Verified Emission Reduction under the Voluntary Market) belong to the Brazilian Indians.

The international regulations on climate change, specifically the UNFCCC and the Kyoto Protocol, defer to national legislation of host countries on the issue of ownership of CERs. The ownership of VERs follows the same principle.

[27] This conclusion is supported by the systematic analysis of articles 20, XI, 225 and 231 of the Brazilian Constitution and infra-constitutional legislation and legal doctrine.

[28] In lieu of space limitations for this paper, we will restrict our comments to some aspects of Federal Law Nº 11,284/06 (Management of Public Forests) and its Federal Decree Nº 6,063/0, as further discussed below.

In the case of Brazil, the proliferation of emission reduction or carbon sequestration projects has evolved under the general rule that credit ownership is derived from the main rights attached to each project activity. In that regard, the person or entity who has legal title, controls/owes project activities that generate the credits, or is a legal beneficiary of their economic results, owns the credits.[29]

As discussed above, the Brazilian Federal Constitution and the relevant laws regarding Brazilian Indians' protection grant them the exclusive usufruct regarding the exploitation of natural resources located on their land (including forest resources) in a sustainable manner and with the main goal of preserving natural habitats.

Federal Decree Nº 5,051/04, Article 7, paragraph 1 internalized the Convention ILO 169 of 1989, guarantees to Brazilian Indians "the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social, and cultural development".

Following this trend, as mentioned above, the Brazilian Federal Constitution and the Brazilian Indians Statute set forth that Brazilian Indians have exclusive usufruct over the resources inside their land, and the economic benefits generated by its use shall belong to them.

In addition, Article 3 of the Forest Code establishes that the use of forest resources on Brazilian Indians' land shall be performed only by Brazilian Indians with the implementation of sustainable forest management regime in order to attend to their subsistence.

Moreover, Article 225 of the Brazilian Federal Constitution also establishes that all Brazilians, including the Brazilian Indians, have the duty to preserve and restore the essential ecological processes and provide for the forest management of species and ecosystems.

[29] So far, the only exception to this rule relates to the Federal Government's claim over the credits resulting from renewable energy projects under the Programme of Incentives for Alternative Electricity Sources (PROINFA). PROINFA promotes the development of renewable sources of energy. One of PROINFA's objectives is to reduce greenhouse gas emissions by almost 2.5 million tonnes of CO_2e per annum. This governmental claim over carbon credit ownership (which is assigned to Eletrobras, the publicly owned energy company responsible for PROINFA's implementation) was challenged by some private investors and is pending review by the Brazilian Supreme Court (Writ of Mandamus Nº 26,326 – Brazilian Supreme Court). For further information on PROINFA, please see Law Nº 10,438 of April 26, 2002; Federal Decree Nº 5,025 of March 30, 2004, amended by Federal Decree Nº 5,882 of August 31, 2006. It is important to note that the Wind Power Auction conducted by Aneel (The Brazilian Electric Energy Agency) on December 2009 also reflected an important shift from the previous position of the government towards retaining the carbon credits from the PROINFA projects to Eletrobras. Under this Wind Power Auction, the carbon credits were assigned to the bidders, in alignment with the general rule of carbon credit ownership discussed in this paper.

The ownership of CERs and VERs generated by the project is clearly a situation where economic benefits result from the demand for credits created by the Kyoto Regime and/or the voluntary market. Regardless of the definition of the legal nature of CERs and VERs, which is still under debate by Brazilian scholars, both are characterized as a right (in the case of CER, as established by international law), the economic benefits of which shall be obtained through project activities.

It is clear that the Surui have the legal title over CERs and VERs which may result from sustainable forest practices conducted by the Surui on their land. Such rights, such as in any other case, must be exercised in compliance with the rules and sustainability criteria established by the relevant legislation, including the regulations regarding CDM project approval or Voluntary Market standards and the sustainable management of natural forests as foreseen in the Brazilian Forest Code.

