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**Demarcating, Protecting and Managing Indigenous Lands
in the Amazon – “Lessons” for Borneo?**

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Abbreviations and Websites of Key Institutions

AIDSESP	Asociación Interétnica de Desarrollo de la Selva Peruana (umbrella organization of indigenous organizations in the Peruvian Amazon, office in Lima) – www.aidesep.org.pe
CIDOB	Confederación de Pueblos y Comunidades Indígenas del Oriente Boliviano (umbrella organization of indigenous organizations in the Bolivian Amazon, office in Santa Cruz) – www.cidob-bo.org
COIAB	Coordenação das Organizações Indígenas da Amazônia Brasileira (umbrella organization of indigenous organizations in the Brazilian Amazon, office in Manaus) – www.coiab.org.br
COICA	Coordinación de las Organizaciones Indígenas de la Cuenca Amazónica (umbrella organization of indigenous organizations in the nine countries of the Amazon Basin, office in Quito, Ecuador) – www.coica.org.ec
FUNAI	Fundação Nacional do Índio (National Indian Foundation, Ministry of Justice, Brazil) – www.funai.gov.br
GTZ	Gesellschaft für Technische Zusammenarbeit (German Agency for Technical Cooperation) – www.gtz.de
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Environmental Institute) – www.ibama.gov.br
INCRA	Instituto Nacional de Colonização e Reforma Agrária (National Agrarian Reform Institute) – www.incra.gov.br
MMA	Ministério do Meio Ambiente (Ministry of the Environment) – www.mma.gov.br
PDPI	Projetos Demonstrativos dos Povos Indígenas (Indigenous Peoples' Demonstration Projects, Ministry of the Environment, Brazil) – www.mma.gov.br/ppg7 ; www.gtz.de/pp-g7
PPG7	Programa Piloto para a Proteção das Florestas Tropicais do Brasil, Tropical Forest Pilot Program – www.mma.gov.br/ppg7 ; www.gtz.de/pp-g7
PPTAL	Projeto Integrado de Proteção às Populações e Terras Indígenas da Amazônia Legal (Indigenous Lands Demarcation Project in the Amazon, FUNAI, Brazil) www.mma.gov.br/ppg7 ; www.gtz.de/pp-g7

Abstract

The Brazilian Amazon is home to more than 150 indigenous peoples which in the last decades have created a multitude of organizations at different levels to defend their rights and interests. In an ongoing struggle, they have gained recognition as indigenous lands (*terras indígenas* or TIs) for more than one million km² or more than 20 % of the Brazilian Amazon, almost half of this area with support from the G7-Tropical Forest Pilot Program which has been implemented since the early 1990s. TIs are a special legal category for state land destined exclusively and permanently for indigenous use and benefit which safeguards indigenous common property.

Drawing on experiences by Brazil's National Indian Foundation (FUNAI), and especially those gained in the context of two international development cooperation projects (in both of which the author currently serves as an advisor) which for ten years have supported the demarcation process with active indigenous participation as well as protection, economic and cultural initiatives by indigenous peoples in the TIs, the paper first succinctly describes the rather complicated process of legal recognition of TIs in the Brazilian Amazon.

It then outlines the main current and future challenges with regard to ensuring one of the major demands of the indigenous movement in the Brazilian Amazon, the long-term sustainability of the TIs as a permanent basis for indigenous autonomy, which include

- to finalize the processes of identification, physical demarcation and legal recognition of TIs against increasing resistance,
- to protect the TIs against illegal external occupation and resource extraction which, given the legal status of the TIs, is a joint task for indigenous peoples and the state,
- to support indigenous peoples and their organizations in conducting their own participatory processes of diagnostic studies, decision-making, planning, sustainable use and management of these areas and their natural resources,
- to develop the capacities of indigenous professionals and organizations to implement these new types of activities and
- to improve the availability, quality and coordination of government and NGO support services for indigenous peoples and their organizations.

The next section briefly compares the legal and *de facto* situation of indigenous peoples and their territories in Brazil to that of other Amazonian and Latin American countries, stressing the overall advances and similar challenges, but giving examples also for the rather substantial differences between countries.

The final part, based on the author's previous experiences in Borneo in the mid 1990s, reflects about possible "lessons" from the Amazonian experiences for indigenous peoples and their supporters in Indonesia, Malaysia and beyond. Since there are various relevant topics being worked on in both regions, a two-way-exchange of experiences is proposed.

Introduction

After decades of ever increasing mobilization all over the world, there is widespread recognition that key conditions for the survival and self-determination of indigenous peoples¹ are *de jure* recognition of and *de facto* control over their lands and natural resources (together increasingly called “**territories**”, see Plant & Hvalkof 2000, Roldán 2004), which are usually held under common property regimes and therefore of central interest at this conference. While international norms like the ILO Convention 169 (1989) are meant to apply worldwide, they need to be translated into national law and applied by national, regional and local institutions to become effective.

ILO Convention 169 (1989) on Indigenous and Tribal Peoples

Part II Article 13.2.: The use of the term **lands** (...) shall include the **concept of territories**, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Art. 14.1.: The **rights of ownership and possession** of the peoples concerned over the lands which they traditionally occupy shall be recognised.

Art. 14.2.: Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to **guarantee effective protection** of their rights of ownership and possession.

Art. 14.3.: Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Art. 15.1.: The rights of the peoples concerned to the **natural resources** pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

(cited from ILO 2000:96-97; my emphasis)

Within the **humid tropics**, whose indigenous inhabitants have received special international attention and support in the context of growing concerns about the fate of tropical rainforests, since the late 1980s many Latin American countries have undergone processes of significant constitutional, legal and institutional reform benefiting indigenous peoples by recognizing their territorial claims and different degrees of local autonomy and self-government (Brysk 2000). In other parts of the humid tropics, especially the Central African Congo region and Southeast Asian hinterlands or archipelagos, despite recent reforms for example in Post-Suharto Indonesia, the recognition of indigenous rights is more difficult.

