# “THE FUTURE IS INDIGENOUS”: INTER-AMERICAN JURISPRUDENCE AND INDIGENOUS KNOWLEDGE APPLIED TO A CRITICAL ANALYSIS OF THE TEMPORAL LANDMARK DEBATE IN BRAZIL

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## ABSTRACT

This thesis critically examines the weakening of Indigenous rights in Brazil through the adoption of the Temporal Landmark thesis and Law 14.701/2023. The research investigates this legislative process's historical and political trajectory, beginning with the 2009 Raposa Serra do Sol decision and turning into law in 2023. The thesis demonstrates how the Brazilian Supreme Court's interpretation of the 2009 decision was strategically used by deputies close to the agribusiness sector to justify limitations on Indigenous land rights. Through a comparative analysis, it evaluates the jurisprudence of the Inter-American Court of Human Rights (IACtHR), regarding the rights to property and consultation, and contrasts it with the vote of Justice Edson Fachin in RE 1017365, which declared the Temporal Landmark thesis unconstitutional. Additionally, the thesis explores the role of Indigenous knowledge and practices as ontologically different from an extractive-based economy. The concept of Bioeconomy is argued to be a framework that benefits from Indigenous knowledge in promoting a sustainable and ethical economy. While recognizing the transformative potential of Bioeconomy, the study questions the institutional, political, and logistical barriers to the effective implementation of this alternative. The research concludes that Law 14.701 reflects the dominance of extractive economic interests over human rights standards.



**Keywords:** Temporal Landmark; Conventionality Control; Indigenous land rights; Bioeconomy; Right to Consultation.

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## LIST OF ABREVIATIONS

APIB — Coalition of Indigenous Peoples of Brazil (*Articulação dos Povos Indígenas do Brasil*)

Cimi — Missionary Indigenist Council (*Conselho Indigenista Missionário*)

CNA — Brazilian Agriculture and Livestock Farming Confederation (*Confederação da Agricultura e Pecuária do Brasil*)

Constitution — 1988 Constitution of the Federative Republic of Brazil

Convention — American Convention on Human Rights

FPA — Agribusiness Parliamentary Front (*Frente Parlamentar da Agropecuária*)

Funai — Indigenous Peoples National Foundation (*Fundação Nacional dos Povos Indígenas*)

IACtHR — Inter-American Court of Human Rights

ICMBio — Chico Mendes Institute for Biodiversity Conservation (*Instituto Chico Mendes de Conservação da Biodiversidade*)

ILO C169 — The Indigenous and Tribal Peoples Convention

PL — Project of Law (*Projeto de Lei*)

RE — Extraordinary Appeal (*Recurso Extraordinário*)

STF — Brazilian Supreme Court (*Supremo Tribunal Federal*)

Temporal Landmark Law or Law — Law 14.701/23

## INTRODUCTION

Indigenous rights have been under development in International Law since the second half of the 20th century, especially with the creation of the Indigenous and Tribal Peoples Convention of the International Labor Organization (ILO C169, 1989). Following developments, such as the United Nations Declaration on the Rights of Indigenous Peoples (2009) and the American Declaration on the Rights of Indigenous Peoples (2016), broadened the international commitment to protecting and promoting Indigenous rights, without binding provisions. The Inter-American Court of Human Rights (IACtHR) was vital in analysing Indigenous rights under the American Convention of Human Rights (1969, Convention), with major developments in securing their rights, including using these international documents in its reasoning.

In Brazil, the history of Indigenous collective rights was marked, in the first moment, through assimilation processes, meaning to insert Indigenous persons through deprivation of their beliefs and forms of organization into the National society. That is, to cease to be Indigenous and to be inserted in "the national — and white — society"[1]. After the end of the civil-military dictatorship (1964-1985), the 1988 Constitution secured Indigenous rights to own cultural, social, economic, costumes, languages, beliefs, and traditions and their original right over their territories[2]. Despite this, the reality of Brazilian Indigenous communities is marked by violence, as they are the primary targets in land conflicts[3] and face delays in the demarcation of their territories[4].



[1] *Recurso Extraordinário 1017365 - Santa Catarina: Voto do Relator* [2021] Edson Fachin (Supremo Tribunal Federal) 7.
[2] Brazil, Brazil 1988 (rev. 2017) Constitution - Constitute [1988 Constitution] art 231.
[3] Lucas Altino, 'Indígenas São as Maiores Vítimas: Brasil Bate Recorde de Conflitos No Campo Em 2023' *O Globo* (Rio de Janeiro, 22 April 2024) <https://oglobo.globo.com/brasil/noticia/2024/04/22/indigenas-sao-as-maiores-vitimas-brasil-bate-recorde-de-conflitos-no-campo-em-2023.ghtml> accessed 22 January 2025.
[4] Cleonácio Henrique Afonso Silva and Deilton Ribeiro Brasil, 'PROCESSO HISTÓRICO DE AFIRMAÇÃO DOS DIREITOS INDÍGENAS NO BRASIL: da perspectiva integracionista à interculturalidade' (2020) 6 Revista de Direitos Humanos em Perspectiva 21 <https://indexlaw.org/index.php/direitoshumanos/article/view/7122>

Law 14.701 (Temporal Landmark Law, *Lei do Marco Temporal*), approved in 2023, was a setback for Indigenous rights in Brazil. This law institutionalizes the Temporal Landmark thesis for Indigenous land rights. This means that Indigenous can only have the right over a territory if they lived permanently in that territory by the date of the promulgation of the Constitution (October 5th, 1988). The Temporal Landmark interpretation is contradictory when compared with the Indigenous "original" right to territory secured in Article 231 of the Constitution[5].

The Temporal Landmark thesis was first applied by the Brazilian Supreme Court (STF) in the case of Raposa Serra do Sol (2009) but subsequently reviewed by the Extraordinary Appeal (RE) 1017365 (2023), when the STF found the thesis unconstitutional. The Brazilian Congress turned the thesis into a law in the same month. President Lula vetoed several provisions of the legislation[6]. Following the rejection of part of the vetoes by the Brazilian Congress, three petitions were submitted to the Supreme Court claiming the bill is unconstitutional, and one arguing for the recognition of its validity[7]. This movement, both pro and against the law, led the Supreme Court Minister Gilmar Mendes to establish a conciliation commission, including several representatives of different sectors of Brazilian society[8], but with low participation of the Indigenous[9].



accessed 22 January 2025; Matilde De Souza, 'Transamazônica: integrar para não entregar' (2020) 8 Nova Revista Amazônica 133 <https://periodicos.ufpa.br/index.php/nra/article/view/8624> accessed 22 January 2025.

[5] Brazil Brazil 1988 (rev. 2017) Constitution - Constitute (n 2) art 231.

[6] Agência Senado, 'Em 2023, marco temporal colocou à prova harmonia entre os Poderes' (*Senado Notícias*, 2 January 2024) <https://www12.senado.leg.br/noticias/materias/2024/01/02/em-2023-marco-temporal-colocou-a-prova-harmonia-entre-os-poderes> accessed 22 January 2025.

[7] STF, 'STF Recebe Mais Uma Ação Contra Lei Que Institui o Marco Temporal Indígena' (*Supremo Tribunal Federal*, 2 January 2024) <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=523742&ori=1> accessed 22 January 2025.

[8] Paulo Roberto Netto, 'Entenda as Audiências de Conciliação Do STF Sobre a Lei Do Marco Temporal' (*Supremo Tribunal Federal*, 8 August 2024) <https://noticias.stf.jus.br/postsnoticias/entenda-as-audiencias-de-conciliacao-do-stf-sobre-a-lei-do-marco-temporal/> accessed 22 January 2025.

[9] Malu Delgado, 'O dia em que homens brancos de terno negociaram o futuro dos Indígenas' (*SUMAÚMA*, 26 August 2024) <https://sumauma.com/marco-temporal-stf-futuro-indigenas-novas-geracoes/> accessed 12 June 2025.

This crisis over the validity of the Temporal Landmark provision is currently underway, but recent developments will not be analysed. This research draws a comparative analysis of the Temporal Landmark thesis, with the jurisprudence of the Inter-American Court and Indigenous knowledge. The use of the IACtHR is justified by its moral authority and progressist interpretation of the Convention. Furthermore, the Court's conventionality control doctrine calls on "inter-American judges" to impugn any legislation or act that is in apparent or actual tension with the Convention, especially with the IACtHR's interpretation[10]. This is one of the issues under the legitimacy crisis of the system, in which the regional system acts as a "resonance chamber for constitutional interpretation"[11,12].

Also, recent production of Indigenous leaders and thinkers can inform on Indigenous worldviews, especially the relationship with their territory. Indigenous rights, then, are the main topic of this research. The Brazilian State and the IACtHR recognize the specificities of the connection of Indigenous peoples with their lands, which grant a different status than the mainstream idea of property.

This thesis is developed in three chapters, from this introduction to the conclusion. The first chapter's subsection analysis will focus on the judiciary debate over the Temporal Landmark thesis in the 2009 ruling. The second subsection focuses on how Deputies mobilized the understanding of the Court during the legislative procedures to approve the Law and how the nineteen conditions for implementing the 2009 ruling were inserted in legislation. By doing so, we mobilize a bibliography about the arbitrary and conditionalized understanding of



[10] Jorge Contesse, 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 414 <https://doi.org/10.1093/icon/mox034> accessed 15 December 2024; Flávia Piovesan, 'ius constitutionale commune latino-americano em Direitos Humanos e o Sistema Interamericano: perspectivas e desafios' (2017) 8 Revista Direito e Práxis 1356 <https://www.scielo.br/j/rdp/a/dLhPxzDmJDTcczFVTdhSwJN/?lang=pt> accessed 29 May 2025.

[11] Contesse (n 10) 430.

[12] Gargarella, for instance, will analyse the case of Gelman v. Uruguay (2011). In this case, the Court offered a judicial review of a democratic and participative decision-making process (the results of a referendum) to defy amnesty laws in the continent. See Roberto Gargarella, 'Democracy and Rights in Gelman v. Uruguay' [2015] *AJIL Unbound* 115 <https://doi.org/10.1017/S2398772300001276> accessed 4 November 2024.

constitutional rights made by the STF when creating the Temporal Landmark provision. The main contribution is how the decision was used as a legitimate and authoritative argument for the Deputies to defend the necessity of the Law. Index I shows how the law almost integrally applies the nineteen conditions.

In the second chapter, the focus will turn to the jurisprudence of the IACtHR. The Temporal Landmark thesis and the 2009 decision were analysed through the conventionality control doctrine[13]. To contribute further to the debate, the analysis will focus on the arguments of the reporting justice, Edson Fachin, on the RE 1017365, to argue on the unconstitutionality of the Temporal Landmark. It will be shown, as well, that Law 14.701 does not comply with the jurisprudence of the IACtHR on the right to consultation, which was not even mobilized during the legislative procedures.

Finally, the final chapter will provide an exposition of Indigenous authors and the mobilization of Indigenous knowledge in the concept of Bioeconomy. Since the Indigenous land rights are a matter that opposes economic interests, authors have argued for the exchange of knowledge between Indigenous and non-Indigenous peoples to produce goods and services in Indigenous territories. The practice would focus on ethical production, providing benefits for the Indigenous and maintaining and recovering biodiversity. Given the whole scenario and practice of the Brazilian State, which has been exposed before, it will be argued that more studies are needed on the challenges to institutionalizing this policy as an economic model in the country.

The methodology involved an exploratory approach to identifying cases, jurisprudence, and the development of key concepts, as well as a bibliographic review and doctrinal analysis. This qualitative research, by providing an overview of local, national, and international

[13] Gilberto Starck and Fernanda Frizzo Bragato, 'O Marco Temporal e a Jurisprudência da Corte Interamericana de Direitos Humanos' (2021) 9 Revista Direitos Sociais e Políticas Públicas (UNIFAFIBE) 424 <https://portal.unifafibe.com.br:443/revista/index.php/direitos-sociais-politicas-pub/article/view/916> accessed 12 May 2025.

standards, can help inform better policy practices based on the limitations of institutional politics in Brazil, especially in developing pro-Indigenous rights policies.

## 1. INDIGENOUS RIGHTS AND LAND CONFLICT IN BRAZIL: AN HISTORICAL AND POLITICAL ANALYSIS OF THE TEMPORAL LANDMARK

The matter in question for this section is the Temporal Landmark thesis on Indigenous land rights. Indigenous peoples are defined as an ethnical group in the Brazilian Constitution, due to their race (biological factor) and values (language, costumes, tradition, beliefs, etc)[14]. Their territories are necessary to guarantee survival as a culturally distinctive group, assuring their cultural, social and physical reproduction[15]. Article 231 of the Constitution says:

> The social organization, customs, languages, creeds and traditions of Indians are recognized, as well as their **original rights to the lands they traditionally occupy**. The Union has the responsibility to delineate these lands and to protect and ensure respect for all their property[16]. *(emphasis added by the author)*.