Federal Public Forest Concession Law

With regards to the possible intersection between Surui Carbon projects in Brazilian Indians' land and Federal Law Nº 11, 284/06 on Management of Public Forests,[30] we understand that the public forest concession regime established by the law does not apply to forests that cover Brazilian Indians' land, due to the following reasons:

- The Brazilian Indians have exclusive constitutional rights of fruition from their land;
- The concept of concession established by Federal Decree Nº 271, of February 28, 1967 and Administrative Law doctrine clearly does not apply to activities conducted on Brazilian Indians' land;[31]

[30] Public forests are classified by the Brazilian Forest Service as "A," "B," or "C". The public forests of category "A" are located in areas destined to Environmental Protection and Conservation Units (Unidades de Conservação de Proteção Integral e de Uso Sustentável) and to the use of traditional communities (e.g., Brazilian Indians), as well as other forms of destinations established by law. The public forests of category "B" are located in public areas but were not object of specific destination, and public forests of category "C" are located in areas of indefinite domain. Further information is available at http://www.florestal.gov.br/

[31] Besides the definition of concession regarding public forests set forth in Law Nº 11,284/06, the legal institution of concession was established in Article 7 of Federal Decree Nº 271 on February 28, 1967. In addition, the Administrative Law legal doctrine defines it as "the agreement by which the Administration transfers a payable or free use of a public land to a private entity, as a resolute *in rem* right, for the specific purposes of urbanization, industrialization, cultivation or any other exploitation with social interests. See MEIRELLES, Hely Lopes. *Direito Administrativo Brasileiro [Brazilian Administrative Law]*, São Paulo: Ed. Malheiros, 2001.

• Article 11, IV of the referred-to Federal Law, which sets forth PAOF[32] makes an exemption for Brazilian Indians' land for the purpose of concession;

• As established by Item 3.1.3, Article 3-A of the Brazilian Forest Code, the use of forest resources on Brazilian Indians' land can be performed only by the Brazilian Indian communities with the implementation of the sustainable forest management regime in order to attend to their subsistence.

Therefore, the commercialization of carbon credits generated in the Brazilian Indians' land is not, in any way, restricted by Federal Law Nº 11,284/06,[33] including the generation of credits resulting from avoided deforestation projects. Further, the applicability of any other requirement of Federal Law Nº 11,284/06 with respect to Brazilian Indians' land will always have to be interpreted in light of the Brazilian Federal Constitutional requirements that defer to the Brazilian Indians and provide them with the exclusive fruition of the natural resources (with the exception of mineral and water resources mentioned above), provided that such fruition is aligned with the principles and practices of sustainable management embedded in Brazilian environmental legislation.

Surui Autonomy to Implement the Project

The Brazilian Indian Statute of 1973 adopted the concept of a guardianship regime, which considered the Brazilian Indians as incapable or lacking capacity to perform acts with legal consequences. With the advent of the Brazilian Federal Constitution in 1988, however, the perspective of Brazilian Indians guardianship established in the Brazilian Indian Statute changed. The Constitution did not mention the guardianship regime and has granted to Brazilian Indians the right to manage their goods, according to their custom and traditions.

[32] PAOF (Plano Anual de Outorga Florestal) is the Annual Plan of Forest Granting, regulated by Federal Decree Nº 6,063/07.

[33] Article 16, §1º, VI, of Federal Law Nº 11,284/06, establishes a restriction for the commercialization of credits from avoided deforestation in natural forests with regard to forest concessions (although the second paragraph of the same Article 16 makes an exception for the cases where carbon credits are generated from reforestation of degraded areas or areas converted into alternative use of soil). An analysis of the constitutionality and public interest of this provision excluding avoided deforestation credits from the environmental services subject to public concession is beyond the scope of this paper. Suffices for our present analyses that the public concession process (and any restriction in connection with it) covered by the law does not involve Brazilian Indians' land.

The Brazilian Civil Code of 2002 also digressed from the guardianship regime of the previous Civil Code of 1916 by transferring this issue to a future specialized law.[34]

In view of this new perspective of the Brazilian Federal Constitution and considering that the Brazilian Indian Statute has not been formally revoked, it shall be interpreted in accordance with the current Constitution regime. Any provision of the 1973 Statute which conflicts with the 1988 Constitution is no longer valid.

