Property rights disputes between indigenous peoples and rural producers in the Midwest region of Brazil: What is the role of justice?

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Abstract

The issue of indigenous lands demarcation in Brazil awakens passion and anger. While raising a humanistic, anthropological, and social discussion, the matter of indigenous property rights over their ancestors' land is faced with pressing economic demands derived from the contemporary perspective on the efficiency of land use and the rights of farmers to use their lands. In particular, the indigenous conflicts in the state of Mato Grosso do Sul (Midwest region of Brazil) deserve special attention. Mato Grosso do Sul not only concentrates the second largest indigenous population in the country, but also delimitates a region with huge economic relevance for the Brazilian agribusiness, mainly in the production and export of grains and beef. Indigenous conflicts in the region have gained momentum in recent years, generating even armed conflicts and deaths. Underlying the indigenous conflicts in Brazil, one can find specific legal and constitutional provisions, which make the role of courts even more emblematic. The indigenous peoples in Brazil have a peculiar legal identity, which emphasizes the need for state intervention and makes the conflicts on property rights that are brought to the courts more complex. The objective of this perspective paper is to identify the patterns of the Judiciary decisions in relation to the maintenance of farmers' property rights considering the demand for indigenous land demarcation in the State of Mato Grosso do Sul. This research is a first attempt to understand the pattern of allocation of property rights of indigenous lands in Brazil from a strictly economic perspective, emphasizing the role of the judicial system. The pioneering spirit of the paper derives from the opportunity to examine the issue under the lens of a specific theoretical approach, the New Institutional Economics.

Keywords: *Property rights, indigenous lands demarcation, judicial decisions, New Institutional Economics.*

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1. Introduction

The issue of indigenous lands demarcation in Brazil awakens passion and anger. While raising a humanistic, anthropological, and social discussion, the matter of indigenous property rights over their ancestors' land is faced with pressing economic demands derived from the contemporary perspective on the efficiency of land use and the rights of farmers to use their lands.

In particular, the indigenous conflicts in the state of Mato Grosso do Sul (Midwest region of Brazil) deserve special attention. Mato Grosso do Sul not only concentrates the second largest indigenous population in the country, but also delimitates a region with huge economic relevance for the Brazilian agribusiness, mainly in the production and export of grains and beef. Indigenous conflicts in the region have gained momentum in recent years, generating even armed conflicts and deaths (SAKAMOTO, 2012).

Underlying the indigenous conflicts in Brazil, one can find specific legal and constitutional provisions, which make the role of courts even more emblematic. The indigenous peoples in Brazil have a peculiar legal identity, which emphasizes the need for state intervention and makes the conflicts on property rights that are brought to the courts more complex.

The objective of this perspective paper is to identify the patterns of the Judiciary decisions in relation to the maintenance of farmers' property rights considering the demand for indigenous land demarcation in the State of Mato Grosso do Sul. To the best of your knowledge, this research is a first attempt to understand the pattern of allocation of property rights of indigenous lands in Brazil from a strictly economic perspective, emphasizing the role of the judicial system. The pioneering spirit of the paper does not stems from its study object – the

demarcation of indigenous lands – since the theme has been broadly investigated by sociologists and anthropologists[1], but it derives from the opportunity to examine the issue under the lens of a specific theoretical approach, the New Institutional Economics (COASE, 1937; BARZEL, 1997; NORTH, 1991; WILLIAMSON, 1985, 1996).

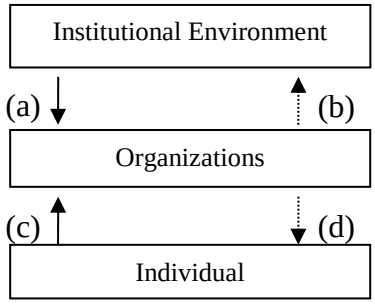
This paper has six sections, including this introduction. In section 2, we provide a brief theoretical background on which our discussion is based; more specifically we discuss the role of courts in an institutional environment where transaction costs are positive, and property rights are disputed. In section 3 we highlight some passages of the main Brazilian laws governing the matter of indigenous peoples' land properties. Section 4 provides an overview of the specific situation of land conflicts between indigenous peoples and rural producers in the state of Mato Grosso do Sul. In section 5, we provide some preliminary results of our empirical analysis about the role of the justice when trying to solve those cases of property right conflicts. We present and discuss some descriptive statistics about judicial decisions actually made.