The Temporal Landmark thesis holds that Indigenous peoples are only entitled to the demarcation of lands they were occupying or disputing on the date of the promulgation of the 1988 Constitution (October 5)[17]. So, the traditional right of the Indigenous to land would only be considered valid if they were occupying the territory on that specific date.

Article 231, however, recognizes the right to land and defines the duty of the State to delineate and secure their rights. In that sense, the right existed before the Constitution was created, configuring an original right[18]. The demarcation process is then merely declaratory[19].



[14] Tércio Sampaio Ferraz Júnior, 'A Demarcação de Terras Indígenas e Seu Fundamento Constitucional' (2004) 3 Revista Brasileira de Direito Constitucional 689 <https://esdc.com.br/ojs/index.php/revista/article/view/65> accessed 24 February 2025.
[15] ibid.
[16] Brazil Brazil 1988 (rev. 2017) Constitution - Constitute (n 2) art 231.
[17] Brazil, Lei Nº 14.701, de 20 de outubro de 2023 2023 [14.701].
[18] Ferraz Júnior (n 14).
[19] *Case of the Xucuru Indigenous People and its members v Brazil* [2018] Inter-American Court of Human Rights Serie C 346 [117].

It aims to ensure the safe exercise of a preexisting right by delimiting portions of land for the traditional use and enjoyment of a given Indigenous community[20].

The issue is centred on two different understandings of constitutionally secured rights. One is the Indigenous fact (fato indígena), named here as the Temporal Landmark thesis, in which the Constitution granted the rights for those occupying the land by October 5th 1988[21]. The other is the *indigenato* theory, which recognizes that previous Constitutions, primarily since 1934, had already acknowledged Indigenous land rights[22]. In this sense, the 1988 Constitution did not create something new regarding land rights but continued an established tradition. This discussion shows that, although the 1988 Constitution marked a new phase for Indigenous rights by overcoming assimilationist ideologies[23] and promoting the principles of human dignity and the prevalence of human rights[24], it did not end land disputes, conflicts and violence[25]. This can be better understood with a historical and social analysis.

The land issue can be rooted in the colonization and perpetuation of the colonial ideology, based on the expropriation of lands, violence, slavery and extermination of non-White[26]. However, it was only after Independence (1822) that private property was introduced.

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[20] Ferraz Júnior (n 14); Antonio Hilario Aguilera Urquiza and Anderson de Souza Santos, 'Direitos constitucionais e povos indígenas: apontamentos sobre a disputa pela efetivação do direito fundamental às suas terras tradicionais' [2020] Tellus 109 <https://tellus.ucdb.br/tellus/article/view/680> accessed 30 May 2025.

[21] *Petição 3388-4 - Roraima: Voto do Ministro Relator* [2008] Carlos Ayres Britto (Supremo Tribunal Federal) [80].

[22] José Afonso da Silva, 'Parecer Sobre o Marco Temporal e Renitente Esbulho' (2019) <https://mobilizacaonacionalindigena.wordpress.com/wp-content/uploads/2016/05/parecer-josc3a9-afonso-marco-temporal_.pdf> accessed 3 April 2025.

[23] Bruno Barbosa Borges, 'Legal Pluralism, Indigenous Rights and the Inter-American Corpus Iuris' (2021) 7 EU Law Journal 60 <https://revistas.uminho.pt/index.php/unio/article/view/4028> accessed 10 March 2025.

[24] Valério de Oliveira Mazzuoli, 'O novo § 3º do art. 5º da Constituição e sua eficácia' (2005) 42 Revista de informação legislativa 93 <https://www2.senado.gov.br/bdsf/handle/id/739> accessed 25 April 2025; Antonio Hilário Aguilera Urquiza and Luiz Carlos Ormay Júnior, 'OS EFEITOS DA INTERNALIZAÇÃO DOS TRATADOS INTERNACIONAIS DE PROTEÇÃO AOS DIREITOS HUMANOS NO BRASIL: UMA ANÁLISE A PARTIR DO CASO DO PACTO DE SAN JOSE DA COSTA RICA' (2017) 12 Revista Eletrônica Direito e Política 620 <https://periodicos.univali.br/index.php/rdp/article/view/11014> accessed 25 April 2025.

[25] Gilberto Starck and Fernanda Frizzo Bragato, 'O Impacto Da Tese Do Marco Temporal Nos Processos Judiciais Que Discutem Direitos Possessórios Indígenas' (2020) 8 Revista Direitos Sociais e Políticas Públicas (UNIFAFIBE) <https://portal.unifafibe.com.br/revista/index.php/direitos-sociais-politicas-pub/article/view/616/1025> accessed 2 May 2025.

[26] Elizângela Cardoso de Araújo Silva, 'Povos indígenas e o direito à terra na realidade brasileira' [2018] Serviço Social & Sociedade 480 <https://www.scielo.br/j/sssoc/a/rX5FhPH8hjdLS5P3536xgxf/> accessed 25 April 2025; Starck and Bragato (n 25).

The Land Act (1850) legally recognized the right to property and consolidated land structure based on capitalist exploitation and use[27]. Thus, the State actively created a legal framework to correspond with the capitalist organization based on private property. By framing it as an individual right and an acquirable good, traditional forms of occupation and their non-market land uses ceased to be recognised[28]. This historical process resulted in the exclusion of non-White and the poor from landownership[29] and the wrongful appropriation of Indigenous territories by third parties[30].

In other words, Brazil's independence did not rupture with its colonial foundations. Aníbal Quijano refers to this historical process and the economic dependency on global capital — centred on the export of primary goods — as resulting in an independent state with a colonial society[31]. José Carlos Mariátegui[32] argues that any study that does not consider the land and the economy when analysing the "Indian issue" will tend to overlook the roots of the problem. The economic and land ownership regimes are fundamental for examining the issue and challenging the elite's "feudalism"[33]. This is particularly significant in Brazil, since land concentration and the economic model were not condemned and/or controlled but reinforced.

There are significant examples of this throughout the 20th century in Brazilian Indigenous policy. In a broader framework, the policy was based on State guardianship and assimilation of Indigenous peoples due to the perception that they were an obstacle to development[34]. The first federal agency for Indigenous peoples, the Indian Protection Service



[27] Silva (n 26).
[28] ibid 486.
[29] Liliane Pereira de Amorim and Maria Cristina Vidotte Blanco Tárrega, 'O acesso à terra: a Lei de Terras de 1850 como obstáculo ao direito territorial quilombola' (2019) 16 Emblemas <https://periodicos.ufcat.edu.br/index.php/emblemas/article/view/56113> accessed 25 April 2025.
[30] Starck and Bragato (n 25).
[31] Aníbal Quijano, 'Colonialidade Do Poder, Eurocentrismo e América Latina', *A colonialidade do saber: eurocentrismo e ciências sociais.* (Consejo Latinoamericano de Ciencias Sociales 2005) 134 <http://bibliotecavirtual.clacso.org.ar/clacso/sur-sur/20100624103322/12_Quijano.pdf> accessed 25 April 2025.
[32] José Carlos Mariátegui, 'El Problema Del Indio' in Luiz Sávio Almeida and Galindo Marcos (eds), *Índios do Nordeste: temas e problemas*, vol 3 (EDUFAL 2002).
[33] ibid.
[34] Silva (n 26).

(1910), aimed to locate, attract and integrate Indigenous peoples into the Brazilian economy[35]. Later, the "March to the West", under Getulio Vargas's government (1930-1945), sought to expand the State's reach into inland regions, since the country was mainly organized on the coast, and incorporate natural and human resources into capitalist production under a development process[36]. The policy also aimed at including Indigenous peoples in the labour force[37]. During the civil-military dictatorship (1964-1985), development policies resulted in numerous deaths, due to violence or the introduction of diseases, and acculturation[38]. Historical documents record violence and crimes committed both by landowners and government officials during the 20th century against the Indigenous[39]. Brazilian policies and the lack of protection for Indigenous communities resulted in genocide, sexual abuse, slavery, and treatment that dehumanised Indigenous peoples, considering them "much lower than an animal."[40].

Nowadays, the land question is centred on the maintenance and expansion of agribusiness, advocated by parliamentarians and landowners, at the expense of Indigenous rights[41]. The importance of the agribusiness sector in the Latin American economy, including Brazil, has been reinforced by market liberalization and neoliberal policies aligned with

[35] Ana Lúcia Vulfe Nötzold and Sandor Fernando Bringmann, 'O Serviço de Proteção Aos Índios e Os Projetos de Desenvolvimento Dos Postos Indígenas: O Programa Pecuário e a Campanha Do Trigo Entre Os Kaingang Da IR7' (2013) 5 Revista Brasileira de História & Ciências Sociais 147 <https://periodicos.furg.br/rbhcs/article/view/10538> accessed 14 February 2025.

[36] Seth Garfield, 'As raízes de uma planta que hoje é o Brasil: os índios e o Estado-Nação na era Vargas' (2000) 20 Revista Brasileira de História 13 <https://www.scielo.br/j/rbh/a/5WGW9qddWRkHSnkrckzLHrx/> accessed 26 April 2025.

[37] Elias dos Santos Bigio, 'A Ação Indigenista Brasileira Sob a Influência Militar e Da Nova República (1967-1990)' (2007) 4 *Revista de Estudos e Pesquisa* 13 <https://www.mpba.mp.br/sites/default/files/biblioteca/direitos-humanos/populacao-indigena/artigos_teses_dissertacoes/artigo_1_elias_bigio_a_acao_indigenista_brasileira_sob_a_influencia_militar_e_da_novarepublica_1967-19901.pdf> accessed 12 February 2023.

[38] Shelton H Davis, 'Indian Policy and the Amazon Mining Frontier' in Shelton H Davis, *Victims of The Miracle - Development and the Indians of Brazil* (1st edn, Cambridge University Press 1977).

[39] Brasil, 'Comissão Nacional Da Verdade: Relatório. Volume II, Texto 5' (Comissão Nacional da Verdade 2014) Vol II <https://www.gov.br/memoriasreveladas/pt-br/assuntos/comissoes-da-verdade/volume_2_digital.pdf> accessed 30 April 2025.

[40] Brasil and Jader Figueiredo, 'Relatório Do Procurador Jader Figueiredo' (Ministério Público Federal 1968) MI-58–445 3–4 <https://midia.mpf.mp.br/6ccr/relatorio-figueiredo/relatorio-figueiredo.pdfAcesso> accessed 30 April 2025.

[41] Caio Pompeia, 'As cinco faces do agronegócio: mudanças climáticas e territórios indígenas' (2023) 66 Revista de Antropologia e202839 <https://www.scielo.br/j/ra/a/jn6fL3MqkGTGTscwJLSv5sj/> accessed 22 January 2025.

transnational capital, which, in turn, led to a greater land concentration and appropriation[42]. In this context, the dynamics of global capital harmed land rights in Latin America — for Indigenous and small farmers. In Brazil, political sectors have been institutionalized through Parliamentary Fronts[43], including the Agribusiness Parliamentary Front (FPA, Frente Parlamentar da Agropecuária). The strength of these Parliamentary Fronts is precisely their cross-party nature[44], becoming even bigger than the parties themselves. Regina Bruno shows that land rights (meaning property) and economic exploitation hold a centrality in Brazilian politics, and land concentration translates into political power[45].

In this conflictive scenario, the inertia of the legislative branch in advancing Indigenous land rights[46], the land disputes[47], the Executive's delay in demarcation processes, and the legal uncertainty are the roots of an unsafe environment for Indigenous peoples. Furthermore, there is also a movement aiming to dismantle rights that have already been secured. The following two subsections will analyse the Temporal Landmark thesis: first, through the judiciary's reasoning in the 2009 ruling; and second, by examining how the Court's interpretation was mobilized by members of Congress during the legislative process to approve the law, including how the nineteen conditions for the implementation of the 2009 ruling were incorporated into legislation.



[42] Cristóbal Kay, 'A Questão Agrária e a Transformação Rural Neoliberal na América Latina' (2018) 12 Revista de Estudos e Pesquisas sobre as Américas 16 <https://periodicos.unb.br/index.php/repam/article/view/20986> accessed 22 January 2025.
[43] Regina Bruno, 'Bancada Ruralista, Conservadorismo e Representação de Interesses No Brasil Contemporâneo' in Renato S Maluf and Georges Flexor (eds), *Questões Agrárias, Agrícolas e Rurais: Conjunturas e Políticas Públicas* (E-papers Serviços Editoriais 2017).
[44] ibid.
[45] Regina Bruno, 'Frente Parlamentar Da Agropecuária (FPA): Campo de Disputa Entre Ruralistas e Petistas No Congresso Nacional Brasileiro' (2021) 29 *Estudos Sociedade & Agricultura* 461 <https://revistaesa.com/ojs/index.php/esa/article/view/esa29-2_09_fpa/esa29-2_09_pdf> accessed 22 January 2025.
[46] Silva and Brasil (n 4).
[47] ibid.