In the face of very different and even within each of these macroregions highly diverse cultural patterns, colonial histories, post-independent developments and public administrations, does it make any sense to expect relevant insights from experiences for example in the Amazon basin? “**Knowledge management**”, “**lessons learnt**” and “**best**

¹ Space does not permit to enter into a lengthy discussion about definitions of „indigenous peoples“ – we fully agree with Tania Murray Li that “self-identification as tribal or indigenous people is not natural or inevitable, but neither is it simply invented, adopted, or imposed” (Li 2000:2). The term is more easily applied – both by those claiming special rights, and by governments acknowledging such rights – to autochthonous populations in the context of former “white settler colonies” (North, Middle and South America, Australia and New Zealand). However, in Africa and Asia as well processes of self-recognition of “indigenous peoples” are on the increase, in clear interaction with the increasing global mobilization of indigenous peoples for example at the United Nations, and acknowledgement of rights and benefits at different levels (Brysk 2000). Even in countries like Indonesia or Malaysia, there is increasing recognition that forest dwellers like the different Dayak and Punan/Penan groups have unduly suffered from “internal colonialism” and have a right to their land and natural resources, as for example stipulated by the ILO Convention. My concern here is mainly with the practical implications of this recognition.

practices” are in fashion in international development cooperation and key terms in its jargon, but the conceptual, methodological and practical implications of meaningfully communicating, let alone “transferring” experiences made in totally different contexts are far from resolved. This paper is only a modest and open-ended first attempt to think about these challenges, taking as core issue the legal recognition, protection and management of indigenous peoples’ territories in the Amazon and Borneo.

The paper will first focus on the situation in the Brazilian Amazon which is home to more than 150 indigenous peoples which in the last decades have created a multitude of organizations at different levels to defend their rights and interests. In an ongoing struggle, they have gained recognition as indigenous lands (*terras indígenas* or TIs) for more than one million km² or more than 20 % of the Brazilian Amazon, almost half of which with support from the G7-Tropical Forest Pilot Program which has been implemented since the early 1990s. Drawing on the experiences of the Brazilian government’s indigenist agency FUNAI (*Fundação Nacional do Índio*, National Indian Foundation), and especially those gained in the context of two development cooperation projects under the umbrella of the multilateral Tropical Forest Pilot Program (PPG7), which for more than ten years have supported the demarcation process with active indigenous participation (PPTAL, FUNAI) as well as protection, economic and cultural initiatives by indigenous peoples in their TIs (PDPI, MMA, *Ministério do Meio Ambiente/Ministry of the Environment*)², the paper will

- succinctly describe the rather complicated process of legal recognition and new challenges of protection and management of TIs in the Brazilian Amazon,
- briefly compare the legal and *de facto* situation of indigenous peoples and their territories in Brazil to that of other Amazonian and Latin American countries and,
- based on the second author’s previous experiences in Borneo in the mid 1990s, reflect about possible “lessons” for indigenous peoples and their supporters in Borneo and beyond. This reflection is intended to develop into a two-way-exchange.

The Process of Legal Recognition of Indigenous Lands (TIs) in Brazil

Brazil with its more than 8.5 million km² and 180 million inhabitants is a country of continental dimensions and importance, structured as a federation of 26 states with substantial autonomy. Its today once again between 350.000-700.000 indigenous inhabitants³ still make up less than 0.5% of the population and therefore, in comparison to countries like Bolivia or Guatemala, have limited demographic potential for political clout. However, for reasons that even leading Brazilian anthropologists still grapple with, Brazil’s today still approximately 210 highly diverse indigenous peoples, the largest of which number less than 50.000, have “a prominent place in the national consciousness” (Ramos 1998:3; see also Ramos 2002).

Similar in Latin America only to Mexico, Brazil has a tradition of almost 100 years of *indigenismo*, a specific government policy for its indigenous peoples which was institutionalized in 1910 with the creation of the SPI (*Servico de Proteção aos Índios/Indian*

² The author is working for GTZ (Gesellschaft für Technische Zusammenarbeit), the German agency for technical cooperation, and has been advising PDPI since the end of 2001 and PPTAL since mid 2004.

³ Depending on the definitions used and the sources. In any event, the trend is increasing, after the indigenous population – estimated at somewhere between 3-8 million at the time of conquest in 1500 - had reached a nadir of as little as 100.000 in the late 1950s.

Protection Service), in 1967 converted into the current FUNAI. Until the 1988 Constitution⁴ and the 2001 Civil Code, Indians were considered “relatively incapable” wards under tutorship (*tutela*) of the state whose *indigenists* developed rather paternalistic attitudes and behaviors towards indigenous peoples which until today hamper indigenous self-organization and self-determination in many regions. The positive side of Brazilian *indigenismo* is that today more than ever the state has a range of constitutional obligations with regard to protection and support of indigenous peoples, the most important being the legal recognition and protection of their pre-existing rights to their lands (*direitos originários*).

What is today called *Terras Indígenas* (TIs, *Indian Lands*) is a special legal category for state land destined exclusively and permanently for indigenous use and benefit which safeguards indigenous common property (without, however, formally recognizing indigenous collective ownership rights which is a demand increasingly heard at indigenous meetings).

Key Articles of the Brazilian Constitution of 1988

Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their **original rights to the lands they traditionally occupy**, it being incumbent upon the Union to demarcate them, protect and ensure respect for all their property.

Paragraph 1 – Lands traditionally occupied by Indians are those on which they live on a permanent basis, those necessary for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions.

Paragraph 2 – The lands traditionally occupied by Indians are intended for their **permanent possession** and they have the **exclusive usufruct** of the riches of the soil, the rivers and the lakes existing therein. (...)

Paragraph 4 – The lands referred to in this article are **inalienable** and **indisposable** and the rights thereto are **not subject to limitation**. (...)

Article 232. The Indians, their communities and organizations have standing under the law to sue to defend their rights and interests, the Public Prosecution intervening in all procedural acts.⁵ (my emphasis)

⁴ Note that while Brazil only ratified the ILO Convention 169 in 2002 (in force since 2004), its 1988 Constitution was already influenced by the international debates about the revision of the previous ILO Convention 107 (1957).