2. Property rights conflicts and the role of the courts: theoretical perspective[2]

Property rights constitute a system that defines relative rights with respect to the use of scarce resources[3]. It is a fundamental component of the *institutional environment* within which economic agents operate. The institutional environment, in turn, represents one basilar element of the institutional analysis. Specifically, Williamson (1985) notes that the New Institutional Economics can be examined through a scheme of three levels according to which the institutional environment, organizations and individuals establish relations of mutual influence (figure 1).

[1] See, for instance, Resende and Langfur (2007), Sposito (2006), Baines (2004), Silva (2006), Faleiros (2005), Heck, Loebens and Carvalho (2005). Some studies have investigated the conflicts in the Amazon region (Alston, Libecap and Muller, 2000; Simmons, 2004), and the relation between land settlements and land conflicts (Alston, Harris and Muller, 2009).
[2] This section is based on Caleman and Monteiro (2013).
[3] Cooter and Ulen (2008, p. 77) note that "[f]rom a legal viewpoint, property is a bundle of rights. These rights describe what people may or may not do with the resources they own: the extent to which they may possess, use, develop, improve, transform, consume, deplete, destroy, sell, donate, bequeath, transfer, mortgage, lease, loan, or exclude others from their property".

Figure 1: New Institutional Economics three-tiered scheme



Source: Williamson (1985)

Within this analytical framework, individuals represent the base level, indicating the fundamental influence derived from behavioral characteristics. For instance, because individuals have bounded rationality, any contractual transaction is incomplete what may give room to opportunistic behavior[4]. Organizations, the middle level, are restricted by or take advantage of opportunities arising from their interactions with individuals and institutions. The institutional environment then represents the top level. Institutions not only determine the rules under which business will be conducted, but also induce the agents to adapt and seek new forms of interaction.

Especially in regard to the institutional environment, North (1991) defines it as a system of informal and formal rules that have an effect on the process of transferring property rights. Informal rules are implicit constraints within a particular culture, which can be derived from customs or codes of conduct. Formal constraints, on the other hand, are compulsory rules made explicit by some legitimate power with the purpose of maintaining order and the development of a society.

Given a particular institutional setting, property rights disputes occur in situations in which transaction costs are positive. In such cases, economic agents are faced with uncertainty about the effective ownership of a given (valuable) resource. The parties on a dispute may then resort to the legal system (i.e., the courts), seeking to enforce the rights that they perceive as legitimate. Accordingly, an important, adjunct dimension of formal rules is the functioning of the judicial system.

[4] See generally Williamson (1996).

The relationship between the enforcement of property rights and the judicial system was examined by Barrère (2004, p.129). The author notes that the courts enforce property rights by monopolizing the power of constraint that obliges everyone to accept the property rights distribution and its consequences. Additionally, it specifies the conditions of utilization of property rights when there are different interpretations and when opposite claims are advanced. Hence, the judicial system may be understood as "a system of legitimate interpretation and distribution of the concrete effects of PRs [property rights] in a social context".

It is interesting to note that the above conclusion seems to be backed on the interpretation that the legal system works efficiently. Dixit (2004, p.3), however, claims that the legal system may be dysfunctional in many countries. For instance, reports indicate that in India one can find 25 million cases pending before the courts (BEARAK, 2000). In Russia, the enforcement of the verdicts of the courts is problematic, mainly for smaller enterprises (HAY and SHLEIFER, 1998; HENDLEY, MURRELL, and RYTERMAN, 2001). Similar situations are reported in Eastern Europe and in Vietnam (McMILLAN; WOODRUFF, 1999; 2000).