### 1.1. The "Temporal Landmark" thesis and the judiciary

The analysis of the Temporal Landmark thesis will focus on the reasoning of the Brazilian Supreme Court (STF) in the case of *Raposa Serra do Sol* (2009). The judicial dispute originated in the State of Roraima after the homologation of the Indigenous land and was brought before the STF by Senator Augusto Affonso Botelho Neto to challenge the demarcation process.

This case illustrates the Executive's delay due to land conflicts. The Indigenous territory was first demarcated physically in 1998[48], but the homologation — an administrative measure of official recognition, equivalent to titling — happened in 2005[49]. The political environment throughout the process was one of violence, including pro-development rhetoric, anti-Indigenous sentiment, and nationalist ideologies[50]. With a heated courtroom[51], the judiciary decided favourably to demarcate the territory through a continuous scheme and remove non-Indigenous people from it, but it incorporated the Temporal Landmark thesis in its arguments.

Apart from the establishment of the Temporal Landmark — except in cases of persistent unlawful occupation (renitente esbulho) — the ruling set nineteen conditions (Index I) for its implementation, that will be further addressed in the following subsection. In his analysis of the case, the reporting justice, Carlos Ayres Britto, interpreted the word "occupy" in the Constitution to support the Temporal Landmark thesis. This interpretation refers to Article 231,



[48] Cristhian Teófilo da Silva, 'A HOMOLOGAÇÃO DA TERRA INDÍGENA RAPOSA/SERRA DO SOL E SEUS EFEITOS: UMA ANÁLISE PERFORMATIVA DAS 19 CONDICIONANTES DO STF' (2018) 33 Revista Brasileira de Ciências Sociais e339803 <https://www.scielo.br/j/rbcsoc/a/F7MWtcMVZbHLkyRrMBRKGQQ/> accessed 3 June 2025.
[49] ibid.
[50] ibid.
[51] Erica Magami Yamada and Luiz Fernando Villares, 'Julgamento da Terra Indígena Raposa Serra do Sol: todo dia era dia de índio' (2010) 6 Revista Direito GV 145 <https://www.scielo.br/j/rdgv/a/7bz9K563SkWKQpLpScGtk6L/> accessed 30 April 2025.

mentioned earlier: the Indigenous "original rights to the lands they traditionally occupy"[52] are recognized.

According to him, the use of the verb in the present tense in the Constitution implies that Indigenous peoples hold rights only over lands they were occupying at the time of the promulgation of the 1988 Constitution. The choice of the present tense — rather than formulations such as "had occupied" or "came to occupy" — serves as a temporal marker that limits land claims[53]. In other words, if an Indigenous community had occupied a certain territory but left it before 1988 — or even if they returned to it after the Constitution was enacted — they would no longer have the right to claim that land.

The reporting justice created an exception in cases of persistent unlawful occupation (*renitente esbulho*). In such cases, it must be proven that the Indigenous community was not occupying their traditional lands by the date of the promulgation due to actions by non-Indigenous individuals[54]. The Court held that if the land was under dispute in 1988 and the Indigenous peoples were trying to reoccupy their traditional territories — either by their own means or through a judicial repossession claim — there would be no right loss [55].

In scholarly work, the interpretation is seen as flawed for two main reasons: It demands that Indigenous resisted and fought for their lands, even in case of armed violence; and the indigenist organ, Fundação Nacional dos Povos Indígenas (Funai), is the one that must represent the Indigenous peoples in judicial proceedings[56]. The most striking contradiction lies in the fact that the Federal Supreme Court (STF) required Indigenous peoples to risk their physical



[52] Brazil Brazil 1988 (rev. 2017) Constitution - Constitute (n 2) art 231.
[53] *Petição 3.388-4 - Roraima: Voto do Ministro Relator* (n 21) para 80.
[54] ibid 97.
[55] Antonio Hilario Aguilera Urquiza and Anderson de Souza Santos, 'Direitos indígenas e o marco temporal: a demarcação do território Terena de Limão Verde (MS)' (2019) 7 Revista Interdisciplinar de Direitos Humanos 19 <https://www3.faac.unesp.br/ridh/index.php/ridh/article/view/686> accessed 4 June 2025.
[56] ibid.

integrity, while they were also denied the autonomy to independently petition the judiciary for repossession of their lands.

A common understanding is that the ruling provided more protections to landowners than to Indigenous communities. For José Afonso da Silva[57], and Antonio Hilario Aguilera Urquiza & Anderson de Souza Santos[58], the STF applied the logic of the individual right to property, as established in the Brazilian Code of Civil Procedure. However, Indigenous land rights are constitutional and had been reaffirmed in previous legal instruments, such as the 1934 Constitution[59]. Therefore, the current Constitution does not create something new and does not even refer to a date or a historical period that should be used when analysing Indigenous land rights[60]. In this sense, the STF decision was totally arbitrary[61]. If there was a concern of ending land conflicts in the country, the Temporal Landmark thesis and the nineteen conditions do so by limiting Indigenous rights and protecting the illegal occupations of their territories[62]. The situation is such that illegal mining remains a serious problem in Raposa Serra do Sol territory, with an environment of insecurity and conflicts both within the community and with external individuals[63].

The argument that land conflicts involving the rights of Indigenous peoples and the property rights of non-Indigenous third parties should not be assessed based on the Brazilian Code of Civil Procedure was central in RE 1017365. This case declared the unconstitutionality of the Temporal Landmark thesis. It originated from a conflict between the Ibirama-Laklãnõ territory and the State of Santa Catarina[64]. RE 1017365 had a different judicial status when



[57] da Silva (n 22).
[58] Urquiza and Santos (n 55).
[59] da Silva (n 22).
[60] ibid.
[61] ibid.
[62] ibid.
[63] Glycya Ribeiro, 'Garimpo divide opiniões e socializa impactos em comunidade da Raposa Serra do Sol' (*((o))eco*, 9 November 2021) <https://oeco.org.br/reportagens/garimpo-divide-opinioes-e-socializa-impactos-em-comunidade-da-raposa-da-serra-do-sol/> accessed 4 June 2025.
[64] Vinícius Chaves Alves and Adalberto Fernandes Sá Junior, 'Terras indígenas e o marco temporal: uma análise sócio-jurídica acerca do julgamento do RE n.º 1.017.365/SC' (2023) 9 Revista de Direito Ambiental e

compared to the previous case, based on its General Repercussion (*Repercussão Geral*) — meaning that it binds the entire judiciary to its significant economic, social, and political implications.

The reporting justice of RE 1017365, Edson Fachin, delivered his vote aligned with the historical approach and critical bibliography discussed in this work. Systematically, Justice Fachin argued that[65]: (i) Indigenous land rights predate the Constitution, and the demarcation process is merely declaratory; (ii) these rights differ from the right to property as secured by the Civil Code, which characterized by economic finality and transmissibility; (iii) land is an intrinsic element of Indigenous identity, where spirituality and collective existence are reproduced; (iv) each ethnicity has a understanding of the relationship with land, and this cultural plurality is protected by the Constitution; (v) the legal history of the Brazilian State demonstrates that Indigenous lands were already recognized in prior Constitutions, and the current one is a "*continuum"* [66] of these established rights; (vi) no contract or concession that deprives the Indigenous from the exclusive usufruct of natural resources is authorized; (vii) once the rights of Indigenous determined territory are recognized, non-Indigenous occupants or landowners are not allowed to ask for a State's compensation, except in cases of good-faith improvements; and (viii) the participation of Indigenous peoples in the process should comply with ILO C169.

Regarding the persistent unlawful occupation, Justice Fachin argued that it is absurd to interpret the Constitution in a way that would encourage conflicts as a condition to recognizing rights[67]. The decision could have been a historical and progressive ruling, capable of overcoming the conflictive interpretation of the Constitution introduced by the Court in 2009.



Socioambientalismo 01 <https://indexlaw.org/index.php/Socioambientalismo/article/view/9485> accessed 22 January 2025.

[65] *Recurso Extraordinário 1.017.365 - Santa Catarina: Voto do Relator* (n 1).

[66] ibid 64.

[67] ibid 78.

However, less than a month later, the National Congress approved Law 14.701/2023, which institutionalized the Temporal Landmark thesis and other restrictive provisions, initiating a new chapter of the crisis over Indigenous land rights[68]. The next section will further analyse the Law.

### 1.2. Law 14.701/2023: Institutionalizing the understanding of the Brazilian Supreme Court

A close reading of the *Raposa Serra do Sol* (2009) decision and Law 14.701 (2023) reveals striking similarities between the conditions for the implementation of the former and the provisions set forth in the latter — including the application of the Temporal Landmark thesis. Index I presents a comparative table of the decision's conditions and corresponding Law provisions. It is intended to assist the reader in understanding the connections developed throughout this work.

Scholarly work has criticized the *Raposa do Sol* decision as "a conditioned" one "for constitutionally secured rights"[69]. Regarding the Temporal Landmark thesis, Cristhian Teófilo da Silva argued that the Supreme Court inserted a "Trojan horse" into the favourable decision. Academic studies have also criticized that the *Raposa Serra do Sol* decision was used in other rulings[70], despite its non-binding nature. Notably, in 2017, the Executive branch established this case as a general guideline for demarcation procedures[71]. The next section will demonstrate



[68] Rodrigo de Lima Leal, Jean Mallmann and Luiz Felipe Ferreira dos Santos, 'Ativismo judicial, backlash e marco temporal de ocupação indígena no Brasil: resistência e repercussões' (2024) 27 Revista de Ciências Jurídicas e Sociais da UNIPAR 325 <https://unipar.openjournalsolutions.com.br/index.php/juridica/article/view/11300> accessed 22 January 2025.
[69] Silva (n 48) 2.
[70] Thiago Leandro Vieira Cavalcante, '"Terra Indígena": Aspectos Históricos Da Construção e Aplicação de Um Conceito Jurídico' (2016) 35 História 1 <https://www.scielo.br/j/his/a/XRTp9SKrKRwMV6D4MjHPMsp/> accessed 22 January 2025.
[71] Brazil and Grace Maria Fernandes Mendonça, 'Parecer n. 0001/2017/GAB/CGU/AGU' (Brasília, 19 July 2017) <https://www.planalto.gov.br/ccivil_03/AGU/PRC-GMF-05-2017.htm> accessed 24 May 2025.

how these precedents were used by members of Congress to argue for the legitimacy of transforming the Court's decision into law.

For the present analysis, the work of Caio Pompeia offers a valuable framework for understanding the Brazilian Congress's position on the conflict between economic interests and Indigenous rights. Pompeia argues that the Brazilian agribusiness sector cannot be analysed as a monolithic bloc with convergence in all economic and policy matters, including those related to environmental and Indigenous rights[72]. Instead, the author built a categorization, based on their views towards these rights: "negationist", "conservatives", "volatiles", "decarbonizers", "Europeans"[73]. His comparative analysis reveals that "negationist" and "conservative" sectors actively pressure the public power to dismantle protections for Indigenous peoples and the environment[74]. The agribusiness lobby is highly organized, using both discursive and practical strategies "that implicate on Indigenous and traditional peoples' land rights"[75].

The agribusiness is also organized through associations. The Brazilian Agriculture and Livestock Farming Confederation (CNA, Confederação da Agricultura e Pecuária do Brasil) is an influential employer association that holds a deep connection with the conservative agribusiness[76]. CNA is also a major stakeholder in the Brazilian politics, which is important to understand what the interests in dispute during the legislative procedures are[77].

The bill was first introduced in 2007, by Deputy Homero Pereira. After sixteen years of legislative proceedings, the resulting law bears little resemblance to the original proposal. Pereira intended to involve the National Congress in the demarcation process by determining the homologation by law[78]. In his words, an essentially administrative measure would become



[72] Pompeia (n 41).
[73] ibid.
[74] ibid.
[75] ibid 2.
[76] Pompeia (n 41).
[77] ibid.
[78] Homero Pereira, 'Projeto de Lei Nº 409, de 2007' <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=444088&filename=Tramitacao-PL%20490/2007> accessed 12 December 2024.

a legislative matter by transferring "the debate of major questions involved in the demarcation of Indigenous lands"[79] to the National Congress, the legitimate representative of the Brazilian people. Given the similarities of the final law and the *Raposa Serra do Sol* decision, this analysis adopted an exploratory method of the legislation, identifying Deputies' interventions that expressly mentioned the ruling.

The interventions analysed here are those that led to the attachment of other propositions. The first, introduced in 2009 by Félix Mendonça, came a few months after the *Raposa do Sol* decision. The second, by Geraldo Simões in 2012, followed shortly after the Court consolidated the conditions for the implementation of the decision. Finally, the last reporting deputy, Arthur Maia, was responsible for consolidating the final version of the law. The matter then moved to the Senate, where it was approved within three months and sent for presidential sanction[80]. Additionally, an intervention by Deputy Zé Trovão, which institutionalized the "urgent status" of the legislative procedure, will be briefly analysed.