⁵ Download from <http://www.v-brazil.com/government/laws/titleVIII.html>. Original text:

Art. 231. “São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os **direitos originários sobre as terras que tradicionalmente ocupam**, competindo à União demarca-las, proteger e fazer respeitar todos os seus bens.

§ 1. São terras tradicionalmente ocupadas pelos índios as por eles habitadas em caráter permanente, as utilizadas para suas atividades produtivas, as imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e as necessárias a sua reprodução física e cultural, segundo seus usos, costumes e tradições.

§ 2. As terras tradicionalmente ocupadas pelos índios destinam-se a sua **posse permanente**, cabendo-lhes o **usufruto exclusivo** das riquezas do solo, dos rios e dos lagos nelas existentes.” (...)

§ 4. As terras de que trata este artigo são **inalienáveis** e **indisponíveis** e os direitos sobre elas, **imprescritíveis**.” (...)

Art. 232. “Os índios, suas comunidades e organizações são partes legítimas para ingressar em juízo em defesa de seus direitos e interesses, intervindo o Ministério Público em todos os atos do processo.” (Magalhães 2003:29-30).

The most recent legislation on the “regularization” of indigenous lands dates from January 1996 (Decree 1775). It defines the following sequence of major steps:

- “**Identification study**” of the area, conducted by an interdisciplinary team headed by a qualified anthropologist, with active indigenous and, where necessary, other institutional participation. The study covers the ethnohistory and current situation of the indigenous people, including environmental aspects and land claims by non-Indians in the area. The study produces an integrated report and a map of the proposed TI (“**delimitation**”).
- A summary of the report and the map are published, and the holders of land claims in the area have 90 days to submit their documentation (“*contraditório*”). FUNAI has 60 days to respond, whereupon the Minister of Justice in theory has 30 days to officially recognize the area (“**declaration**”) – in practice, this often takes much longer. This part of the decree in 1996 raised a storm of national and international protests, but it did not have the apprehended effect of obstructing the majority of demarcations, and by now it is rather seen as an appropriate procedure to permanently resolve non-indigenous land claims.
- The physical “**demarcation**” through placing signs at strategic points along natural boundaries and/or cutting up 6 m wide swaths in the forest is usually subcontracted to companies. PPTAL has piloted ways to increase indigenous participation in this important phase to avoid mistakes in boundary establishment and increase indigenous knowledge and ownership of the area, a precondition for its defence and sustainable use.
- Parallel to demarcation (and often delayed), **compensations** are paid to those non-indigenous landowners whose claims were found to be legitimate (“*de boa fé*”), whereas the others have to leave the area without such compensation. **Resettlement** of the first category of occupants should be supported by the National Land Reform Agency INCRA which, however, despite a formal agreement with FUNAI often does not fulfill its task satisfactorily.
- The final steps in the process are the official recognition of the demarcated area by Presidential Decree (“*homologação*”), followed by cadastral **registration** of the area both at municipal and national levels.

Following this procedure, which despite the deadlines in controversial cases can take decades, until 2006, about **12.5 % of the Brazilian national territory** (almost 1.07 million km²) had been recognized as belonging to **607 Terras Indígenas** (up from 12 % in 2000, ISA 2000). About 90 % of the total area (411 or almost 68 % of the TIs) have reached the last two steps in the regularization process, i.e. registration or at least Presidential Decree, and can thus be considered legally secured.

Sixty-eight percent of the number (414) and 99 % of the total area of TIs (more than 1.05 million km²) are located in the nine states of the administrative macroregion of the “**Legal Amazon**” (more than 5.1 million km² or about 60 % of the country; the TIs currently make up 20.6 % of this region). The 290 already fully legally recognized Indian areas, i.e. again those in the last two steps, alone by now make up almost 0.95 million km² or 18.5 % of this region, numbers which are steadily increasing due to the relatively large percentage of TIs still in the initial phases of the process, where the final area is still unknown (Source: STI, *Sistema de Terras Indígenas/Indigenous Lands Database*, FUNAI, April 2006).

The importance of the TIs for the maintenance of tropical forests, especially in so-called “frontier regions”, where road construction, logging, agroindustry and/or smallholder settlement are on the advance, is clearly visible from satellite images (for a recent quantitative analysis, see Nepstad et al. 2006).

One major challenge to ensure one of the key demands of the indigenous movement in the Brazilian Amazon, the long-term sustainability of the TIs as a permanent basis for indigenous autonomy and self-determination, is to finalize the ongoing ever more complicated processes of identification, physical demarcation and legal recognition of TIs, often against considerable local and regional resistance. However, there are also new challenges on the horizon, relating to the protection and management of TIs.

The Challenges of Protection and Management of TIs in the Brazilian Amazon

The dynamics of “Amazonian Development” have captured both media and academic attention at least since the 1960s, when the Brazilian military regimes started ambitious projects of highway construction (*Transamazônica*), agrarian settlement and industrial growth poles with often highly detrimental impacts for indigenous peoples and the environment. Since the 1988 Constitution and the 1992 Rio Conference, human rights, social and environmental concerns have received more support, but even the current left-wing “Lula” government, despite various initiatives to bring together relevant ministries and civil society to slow down deforestation and promote sustainable development in the Amazon, is struggling with the inherent contradictions of the export-oriented growth model demanded by strong economic lobbies.

In this context, legal recognition of indigenous lands is clearly not enough to protect them. Especially in the “frontier regions”, *Terras Indígenas* are facing increasing pressures from different sources like large-scale soybean production, commercial logging and illegal diamond or gold mining. Even localized hunting, fishing or gathering by non-Indians violates indigenous rights and reduces their resource base.

Besides assistance in facing these external threats, many indigenous peoples demand government and other support for their initiatives in what in Brazil is called *etnodesenvolvimento*, “ethnodevelopment” based on their own cultures, visions, priorities and practices, which may or may not include the principle of sustainability. According to international and Brazilian law, sustainable management is *not* a precondition for the recognition of indigenous rights, but obviously something to be negotiated with indigenous peoples, in their own best interest.