Especially in Brazil, studies prepared by the World Bank highlight a number of weaknesses in the national judicial system[5]. Yeung (2010) also identifies different problems in the Brazilian judiciary; the authors argue that the flaws in the judicial system have historical, cultural, political, structural, and legal origins[6].

According to Yeung and Azevedo (2012), the difficulties observed in the Brazilian judicial system become more evident because of the high number of cases pending before the courts, and the high volume of cases designated to each judge (an average of 10,000 per judge). These factors, in conjunction with the numerous possibilities of appealing a judicial decision, contribute to a perverse result: the average time for judgment of a case in Brazil ranges from 1,000 to 1,500 days. Beyond the traditional factors used to explain the inefficiency of the judicial system – lack of financial and human resources, as well as inadequate criminal

[5] Technical Document nº 319/1996 – "O Setor Judiciário na América Latina e no Caribe – Elementos para reforma" [The Judicial Sector in Latin America and the Caribbean – Elements for reform]; Report nº 19/1997 – "O Estado em Transformação" [The State Transformation] and Report nº 24/2002 – "Instituições para os mercados" [Institutions for markets]. Available at: www.worldbank.org.
[6] See also Yeung (2010).

procedure – Yeung and Azevedo (2012) call attention to the inefficient management of the "judicial machine" and the organizational culture supported by an entrenched bureaucracy.

Besides such 'structural' aspects related to the routine operation of the judicial system, the effective solution of property rights disputes may also involve the quality of the laws. If it is true that the law itself is unclear about the principles over the issue at hand (e.g., rural land conflicts between indigenous and rural producers), it is very unlikely that jurisdictional security may be achieved. For this reason, scholars studying this theme must be additionally cautious, since insecurity may be caused either by the inefficient operation of the judicial system, the vagueness of law itself, or by a high variability (and divergence) in judges' decisions.

If there is great variability in legal interpretation – and, therefore, in judicial decisions –, the root of the problem may be not only ideological and political diversity in the judiciary (this would be a phenomenon found in other countries), but it may also be caused by imprecision in laws. In this regard, Brazilian legal authors Falcão, Schuartz and Arguelhes (2006) argue that the supposedly anti-liberal bias often attributed to the magistrates has its origins in the creation of laws by the Executive and/or Legislative Powers[7].

In the case of disputes involving indigenous people, the bad quality of laws is clearly identified: more precisely, the contradiction existing between the two most important set or rules governing indigenous issues in Brazil – the "Statute of the Indigenous People" ("Estatuto do Índio") and the Federal Constitution – has last for more than two decades.

3. What does the law say about it? Juridical basis for judicial decisions

Although the rights of indigenous people have been recognized since the first constitutions amended in Republican Brazil, only in 1973 a significant body of laws was consolidated under Law number 6.001, lately known as the "Statue of the Indigenous People". Some years later, after the military dictatorship was over, a new Federal Constitution was amended, and it

[7] Therefore, it is desirable to always differentiate judicial "bias" (caused by judges who are ideologically driven when making a decision) from legislative bias (originated in the moment of law enactment and associated with ideologically driven lawmakers). Unfortunately, the accomplishment of this task is not always possible.

again contained a specific chapter dealing with indigenous peoples' issues. These two sets of laws are the main references for decisions made in courts in present days.

3.1 The Statue of the Indigenous People ("Estatuto do Índio")

In its first article, the Statute of the Indigenous People affirms that: "This law regulates the legal situation of foresters and of indigenous communities. It aims at preserving their culture and at integrating them to the national communion, in a progressive and harmonious manner." Thus, clearly, the law indicates that the main objective of national policies is to integrate indigenous people into the white civilization. Some other articles in the Statute provide the basis under which Brazilian law treats these people. Section IX of article 2 states that the state, "in order to protect indigenous communities and to preserve their rights will guarantee that they have *permanent* possession of the lands in which they live, granting them exclusive utilization of the natural wealth and all the utilities found in those lands" (remarks added).