With regard to Brazilian Indians' guardianship, the main provision of the Brazilian Federal Constitution of 1988 is Article 232,[35] which sets forth that the Brazilian Indians have rights to sue in order to legally defend their interests. Accordingly, the Brazilian Indians have been granted independent access to the court system (the participation of the District Attorney is under the custom legis position, as in several other cases foreseen in Brazilian laws). As a consequence, the Brazilian Indians do not need to be represented by Funai to exercise their rights.[36]

This means that the Brazilian Federal Constitution changed the extent of the Brazilian Indians' guardianship concept of the 1973 Brazilian Indian Statute, since the Funai role, although still extremely important, is confined to implementation of public policies or to enforcement activities against violations of the rights of Brazilian Indians.[37] It is important to note, anyway, that even in the former regime, the participation of the National Indian Foundation (Funai) as a precondition for a given act to be legally valid was linked to communities that were not integrated into Brazilian society and were incapable of understanding and defending their own rights. As established by the Brazilian Indian Statute:

> *Article 8 - The acts practiced between Brazilian Indians not integrated into Brazilian society and any stranger to the Brazilian Indians communities, when there has not been assistance from the competent guardianship entity, are considered null.*

[34] Civil Code of 2002, Article 4, sole paragraph.

[35] Article 232: Indians, their communities, and organizations have standing to sue to defend their rights and interests, the Public Attorney's Office intervening in all the procedural acts.

[36] We adopt thae position that "generally, the capacity required from the part to the legal proceeding is the same which is required for the acts of civil life, i.e., to practice the legal acts of substantive law [...]". Please refer to Humberto Theodoro Junior, as quoted by Luiz Fernando Villares. *Direito e Povos Indígenas [Law and Indigenous People]*. Juruá Editor, 2009, p. 60-61.

[37] We support the thesis of non-reception of the "guardianship-non-capacity" concept by the 1988 Constitution Respectively, see Helder Girão Barreto, *Direitos Indígenas [Indigenous Rights]*. Juruá Editor, 2003, p. 42-43 and Luiz Fernando Villares, cit.

Sole paragraph. The rule of this Article does not apply in the case where the Brazilian Indians show consciousness and knowledge of the practiced act, given that it is not prejudicial to him/her, and of the extension of its effects.

As mentioned above, since the late 1980s, Brazilian Indians have organized themselves in order to defend and represent their own interests by constituting Brazilian Indian Associations under the Brazilian legal system. In this sense, the Associação Metareilá clearly meets those requirements and is entitled to fulfill the role of project participant and representative of the Surui in the project development and credit commercialization, provided that (i) Associação Metareilá acquires a specific mandate to take decisions and implement the project on behalf of all the clans which comprise the Surui present in the areas where the project will be implemented and (ii) the economic results of the commercialization are reverted to such clans. Those conditions establish the autonomy of the Surui to conduct the project and legitimate that their association acts in accordance with the overall interests of their community.

Finally, it is important to clarify that although Funai's participation is not a pre-condition for the legal act to be deemed valid; however, it is important to submit the project to Funai to allow the agency to fulfill its role of identifying any potential situation which can result in damages to the Brazilian Indians' rights. On the other hand, the fact that Funai's participation is not a pre-condition for the validation of legal acts of Brazilian Indians does not restrict Funai's duties and power to seek, whenever necessary, administrative and judicial remedies to protect Brazilian Indians' rights. It also does not impair its remaining important role in formulating the national policies and implementing administrative actions aimed at protecting the Brazilian Indians' rights, including the demarcation of Indians' lands and many other supportive actions.

Based on the Surui's constitutional rights discussed in this paper (permanent possession over their lands, exclusive usufruct and perception of economic benefits resulting from its sustainable use, and carbon credit ownership) and their autonomy to implement the projects, we conclude that the participation of Funai as a project participant is not mandatory to validate the actions of the representatives of the Surui in project development and credit commercialization. However, given the role of Funai in protecting Brazilian Indians' rights, it is recommended that obtaining Funai's formal analysis and institutional support of the project as part of the stakeholders' consultation conducted by the Surui. Further, Funai may play an important role in implementing policies that favor the implementation of these types of projects.

The fact that the Surui are able to autonomously implement the project also displaces consideration of the economic results of the project as part of the "Indian Heritage" concept

provided by more recent policies established by the Federal Government.[38] In that regard, any allocation of a portion of the economic results of the project by the Surui to Funai should be considered on a voluntary basis from a project governance standpoint.