Major current challenges in this context, always exacerbated by the size of the area and the number and diversity of indigenous peoples and their situations, are:

- **Inconsistencies in the relevant bodies of indigenist and environmental legislation** which are often lacking updated implementing regulations. Overlaps between TIs and protected areas are one important unresolved issue (see next chapter). Also, there is “an underlying assumption in the legal framework that the usufruct granted to indigenous people left them frozen in time insofar as it was expected they would primarily subsist in their areas but never commercially exploit natural resources.” (Lisansky 2005: no page number)
- **Weaknesses of FUNAI:** while the agency in principle has the mandate and the capillary structure with about 60 regional administrations and 350 local *Postos*

Indígenas (PINs, Indian Posts) to attend to the new demands and challenges, both institutional culture and its serious lack of human and financial resources make it difficult for FUNAI to fulfill its role.

- **Lack of an integrated and interinstitutional strategy to protect the TIs** against encroachment, illegal external occupation and resource extraction which, given the legal status of the TIs, is a joint task for indigenous peoples and the state. The division of labor between different relevant government organs (besides FUNAI, the environmental agency IBAMA, the Federal Police and at least in border areas the military) still needs discussion, and their mobilization in cases of emergency is often hampered by lack of timely information, coordination and budget allocations.
- **Lack of qualified technical assistance for indigenous peoples** and their organizations in conducting their own participatory processes of diagnostic studies, decision-making, planning, sustainable use and management of these areas and their natural resources. In the absence of government or NGO support, indigenous peoples can become prone to be coopted into the regional development processes, for example renting out parts of their TIs to soybean farmers, or permitting illegal timber or mineral extraction, receiving often ridiculously low returns.
- **Lack of programs to develop the capacities of indigenous professionals and organizations** and, afterwards, of financial support to ensure their employment and the implementation of innovative activities with and for indigenous peoples.
- Overall, in Brazil there is still a serious need to improve the **availability, quality and coordination of government and NGO support** for indigenous peoples and their organizations.

Nevertheless, at local and regional levels, many **promising experiences by indigenous peoples and their organizations** – often supported by NGOs or development projects - exist already which need to be evaluated, disseminated and converted into public policy recommendations. In the context of PPTAL, as a follow-up to demarcation, indigenous peoples in by now almost 50 TIs have received support for organizing information campaigns both among their own villagers and surrounding non-Indians about the new legal situation, regularly monitoring their boundaries and communicating invasions by radio. PDPI supports about a dozen similar initiatives as well as processes of “redcentralization” within TIs to better occupy, use and defend the areas, as well as regional processes of training of “indigenous environmental agents” and institutional articulation with relevant government agencies.

A major challenge of all these activities is their continuity after the end of project **funding**, financial resources being necessary mainly for the maintenance and continued use of the means of transportation and equipment necessary to cover huge areas. More and more indigenous organizations therefore, arguing that TIs are state land and that they are therefore performing an “**environmental service**” in the national and international interest by preventing invasions and ensuring sustainable management, demand regular resource transfers from the state. The debate over these issues has only begun.

With regard to the **management of indigenous territories for local benefit**, after decades of not very successful community development projects, new approaches are being developed. **Community mapping and other forms of participatory socio-environmental studies** are being supported by PPTAL and various NGOs to provide indigenous peoples with relevant information. However, information needs are often not sufficiently defined together with indigenous peoples to ensure that maps and study results can be and are being put to use for

management planning or economic projects afterwards. Discussions **about land use zoning and management planning** in indigenous territories – no legal obligation in Brazil – are only beginning. An interesting experience is the process initiated by a regional indigenous organization on the upper Rio Negro (Amazonas state) which, with NGO support, has developed a regional development program for its more than 10 million ha territory inhabited by about 50.000 members of more than 20 indigenous peoples, negotiating government services and implementing local and subregional projects in this overall framework. In the state of Acre, the state government intends to break its “economic-ecological zonation” down to the level of TIs, as is done for municipalities. However, since the boundaries of municipalities and TIs overlap, and only the former are administrative units in Brazil, it still needs to be clarified who is to be in charge of which type of management planning in TIs, and which government agencies will have which supporting role.

Brief Comparison with the *de jure* and *de facto* Situation of Indigenous Peoples and their Territories in other Amazonian and Latin American Countries

Latin America is more homogeneous than Africa and Asia in terms of colonial history, national cultures and current legal and political situations, the latter due to similar redemocratization processes in the 1980s which resulted in

- what has been termed the “**New Latin American Constitutionalism**” including
- increasing prevalence of a “rights-based approach”⁶ to indigenous claims (Plant & Hvalkof 2000) and
- a general recognition of the multiethnic and pluricultural nature of the Latin American states which leads to a mainstreaming of indigenous concerns, gradually replacing the classical protectionist approaches.

However, the *de jure* and *de facto* situations of indigenous peoples and their territories in Latin America still vary considerably (see also Roldán 2004).

Despite the current revitalization of regional agreements like the 1978 Amazon Pact (now an international organization with seat in Brasilia) and the existence of an Amazonian indigenous umbrella organization (COICA, founded in 1984), there is still rather limited comparative documentation, analysis and exchange of experiences even within the Amazon basin where the same or closely related indigenous peoples often live in two or three neighboring states. This part of the paper can therefore only outline general trends, based mainly on the two major reviews cited above, and mention a few interesting experiences (for more details, see overview table at the end).

The first important issue in Latin America (as elsewhere in the world) is the **ownership status of indigenous lands or territories**: as explained above, in Brazil *Terras Indígenas* are state land (albeit with a special status and guaranteed perpetual usufruct). In contrast, in several of the Andean countries, indigenous peoples in both the highlands and the Amazonian lowlands can get land titles also for communal holdings in a regime of “outright ownership” - often however without including rights to natural resources, be they renewable or non-renewable resources (Roldán 2004). Also, “a problem of land titling and registration systems

⁶ Within this general approach, the special rights held by indigenous peoples are seen as deriving from combinations of the following sources: recognition of original or immemorial rights (e.g. in Brazil), existence of colonial land titles (e.g. in Colombia, Guatemala and Mexico), and the need to compensate for historical debts and combat ongoing discrimination (also in Brazil) (Plant & Hvalkof 2000:19).

throughout Latin America tends to be the **absence of any intermediate forms of recognition between individual and collective titles**” which would better be able to deal with the diversity of situations (Plant & Hvalkof 2000:71).⁷ “As regards the active demands of indigenous community members to land titles, it is vital to distinguish between two aspects. One is the collective title to protect the community against external encroachment and resolve conflicts. The other is the internal need to safeguard land rights vis-à-vis other community members” (ibd.). With the advance of legal recognition and boundary establishment, adjustments in **internal** rules and regulations of indigenous territories and communities are now gaining more importance.