Two main facts must be noted. First, there was no major public hearing during the legislative proceedings[81]. Although two requests were made in 2021, they never happened. A third hearing, requested in 2023, took place after the Law was enacted, and in the context of the Amazonian and Original and Traditional Peoples Commission[82]. As such, there was no real opportunity for civil society or affected communities to participate officially in the debate.



[79] ibid.

[80] Câmara dos Deputados, 'Ficha de Tramitação: PL 490/2007' (*Portal da Câmara dos Deputados*) <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=345311&fichaAmigavel=nao> accessed 22 January 2025.

[81] Câmara dos Deputados, 'Requerimentos Apresentados - PL 490/2007' (*Portal da Câmara dos Deputados*) <https://www.camara.leg.br/proposicoesWeb/prop_requerimentos?idProposicao=345311> accessed 22 January 2025.

[82] Célia Xakriabá, 'Requerimento 28/2023' <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2360570> accessed 24 April 2025.

Secondly, Deputies Homero Pereira[83], Geraldo Simões[84], Zé Trovão,[85] and Arthur Maia[86] were or are part of the FPA. Regina Bruno's[87] interpretation of the strength of the Parliamentary Fronts as cross-party coalitions is particularly relevant here, as each of these deputies belongs to a different political party and represents a different state. It was not possible to verify whether Félix Mendonça had any connection with the FPA.

Proceeding to the interventions' analysis, three main findings emerge from the deputies' justification for the proposed measures: A perception that the demarcation process lacks clear and objective standards; the rhetorical emphasis on the need to secure productive capacities and legal certainty; and the strategic mobilization of the STF decision, due to its institutional legitimacy in interpreting the Constitution.

Félix Mendonça's intervention defined the demarcation process as an "unilateral will"[88] of the indigenist agency, Funai. Geraldo Simões argued that the demarcation process is embedded with subjectivities and arbitrariness of the agency, due to its "totalitarian" [89] power. Zé Trovão, when required the urgency of the matter, said it was necessary to establish clear and

[83] Agência FPA, 'Eternas Saudades de Homero Pereira' (20 October 2013) <https://agencia.fpagropecuaria.org.br/2013/10/20/eternas-saudades-de-homero-pereira/> accessed 22 January 2025.

[84] Geraldo Simões is no longer part of the Agribusiness Parliamentary Front. Isabel Sanchez, 'Bancada ruralista já propôs 25 Projetos de Lei que ameaçam demarcação de terras indígenas e quilombolas' (*De Olho nos Ruralistas*, 11 September 2017) <https://deolhonosruralistas.com.br/2017/09/11/bancada-ruralista-ja-propos-25-projetos-de-lei-que-ameacam-demarcacao-de-terras-indigenas-e-quilombolas/> accessed 8 May 2025.

[85] Câmara dos Deputados, 'Frentes e Grupos Parlamentares: Frente Parlamentar da Agropecuária - FPA' (*Portal da Câmara dos Deputados*) <https://www.camara.leg.br/deputados/frentes-parlamentares/57/54323/membros> accessed 5 June 2025.

[86] ibid.

[87] Bruno (n 43).

[88] Félix Mendonça, 'PL 5.993/2009' (*Portal da Câmara dos Deputados*, 2009) 4 <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=448694> accessed 5 June 2025.

[89] Geraldo Simões, 'PL 6.818/2013' 6 <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1199272&filename=PL%206818/2013> accessed 5 June 2025.

objective criteria for demarcations[90]. Arthur Maia is the only one who does not mention Funai or the lack of objective standards in the process[91].

Regarding the need to secure productive forces and legal certainty, Geraldo Simões is the only one who did not mobilize this argument. Félix Mendonça justified that his proposition aimed to consider the interests of "productive forces", the country's security, preservation of the environment, enjoyment of potential energetic resources, and maintenance of infrastructure[92]. Zé Trovão said that the urgent legislative proceedings should consider the need to end land conflicts by guaranteeing legal certainty and to protect the stability of productive activities in rural areas[93]. Finally, Arthur Maia argued positively on using STF's understanding to promote legal certainty[94] by applying the Court's interpretation in all cases. Also, he claimed that the Law would provide legal conditions for Indigenous peoples, if they so wish, to interact in a labour-based scheme with different sectors of society[95].

Finally, Félix Mendonça, Geraldo Simões, and Arthur Maia mobilized the STF's decision at different levels. Mendonça referred to the understanding as relevant, but also honoured the justice Carlos Alberto de Menezes Direito, author of the conditions[96]. Geraldo Simões recalled that the STF used the parameters to limit the expansion of the Indigenous territory *Ribeirão dos Silveiras*, even when the conditions for implementing the Raposa Serra do Sol decision were non-binding[97]. Lastly, he quoted Justice Luis Roberto Barroso on the ratification of the decision in 2013, when Barroso affirmed that the *Raposa Serra do Sol* case



[90] Zé Trovão, 'Requerimento de Urgência 1526-2023' <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2272567&filename=REQ+1526/2023> accessed 20 April 2025.
[91] Arthur Maia, 'Relatório PL 490/2007' <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2009611&filename=Tramitacao-PL%20490/2007> accessed 20 April 2025.
[92] Mendonça (n 88) 4.
[93] Trovão (n 90).
[94] Maia (n 91) 18.
[95] ibid.
[96] Mendonça (n 88).
[97] Simões (n 89).

"showcases the intellectual and persuasive strength of the country's highest Court"[98]. Arthur Maio mobilized the exact quotation, however, with a higher number of examples of the use of this jurisprudence in recent years, including the Executive memorandum of 2017[99].

It is worth noting that on two occasions, during the 2018 and the 2022 elections, the Brazilian Agriculture and Livestock Farming Confederation (CNA) wrote an analysis of the country's economic obstacles and made policy recommendations[100]. In 2018, the CNA stated that the amount of land used for economic production is very low (9% of the country's territory) and the national legal framework is an obstacle to the full enjoyment of land, since 13% of it belongs to the "Indians"[101]. The association, then, portrays Indigenous territories as a problem for their economic interests. As policy recommendations, the entity asked the government to use the parameters and conditions of the Raposa Serra do Sol's case to end land conflicts[102]. It criticized Funai's "arbitrariness" for land demarcation. It argued for the need to create legislation based on the mentioned decision, and that promotes the "insertion of Indigenous peoples in the productive process, aiming to surpass the main obstacles in the production and commercialisation of agricultural products of Indigenous communities"[103].

In 2022, on land management, CNA asked to turn the Temporal Landmark thesis and the 19 conditions of the Raposa Serra do Sol case into law. That would secure "legal certainty", alongside adopting "technical" procedures to the demarcation process, and making it possible for the Indigenous to develop economic activities, even in cooperation with non-Indigenous[104].



[98] The actual phrase would be "moral" other than "intellectual". The studies reproduces the quoting as appears in ibid. For the actual quotation and vote, see *Embargos de Declaração - Petição 3388 Roraima* [2013] Roberto Barroso (Supremo Tribunal Federal) [4].
[99] Brazil and Mendonça (n 71).
[100] Confederação da Agricultura e Pecuária do Brasil, 'O Que Esperamos Dos Próximos Governantes: 2022' <https://cnabrasil.org.br/storage/arquivos/pdf/proximos_governantes_final.pdf> accessed 28 April 2025.
[101] Conselho do Agro and Confederação da Agricultura e Pecuária do Brasil, 'O Futuro é Agro (2018-2023)' 10 <https://www.cnabrasil.org.br/assets/arquivos/plano_de_estado_completo_21x28cm_web.pdf> accessed 28 April 2025.
[102] ibid 38.
[103] ibid 39.
[104] Confederação da Agricultura e Pecuária do Brasil (n 100) 84.

It is worth noting that Zé Trovão mobilised the term to propose and advocate for the urgency of the proposition[105].

Caio Pompeia analysed the use of the concept of legal certainty as a means to conflate different groups and sectors of society, such as the industrial one[106], in a neutral, technical term. By doing so, the Agribusiness sector could influence and gather an alliance on their anti-environment and anti-Indigenous agenda[107].

CNA's documents can explain the insertion of Articles 26, 26 (2), and 27. Article 26 authorizes the development of economic activities in Indigenous lands, including with the cooperation and participation of non-Indigenous[108]. Article 27 allows touristic practices another economic possibility, including the celebration of contracts with third parties[109]. All of these are mentioned in the documents quoted here.

Scholarly work has argued that the writing of the conditions and the use of plural rather than singular ("Indigenous lands" and "Indigenous peoples", see Index I) already opened the possibility of using it as binding jurisprudence[110]. This interpretation aligns with the findings of this research because Deputies used the case in the STF and its use by the executive and judiciary as an authoritative argument.

As for the conditions, the possibility of limiting Indigenous rights based on the "public interest" (conditions 1, 2 and 5[111] vis-a-vis Article 20[112]) and the entry of third parties into Indigenous territories without any consultation weakens legal protections, potentially legitimising illegal occupations[113]. With a special focus on economic and development



[105] Trovão (n 90).
[106] Caio Pompeia, 'Concertação e Poder: O agronegócio como fenômeno político no Brasil' (2020) 35 Revista Brasileira de Ciências Sociais e3510410, 4 <https://www.scielo.br/j/rbcsoc/a/bWNJXhwGrcqZRqjJF6rD5pv/?lang=pt> accessed 24 May 2025.
[107] ibid.
[108] Brazil Lei Nº 14.701, de 20 de outubro de 2023 (n 17) art 26.
[109] ibid 27.
[110] Silva (n 48).
[111] *Petição 3388-4 - Roraima: Decisão* [2009] Carlos Ayres Britto (Supremo Tribunal Federal).
[112] Brazil Lei Nº 14.701, de 20 de outubro de 2023 (n 17).
[113] Silva (n 48).

activities, the conditions exclude Indigenous peoples from the consultation process and their participation in the use and management of their territory, without any provision of financial compensation for development projects, and prohibiting the expansion of already demarcated lands[114]. If further studies prove the traditional relationship of a community beyond the already demarcated lands, the Executive cannot extend it.

This chapter provided a critique of the legislative process surrounding Law 14.701. It demonstrated how an arbitrary interpretation of the Constitution was later mobilized by groups seeking to undermine Indigenous rights for economic gain. The Temporal Landmark, in all its versions, poses significant threats to territories that have already been officially recognized. Moreover, Article 15[115] of the Law nullifies demarcations that did not adhere to the temporal criterion for territorial occupation — October 5, 1988. The next chapter will focus on the conventionality control of these recent developments.



[114] Yamada and Villares (n 51).
[115] Brazil Lei Nº 14.701, de 20 de outubro de 2023 (n 17).

## 2. JURISPRUDENCE OF THE INTER-AMERICAN COURT: EXPANDING INDIGENOUS RIGHTS

The previous exposure of the Brazilian legal framework can be compared with Indigenous rights secured under international human law. The analysis focuses on the Inter-American Court and the doctrine of control of conventionality. As shown, the Brazilian State fixed conditions on the enjoyment of Indigenous peoples' territorial rights and their right to consultation. The IACtHR analyses the right to consultation[116] as a guaranteed procedure to limit the right to property, which is not an absolute right[117].

There is a pattern of Indigenous rights land rights in the IACtHR, usually when states fail to comply with the recognition of these rights or the procedures to limit them to extractive and exploitation activities, or the implementation of a development project in Indigenous territories. This type of conflict usually arises when extractive-based development[118] is taking place. Extractive-based activities are seen as a means to finance social policies and to mitigate poverty by guaranteeing revenues for the State. On the continent, it took the form of the use of Nature "as a collection of exploitable resources for modernization"[119]. Major stakeholders in these conflicts are States and companies on one side, and Indigenous and local communities on the other.

This section will focus on the jurisprudence of IACtHR on the right to property and consultation procedures compared to Brazil's legal framework. For this purpose, a jurisprudence review was done and analysed based on scholarly work. However, the Temporal Landmark thesis had already been compared in academic work. Gilberto Starck and Fernanda



[116] Par Engstrom and Edward Perez, 'Confronting Extractivism: The Inter-American Human Rights System and Indigenous Rights in Latin America' (Social Science Research Network, 19 March 2024) <https://papers.ssrn.com/abstract=4771890> accessed 27 April 2025.
[117] ibid.
[118] ibid.
[119] ibid 2.

Frizzo Bragato argue that the decision of *Raposa Serra do Sol* does not comply with the jurisprudence of the Court, based on its understanding of the Indigenous fact (*fato indígena*)[120]. To contribute to the discussion, the comparison will focus on the RE 1017365, with a special focus on the vote of the reporting justice, Edson Fachin, who introduced most of the standards of the decision and argued on the unconstitutionality of the Temporal Landmark thesis. In the second subsection, the critique focuses on the lack of participation of Indigenous and affected communities during the legislative procedures and in the resulting Law.