Chapter 1 of Title III of the Statute deals explicitly with "The Land of the Indigenous People". Its article 18 affirms that indigenous peoples' lands may not be rented or commercially transacted by any legal means, if the transaction restricts the full and direct possession of the land by the indigenous people. Furthermore, the first paragraph of this same article states that, in these areas, it is forbidden for any person, who is unknown to the tribal groups to hunt, to fish or to collect fruits, as well as any to practice any agriculture or extractive activities. The following article, number 19, states that indigenous lands will be demarcated by the state, under the orientation and initiative of specialized federal units. The following article indicates the circumstances under which the Federal Union may intervene in indigenous lands; these include situations of fight between tribal groups, epidemics, necessity of national security, public works that foster national development, prevention of public and large scale disturbance and robbery, and exploitation of underground wealth that are of relevant interest for national security and development. Thus, it is clear that, under no circumstances, indigenous lands will be reallocated for private individuals, for purposes of private production of goods, food included.

Another article worth mentioning in the Statute is article 22, of chapter 2, in the same Title III. This chapter deals with "Occupied Lands". It affirms that indigenous people and foresters

do have *permanent* possession of the lands in which they live, and also *exclusive usage* of the natural wealth and all the utilities which are found in those lands. Furthermore, lands occupied by indigenous people are inalienable goods belonging to the Federal Union.

Last but not least, article 62 of Title VII, which is called "General Provisions", affirms that all actions, of any type, which deal with the domain, possession or occupation of lands inhabited by indigenous people and communities are hereby legally extinct, and their impacts nullified. The second paragraph of this same article adds that nobody is entitled to damage compensations paid by the Federal Union, in cases of nullity and/or extinction of the rights mentioned here, even when there exist economic consequences. In other words, it means that, in case someone purchases land which, with or without the purchaser's knowledge, is legally a possession of indigenous people, and if he/she starts cultivating the land for economic purposes for years on, even so, the law may "confiscate" the land and transfer its possession to the indigenous people, and it shall not pay any damages to the owner who cultivated in that land.

3.2 Federal Constitution of 1988

The Federal Constitution amended after the end of the military dictatorship which governed Brazil for 20 years, is known as the "Constitution of Citizenship" (Constituição Cidadã), due to its broad preoccupation with guaranteeing civil rights, probably under the fear of a return of the dictatorship. Chapter VIII ("About the Indigenous People), and specifically, article 231 recognizes indigenous people's rights.

The main body of article 231 affirms that "The law recognizes the indigenous people and their social organization, their costumes, languages, beliefs and traditions, and it also recognizes their rights over the lands which they traditionally occupy; the Federal Union must demarcate these lands, protect them, and make one respect all their goods".

Paragraph 1 defines what shall be considered the indigenous peoples' lands[8]: "those traditionally occupied by them for permanent living, those used for productive activities,

[8] Brazilian laws are usually codified under a collection of rules, i.e., codes (e.g, the Constitution, the Civil Code, the Code of Labor Laws, the Code of Consumer Laws, etc.). Each code is made up of hundreds of articles, which

those necessary for the preservation of the environmental resources needed for their well-being and those necessary for their physical and cultural reproduction, according to their use, costumes and traditions. Many observers evaluate that this part of the Constitution is a clear sign that the state have no more intentions to integrate indigenous people to the modern civilization; instead, it recognizes indigenous peoples' traditions and culture as something that must be recognized and preserved. In this sense, the Constitution would be against the Statute.

Paragraph 2, on the other hand, repeats an idea which was already indicated in the Statute: "Lands which are traditionally occupied by the indigenous people are their permanent possession, and the underground wealth, the wealth found in rivers and lakes within those lands, shall be *exclusively* utilized by these people" (remarks added).

Paragraph 3 affirms that the utilization of the hydro resources – including hydroelectric resources – the research and exploitation of mineral wealth in indigenous peoples' lands may only occur with the authorization of the National Congress. In these cases, communities affected by the activities must be consulted, and if the economic exploitation shall be approved, they must be legally entitled to the results achieved.