As indicated above, the “lack of legal definition of ownership rights over, and use and administration of, **natural resources in indigenous territories ...**” (Roldán 2004:15) is a second increasingly controversial issue (whose impact seems to be worst in cases where land rights are also not clearly defined). “There may be a greater willingness to recognize and apply the territorial concept in the Amazon and tropical lowlands, where the contiguous land areas vested in indigenous groups can cover several million hectares, allowing for more genuinely integrated approaches to resource management and territorial ordering” (Plant & Hvalkof 2000:23). However, despite having ratified ILO Convention 169, national legislations and policies still vary considerably with regard to their recognition of indigenous rights over renewable and most of all non-renewable, subsoil resources like oil, gas and minerals being invariably claimed by the state. Regulations and procedures for negotiations about their extraction in indigenous territories, compensation and/or benefit-sharing are only beginning to be developed, and arrangements have so far been made more on an *ad-hoc* basis.

A closely related issue is the “lack of adequate legal definition of the management of indigenous territories that **overlap with national parks or other protected areas ...**” (Roldán 2004:15), a problem that occurs in many countries, often further challenging the not always easy alliance between indigenous peoples and environmentalists which has advanced since the 1980s. Brazil’s recent legislation rigidly separates indigenous and protected areas, not allowing any permanent human presence in the category of “fully protected areas” like National Parks⁸. In contrast, Bolivia’s 1992 Environment Law provides for indigenous participation in the administration of protected areas, and several interesting experiences of co-management exist (Mason et al. n.d.). In Peru, creating communal nature reserves is a recent strategy adopted by the lowland indigenous movement to add to the increasingly insufficient areas of the *comunidades nativas* (indigenous communities) dating from the country’s land titling process since the 1960s (Smith et al. 2003).

A fourth major issue are ways to guarantee **land (and resource) tenure security**. The cover term **regularization** is increasingly being used for activities which go beyond boundary declaration/demarcation and issuing documents to include their proper cadastral registration and, most importantly, systematically dealing with non-indigenous claims. Despite the ongoing debate among indigenous peoples and their supporters in Brazil and Latin America if the Brazilian legal solution to ownership (state land) is optimal, Brazilian advances in the

⁷ The authors, apparently unfamiliar with the discussions about common property regimes, but also because they seem to be eager to establish a dialogue with their client, the Inter-American Development Bank, consider it „most useful to conceive indigenous land tenure systems as alternative forms of private ownership, under decentralized mechanisms which permit the allocation of land use rights under the internal norms of each community“ (Plant & Hvalkof 2000:27).

⁸ This leads to problems in the finalization of regularization processes of TIs in regions where National Parks and other protected areas were previously established (often disregarding the known presence of indigenous peoples). A new legal figure of “*dupla afetação*” (“double determination”) is being included in recent Presidential Decrees, but its practical implications in terms of co-management of these areas between indigenous peoples, FUNAI and IBAMA still need to be worked out.

process of regularization are impressive, and procedures for resettling and compensating non-Indians are strict and rather effective. This contrasts for example with the priority given to non-Indian land titles and timber concessions within Bolivian indigenous territories during the *saneamiento* (clarification) process which often creates a patchwork situation breeding conflicts. Despite formal state ownership of the land, due to their special status and protection, Brazilian TIs have relatively high tenure security and can as much be considered common property as indigenous territories in the Spanish speaking Americas (Lauriola 2004).

By now, most of the national legislations in Latin America provide indigenous territories at least in theory with such tenure security by affirming that they are inalienable (by outsiders), nonprescriptible (not subject to state interference/limitation), inembargable (nonmortgageable), untransferable, intangible etc., or combinations thereof. However, *de facto* protection still varies widely, and informal land markets – outright sale or renting out of indigenous lands - are on the increase in many regions (Plant & Hvalkof 2000:19, Roldán 2004:27).

More **operational problems** with regard to the legal recognition of indigenous territories remain as well and include the following (Roldán 2004:15-16):

- “Imprecision in the writing of indigenous legislation ...” leaving much room for interpretation (a general problem);
- “Failure to develop the body of laws necessary to operationalize the rights guaranteed by the constitutions or international treaties ... “ (case: Ecuador, where the 1998 constitution follows the Colombian example of creating indigenous self-governing units, but has not been translated into action yet);
- “Time-consuming, overly complex, or poorly conceived procedures for gaining legal recognition of indigenous lands ...” (cases: Bolivia and Peru, where the Amazonian indigenous umbrella organizations CIDOB and AIDSESEP, respectively, with international support have started land programs of their own which include extensive participatory mapping processes, GIS, publication of maps and manuals etc., all used to put pressure on governments to speed up the process of recognition of indigenous territories);
- “Failure to carry out adequate consultation with indigenous communities ...” (another frequent problem).

General **conclusions with regard to legal systems** to protect indigenous territories that may be relevant for the African and Asian context as well are the following (Roldán 2004:25):

- “Legal systems more strongly support indigenous land rights when they take into account not only land ownership itself, but also the security of that ownership and whether it is conceptualized within the framework of the concept of an indigenous territory.”
- “Land rights are also stronger when the legal system concurrently recognizes other rights over natural resources on the indigenous lands and the rights of indigenous peoples to manage their own affairs.”