### 2.1. The Indigenous right to property in the IACtHR and the conventionality control of RE 1017365

The IACtHR has been developing progressive standards[121] and binding obligations related to Indigenous rights, especially on the collective rights to property under Article 21 of the American Convention on Human Rights[122] (Convention). Scholars recognize the trend of mobilizing international law to advance Indigenous rights in the Inter-American system[123]. In recent years, it has overcome formalistic interpretations, such as the right to property as an individual right. The case law is also an example of the "increasingly dynamic role of indigenous peoples in the international legal arena traditionally dominated by governmental actors"[124].



[120] Starck and Bragato (n 25).
[121] Stephen James Anaya and Claudio Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples' [2002] Arizona Journal of International and Comparative Law 15 <https://scholar.law.colorado.edu/faculty-articles/845>.
[122] Efrén C Olivares Alanís, 'Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence from the Inter-American System of Human Rights' (2013) 5 Goettingen Journal of International Law 187 <https://journals.uni-goettingen.de/gojil/article/view/2076/1760>.
[123] Anaya and Grossman (n 121).
[124] Leonardo J Alvardo, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua' (2007) 24 Arizona Journal of International and Comparative Law 609, 617 <https://heinonline.org/HOL/P?h=hein.journals/ajicl24&i=617> accessed 9 May 2025.

The IACtHR recognized in several opportunities[125] the distinct nature of Indigenous lands compared to the "classic concept"[126] of property prevalent in liberal societies. Its jurisprudence acknowledges the "intrinsic connection that indigenous and tribal peoples have with their territory"[127]. The State must protect this connection to guarantee the Indigenous "traditional way of living" and their cultural, economic, and social distinctiveness[128]. Moreover, the Court has emphasised that Indigenous property expands beyond material possession, as it holds a spiritual meaning for these communities[129], especially towards natural resources[130]. The Court has further stated that Indigenous communities have an ontological connection with natural resources, "because they are an integral element of their cosmology, their spirituality and, consequently, their cultural identity"[131].

Compared to the Brazilian case, the argument that Indigenous lands are protected as private property under the Brazilian Code of Civil Procedure is inconsistent with the IACtHR jurisprudence. This argument was used when applying the unlawful persistent dispossession (*renitente esbulho*) as an exception to the Temporal Landmark thesis in the Raposa Serra do Sol case and it was criticized by José Afonso da Silva[132]. *Renitente esbulho* is a concept of the Brazilian Civil Code that addresses land conflicts between individuals and, as such, should not be applied to Indigenous lands of traditional occupation. José Afonso da Silva[133], thus, criticizes the *renitente esbulho* as a parameter to recognize the Indigenous land right, as it disregards the distinctive constitutional status of traditional occupation as an original right.



[125] *Case of the Xucuru Indigenous People and its members v. Brazil* (n 19) para 115.
[126] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-American Court of Human Rights Series C 245 [145].
[127] ibid 146.
[128] ibid.
[129] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-American Court of Human Rights Series C 79 [149].
[130] *Case of Saramaka People v Suriname* [2007] Inter-American Court of Human Rights Seriesc172 [121]; *Xákmok Kásek Indigenous Community v Paraguay* [2010] Inter-American Court of Human Rights Series C 214 [174].
[131] *Xákmok Kásek Indigenous Community v. Paraguay* (n 130) para 174.
[132] da Silva (n 22).
[133] ibid.

In RE 1017365, which ruled on the unconstitutionality of the Temporal Landmark thesis, the reporting justice Edson Fachin argued that land for Indigenous peoples has a different legal status than private possession and property[134]. The private conception has an economic value and finality[135], while Indigenous lands are part of their identity[136], as a *habitat*[137]. Fachin's interpretation is more aligned with the jurisprudence of the IACtHR by expanding the notion of land as an economic good. On the other hand, the Temporal Landmark thesis applied in *Raposa Serra do Sol* holds that Indigenous lands have the same legal status as the classic concept of property.

To build on the argumentation, the Court uses the Indigenous customary law on land occupation[138] as a legal parameter. For Indigenous peoples, the possession has the same effects as the State's legal titling[139]. Property in Indigenous customary law is based on the occupation and use of land, including for spiritual purposes and cultural reproduction. For the Court, the Indigenous community rights precede the country's legal system[140]. Logically, this understanding assures indigenous communities the right to ownership and registration of their lands by the State[141].

This corresponds to Indigenous land rights and their declaratory nature in Brazil. This was also how the IACtHR interpreted them in *Xucuru Indigenous People and Its Members v. Brazil* (2018)[142]. The *indigenato* view was first established in Brazil in 1680[143]. This concept understands that the Indigenous right to land precedes the Constitutional recognition of it[144].



[134] *Recurso Extraordinário 1.017.365 - Santa Catarina: Voto do Relator* (n 1) 51.
[135] ibid.
[136] ibid 53.
[137] ibid 52.
[138] Anaya and Grossman (n 121).
[139] *Case of the Xucuru Indigenous People and its members v. Brazil* (n 19) para 117.
[140] Alvardo (n 124).
[141] *Case of the Xucuru Indigenous People and its members v. Brazil* (n 19) para 117.
[142] ibid 128.
[143] da Silva (n 22).
[144] ibid 5.

Justice Edson Fachin embraced the *indigenato* by saying that the 1988 Constitution is a "*continuum*" in recognizing Indigenous rights to their traditional lands[145].

Furthermore, both the Brazilian Deputies, as shown before, and the IACtHR mobilize the concept of "legal certainty". The idea is defined in the jurisprudence as the State's practices that guarantee confidence "that fundamental rights and freedom will be respected and ensured to all persons"[146]. Brazil's delay in titling Indigenous lands and freeing them from non-Indigenous control was analysed in Xucuru's case. The Court argued on the lack of titling as a violation of the right to property and on the right of fair trial, under "reasonable time"[147], based on ineffective administrative procedures[148]. In such sense, effective measures would guarantee the certainty of a fundamental right. On the occupation of non-Indigenous in traditional lands, the Court understands that the State has to refrain from taking actions carried out by State agents, or third parties acting with their acquiescence or tolerance, that could impact the communities' existence, enjoyment, and use of the property[149]. The State must guarantee the "effective ownership"[150].

In the views of Justice Edson Fachin, Article 67 of the Constitution[151], in which the State would conclude the demarcation of all Indigenous lands in five years after the promulgation of the Magna Carta, is programmatic[152]. Failure to demarcate the lands during this period is not a breach of the Constitution, but the State's inefficiency set Indigenous peoples "as dependent on the administrative measures"[153] and as a source of the alarming judicialization of demarcation processes[154]. On the occupation of non-Indigenous individuals, Justice Fachin argues that they



[145] *Recurso Extraordinário 1.017.365 - Santa Catarina: Voto do Relator* (n 1) 64.
[146] *Case of the Xucuru Indigenous People and its members v. Brazil* (n 19) para 123.
[147] ibid 149.
[148] ibid.
[149] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (n 129) para 153.
[150] *Case of Kaliña and Lokono Peoples v Suriname* [2015] Inter-American Court of Human Rights Series C 309 [132].
[151] Brazil Brazil 1988 (rev. 2017) Constitution - Constitute (n 2) art 67.
[152] *Recurso Extraordinário 1.017.365 - Santa Catarina: Voto do Relator* (n 1) 32–33.
[153] ibid.
[154] ibid.

do not have the right to stay in traditional lands[155], and the State must protect Indigenous territorial rights from third parties[156]. Thus, the justice interpretation aligns with IACtHR by reassuring the effective ownership, although Justice Fachin states that delays in demarcation proceedings do not violate the Constitution.

The IACtHR has also analysed the right to land when a community leaves their territory involuntarily for reasons beyond their control[157]. Based on the right to land, the State must ensure the conditions for their return[158]. By embracing the *indigenato*, the Brazilian Constitution guarantees the right over land even if the Indigenous are not occupying that territory, as long as they have a traditional connection to the land. On that matter, Justice Edson Fachin says: "The constitutional protection of the original rights over the lands traditionally occupied by Indigenous peoples does not depend on the existence of any temporal landmark as of October 5, 1988"[159].

The IACtHR also established that when the State grants the title of the traditional territories to a non-Indigenous individual or company, it must nullify the ownership or concession[160], except when done in "good faith". The Brazilian Constitution also recognizes the nullity of third parties' property titles in ancestral lands[161]. Justice Edson Fachin argued that the Supreme Court should follow the provision of the Constitution and allow financial compensation only for good-faith improvements[162]. However, this was not the final decision. Justice Alexandre de Moraes suggested upfront compensation for the bare land value and good-



[155] ibid 96.
[156] ibid 98.
[157] *Case of the Moiwana Community v Suriname* [2005] Inter-American Court of Human Rights Series C 124 [128].
[158] ibid.
[159] *Recurso Extraordinário 1.017.365 - Santa Catarina: Voto do Relator* (n 1) 108.
[160] *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama* [2014] Inter-American Court of Human Rights Series C 284 [233].
[161] Brazil Brazil 1988 (rev. 2017) Constitution - Constitute (n 2) art 231 § 6º.
[162] *Recurso Extraordinário 1.017.365 - Santa Catarina: Voto do Relator* (n 1) 96.

faith improvements[163]. The ruling established that such compensations would happen alongside the demarcation process[164].

Brazilian Indigenous organizations called Justice Alexandre de Morais's vote important by opposing the Temporal Landmark thesis. Still, the compensation on bare land value can threaten Indigenous rights. For the Missionary Indigenist Council (Cimi, Conselho Indigenista Missionário), demarcation processes can become even slower due to the financial compensation of non-Indigenous third parties in Indigenous lands[165]. The Coalition of Indigenous Peoples of Brazil (APIB, Articulação dos Povos Indígenas do Brasil) argues that it can become a financial burden to the State, and the demarcation procedures could be paralyzed due to the lack of budget for compensation[166].

The final jurisprudence for the analysis is on limiting the Indigenous land rights. For the IACtHR, not all resources are essential for their way of life[167]; thus, the provision of Article 21 should not be read to prevent the State from granting any license to exploit and extract natural resources[168]. The Court decided that to limit the collective right of property, the limiting should be: (i) prescribed by law and correspond society's interests[169], (ii) necessary to achieve an "imperative public interest"[170]; (iii) proportionate, resulting in the least interference possible with the rights being restrained[171]; and (iv) a "legitimate objective in a democratic society"[172]. However, the State should consult with affected communities as regulated in the ILO C169.



[163] Alexandre de Morais, 'Recurso Extraordinário 1.017.365 - Santa Catarina: Voto Ministro Alexandre de Morais' 52 <https://static.poder360.com.br/2023/08/RE-1017365-Voto-Min-Alexandre-1.pdf> accessed 24 April 2025.
[164] *Recurso Extraordinário 1017365 - Santa Catarina: Decisão* [2023] Edson Fachin (Supremo Tribunal Federal).
[165] Tiago Miotto, 'Nota do Cimi: Constituição veda indenização por terra nua em demarcação de terras indígenas | Cimi' (21 August 2023) <https://cimi.org.br/2023/08/nota-constituicao-indenizacao-terra-demarcacao/> accessed 7 June 2025.
[166] 'Indenizar fazendeiros invasores vai custar mais de 1 bilhão e pode tornar demarcações inviáveis' (*APIB*, 25 July 2023) <https://apiboficial.org/2023/09/25/indenizar-fazendeiros-invasores-vai-custar-mais-de-1-bilhao-e-pode-tornar-demarcacoes-inviaveis/> accessed 7 June 2025.
[167] *Case of Saramaka People v. Suriname* (n 130) para 126.
[168] ibid.
[169] *Case of the Yakye Axa Indigenous Community v Paraguay* [2005] Inter-American Court of Human Rights Series C125 [145].
[170] ibid.
[171] ibid.
[172] *Case of Saramaka People v. Suriname* (n 130) para 127.

That is, for restraining the right to property of Indigenous communities, these communities must be consulted and, in special cases, should consent to the project or activity taking place. This is the subject of the following section.

### 2.2. The right to consultation and the Temporal Landmark Law

For the consultation jurisprudence, the IACtHR relies on the ILO C169[173]. The insertion of it as a complementary document shows how the ILO C169 is relevant in global politics, despite being under-ratified[174]. Scholarly work shows its importance to political processes in national spheres in redefining and rethinking "indigenous peoplehood"[175] and framing "the boundaries of citizenship and decision-making"[176]. However, academia has also discussed the consultation procedure as a colonial one. Acuña argues that consultation can lose its emancipatory possibilities when incorporated into the political economy governance and used only to comply with corporate social responsibility[177], which does not necessarily offer emancipation.