Paragraph 4 contains an important legal characterization about indigenous peoples' lands: "these lands are inalienable and non-disposable, and the rights over them are indefeasible". In other words, if a particular piece of land is legally defined to be belonging to the indigenous people, no matter how many years or decades may pass, their rights of it will not cease.

Paragraph 6, again, repeats an idea already mentioned in the Statute: all actions which deal with the occupation, domain, and possession of indigenous peoples' lands are nullified and extinct, and shall not have any legal effect. Also, actions which deal with the exploitation of the natural underground wealth, the wealth found in rivers and lakes located in those lands, *unless those of relevant and public interest by the Federal Union;* under such circumstances, there will be additional laws to regulate it. Yet, there will not be damage compensations to be paid by the Federal Union, except, under those cases defined by law, of improvements derived by good faith occupation" (remarks added). In other words, it is not true that the

are usually made up by a main text – indicating the main concepts of the law – followed by several paragraphs, which usually indicates specific issues, or more detailed explanations about the article.

indigenous peoples' lands are always inviolable, there are cases in which the state may declare that it is a public interest to explore the natural wealth found in those lands. More specifically, it may not authorize the utilization of land for private agricultural purposes, but may authorize it for the construction of a hydroelectric power plant.

In what follows, the authors examine the nature of the rural land conflicts in the Midwest region of Brazil and investigate the role of the judiciary in solving these conflicts. The analysis is particularly focused on the judicial decisions in itself.

4. The nature of indigenous land demarcation conflicts in Brazil

Conflicts associated to indigenous lands are increasingly frequent in Brazil. These conflicts stem from the demand for the demarcation of Indigenous Reserve Areas within important productive regions of the Brazilian economy, ranging from areas once used for national programs for countryside colonization to regions of hydropower investments in the Amazon rainforest. Specifically in the case of rural production areas, the problem is even more intricate because the vast majority of the disputes involve lands that were acquired in good faith by the ancestors of the current rural producers – i.e., lands with official documents.

The indigenous population in Brazil is estimated at 896,917 individuals (IBGE, 2012), represented by 305 ethnic groups, speaking 274 different languages[9]. As we have seen in the previous section, Indigenous Peoples' right to land is guaranteed by Article 231 of the Federal Constitution. It is up to the State to demarcate[10] these lands, protect it and enforce property rights.

In the 1980s, with the enactment of the Brazilian Federal Constitution, the process of resumption of land by indigenous communities in the Midwest region of Brazil was started (COLMAN, 2007). However, forty years before the Brazilian government promoted the establishment of rural producers in the region with the explicit purpose of colonization and

[9] The State of Amazonas concentrates the largest share of this population (20.6%), followed by Mato Grosso do Sul (9.0%), Bahia (6.9%), Pernambuco (6.5%) and Mato Grosso (5.2%).
[10] The Decree No 22 of April, 4th, 1991 regulates the demarcation of indigenous lands in Brazil. The stages of regularization of indigenous lands are: (i) Identification (usually by means of specific anthropological studies conduct by FUNAI), (ii) Delimitation (the imposition of limits which are recognized by the State); (iii) Demarcation (definition of the land marks and place signposts), (iv) Approval (indigenous land approved by the State), (v) Registration (notarization by the Property Registry and the Department of Heritage Union).

economic integration of the Midwest region of the country (BRAND, 1997). The government granted and/or sold land titles to settlers. Such a situation is the fundamental reason for a contemporary dichotomy: the indigenous peoples claim the areas that are guaranteed to them by law, while farmers have at hand official documents that guarantee their ownership of the land[11].

Besides the 1988 Federal Constitution and the Statute of the Indigenous People, an important legal provision for dispute over indigenous land in Brazil stems from a decision made by the Brazilian Supreme Court in 2009. The Court analyzed the dispute between rice farmers and indigenous people in the state of Roraima (north region of Brazil)[12]. The court decision establishes conditions to govern the process of identification and demarcation of indigenous lands in the country. Among other important provisions, it reaffirms the timeframe established by the Federal Constitution of 1988.