With regard to the **protection of indigenous territories against encroachments**, as outlined above an increasing concern in Brazil, surprisingly little information is available from the other Amazonian countries about government and/or indigenous strategies, not even pilot activities. If in Brazil already, where the state is strong and government comparatively well-funded, these activities are insufficient, weaker states and poorer countries like Bolivia or Ecuador obviously face difficulties. However, we may also in part see the “other side of the

coin” of indigenous titles: in countries where indigenous territories are under indigenous ownership, the state has less formal obligation to intervene than in Brazil. Finally, for indigenous peoples and their organizations themselves, the issue of protection may often be an integral part of territorial management, not being mentioned separately.

The main initiative towards developing **management strategies for indigenous territories**, so far, comes from indigenous organizations and their NGO-supporters. As mentioned before, **participatory mapping** processes organized by indigenous organizations with researcher and/or NGO-support are *en vogue* in most Latin American countries (Herlihy & Knapp 2003, Chapin et al. 2005), their results so far more often being used to support territorial claims where “the power of maps” is useful *vis-à-vis* government agencies. Obviously, maps can also become a basis for management strategies after territorial regularization, but this is hardly documented so far. In Colombia, but also in Peru, many indigenous peoples and/or organizations are developing so-called *Planes de Vida* (“Life Plans”), which can range from vision statements about the future of the particular indigenous people to rather detailed development plans. In lowland Bolivia and Ecuador, regional indigenous organizations, often with NGO support, are also gaining first experiences with the elaboration of different types and formats of management plans, but so far, little information is available on the practical use and the impacts of such plans (for an example, see CIPTA/WCS/Bolivia 2002).

The transition from indigenous management to **self-government of indigenous territories**, i.e. the full realization of indigenous autonomy and self-determination within the context of the respective state, obviously strongly depends on constitutional and other legal provisions. In all of Latin America, this issue is most clearly regulated in Panama where the indigenous *Comarcas* since the 1983 constitution have had an administrative status equal to a province, with a rather complicated local government structure which combines indigenous and national elements and receives annual budget allocations from the national level. Colombia’s and Ecuador’s constitutions foresee the transformation of indigenous territories into what they call *Entidades Territoriales Indígenas* (indigenous territorial units) with similar functions, however, implementing regulations are lagging behind. Nevertheless, especially in the Colombian departments of Amazonas and Vaupés, regional indigenous organizations, with NGO support for more than 15 years have been preparing themselves for what they call *autogobierno* (self-government), taking over more and more of the responsibilities of local government in the areas of education, health, economy, environment and public administration, forming new legal personalities and participating actively in regional political processes like the design of departmental development strategies (COAMA 1999, Vieco et al. 2000). These new responsibilities obviously create many intercultural, political and management challenges for the new indigenous organizations which deserve more documentation and analysis.

A final interesting issue are incipient (though still rather hesitant) **transboundary activities** (encouraged e.g. by ILO Convention 169 and the Amazon Pact), both by indigenous peoples themselves, and by government agencies or NGOs. One example are **Trans-Boundary Protected Areas (TBPA)**, often inhabited by indigenous peoples, like the Cordillera del Condor (Peru-Ecuador) “peace park” created after resolution of a border conflict in 1998 where the local Achuar, Aguaruna, Huambisa and Shuar people and their organizations have negotiated a “Binational Plan of Integrated Sustainable Development” (Plant & Hvalkof 2000). With the increasing transboundary road construction, especially along the Brazilian borders, these activities are becoming both more necessary and more feasible.

Comparison of the Situation of Indigenous Peoples and their Territories in the Amazon and Panama

Country (current constitution)	Legal Recognition of Indigenous Territories Note: everywhere in Latin America, states maintain ownership of subsoil natural resources like oil, gas and minerals which are claimed as part of indigenous territories by indigenous organizations like COICA	Protection of Indigenous Territories against Encroachment and their Management by Indigenous Peoples
Brazil (1988)	Strong legislation, clear institutional responsibilities, strong tenure security: <i>Terras Indígenas</i> (perpetual use rights, state property, resettlement of non-Indians, so far no provision to become an administrative unit) Process of legal recognition advanced, total area at least: 106.6 million ha (Amazon: 105.3 million ha) 12.5 % of the national territory, 20.6 % of the Amazon	Joint responsibility of various government organs and indigenous peoples Protection: Reactive approach to invasions (mobilization in emergencies), no early warning system and overall strategy yet, pilot experiences supported by PPTAL and PDPI Management: Legal ambiguities about rights, responsibilities and procedures, plans no obligation, only some NGO support regional management planning (case: Alto Rio Negro), lack of supporting institutions both for management planning and for economic activities in indigenous areas
Bolivia (1995)	<i>Tierras Comunitarias de Origen</i> (TCO; perpetual common property rights held by indigenous peoples with recognized legal personality, titled by INRA, <i>Instituto Nacional de Reforma Agraria</i>) Process of legal recognition (rights of non-Indians confirmed!): total area: 5.4 million ha <i>Distritos Municipales Indígenas</i> (so far, often still different boundaries => <i>mancomunidades</i> as solution)	Concept of “ <i>unidades de gestión territorial indígena</i> ” exists, but so far only some NGO experiences in management planning (TCO Tacana with WCS support) CIDOB since 1996 has CPTI (Centro de Planificación y Gestión Territorial Indígena)
Peru (1993)	<i>Comunidad Nativa</i> (1974 agrarian reform category, collective land titles, need for legal incorporation of landholders, but limited area, land can be bought and sold, only use rights to renewable natural resources) & <i>Reserva Comunal</i> (current strategy to get communal protected areas as an extension) Total area: 11.5 million ha (Amazon 2001)	AIDSESEP has CIPTA (Centro de Información y Planificación Territorial) & Programa de Territorio y Recursos Naturales; mapping, GIS & incipient management planning supported by the Instituto del Bien Comum (IBC) <i>Planes de Vida</i> (“life plans”) as instrument (see Colombia)
Ecuador (1998)	“Patchwork of land legislation” => collective land titles, but not held by legally recognized indigenous peoples (Brysk 2000:255); total area: over 3 million ha (25% of the Amazon) <i>Circunscripción Territorial Indígena</i> (so far, no implementing regulation)	Limited experiences in planning (Huaorani), less in implementation

