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# PROPERTY RIGHTS AND LAND CONFLICTS IN BRAZIL: THE CASE OF MONGANGUÁ'S GROWERS' ASSOCIATION

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Brazilian land issues have become complex in the last fifteen years due to conflicts over property rights resulting from friction among squatter peasants, multi-interest organizations and government. Conflicts in this unstable institutional environment impacted on agricultural activity with public and private land invasion, land-ownership disputes and indigenous and natural reserve lands expropriation. Based on the Property Right Theory and New Institutional Economics, the Brazilian Institutional Agrarian setting and its possible economic effects on agricultural activity are analyzed. A historical review of the Brazilian agrarian legislation based on the coded law is followed by a mapping of interests from governmental agencies that bring uncertainties due to undefined property rights arising out of controversial legislation with ambiguous interpretations and unexpected judicial results. A case study illustrates a land conflict started in 1998 between the FUNAI (National Indian Foundation) and a growers' guild from Sao Paulo Coastal Atlantic Forest. A legal dispute ended in the area's expropriation in 2005. Also implicated in this conflict were: INCRA (National Institute of Colonization and Agrarian Reform), Federal Revenue Service and State Government. Data obtained and analysis results revealed significant losses in private investments.

**Keys-words:** *land property right, private investments, institutional environment.*

## **Introduction**

Recent studies on the economic dimensions and implications of property rights have advanced substantially through important works based on the New Institutional Economics (NEI), particularly those concerning the positive analysis of the relations between public and private institutions and their economic efficiency.

Conceptually, NEI's view of property right is based on the Coasean approach (1937) analyzing the importance of creating and allocating property rights among economic agents both in formal and informal transactions (social rules). In other words, goods and services are not only conditional to their legal use, but also to the agents' effective capacity to do business. Therefore, it is assumed that, within the reality of an economic system, negotiations and productive activities generate "positive transaction costs". This means that the costs to define and secure property rights are inevitable,

thereby influencing the creation and search for a more efficient defining framework for property rights able to reduce transaction costs and enhance production incentives.

The diversity of analyses and results of empirical research into property rights and their relation with the investments has brought about constant debates on the dimensions and practical effect of the Property Rights Theory. In the case of land, one of the most-widely studied topics within this corpus of literature, formal and informal “*property titles*” prevail as the most commonly used analytical standard to determine the “*definition of property rights*”. Allied to the guarantee conditions of public or private property rights, they determine different levels of investment efficiency (Azevedo and Baloskorsky 2000).

Nevertheless, Vertova (2006) posits that the outcomes of this empirical literature present a mix of evidences ranging from positive to null effects of land property titles on investments (Migot-Adholla et al. 1991; Besley 1995; Alston, Libecap and Schneider 1996; Feder et al. 1998; Lanjouw and Levy 2002; Field 2002; Galiani and Schargrodsy 2003; among others).

In the instance of the Brazilian civil law, rooted in the Roman-Germanic legal tradition, the last fifteen years of intensified conflicts on land property rights involving agricultural land-owners and private and governmental organizations of varied interests appear as a relevant example of the complex relations among property rights, economic performance and efficient norm compliance.

Usually, the literature attributes the origins of the land problem to the historic occupation and distribution model developed since the colonial period, determining a high degree of land concentration<sup>1</sup> (Furtado 1989). In 1530, the king of Portugal divided

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<sup>1</sup> In Brazil the *Gini* coefficient that measures the land concentration is of 0,802 (calculated in 2000). This is still bigger than the of income concentration index (0,544 in 2005). The *Gini* coefficient varies from 0, which corresponds to perfect equality, to 1, corresponding to perfect inequality. Data of the National Research of Domiciles Sample (Pnad) of the Brazilian Institute for Geography and Statistic (IBGE).

the land into hereditary captainships or captaincies (*capitanias hereditárias*)<sup>2</sup> to secure the colonization of Brazil, under a land distribution system regime called “*sesmarias*”<sup>3</sup> or large crown land grants. These grants were distributed to courtiers, known as donatários (“*donees*”) or sesmeiros, who were entitled them to take possession but not ownership of the land. They could hold 20% of the property, with the obligation of distributing the remainder for cultivation. Thus donees possessed limited power: they had the right to use the land, but were not legitimated with the right of property (Antunes 1985).

The obligation of cultivating the land created the figure of the squatter or peasant without a land property title who, in a disorderly manner, made the property productive. This type of occupation also reflected in the expelling, dominance and extinction of indigenous cultures that succumbed to the white man's diseases. The colonial period witnessed several attempts to regulate and control the growing numbers of squatters, with no concrete results.

In 1822, with the independence from Portugal, the legislation of the *sesmarias* was revoked and Brazil remained for almost thirty years with no laws on rural properties prevailing to “ownership” as defining of the property right (Andrade 1995).

In 1850, the same year the Eusébio de Queirós law that prohibited the traffic of slaves was passed, the Law of the Lands and Migration was also passed (Law 601 of 18<sup>th</sup> September). This law established that: i. as of a specific date, all landowners should be registered; ii. Unproductive lands (or “*devolutas*” or vacant lands) should pass to the State; and iii. Public lands would only be acquired by purchase. Implicitly, the Law of Lands aimed at hampering land access to immigrants, poor white workers, freed black

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<sup>2</sup> This system consisted in the donation of lands to private individuals. The first division included 15 tracts of land granted to 12 donatories in 1534.

<sup>3</sup> The legal regime of the *sesmarias* originates in the communal lands of the medieval period and was characterized by monoculture activities and slave labor.

men and the mestizos, thereby facilitating the provision of labor for the huge land holdings.