The Ordinance nº 303 published by the Brazilian General Attorney in July 2012 provides the institutional safeguards for indigenous land demarcation, thus regulating the application of the Supreme Court decision. Among other conditions, the Ordinance establishes that the enjoyment of the indigenous people on their land should neither outweigh the national defense policy, nor obstruct the use of energy resources, as well as research and mining of mineral resources considered as assets of the State. It also prohibits the expansion of indigenous lands already demarcated.

Ordinance nº 303 was considered a breakthrough by producers' representatives, given its potential for pacification of indigenous conflicts. Nevertheless, it was suspended by Ordinance nº 405 issued in September 2012. The intense clamor coming from social movements captained by the Church, prosecutors and government agencies contributed to its suspension[13].

[11] Plant and Hvalkof (2001) and Griffiths (2004) have investigate the relationship between land titling, land tenure and indigenous peoples.
[12] The dispute was associated to the legal demarcation of the Indigenous Reserve Area called Raposa Serra do Sol (PET 3388 - RR).
[13] Editorial published in the newspaper "Folha de Sao Paulo", October 17th, 2012 - "Até abuso tem limite" [Even the abuse has a limit] – Katia Abreu, Brazilian Senator and President of the National Confederation of

There is thus a complex institutional scenario in Brazil, characterized by a lack of a clear delineation of property rights on indigenous lands, resulting in legal uncertainty which impacts farmers and indigenous communities. Particularly in the case of the State of Mato Grosso do Sul, the problem becomes even more challenging since the lands in dispute were mostly purchased by producers and titled by the State itself (BRAND, 1997).

4.1. Conflicts in the Midwest of Brazil: the case of Mato Grosso do Sul

The State of Mato Grosso do Sul concentrates the second largest indigenous population in Brazil[14]. It also represents a region with huge economic relevance for the Brazilian agribusiness. Indigenous conflicts in the state stems from the demand for demarcation of lands. There are two opposing groups: on one side, the National Indian Foundation (FUNAI), NGOs and the public prosecutors; on the other side, the farmers and the Rural Unions. The result of this conflict is not only legal disputes, but also the intensification of the violence in the countryside. According to the Indigenous Missionary Council (CIMI, 2011), in 2011 Mato Grosso do Sul recorded 62.7% of the total number of homicides against Indians in Brazil. In the last eight years, over 250 indigenous were killed in the state. According to CIMI (2011) Mato Grosso do Sul recorded 51 homicides against Indians in Brazil[15].

Despite the severity of the scenario from a social perspective, the economic perspective is also relevant. Ordinances issued by FUNAI in 2008[16] set the beginning of anthropological studies in the process of demarcation of indigenous land in Mato Grosso do Sul. These lands involve 26 counties which are responsible for the largest volume of grain production in the

Agriculture and Livestock. Available at:< http://www1.folha.uol.com.br/fsp/mercado/74356-ate-abuso-tem-limite.shtml>

[14] The indigenous population in Mato Grosso do Sul is composed mainly by the ethnic "Guarani" (63.41%) and Terena (33.17%). Other ethnic groups represent 3.42% of the indigenous population (Famasul, 2013).

[15] These data are refuted by the Federation of Agriculture and Livestock of Mato Grosso do Sul (FAMASUL, 2013). According to a survey conducted by the State Secretary of Justice and Public Security, there were 27 homicides against Indians in 2011, and in 18 cases murders were committed by Indians themselves. Moreover, in the 7 cases in which the authors were not identified, the reasons were interpersonal disputes among Indians themselves. Witnesses of these crimes pointed to the use of alcoholic beverages in the majority of the reported events; the instruments used in the crimes were knives and pieces of wood. In any case, data confirm the degree of violence in the region. Considering the suicide rates of indigenous in Mato Grosso do Sul – 50% of the national index in 2011 (CIMI, 2011) – the severity of the social scenario is obvious.