Country (current constitution)	Legal Recognition of Indigenous Territories (note: everywhere in Latin America there state ownership of subsoil resources)	Protection of Indigenous Territories against Encroachment and their Management by Indigenous Peoples
Colombia (1991)	<i>Resguardo</i> (perpetual collective ownership rights recognized by the courts) Process of legal recognition advanced, total area: 36.500.000 ha (more than 21 million ha in the Amazon) <i>Entidad Territorial Indígena</i> (possibility to establish indigenous administrative units with own budget); <i>gobierno propio</i> & AATIs (<i>Asociaciones de Autoridades Tradicionales Indígenas</i>) already created in various Amazonian departments	Fundación GAIA Amazonas (FGA) has been support relevant processes for 15 years, e.g. <i>planes de ordenamiento territorial</i> in various regions <i>Planes de Vida</i> (“life plans”) as broad, integrated planning- and management strategy: vision for the future of indigenous peoples in their territories, include support from government and private institutions
Venezuela (1999)	First legal recognitions in process (so far collective titles as for <i>campesinos</i> , not as indigenous peoples)	(no information)
Three Guyanas	Part of the Amazon basin and – with the exception of French Guyana – members of the Amazon pact, but excluded here because of their rather different colonial history and lack of information about relevant experiences	
For comparison: Panama (1983)	<i>Comarca</i> (combines communal ownership rights with political self-administration incl. budget); strong tenure security as each <i>Comarca</i> is created by its individual law, but lack of adequate physical demarcation and unclear situation of control over natural resources	(no information)

Sources: Elaboration by the author, based on texts listed in the References and years of compilation and exchange of information in the context of membership in GTZ Working Group on Indigenous Peoples in Latin America.

Any “Lessons” for Indigenous Peoples and their Supporters in Borneo and Beyond?

The last time the author visited East Kalimantan/Indonesia and Sarawak/Malaysia was in 1999, i.e. in the case of Indonesia, briefly after the downfall of the Suharto government. Having worked in Brazil since 2001, there was little time and opportunity to accompany developments in both countries and the region in general. A quick Internet research early this year and e-mail contacts with some ex-colleagues indicate that at least at first glance, improvements have not been as substantial and fast as many representatives of indigenous peoples and their supporters had hoped for in the beginning of the **Indonesian democratization process**:

“For years the Indonesian government never officially recognised the existence of indigenous communities. Officials need to be able to ‘locate’ an issue conceptually and physically, yet the government has no definition of indigenous peoples and no map of where they are. Even now, it talks in terms of the forests of ‘communities who live by customary law’ (hutan masyarakat hukum adat) to avoid the phrase ‘indigenous land’ or adat forests.” (Chidley 2002, Part III:4, our emphasis)

Some early more or less encouraging **post-Suharto era legal reforms** in the land and forestry sectors, the impacts of which are increasingly being analyzed by CIFOR and other researchers, included:

- The **1999 new Basic Forest Law** which acknowledges at least the importance of local people but defines *adat* forests still only as a class of “state forest where communities who live by customary laws can be found” (UU 41/1999, sub-clause 6)
- The **1999 Ministry of Agrarian Affairs Decree** which allows for delineation and registration of *adat* rights in some forested areas (*Permen Agraria HS Hak Ulayat Adat 5/99*).
- The **1999 Regional Autonomy Laws** (UU 22 and 25/1999) supporting administrative and fiscal decentralization processes, also in the forestry sector. Their implementation since 2001, especially in regions with weak civil society, according to some observers rather “decentralized corruption” and “led to a dramatic increase in the uncontrolled exploitation of forests” (Chidley 2002, Part II:1). According to a recent empirical study, however, decentralization in the forestry sector economically benefited forest dwellers in East Kalimantan and gave them more control over local forests, without harming the environment any more than timber companies on their own did before decentralization (Engel and Palmer 2006).

In any event, until today, the possibilities for indigenous communities in Indonesia to get legal recognition and effective protection of their rights, and practical support for sustainably using their lands and forests appear to be rather limited. Movements like the Network for Participatory Mapping (**JKPP, Jaringan Kerja Pemetaan Partisipatif**) against all odds continue their work and had by 2004 mapped about 3 million hectares of indigenous territories. However, official recognition of these areas is still lagging behind (Kurniawan and Hanafi 2004).

Under these circumstances, the collaborative management of **Kayan Mentarang National Park** in East Kalimantan, supported by WWF Indonesia since the mid 1990s, still seems to be one of the most successful experiences. The creation of the park – which from the indigenous point of view is fully located in *Adat* territory – gives some protection to indigenous land and resource rights against timber companies and other intruders. Kayan Mentarang was initially planned as a strict nature reserve which would have conflicted with the presence of local people. Only its conversion into a National Park allowed for the present co-management system, which, however, still provides no outright legal recognition of indigenous land and resource rights. Project support for the continuation of or negotiated adjustments in indigenous management by local Dayak and Punan communities functions as park management in a situation where the

government hardly has the capacity to do so. In 2004, the Ministry of Forestry issued a decree which formalizes such co-management systems (Eghenter 2005). Unfortunately, such experiences still seem to be rare, and few indigenous peoples have the – at least for Indonesian conditions – comparatively “good fortune” to have the National Park administration as ally.

It is an open question to the audience if Brazilian and other Latin American **experiences in terms of legal systems for the recognition of indigenous territories, land regularization procedures and incipient indigenous protection and management of their territories** can give any useful hints to indigenous peoples and their supporters in Kalimantan, the rest of Borneo, and beyond. In case it does, we could start to discuss and try out ways to foment an exchange on relevant issues and experiences, in the context of IASCP or beyond, be it electronic or (if resources permit) through exchange visits, seminars etc.

One issue where most likely a direct cross-continental exchange among indigenous activists is already happening at UN and other events is the **growing indigenous mobilization** also in Indonesia: indigenous peoples held two important congresses in 1999 and 2003 and formed AMAN (*Aliansi Masyarakat Adat Nusantara*), with its 927 registered and 777 verified communities claiming to represent 50-70 million people, 30-50 million of which directly dependent upon *adat* forests (Moniaga 2003). Many issues faced by AMAN are common to indigenous organizations worldwide, also in Latin America: for example, how to

- communicate across cultural and physical distances,
- resolve the delicate question of representation and legitimacy of leaders,
- deal with gender and generation differences, and
- improve the management of projects and organizations.