The IACtHR defines consultation as a procedural right to secure Indigenous participation in conflicts between communities and third parties[178], companies, and economic activities[179] or on development projects made by the State[180]. In the jurisprudence, it is the duty



[173] Isabel M Madariaga Cuneo, 'ILO Convention 169 in the Inter-American Human Rights System: Consultation and Consent' (2020) 24 The International Journal of Human Rights 257 <https://doi.org/10.1080/13642987.2019.1677622> accessed 30 April 2025.
[174] Peter Bille Larsen, 'Contextualising Ratification and Implementation: A Critical Appraisal of ILO Convention 169 from a Social Justice Perspective' (2020) 24 The International Journal of Human Rights 94 <https://www.tandfonline.com/doi/abs/10.1080/13642987.2019.1677613> accessed 3 February 2025.
[175] ibid 97.
[176] ibid.
[177] R Merino Acuña, 'Coloniality and Indigenous Territorial Rights in the Peruvian Amazon: A Critique of the Prior Consultation Law' (2015) 38 Bath Papers in International Development and Wellbeing.
[178] *Case of the Xucuru Indigenous People and its members v. Brazil* (n 19); *Case of the Indigenous Community of the Lhaka Honhat (Our Land) Association Vs Argentina* [2020] Inter-American Court of Human Rights Series C No. 400.
[179] *Case of Saramaka People v. Suriname* (n 130).
[180] *Case of the Indigenous Community of the Lhaka Honhat (Our Land) Association Vs. Argentina* (n 178).

of the State to ensure the rights and enjoyment of the Indigenous peoples to their lands[181]. The IACtHR has established the following parameters for consultation: The affected communities should participate and be consulted about the project; it needs to guarantee a reasonable benefit from the project to the affected communities; and the State must ensure the assessment of environmental and social impacts[182].

Two main aspects are drawn for it: First, the IACtHR understands that Indigenous peoples are "distinct social and political actors" that "must receive particular recognition and respect in a democratic society"[183]. Thus, the consultation is "intended to preserve, protect and guarantee the special relationship that the members"[184] of a community have with their territory, allowing their physical and cultural survival.

Secondly, the consultation process must guarantee the effectiveness of participation. For this end, it must be (i) culturally appropriate, based on the Indigenous customs and traditions[185]; (ii) informed, with constant communication between the parties and with information disseminate by the State[186]; (iii) carried out in good faith, aiming to reach an agreement[187]; (iv) based on the voluntary and knowingly acceptance of the economic activity, in which the State must share the environmental and social risk assessments[188]; (v) conducted according to the communities' decision-making processes and methods[189].

Merino Acuña criticizes this reading because it allows the limitation of Indigenous properties, implying that Indigenous peoples are not able to identify or correspond to a "national interest" in the management of their traditional territories[190]. In that sense, Indigenous peoples'



[181] *Case of Saramaka People v. Suriname* (n 130) paras 2–3.
[182] ibid 127.
[183] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (n 126) para 159.
[184] *Case of Saramaka People v. Suriname* (n 130) para 129.
[185] ibid 129, 133.
[186] ibid.
[187] ibid.
[188] ibid.
[189] ibid 133.
[190] Merino Acuña (n 177).

rights must be violated for economic development and the benefit of the national State, almost as if they were a "less civilized" people[191]. This logic is similar to assimilation policies in Brazil and the Indigenous peoples as an obstacle to development.

Jo M. Pasqualucci also points out critical points related to the IACtHR jurisprudence[192]. The IACtHR has established a difference between consultation, which should happen whenever there is an impact, and consent, when there is a significant impact on the community's use and enjoyment of their ancestral territory[193]. This jurisprudence, in which consent is only necessary for projects of major impacts, is limited compared to the UN Declaration on the Rights of Indigenous Peoples[194]. The UN framework calls for getting consent before any project affecting indigenous lives and territories, without conditioning it to a significant impact[195]. In the author's words, this interpretation "seems to give the State leeway to grant smaller for-profit logging and mining concessions that could seriously impact indigenous communities close to their villages"[196].

Over the years, the IACtHR expanded the consultation jurisprudence. It relied on the ILO Committee of Experts to define that the consultation procedure must happen before approving any measure, including legislative ones, that may affect the communities[197]. In that sense, consultation is an instrument for political participation. The IACtHR has also defined projects with environmental impact or information about the exploitation of natural resources in Indigenous territories as, by nature, a "public interest"[198]. This jurisprudence has been settled



[191] ibid 16.
[192] Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 *Wisconsin International Law Journal* 51 <https://repository.law.wisc.edu/s/uwlaw/item/29204> accessed 22 February 2025.
[193] *Case of Saramaka People v. Suriname* (n 130) para 136.
[194] ibid.
[195] ibid.
[196] Pasqualucci (n 192) 91.
[197] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (n 126) para 181.
[198] *Indigenous Community Maya Q'Eqchi Agua Caliente v Guatemala* [2023] Inter-American Court of Human Rights Series C 488 [252].

throughout the years, and the IACtHR understands that failing to consult the Indigenous peoples about economic activities in their territories breaches Articles 21 (Right to Property), Article 23 (Right to Participate in Government) and Article 13 (Right to Freedom of Thought and Expression)[199].

Tomaselii and Cittadino have criticized the jurisprudence for the lack of incorporation of Indigenous worldviews[200] into the jurisprudence, because the only form of resistance is through consultation. For MacKay[201], it is ironic that the IACtHR mobilized other treaties and interpretations, such as UN treaty bodies, but omitted itself on the necessity of consent, even when directly mentioning Article 32(2) of the UN Declaration on the Rights of Indigenous Peoples. The criticism also focused on the emphasis on procedural aspects, preventing the IACtHR analysis of substantive rights[202]. However, political experiences show that even when the consultation happens, it is usually flawed, eventually due to the power imbalance between communities, the company and the State[203].

Additionally, consulting with the affected communities does not mean that their visions and opinions will be incorporated and that the process prevents future rights violations[204]. For Verdonck and Desmet[205], the IACtHR should be careful in using abstract concepts, such as "major impact", or preconceptions, such as "large-scale project", to trigger the free, prior and



[199] ibid 269.
[200] Alexandra Tomaselli and Federica Cittadino, 'Land, Consultation and Participation Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights' in Bertus de Villiers and others (eds), *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts* (Brill 2021) <https://brill.com/edcollchap-oa/book/9789004461666/BP000006.xml> accessed 11 March 2025.
[201] Fergus MacKay, 'The Case of the Kalina and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence, and Mutual Reinforcement' (2018) 11 Erasmus Law Review 31, 41 <https://heinonline.org/HOL/P?h=hein.journals/erasmus11&i=33> accessed 12 May 2025.
[202] ibid 40.
[203] MacKay (n 201).
[204] Lieselot Verdonck and Ellen Desmet, 'Moving Human Rights Jurisprudence to a Higher Gear: Rewriting the Case of the Kichwa Indigenous People of Sarayaku v Ecuador (IACtHR)', *Integrated Human Rights in Practice* (Edward Elgar Publishing Limited 2017) <https://www.elgaronline.com/edcollchap/edcoll/9781786433794/9781786433794.00025.xml> accessed 13 May 2025.
[205] ibid.

informed consent, since the size of the project does not necessarily correlate with its impact[206]. For them, the jurisprudence should hold non-state actors to respect human rights, even though they are not under its jurisdiction, since "the mere fact that there is no remedy to enforce an obligation does not mean that the obligation cannot exist"[207].

Another fragility is when the IACtHR defers the definition of a valid public or national interest to national authorities[208], as it can pose threats and irreparable harm to local communities. For example, the construction and functioning of Belo Monte Hydroelectric in Brazil caused irreparable damage to traditional communities. In 2011, the Inter-American Commission issued a precautionary measure for Indigenous communities affected by the hydroelectric plant. It justified doing so based on the risk to the communities' health and survival (contamination of diseases), and the lack of consultation with the communities[209].

Upasana Khatri[210] compared the procedures adopted during the planning of Belo Monte with the Court's jurisprudence and found that Brazil did not comply with it. First, Norte Energia, the plant's concessionaire, took advantage of the communities' members who spoke little Portuguese and delivered a poor translation of their sayings to the company president[211]. This means the process was not culturally appropriate or made in good faith. It was also used as leverage existing conflicts between different communities[212].

[206] The authors argue that even small projects can have a big environmental and human rights impact. In that sense, "large scale project" should not be used indiscriminately as an informer of the need to get consent.
[207] Verdonck and Desmet (n 204). More recently, in cases like Lhaka Hohnat v. Argentina (2019) and People from La Oroya vs Peru (2024) the Court have expanded not only the understanding of the right to a healthy environment, but also States and business duties under human rights law, especially mobilizing the United Nations Guiding Principles on Business and Human Rights (2011). The author's text, from 2017, was already calling the Court to mobilize this document, as it has done with other international standards of human rights, such as ILO C169.
[208] *Case of the Indigenous Community of the Lhaka Honhat (Our Land) Association Vs. Argentina* (n 178) para 181.
[209] Inter-American Commission on Human Rights, 'Precautionary Measures 382-10 - Indigenous Communities of the Xingu River Basin, Pará, Brasil' <https://www.oas.org/en/IACHR/decisions/MC/precautionary.asp?Year=2011> accessed 14 May 2025.
[210] Upasana Khatri, 'Indigenous Peoples' Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku v. Ecuador and Its Potential to Delegitimize the Belo Monte Dam Comments' (2013) 29 American University International Law Review 165 <https://heinonline.org/HOL/P?h=hein.journals/amuilr29&i=177> accessed 13 May 2025.
[211] ibid 193.
[212] ibid 194.

Also, the Brazilian state failed to host a state-sponsored consultation when delegated to Norte Energia[213]. However, the IACtHR has established the duty of the State to conduct consultations, as it cannot refer to a non-State party. Furthermore, the consultation process failed to provide the necessary information, and the government released a 20,000-page technical document two days before the meeting to discuss environmental and social impacts[214]. This implies the lack of an informed consultation and a lack of intent to reach an agreement.

Finally, the law authorizing the plant was questioned on the lack of consultation during the legislative process[215]. In 2024, the Brazilian Supreme Court decided that the Legislative Decree 778/2005, which authorized the construction and exploitation of the river for producing energy, did not follow the ILO C169 and the Constitution[216]. The decision recognized that the State failed to consult the affected communities, but understood that the Belo Monte Hydroelectric plant is strategic to the country. Therefore, interrupting its functioning would cause damage to the State and the public interest[217]. As remedies, the Court asked for reparations, including economic[218].

The Temporal Landmark Law threatens Indigenous rights by weakening provisions and not complying with the IACtHR jurisprudence. On development plans, the Law says in Article 21: "the establishment of military bases, units, and posts, as well as other military interventions, the strategic expansion of the road network, the exploitation of strategic energy alternatives […] will be implemented without the consultation with Indigenous communities affected"[219]. The wording expressly withdraws the obligation to consult affected communities. Moreover, Article 23 does not even mention consultation on the permission to install "equipment,



[213] ibid.
[214] ibid 171.
[215] ibid 200.
[216] *Quartos Embargos de Declaração no Agravo Regimental nos Terceiros Embargos de Declaração* [2024] Ministro Alexandre de Moraes (Supremo Tribunal Federal) [2].
[217] ibid 5.
[218] ibid 7.
[219] Brazil Lei Nº 14.701, de 20 de outubro de 2023 (n 17) art 21.

communication networks, roads, and transportation routes on Indigenous lands"[220]. If the Brazilian state has already failed its constitutional and international obligations when the legal framework was stronger, weakening Indigenous rights makes the scenario worse, sidelining the effective political participation of traditional peoples.

The legislative proceedings described in the previous section lacked public hearings for civil societies' participation. The IACtHR established that Indigenous communities must be consulted whenever a measure that can affect the communities is considered or debated, even if it is a legislative measure. The lack of public hearings, where the civil society can participate directly and actively in public affairs, shows a lack of legitimacy[221]. Francisco Paulo Jamil Almeida Marques[222] also argues that political participation is essential for the effectiveness of policymaking and implementation processes.

These examples show that the Brazilian State has failed to comply with the IACtHR jurisprudence in terms of consultation and faces difficulties implementing adequate procedures to protect Indigenous rights. As discussed, the Temporal Landmark thesis is still valid, despite the decision on its unconstitutionality. The main argument developed here is that the vote of reporting Justice Edson Fachin is more aligned with the IACtHR jurisprudence than the Temporal Landmark thesis. Still, Brazil had shown failures in the recent past. From the standpoint that the conflict centres on economic interests over Indigenous rights, the next chapter will portray the ongoing debate on using Indigenous knowledge for development.



[220] ibid 23.
[221] Francisco Paulo Jamil Almeida Marques, 'Participação política, legitimidade e eficácia democrática' (2010) 23 Caderno CRH 591 <https://www.scielo.br/j/ccrh/a/by9hn9KhRQqpXx3PHTpkwkR/> accessed 8 June 2025.
[222] ibid.