REDD: Some Discussions in Light of a Possible Future Regime

Although our initial legal analysis focuses on the afforestation and reforestation aspects of the Surui project, we were able to further consider some aspects related to REDD projects in the absence of national and international regulations regarding REDD, based on the overall objectives of REDD projects (conservation of forests and sequestration of GHGs) and the overall legal framework in place. However, the current absence of specific Brazilian legal requirements regarding REDD projects may be impacted by the Brazilian ratification of a possible future REDD international regime. In this scenario, provided that some kind of agreement is reached in the near future, the ultimate REDD legal regime will be conditioned to (i) the extent that REDD credits will be recognized as a tradable right in the international market and (ii) the possible impact of REDD credits in future Brazilian emission reduction targets mandates, if any.

The combination of those factors, among others, may trigger a more or less interventionist approach by the Government in trying to define a specific REDD legal regime in Brazil. In theory, some level of restriction on such rights may be possible, depending on the existence of a regulated market (for example, through taxation of economic benefits deriving from REDD projects). Such regime may or may not seek to include some innovation regarding ownership of carbon credits vis-à-vis the general rule in place, whereby carbon credit ownership is connected to the main rights attached to each project activity. (The person or group who owns the economic results of the project activities that generate the credits, or is a legal beneficiary thereof, owns the credits).[39]

Regardless of the ultimate design of a Brazilian REDD Strategy and its corresponding legal and policy contours, its legality will depend on its alignment with the Constitution, including the

[38] Federal Decree Nº 4.645 of March 25, 2003, Art. 25 (amending Law Nº 5.371 of December 5, 1967, which initially established Funai). Funai is merely entitled to take care of and manage the Indigenous Heritage of Brazilian Indian Communities that are isolated or do not have the capability to defend and represent their own interests. The situation of the Suruí Community is different in that its members have organized themselves by constituting Associação Metareilá do Povo Indígena Suruí which has represented their interests since 1989.

[39] Under a more restrictive international scenario, some stakeholders have suggested that some governmental interventionist approach over credit ownership may be necessary to assist the country in complying with a possible mandated emission reduction target in a future international regime, thus avoiding the risk of double counting credits arising from Brazilian forests.

constitutional rights of Brazilian Indians. In that respect, under the current constitutional regime and legal framework, we do not envisage any possible elimination of the Brazilian Indians' rights over REDD projects originating in their demarcated lands, as previously discussed, due to their clear exclusive rights of usufruct to such lands. It is important to note that, even under the few constitutional exceptions regarding the Brazilian Indians' exclusive usufruct of their land (namely, the utilization of water resources, included the energetic potential and the prospecting and exploitation of mineral resources) and based on a relevant national interest, they are entitled to participate in the discussion process (the ultimate decision being approved by the National Congress) and to share in the economic benefits of such activities.

We tested our conclusion against other arguments in favor of a interventionist governmental approach in a future REDD National Policy, and the results of our analysis remained the same.

One possible argument would be that the Union's full ownership of, or share in, the economic benefits resulting from the REDD projects could be based on the role of the Union in demarcating and safeguarding Brazilian Indians' land in the country. A similar argument is raised by some stakeholders when discussing REDD rights in private areas on the grounds of an alleged lack of effort by property owners or forest users in relation to the conservation of native forests. In both cases, those arguments are not sufficient to restrict the Brazilian Indians' rights over REDD credits originating from their lands.

As we have discussed throughout this paper, the Union's proprietary rights over Brazilian Indian lands are instrumental to protecting the Indians' rights recognized by the Constitution as original rights over their lands, preceding the Constitution itself.[40] The constitutional obligation of the Union in securing the Brazilian Indians' rights is not pre-conditioned to any type of duties by the Indians as a counterpart obligation and should not entitle the Union to any economic compensation by the Brazilian Indians. In fact, any discussion of possible payments for environmental services considers the users of forestry land as beneficiaries of such payments, not the contrary. On the other hand, the original rights of Brazilian Indians over the land they traditionally occupied, as recognized by the Federal Constitution, derive, among other factors, from their ancient and historic role "as the first of all genuine Brazilian cultural and civilization

[40] See *"A Constituição e o Supremo – Supremo Tribunal Federal"*, art. 231, paragraph 1, citing the decisions ("Voto") of Ministry Carlos Ayres de Britto and Ministry Celso de Mello in Pet 3.388 and RE 183.188, respectively (available at www.sft.jus.br/portal/constituicao/artigo).

forms."[41] In this role, their tradition of the sustainable use of natural resources, including conservation of native forests, is paramount.