Here, a more systematic exchange among indigenous leaders and their supporters on carefully selected and prepared topics could be useful.

Rather specific for the Indonesian context is the accusation that the indigenous movement tends to “**revitalize feudalism**” (although some “emergent” or rather “resisting” indigenous peoples in the Amazon face similar criticism for “suddenly” claiming rights based on traditions which were long repressed and hidden – and some indigenous Amazonians are not quite as egalitarian as the common image suggests). Despite acknowledging the political importance of the above mentioned advances at the level of discourse and mobilization, among social science researchers and other intellectuals, there seems to remain a healthy scepticism about the benefits of “**Adat Revivalism**” (Workshop Topic, Asia Research Institute, 2004) and applying what has been called “the tribal slot” to the highly complex cultural patchworks found all over the Indonesian archipelago.

Concerns in this part of the world seem to be strong especially if this application goes beyond what in earlier years the Indonesian government called “*suku-suku terasing*” (“backward tribes”), the fear being that “losers would include those who fail to fit a clear cut ethnic-and-territorial niche”, alliances with other underprivileged social sectors would become more difficult, and conflicts could increase (Li 2000:20). Having lived and worked both in Indonesia and Brazil for about the same amount of time by now, I realize that the Indonesian situation is far more complex – but that should not be an argument against searching for ways to broaden indigenous people’s options and control over their own future, which may – or may not – include the strategy of cultural revitalization. The basic challenge is the same all over the world: “The broader visions framed by the discourse on indigenous people have been attempts to rework the meanings of democracy, citizenship and development. ... These visions do not reject the idea of development, but hold the state to account” (Li 2000:24).

At the end, let us briefly look at a neighboring country sharing the island of Borneo, i.e. **Malaysia, especially Sarawak and Sabah**. In Malaysia, due to British legal tradition (Common Law), quite different from both Indonesia and Latin America, progress related to Native Customary Rights (NCR) – in Sarawak based on the 1958 Land Code - depends on court cases

(re-)interpreting the constitution and legislation and setting precedents. Currently, over 40 native land cases are being processed in the Sarawak justice system alone. Recent favourable decisions were:

- In 2001, the High Court of Sarawak issued a landmark ruling in favour of the Iban village of Rumah Nor against a pulp and paper factory threatening their ancestral land, recognizing both farmlands, communal forests, and rivers;
- In 2002, the Malaysian High Court in an Orang Asli case from Selangor, mainland Malaysia, declared the existence of Native Land Title under Common Law (Federal Constitution's Art. 13 and the State's fiduciary duty towards the Orang Asli), requiring the State to pay compensation to the Orang Asli.

In this legal context, experiences and court cases from other Commonwealth countries like Canada or Australia are obviously much more relevant than those from other legal traditions, but an exchange about all other not directly legal issues discussed above could still be useful.

Advances in Malaysia unfortunately are also still rather precarious: immediately after the Sarawak 2001 court case, the flourishing community mapping movement was banned from providing evidence in all of Malaysia through the "Land Surveyors Ordinance" (2001) which requires all map makers to be certified by the government and all maps to be approved by the Director of Lands and Surveys before they can be used in the courts. This was a serious blow to initiatives like the Borneo Project and others who helped more than 100 communities to map more than 40 territories in less than 10 years. Until 2004, there had been no new court case to test the way the government would apply this ordinance (Bujang 2004).

On the more positive side, in March 2005, SUHAKAM (Malaysian Human Rights Commission) organized a first-ever Seminar on Native Customary Rights in Kuching, Sarawak which led to a long list of demands by traditional leaders. Here again, fomenting an exchange with indigenous leaders from other parts of the world could be a supporting strategy.

Transboundary issues are also of increasing importance on Borneo, as in Latin America especially with regard to protected areas like the twinning of Bentuang-Karimun National Park (West Kalimantan) with an adjacent area in Sarawak, or of the already mentioned Kayan-Mentarang National Park (East Kalimantan) with an adjacent area in Sarawak and Sabah. Besides, as happens in the Amazon, the impacts of national borders on the legal and political situation and development prospects of indigenous peoples straddling those borders are becoming a research topic (e.g. Bala 2000 on the Sarawak-East Kalimantan border in the Kelabit highlands).

Prospects

Instead of offering conclusions, this still rather incipient and prospective paper rather ends reiterating its "invitation to cross-continental exchange". Given the ongoing need for **legal and institutional reforms towards recognition of indigenous peoples' land and resource rights** in Indonesia, Malaysia and beyond, I suggest that at least some **inspirations** might be drawn from the Latin American, especially Amazonian experiences, and would be interested in contributing to such a process of exchange.

Areas for a **fruitful dialogue** between indigenous peoples, their supporters and researchers in both regions of the world, where - as can already be identified at this point - "lessons" can flow both ways, include:

- **Community or participatory mapping**, which has seen an impressive increase in quality and scale all over the world in recent years. Besides exchanging information and

experiences about methods and technologies, it would be good to know more about the uses to which these maps are being put, especially if, where and how they are already used for management planning.

- **Co-management of indigenous territories which coincide with protect areas** is another topic of increasing interest both in Latin America (in some recent cases of Presidential Decrees even in Brazil), Asia and Africa, with many legal, political, institutional, and methodological implications (see issues raised e.g. in Feyerabend et al. 2004 and Natcher et al. 2005).
- Finally, the apparent security of **definitions of “indigenous people”** (“Indians”) in the Americas creates a certain risk of essentialism which is recognized and increasingly being discussed by Latin American anthropologists, as it is in Asia. The related issues of **indigenous territoriality**, including the impacts of fixing boundaries and restricting indigenous peoples’ movements to a confined space, are apparently so far being debated more in Asia. It would be interesting to organize an exchange on these topics, including leaders of the indigenous movements.

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