## 3. INDIGENOUS KNOWLEDGE INFORMING POLICIES

The Temporal Landmark framework shows that the Brazilian State is weakening its Indigenous rights protections. Moreover, the ongoing dispute over the Temporal Landmark thesis has been questioned for its constitutional validity. The Brazilian government's practices have also shown significant failures recently. This chapter will focus on how Indigenous literature can be a source of knowledge for expanding the understanding of Indigenous rights. And, in sequence, how this knowledge has been mobilized by literature as a source of an alternative economic model.

In recent years, there has been an exponential growth in the number of publications by Indigenous authors in Brazil. Geni Nuñez[223], for instance, discusses affectionate relationships from the values of the Guarani Indigenous community, showing that the colonization period still shows signs in silencing Indigenous worldviews and practices. Ailton Krenak[224] wrote during the pandemic about the will to go back to "normality". This "normal" is the total detachment of humankind from Nature. His criticism is that the relationship between human society and Nature is devastating and (re)producing inequalities between communities and peoples.

First, it is important to understand how Indigenous communities relate to Nature and their different practices. Ailton Krenak's work will inform the next section. The second section will focus on how academia has interpreted these practices and knowledge to overcome economic interests and Indigenous rights conflicts.



### 3.1. The primacy of Indigenous knowledge and livelihood in enforcing their rights

[223] Geni Nuñez, *Descolonizando afetos: Experimentações sobre outras formas de amar* (Planeta do Brasil 2023).
[224] Ailton Krenak, *O Amanhã Não Está A Venda* (Companhia das Letras 2020).

The relationship of the Indigenous communities with their traditional lands goes beyond their capitalist value. However, Ailton Krenak criticizes the understanding of Indigenous territories as extremely reductionist[225]. His book *Ideas to Postpone the End of the World* (2019) presents that the World, at least as we know it, is coming to an end. It is not an apocalyptic view; the book is an invitation to rethink the relationship between humans and the Earth. For him, the "divorce" of humankind from other animals and Nature happens when and where we develop extractive and industrial activities[226]. Maintaining a relationship with Nature based solely on its economic value distances humankind from a harmonic experience with other beings.

One example is that white-Western society only recognizes personality as a human attribute. From the Indigenous point of view, a feature in Nature can be a family relative and express its own emotions. Krenak's community understands the river going through their lands — the "Rio Doce" — as the community`s grandfather. For them, Nature is not a resource, a word mainly used in economic theory to describe natural features, but part of their societies[227]. Indigenous peoples usually face Nature and their traditional territory as interdependent with their own existence, not as owners of land but as children of nature[228]. Their relationship with nature is like a societal one, in which it is impossible to think and reproduce (both material and immaterial) life without thinking about their territories and Nature within[229]. Thus, Nature is not detached from their societies, livelihoods, and knowledge, but a fundamental subject, having agency over life. Like humans, Nature is a citizen of this society. In liberal societies, the differentiation between who holds rights, feelings, thoughts, or acts is binary, in which humans



[225] Ailton Krenak, *Ideias Para Adiar o Fim Do Mundo* (Companhia das Letras 2019).
[226] ibid.
[227] ibid.
[228] Uma Concertação Pela Amazônia (ed), *Bioeconomia Indígena: Saberes Ancestrais e Tecnologias Sociais* (São Paulo, Arapyaú 2024) 10.
[229] Uma Concertação Pela Amazônia (n 228).

perform and possess these categories, and the rest of living beings do not. The blur between human and non-human is the basis of Indigenous thought compared to Western tradition.

Verdonck and Desmet had already criticized the interpretation of Article 21 (Right to Property) in the IACtHR jurisprudence. Even though the IACtHR includes the right to cultural identity and the enjoyment of social, cultural, and economic development to the right to property, the authors understand that the "fundamental right of which indigenous peoples are deprived is their right to decide for themselves and to choose their own development path"[230]. It is possible to take this argument even further with the ideas presented by Krenak. For him, the State is a threat to Indigenous forms of organization[231]. Throughout the book, it is possible to note that the author prefers using "forms of organization" and "ethics" rather than purely religious beliefs to describe their relationship with the land. What can be drawn from this is that the interpretation of the IACtHR, which focuses mainly on the spiritual value of the land, is limiting compared to the Indigenous peoples' practices. Their practices are organized in an ethical, organizational and relational relationship with their territory, but with religious transversing it. Framing these forms of organization and the relationship with Nature as a pure spiritual one cannot outsource the whole picture.

This "civilizing"[232] ideology and practice, which can take the form of a State or elites and their interests, are mere abstractions, in which humankind loses the bond with nature, silencing diversity and other forms of life[233]. These other forms of life are what he refers to as "sub-humankind", local communities throughout the world that refuse to be integrated and assimilated into Westernized societies[234]. Based on that, he adds:

> The notion that white Europeans [...] go colonizing the rest of the world was based on the premise that there was an enlightened humanity that had to go in search of the

[230] Verdonck and Desmet (n 204) 451.
[231] Krenak (n 225) 39.
[232] Krenak (n 225).
[233] ibid.
[234] ibid.

> benighted humanity and bring those savages into their incredible light. This call to civilization was always justified by the idea that there is a right way of being in the world, one truth, or concept of truth, that has guided the choices made through history[235].

The author calls for the end of the thought that humans are all equal. It is necessary to expand our subjectivity and to put an end to the project of homogenization of lives, experiences and knowledge[236]. For Krenak, "the ecology of knowledge", supporting himself on the concept developed by Boa Ventura de Souza Santos[237], "should be an integral part of our everyday experience, inspiring our choices about where we want to live and the experience we want as a community"[238]. His criticism is over limiting the "forms of organization" of Indigenous livelihoods.

At the same time, portraying their relationship with the land as "worldviews" is also reductionist. For instance, when analysing the conflicting rights due to a development plan, the Court relies on "national interest" [239] to limit Indigenous communities' land rights, even if the territory is necessary to protect them and allow their physical and cultural reproduction[240]. This is also applied in the national sphere. The previous chapter discussed the 2024 Supreme Court decision, in which the "public interest" was used in the proportionality test on the costs of interrupting the operation of Belo Monte hydroelectric and protecting Indigenous rights. This decision leads to the rationale that "national interest" and the Indigenous forms of organization are incompatible because the latter needs to be limited to fulfill the former.

The Brazilian State defines itself in the Constitution as a democratic state based on securing social and individual rights, equality, justice, social harmony, and a pluralistic



[235] ibid 11.
[236] ibid 29–33.
[237] See Boaventura de Sousa Santos, 'Para além do pensamento abissal: das linhas globais a uma ecologia de saberes' [2007] Novos estudos CEBRAP 71 <https://www.scielo.br/j/nec/a/ytPjkXXYbTRxnJ7THFDBrgc> accessed 27 May 2025.
[238] Krenak (n 225) 24.
[239] *Case of the Indigenous Community of the Lhaka Honhat (Our Land) Association Vs. Argentina* (n 178) para 181.
[240] *Xákmok Kásek Indigenous Community v. Paraguay* (n 130) para 174.

society[241]. Thus, the primary national interest should be this, rather than creating a hierarchy between national interest and pluralistic forms of organization.

As seen, the conflicts on development plans are centred on those with an extractives-based logic[242], or with a high environmental and human impact. Comini[243] understands that in recent years the Brazilian economy has been based on destroying nature (or natural resources) and undermining the regional economy on a predatory basis, leading to insecurity and precarious living conditions. The degradation of nature has a massive impact on Brazilian society. For Indigenous peoples, with climate change, the markers of nature (such as the rain and dry season) are not as exact and clear as they used to be. Secondly, the degradation, mainly through market-driven exploitation of natural resources, has a spiritual impact[244].

The document of the Instituto de Pesquisa e Formação Indígena (Research and Indigenous Formation Institute) aligns with this view of the unpredictability of expected climate patterns due to environmental transformations, including agricultural pests' outbreaks[245]. The Institute suggests a long-term monitoring and a multifaceted approach, other than explaining them purely as "climate change"[246]. From this framework, it is expected to understand how local dynamics, such as illegal mining, fires, and logging, directly affect Indigenous livelihoods[247].

There are also the spiritual aspects. Indigenous beliefs see Nature's degradation as the destruction of the livelihoods of spiritual agents. This leads to an unbalanced synergy between



[241] Brazil Brazil 1988 (rev. 2017) Constitution - Constitute (n 2) s Preamble.
[242] Engstrom and Perez (n 116).
[243] Graziella Maria Comini, 'Rumos para a economia da floresta' (2022) 21 GV-EXECUTIVO <https://periodicos.fgv.br/gvexecutivo/article/view/88529> accessed 26 May 2025.
[244] Uma Concertação Pela Amazônia (n 228).
[245] Rita Becker Lewkowicz, 'Environmental Transformations and Climate Change on Indigenous Lands: A Curricular Proposal Oiapoque' (Iepé Oiapoque 2024) <https://institutoiepe.org.br/2024/11/environmentaltransformationsand-climate-changeon-indigenous-lands-on-indigenous-lands-a-curricular-proposal-a-curricular-proposal-oiapoque-amapa-brazil/> accessed 24 April 2025.
[246] ibid.
[247] ibid.

the spiritual and material world, leading the Earth and biodiversity into sickness[248]. It is interesting to notice that the unbalanced environment has an explanation based on Earth's feelings. As mentioned earlier, the mainstream conception is that humans are the only living beings with personality. These spiritual agents and guardians in nature rebel over not having anywhere else to live, causing extreme climate events[249].

Conservation of biodiversity and Indigenous territories works as a two-way process: Conservation helps secure Indigenous rights, and Indigenous territories are more effective in conserving Nature than private-run conservation projects, due to their territory management[250].

### 3.2. Bioeconomy: a new economic model for Brazil?

The concept of bioeconomy has been mostly applied in policy briefs and studies about the potential of Indigenous knowledge for a sustainable economy. The reporter Glycya Ribeiro wrote about conflicting views within the Indigenous community of Raposa Serra do Sol territory about mining activities with Indigenous participation[251]. The author shows that some members see extractive activities as a way to guarantee the quality of life through economic revenue. Others do not think that this practice should take place in their territory.

Bioeconomy[252] is portrayed as an answer to preserve Nature and insert Indigenous products into the economy. It is impossible to deny that, historically, Indigenous communities held economic relations with Brazilian society on different scales. However, the foundation of



[248] Uma Concertação Pela Amazônia (n 228).
[249] ibid.
[250] Rights and Resource Initiatives, 'Rights-Based Conservation: The Path to Preserving Earth's Biological and Cultural Diversity?' (Rights and Resource Initiatives 2020) Technical Report <https://rightsandresources.org/wp-content/uploads/Final_Rights_Conservation_RRI_07-21-2021.pdf> accessed 25 May 2025.
[251] Ribeiro (n 63).
[252] The term is not unanimous and can be connected to greenwashing practices. It can appear as socio-bioeconomy, bioeconomy of biodiversity, inclusive bioeconomy, restorative bioeconomy, bioeconomy bioecologic, or new bioeconomy. See Rachael Garrett and others, 'Apoiando Sociobioeconomias de Saudáveis Florestas Em Pé e Rios Fluindo Na Amazônia' (The Amazon We Want 2023) Policy Brief <https://eng-briefs.sp-amazon.org/230805%20Bioeconomy%20PB%20(English).pdf> accessed 14 April 2025.

their use of nature is intrinsically divergent from that of the Western-White-Capitalist model[253]. Bioeconomy argues for an economic structure based on the sustainable production, with respect for Nature; the interchange of Indigenous and non-Indigenous knowledge based on developing techniques; an alterity relationship with non-Humans; and the development of partnership for training Indigenous peoples[254].

The concept for this purpose cannot be confused with the one referring to energetic transition in the Global North and industrialized countries[255]. For the Francisco Costa et. al., the transition from fossil fuel to an economy based on biological inputs does not aim to produce value and conserve natural diversity[256]. In a highly diverse environment, such as Brazil, Bioeconomy unites the conservation and recuperation of nature, local governance and food security[257], promotion of knowledge, rights and territories of Indigenous and local communities, with a spillover effect on the national and global community[258].

In comparison, tourism activities are seen under this concept not only as a way to generate income but also to promote environmental education. The Temporal Landmark Law allows tourism if organized by the Indigenous communities, including allowing hunting[259], which does not necessarily comply with local practices. In an interview, the Indigenous leader Wagner Krahô-Kanela mentioned creating a sustainable touristic program to protect their territory, with activities against deforestation, aggression and environmental pollution[260]. In this scope, ecotourism on a communitarian basis can potentially disseminate knowledge and



[253] Uma Concertação Pela Amazônia (n 228).
[254] ibid.
[255] Francisco Assis da Costa and et. al, 'Uma Bioeconomia Inovadora Para a Amazônia: Conceitos, Limites e Tendências Para Uma Definição Apropriada Ao Bioma Floresta Tropical.' (WRI Brasil 2022) Texto para Discussão <https://www.wribrasil.org.br/sites/default/files/2022-07/NEA-BR_Bioeconomia_PT.pdf> accessed 3 February 2025.
[256] ibid.
[257] ibid.
[258] Garrett and others (n 252).
[259] Brazil Lei Nº 14.701, de 20 de outubro de 2023 (n 17) art 27.
[260] Uma Concertação Pela Amazônia (n 228) 16.

campaign about the need to fund biodiversity conservation[261]. Even if there is a will and a desire by some Indigenous communities to practice and promote tourism in their territories, the Brazilian legal framework is not necessarily aligned with the communities' values (education and knowledge promotion).