[16] Ordinances nº 788, 789, 790, 791, 792 and 793 of July, 2008 establish as part of anthropological studies for the identification and demarcation of indigenous areas the lands that are traditionally occupied by the ethnic groups "Guarani Kaiowa" and "Nhandeva" in Mato Grosso do Sul.

State. According to Famasul (2013), these counties comprise 21% of the total area of the state, 28% of the population, 25% of GDP, 37% of exports, 22% of jobs, and 30% of rural production units[17]. The issuance of these ordinances potentiated the already widespread feeling of legal insecurity among farmers: the legal owners of the lands are subject to evaluation studies for the purpose of demarcation of indigenous lands.

The production of sugarcane and soybeans are also strongly impacted by the Indigenous conflicts in the region. Decree no. 6961, issued in 2009, approved the Agro-Ecological Zoning of Sugarcane which defines that planting sugarcane in indigenous area is irregular and makes producers unfit to receive public funding. As a result, some of the sugar and ethanol mills have cut commercial relations with rural producers whose properties are located in areas under indigenous land demarcation process[18].

In the case of soybean production, since it is a more consolidated culture in the state, it occupies larger extension of production areas. Accordingly, the impact associated to the conflict is also important, involving issues related to water contamination and truck traffic in indigenous lands (SAKAMOTO, 2012).

According to Sakamoto (2012), the indigenous lands in Mato Grosso do Sul ("Guarani" ethnicity) sum up to 115.922 hectares[19]. Currently, the state has 53 farms invaded. For producers, the invasion process receives a "green light" as soon as the "identification" stage of regularization process of a land as indigenous starts (lands "under study" by FUNAI).

Hence, the conflict of indigenous land demarcation constitutes a problematic scenario from a social as well as an economic perspective. From the point of view of farmers, the current legal uncertainty creates negative impacts on the economy of the state, suppressing the expansion of production and creating uncertainties for future investments. From the perspective of

[17] It accounts for 60% of the production of soybean in the state, 65% of corn, 57% of rice crop, 43% of sugar cane crop and 22% of the cattle herd.
[18] Several mills in Mato Grosso do Sul had to sign "Terms of Adjustment of Conduct" (TAC) with the State General Attorney, pledging not to acquire sugarcane from areas that are in the process of indigenous land demarcation (SAKAMOTO, 2012).
[19] Areas classified as "declared", "approved" and "regularized". Considering data from Famasul (2013), Mato Grosso do Sul has four indigenous lands in the stage of "study", one being "delimited", four in the stage of "declaration", two in the stage of "approval" and 30 in the stage of "registration", what totalizes 41 indigenous lands in different stages of settlement. There are also eight registered indigenous lands under demand of expansion, 39 planned under "Commitment Adjustment of Conduct" (CAC) and 62 under CIMI provisions.

advocates of the indigenous cause, the society has the unique opportunity to make a social and cultural redemption of ancestors' communities.

In this arena, the courts are called to settle specific conflicts on property rights. In doing so, the judiciary may once again play a major role in reducing transaction costs. More importantly, the judicial system creates a jurisprudence that influences the prospective behavior of the different economic agents. In the next section we investigate this particular phenomenon.

5. Tendencies in judicial decisions over land conflicts between farmers and indigenous people in Mato Grosso do Sul: recent statistics

In this section, the authors' purpose is to make an empirical analysis on several decisions recently made by Brazilian second-degree courts, which are specifically related to the conflicts between farmers and indigenous people in Mato Grosso do Sul. The analysis was limited to those cases of land conflicts.

5.1 Methodology and Variables

Our main empirical question is: "What has been the trend in court decisions on conflicts between indigenous people and farmers?" We will first use descriptive statistics to try to answer to this question. For this purpose, we analyze the following variables:

- Variable 1: the court's decision favored the indigenous people? Results can take three values: x = 1: entirely favored the indigenous; x = 2: favored partially; x = 3: totally favored farmers.
- Variable 2: the judge's decision changed the previous decision from a lower court? (y = 0 for "no" and y = 1 for "yes").
- Variable 3: the type of parties involved in the litigation, i.e., type of litigant and type of "plaintiff". For this variable we had the following types: (1) individuals, (2) enterprise or commercial association, (3) the Federal Union or other public autarchy,

(4) indigenous people as individuals[20], (5) the State of Matos Grosso do Sul or counties, (6) a Court, or a judicial decision.