Another possible argument towards the alleged ownership of REDD credits by the Union seeks to combine the definition of Brazilian Indians' land as "Goods of the Union" ("Bens da União")[42] with the concepts of "legal nature of forest resources," as stated in the Brazilian Forest Code,[43] and "the social function of the rural property," as stated in the Federal Constitution[44] and the Brazilian Civil Code.[45] This interpretation would favor the concept of public ownership of forest resources (even those located in private land), allocating to the Union the their economic benefits. The applicability of such an argument over private land is outside of the scope of this paper. Suffice it to say, however, that such arguments would not impact the Brazilian Indians' rights herein discussed. As stated, the hybrid nature of the Brazilian Indian lands comprises a sui generis legal proprietary regime, whereby the exclusive usufruct by the Brazilian Indians is explicitly recognized by the Brazilian Constitution.

In that respect, the fact that the land (including the native forests) traditionally occupied by Brazilian Indians belong to the Union does not impact their rights herein discussed, which derive from their original rights over such lands and their exclusive usufruct rights. With respect to the extension of their usufruct rights, it is important to note that the expression "the richness related to soil, rivers and lakes which exists within them" stated in Art. 231, paragraph 2 of the Constitution shall be interpreted in the broader sense and does include forest resources located on their land. The exceptions to the concept of "soil" embedded in the Federal Constitution are expressly stated in Art. 176, which reads as follows:

> *Art. 176: Mineral deposits, whether being exploited or not, and other mineral resources and hydraulic energy potential represent property separate from the soil, for purposes*

[41] Supremo Tribunal Federal (Brazilian Supreme Court) Pet 3.388, Rel. Min. Carlos Britto, julgamento em 27-8-08, Plenário Informativo 517.

[42] Brazilian Constitution, Art. 20,XI.

[43] "Artigo 1º, caput: *As florestas existentes no território nacional e as demais formas de vegetação, reconhecidas de utilidade às terras que revestem, são bens de interesse comum a todos os habitantes do País, exercendo-se os direitos de propriedade, com as limitações que a legislação em geral e especialmente esta Lei estabelecem.*" [Article 1, main section: The forests that exist in the national land and other types of vegetation, recognized as the ones which are useful to the lands they cover, are common interest goods, with the rights over the lands, subject to some legal limitations established in law and in the Forest Code in particular].

[44] Federal Constitution, Art. 186. c.c. Art 5, XXIII.

[45] Brazilian Civil Code (Law 10,406/2002), Art. 1.228, paragraph 1.

of exploitation or use, and belong to the Republic, the grant holder being guaranteed ownership of the mined product ["As jazidas, em lavras ou não, e demais recursos minerais e os potenciais de energia hidráulica constituem propriedade distinta do solo, para efeito de exploração ou aproveitamento, e pertencem à União, garantida ao concessionário a propriedade do produto da lavra"].

Further, this wording is consistent with the remaining requirements of Art. 231, paragraph 3, which states that the only exceptions to the Brazilian Indians' exclusive usufruct rights over their lands are in the case of hydraulic and mineral resources. Even in those cases, the Brazilian Indians are entitled to share in the economic benefits from such activities, and not otherwise.

It is worth mentioning that two other important constitutional aspects of REDD projects that are not restricted to projects in Brazilian Indians' land come from the combination of Art. 170 (which regulates the Brazilian economic order principles, including the harmonization of free will – "livre iniciativa" – and respect for the environment) and Art. 225 (which demand protection of the environment by public and private entities and individuals) of the Constitution. Accordingly, the protection of the environment can also be achieved through the use of market mechanisms such as REDD through the voluntary market or CDM under the UNFCCC and Kyoto Protocol. Any interventionist approach against those principles must be based on a very clear and strong case on behalf of the national interest and must be further tested against the rights and principles as stated in the Brazilian Constitution.

Project Governance

Due to the uncertainties of a future REDD regime, the inherent permanency and leakage risks of any forestry project, and the need for building up a robust and efficient national policy, it is recommended that the structure of REDD projects in the Surui lands allow, to the extent possible, the inclusion of such projects in a future Brazilian national REDD legal regime. In that regard, the Surui may consider voluntarily allocating a portion of the economic benefits from the projects (e.g., a portion of the income resulting from the sale of CERs or VERs) to be invested in an emerging REDD national system, particularly, in actions that can be implemented in the area of influence of the Surui project. Such investments can be made through the donation of funds or equipment to public entities such as Funai, the Brazilian Institute for the Environment and Natural Resources (Ibama), or the Federal or State Police who can play an important role in the enforcement of measures avoiding or interrupting any action by third parties that may jeopardize the integrity of the forest resources or the overall objectives of the project.