Different from the Western conception of land, Indigenous peoples value it beyond its capacity to generate value. For instance, a non-Indigenous person usually analyses the potential of land production and not its immaterial value (the biodiversity, spirituality, historical importance etc.)[262]. Most of the time, Nature, such as a forest, can pose difficulties for the monoculture plantation. Thus, the trees and animals must be removed so that the land can produce market-driven goods[263]. On the other hand, for Indigenous peoples, the land is not only for producing goods and services; even when used for it, the production process also holds more than a monetary value, even for external trade. Indigenous communities produce goods and manage their land based on ancestral knowledge and the connection between humans, the production process, and Nature itself. The relationship of Indigenous peoples with their lands is reciprocal, connected through the territory of life, a holistic view of life: Human and non-human, including the ancestors and the next generations[264].

Organizations have advocated for technical innovations to promote and preserve Indigenous knowledge and practices[265]. However, local organizations have also positioned themselves against the use of technologies and innovation with high industrial input to "promote the substitution of the native forest for monoculture of genetically uniform"[266]. Their criticism is on greenwashing, in which businesses use the rhetoric of environmental accuracy,



[261] Garrett and others (n 252).
[262] Uma Concertação Pela Amazônia (n 228).
[263] ibid.
[264] Rights and Resource Initiatives (n 250).
[265] 'Leia a Carta da Amazônia 2021: "na defesa de uma economia capaz de conviver com a floresta, garantir direitos e distribuir renda"' (*GT Agenda 2030*, 3 November 2021) <https://gtagenda2030.org.br/2021/11/03/leia-na-integra-a-carta-da-amazonia-2021/> accessed 23 May 2025.
[266] ibid.

while threatening territorial rights, traditional knowledge, and the Indigenous harmonic way of living[267].

The Bioeconomy can value the knowledge and the use of diverse natural products, breaking the homogenization pattern of production. That is, instead of cleaning the lands of local and natural products for the introduction of monoculture, it should value the regional biodiversity to strengthen the economy and guarantee food security[268]. Most of the issues of implementing this model are focused on the low production scale. It is necessary to consider alternatives for popular products, such as Açaí, Guaraná, and Brazil nut, to comply with the market's demands while preserving production sustainability, especially by not destroying biodiversity.

This might be a potential way of securing the economic, social, and cultural rights of Indigenous communities in Brazil based on sustainable and social production and relations with nature[269]. The Brazilian framework lacks policies that promote and secure this way of production, posing limits to its development[270]. There are not enough administrative, economic, logistic, and public policies to strengthen the Bioeconomy practice. Investments in tracking the production chain and local businesses are vital for implementing Bioeconomy practices.



[267] ibid.
[268] Alfredo Kingo Oyama Homma, 'O diálogo com a floresta: qual é o limite da bioeconomia na Amazônia?' (2022) 11 Research, Society and Development e53011427555 <https://rsdjournal.org/index.php/rsd/article/view/27555> accessed 3 February 2025.
[269] Garrett and others (n 252).
[270] Comini (n 243); Garrett and others (n 252); Costa and et. al (n 255).

## CONCLUSION

This thesis critically examined the debate on the Temporal Landmark thesis and Law 14.701 in Brazil. The analyses focused on their legal foundations, impact on Indigenous territorial rights, and political and economic implications. It also examined the thesis's historical development from the Raposa Serra do Sol decision, especially how its nineteen conditions for implementation were the basis for the later use by economic groups to restrict Indigenous land rights and create the Temporal Landmark Law.

By comparing Justice Edson Fachin's opinion in RE 1379751 with Inter-American Court of Human Rights jurisprudence. The study showed that, although the ruling did not explicitly reference the IACtHR, Edson Fachin's interpretation aligns with regional standards, particularly on the ontological difference of Indigenous territories when compared to private property. However, the analysis also highlighted that the legislative process leading to Law 14.701 failed to comply with the duty of consultation. By the conventionality control doctrine, Brazil has to comply with the IACtHR jurisprudence.

The research further explored the tension between Indigenous rights and agribusiness interests. It found that the Raposa Serra do Sol decision was strategically mobilized by economic actors, especially the Agribusiness Parliamentary Front, to weaken the protection of Indigenous land rights. In this context, the Bioeconomy emerged as a potential alternative economic model rooted in traditional knowledge and ethical practices. Yet, the study identified significant challenges to its institutionalization, including logistical and political barriers.

In conclusion, Law 14.701 weakens Indigenous rights protections in Brazil. The Law reflects the dominance of an extractive-based economy at the expense of Indigenous and local living conditions. This work also suggests that further research should investigate the role of Brazilian states and municipalities in promoting Indigenous autonomy, especially as an

alternative to the National conservative approach. There is an urgent need to create enabling conditions to realize Indigenous rights and protect them from the political and economic interests of the Brazilian elites.

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**INDEX I - Comparative table: STF decision, Raposa Serra do Sol case (2009), and Temporal Landmark Law (2023)**

| Condition (Nº) | Conditions – Decision of Raposa Serra do Sol, 2009[271] | Law 14.701, 2023[272] |
|---|---|---|
| 1 | The usufruct of the riches of the soil, rivers and lakes existing on Indigenous lands can be relativized whenever there is, as provided for in article 231 (paragraph 6 of the Federal Constitution), the relevant public interest of the Union in the form of a Complementary Law. | Art. 20.<br><br>The usufruct of Indigenous people does not override the interests of national defence and sovereignty policy.<br><br>Sole paragraph. The installation of military bases, units, and posts, and other military interventions, the strategic expansion of the road network, the exploration of strategic energy alternatives, and the safeguarding of strategic wealth shall be implemented independently of consultation with the Indigenous communities involved or with the competent federal indigenist body. |
| 2 | The usufruct of the Indians does not include the use of water resources and energy potential, which will always depend on the authorization of the National Congress. | |
| 5 | The usufruct of the Indians does not override the interests of the National Defence Policy. The installation of military bases, units and posts and other military interventions, the strategic expansion of the road network, the exploration of strategic energy alternatives and the safeguarding of strategic riches, at the discretion of the competent bodies (the Ministry of Defence, the National Defence Council), will be implemented independently of consultation with the Indigenous communities involved and Funai. | |

[271] Conditions translated from the decision of Raposa Serra do Sol, 2009, by the author. See original version: Supremo Tribunal Federal. Petição 3388-4 – Roraima: Decisão. [2009]. Carlos Ayres Britto. Available at: <https://portal.stf.jus.br/processos/downloadTexto.asp?id=2576665&ext=RTF>.Accessed on 20 January 2025.

[272] Articles translated from Law 14.701 of 2023, by the author. See for original version: Brazil, Lei Nº 14.701, of 20 October 2023. 2023. Available at: https://www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/lei/l14701.htm. Accessed on 22 January 2025.

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| 6 | The Armed Forces of the Federal Police's actions in the Indigenous area, within the scope of their duties, are guaranteed and will take place independently of consultation with the Indigenous communities involved and Funai. | Art. 21.<br><br>The Armed Forces and the Federal Police are guaranteed the right to act in Indigenous areas, within the scope of their duties, regardless of consultation with the Indigenous communities involved or the competent federal indigenist body. |
| 7 | The usufruct of the Indians does not prevent the installation by the Federal Government of public facilities, communication networks, roads and transportation routes, as well as constructions necessary for the provision of public services by the Federal Government, especially health and education services. | Art. 22.<br><br>The government is allowed to install equipment, communication networks, roads, and transportation routes on Indigenous lands, as well as constructions necessary for the provision of public services, especially health and education. |
| 8 | The usufruct of the Indians in the area affected by conservation units is under the immediate responsibility of the Chico Mendes Institute for Biodiversity Conservation (ICMBio, Instituto Chico Mendes de Conservação da Biodiversidade) | Art. 23.<br><br>The federal body managing the protected areas shall be responsible for Indigenous peoples' use of Indigenous lands superimposed on conservation units, observing the compatibility of the respective protection regime.<br><br>§ Paragraph 1 - The managing federal body shall be responsible for the administration of the areas of the conservation units overlapping with Indigenous lands, with the participation of the Indigenous communities, who must be heard, considering their uses, traditions and customs, and may, to this end, count |
| 9 | The ICMBio will be responsible for the administration of the conservation unit area, which is also affected by the Indigenous land, with the participation of the Indigenous communities in the area, who must be heard, taking into account the uses, traditions and customs of the Indigenous people, and may, to this end, count on the advice of Funai. | |

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| 10 | Non-Indian visitors and researchers must be allowed into the area affected by the conservation unit at the times and under the conditions stipulated by the ICMBio. | on the advice of the competent federal Indigenous body.<br><br>§ Paragraph 2 - The transit of non-Indigenous visitors and researchers must be allowed in the area affected by the conservation unit, at the times and under the conditions stipulated by the managing federal body. |
| 11 | Non-Indians must be allowed to enter, transit or stay in the rest of the Indigenous land, subject to the conditions established by FUNAI. | Art. 24: Non-Indigenous people may enter Indigenous areas:<br><br>I - by private individuals authorized by the Indigenous community.<br><br>II - by public agents justifiably at the service of one of the federative entities.<br><br>III - by those responsible for providing public services or for carrying out, maintaining or installing public works and equipment.<br><br>IV - by researchers authorized by FUNAI and the Indigenous community.<br><br>V - by people in transit, if there are roads or other public means of passage. |
| 12 | The entry, transit and stay of non-Indians cannot be subject to any charges or sums of any kind by the Indigenous communities. | Art. 25 § 3.<br><br>The entry, transit and stay of non-Indigenous people may not be subject to the collection of fees or amounts of any kind by Indigenous communities. |
| 13 | Nor may tariffs or sums of any kind be charged or demanded in exchange for the use of roads, public facilities, power transmission lines or any other equipment and facilities placed at the service of the public, whether they have been expressly excluded from the approval. | Art. 25.<br><br>The collection of tariffs or amounts of any kind or the exchange for the use of roads, public equipment, power transmission lines or any other equipment and facilities placed at the service of the public on Indigenous lands is prohibited. |

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| 14 | Indigenous lands may not be leased or subject to any legal act or deal that restricts the full exercise of usufruct and direct possession by the Indigenous community. | Art. 26.<br><br>Economic activities may be carried out on Indigenous lands, provided they are carried out by the Indigenous community, admitting cooperation and hiring non-Indigenous third parties. § Paragraph 1 - Indigenous lands may not be leased or subject to any legal act or deal that eliminates direct ownership by the Indigenous community<br>Paragraph 2 - Contracts may be signed for cooperation between Indigenous and non-Indigenous people to carry out economic activities, including agroforestry, on Indigenous lands, provided that |
| 15 | It is forbidden for anyone outside the tribal groups or Indigenous communities to hunt, fish or gather fruit, as well as engage in extractive agricultural activities on Indigenous lands. | |
| 16 | The lands under the occupation and possession of Indigenous groups and communities, the exclusive usufruct of the natural wealth and utilities existing on the occupied lands, in compliance with the provisions of article 49, XVI, and 231, paragraph 3, of the Constitution of the Republic, as well as Indigenous income, enjoy full tax immunity, and no taxes, fees or contributions can be levied on either of them. | Art. 29.<br><br>The lands under the occupation and possession of Indigenous groups and communities and the exclusive usufruct of the natural riches and utilities existing on the occupied lands, subject to the provisions of item XVI of the caput of art. 49 and § 3 of art. 231 of the Federal Constitution, as well as Indigenous income, shall enjoy full tax exemption, with the collection of any taxes, fees or contributions on either of them being prohibited. |
| 17 | The expansion of Indigenous land that has already been demarcated is prohibited. | Art. 13.<br><br>The expansion of already demarcated Indigenous lands is prohibited |
| 18 | The rights of Indians in relation to their lands are imprescriptible, and these are inalienable and unavailable. | Art. 2<br><br>V - the imprescriptibly, inalienability and unavailability of Indigenous rights |
| 19 | The effective participation of federal entities in all stages of the demarcation process is guaranteed. | Art. 5<br><br>Sole Paragraph. The federal entities are guaranteed the right to participate effectively in the administrative process of demarcating lands |

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| | | traditionally occupied by Indigenous people. |
| 3 | The usufruct of the Indians does not cover the research and mining of mineral wealth, which will always depend on authorization from the National Congress, ensuring the Indians a share in the results of the mining, in accordance with the law. | No data match. |
| 4 | The usufruct of the Indians does not extend to mining or smelting, and if necessary, permission to mine must be obtained. | No data match. |