- Variable 4: duration of the process from the first entry in the judiciary.
- Variable 5: Matter of the conflict (the technical report assigning indigenous lands, warrant of ejectment, etc.).

We also incorporate some control variables:

– the Judge-Rapporteur of the case;
– Type of suit;
– Judgment date;
– County in which the conflict occurred;
– Unanimity of the decision[21];
– Whether the rapporteur won or was defeated in his/her decision;
– Law or jurisprudence on which the decision was based (quotes by the rapporteur or other judges). Quotes in this specific case are mostly related to: (i) the Indigenous People Statute; (ii) the Federal Constitution, particularly Article 231; (iii) Law N. 1776 of 1996 – this law established the rules under which FUNAI can create study groups and request technical reports for the demarcation of indigenous lands; (iv) PET 44,247, case of the conflict between indigenous peoples and rice growers in the state of Roraima, in the region of the Raposa Serra do Sol, which was decided by the Supreme Court in 2009.

5.2 Database , Sample Definition and Measures

All cases used to build our current data base are real litigations decided by the 3rd Region of the Federal Regional Court (TRF3). This is the second degree court that handles cases related to land disputes between indigenous people and farmers in the state of Mato Grosso do Sul. Typically, litigations here are appeals against decisions made in first degree courts.

[20] As a usual rule, indigenous people as individuals are not allowed, by law, to be active parts in litigations, since the law does not recognize them as legally capable; the Federal Union, or FUNAI are their usual representatives. Only under very special circumstances they are allowed to represent themselves in a legal suit.
[21] Decisions at the TRF3, as it is a second degree court, are made in groups of 3 judges, although the rapporteur is the only one who studies the case entirely, and is responsible to narrate the case and present the main arguments.

All cases used in this study are available in the form of digital files on the site of the TRF3. By typing the keywords "indigenous people", "land" and "MS" 98 cases are identified. Of this total, we created a sample of 60 cases.

5.3 Empirical results and Analysis

Some brief descriptive statistics are shown below:

Table 1: Who did the judicial decision favor?	
Totally favored the indigenous	49.1%
Partially favored the indigenous	15.8%
Totally favorable to the land owners	35.1%

Source: TRF-3 and analysis by authors.

Table 2: Did the decision reformed the one by 1st degree court?	
Yes	56.1%
No	40.4%

Source: TRF-3 and analysis by authors.

Table 3: Jurisprudence or laws cited in the decision	
The Statue of the Indigenous	36.8%
Article 231 of the Federal Constitution	68.4%
The Supreme Court (STF) decision on the case of "Raposa Serra do Sol"	22.8%

Source: TRF-3 and analysis by authors.

We can observe some preliminary results with this sample. Despite not controlling for the matter discussed in the cases analyzed here, there does not seem to be a clear tendency of the second-degree courts, when deciding over the conflicts between farmers and indigenous people: in 49% of the cases, the indigenous were totally favored, and in 45% the farmers were totally favored. As a tendency already shown somewhere else in the Brazilian Judiciary (see Yeung, 2010), there is a high instability in judicial decisions, meaning that they have a high tendency to be reformed whenever someone appeal to higher instances. In the sample analyzed, more than 56% of the cases were reformed when passed from 1st degree to 2nd

degree courts. Finally, as mentioned earlier in this paper, the Statute of the Indigenous People and article 231 of the Federal Constitution are frequently mentioned in judicial decisions about the issue of land conflicts with indigenous. In recent years, the paradigmatic case decided by the Federal Supreme Court (STF), the Raposa Serra do Sol case, has also been frequently cited by judges in their decisions.

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