Another important governance element of the project is to guarantee financial returns that are compatible with the environmental services provided by the forestry resources on the Surui land. This goal shall be achieved by using sound methodologies aimed at valuing environmental services to preserve forest resources that take into consideration the long-term benefits derived from reforestation, afforestation and forest conservation, including, but not limited to, a thorough analysis of the price of environmental services (including carbon) on the national and international markets. It is important to note that the sale of credits below national or international average prices may raise concerns among some stakeholders regarding a violation of the Brazilian Indians' rights. Such concerns may trigger administrative and judicial actions by organizations such as Funai, the District Attorney's Office ("Ministério Público") and others who must protect the Brazilian Indians' rights and have the legal standing to sue under the Public Civil Action Law ("Lei de Ação Civil Pública"). The sale of REDD credits below market prices may also trigger claims on the grounds of an alleged negative impact on the Brazilian national REDD strategy (as a result of which such action may be contrary to national interest) in light of future Brazilian commitments under a Post-2012 Kyoto or UNFCCC regime.

In light of those considerations, we recommend that Surui consider sales strategies which allow proper publicity, keep a record of important transactions, and, if possible, take advantage of competition among buyers to sell credits. In that regard, the Surui Community may consider selling the credits through the Brazilian Mercantile and Future Exchange (BM&F/Bovespa) or any other carbon platform which guarantees a credible auction system.

With respect to the use of contract instruments for the commercialization of the credits (either ERPAs or VERPAs, depending on the circumstances), it is important that such instruments are compatible with the legal nature of the Surui rights. In that regard, the hybrid proprietary rights over the land and constitutional barriers to any future encumbrance over the land shall be considered. As a result, the parties may have to choose payment structures which condition the disbursement of money with regard to effective reforestation, afforestation or forest conservation. Any early payment by the buyers or any other financing activity cannot be conditional on the securing of any of the natural resources present in the Surui land, or the land itself.

Conclusion

Based on our assumptions and discussions above, our legal analysis has shown that:

The Clean Development Mechanism (CDM) and REDD projects proposed by the Surui are conceptually in accordance with the international and national climate change regime and in

alignment with the Brazilian constitutional requirements and principles and legislation regarding environmental protection and Brazilian Indians rights.

There is no legal restriction under the international and national legal regulations on CDM projects towards the inclusion of the Surui as project participants.

The Surui are entitled to the economic benefits of such projects, due to their constitutional rights of permanent possession over their lands and exclusive usufruct and perception of economic benefits resulting from sustainable use thereof. The Surui's ownership over CERs and VERs generated by the projects is clearly a pre-condition for the fruition of such exclusive economic benefits.

The Surui's legal title over the carbon credits is also consistent with the general rule applied in Brazil whereby credit ownership rights derive from the main rights over the project activities.

Considering the Brazilian Constitutional Rights granted to Brazilian Indians, the involvement of the National Indian Foundation (Funai) as a project participant as a pre-condition for validating the acts undertaken by the representatives of the Surui Community is not necessary. However, given the role of Funai in protecting Brazilian Indians' rights, it is recommended to have Funai's formal analysis and institutional support to the project as part of stakeholder consultation process.

Regardless of the ultimate design of a Brazilian REDD Policy in the near future and its correspondent legal contours, its legality will depend on its alignment with the Constitution, including the Constitutional rights of Brazilian Indians.

From a project governance standpoint, due to the uncertainties about a future REDD regime, the inherent permanency and leakage risks of any forestry project, and the need for building up a robust and efficient National Policy, the Surui may consider voluntarily allocating part of the economic results of the projects to be invested in the emerging Brazilian REDD Framework, particularly on law enforcement infrastructure and forestry governance activities that can be implemented by public agencies (such as Funai and other environmental authorities) and private stakeholders.

The Surui should prioritize commercial strategies which favor (i) competition amongst prospective buyers and (ii) financial returns compatible with the environmental services provided the projects.

Contract instruments, payment conditions, and securitization in connection with the commercialization of the credits (including ERPAs and VERPAs) shall be compatible with the nature of the Surui constitutional rights, which, *inter alia*, forbids any encumbrance over the land.