Regarding the indigenous populations, the Law of the Lands guaranteed their rights. However, the argument that only few Indians remained in Brazil, i.e., they had either been extinct or incorporated into the social and cultural systems, led to an expansion of land squatting<sup>4</sup>. According to the Socio-Environmental Institute (ISA), there are presently 220 indigenous peoples corresponding to 370 thousand people, which represent 0.2% of the country's total population. It is estimated that in the 16<sup>th</sup> century there were about 1,000 indigenous peoples, or approximately 4 million people. Therefore, the difficult access to land and its use in Brazil have always given rise to conflicts, particularly in the states' bordering regions.

Nevertheless, the economic crisis that has been withdrawing a significant part of the population from the labor market, allied to the shift of the labor force from farms to cities as a consequence of mechanization in agriculture, has led the complication and escalation of conflicts since 1980 (Graziano Neto 1994; Muller 1988; Romeiro 1994).

The social movements for agrarian reform led by indigenists and environmentalists, in conjunction with a framework of ambiguous institutional mechanisms, create an unstable business climate, once the results of the processes vary according to the understanding of the courts of law and the characteristics of the conflict regions.<sup>5</sup>

Therefore, the present article aims to discuss the Brazilian land legislation and its peculiarities, based on a concrete case of legal dispute occurring mainly over the 1998-

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<sup>4</sup> Illegal activity characterized by the multiplicity of land title registries, usually forged, relative to the same area. This superposition of titles is also identified in public lands and forest reservations, besides the ones regarding Indians.

<sup>5</sup> It can be said, based on an examination of the Latin American Case Collection on Law and Public Policies of the Sao Paulo State Getúlio Vargas Foundation, that contradictory information from the judicial system create uncertainties. The case of the Tamboré farm in the city of Andradina, state of Sao Paulo, illustrates this: following its occupation by members of the Landless Peasant Movement (MST) in 1986, and a favorable judgment for the disappropriation of an area of 3,393 hectares, the legal dispute lingers on until today through appeals and injunctions that do not allow for a resolution of the case.

2005 period between squatters, Indians and the State of Sao Paulo, in the coastal region of this state. By drawing on the New Institutional Economics, this paper makes an attempt to verify the extent to which the institutional environment is implied in the conflict and the possible economic effects of its participation the conflict.

Besides this Introduction, the article is divided into 4 parts. Part 1 will explain the theoretical premises. Part 2 will discuss a view on land legislation in Brazil. Part 3 will analyze the experience of land dispute. Finally, a few conclusions will be drawn from the case.

### **1. Property Rights and the New Institutional Economics**

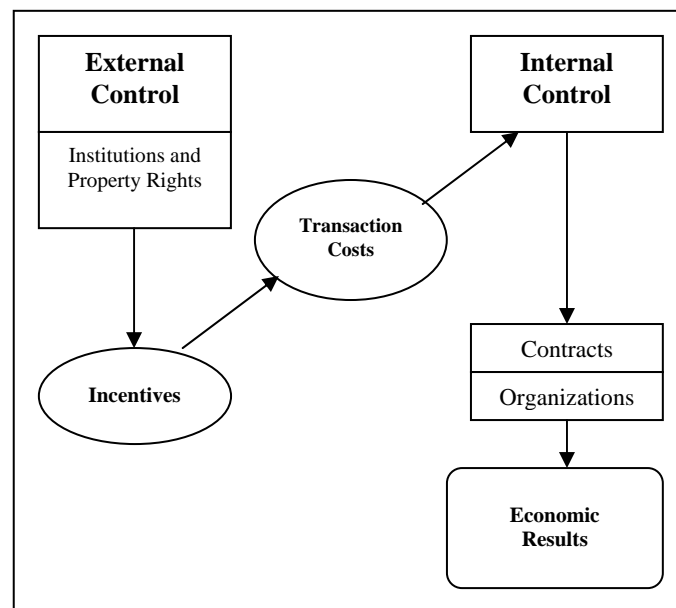
The institution of property rights has been considered the most important and effective means to create, keep and protect scarce resources. Most of the inefficiencies in Eastern European and Asian communist countries have been attributed to the inexistence of private properties. Thus, without property rights, agents do not feel motivated to innovate or even to take risks to create new riches (Roberts and Milgron 1992; De Alessi 1990).

According to the New Economy of the Institutions, the term property right to an asset, in its general sense, defines the right to use it, change its form and substance, and also to transfer some or all of the rights to others according to one's will. In other words, under conditions of full private property, an asset owner is entitled to use it, rent it or sell it. In a case of the sale a collection of property rights is then transferred from one person to another. As a consequence, the value of any private property depends, *ceteris paribus*, on the bundle of property rights that can be conveyed in the transaction (Furubotn and Richter 2000).

The prevailing structure of property rights of a society can be understood as the network of social and economic relations that define the position of each individual regarding the use of resources. This means that an individual's property rights are determined according to the formal rules, social rules and the rules of customs guiding the life of a society.

Thus, an individual's economic importance depends on how such rights are recognized and *enforced* by other members of the society. An individual's ability or power to use available resources derives from his or her external (exogenous) control and internal (endogenous) control of them (See Figure 1).

*Figure 1 – A short-run view of the Interaction between Institutions and Wealth*



*Source: Eggertsson (1998)*

External control mechanisms concern the way the institutional environment—constitutions, rules, norms and sanctions—restrain and direct individuals in society. The legal system establishes and allocates property rights concomitantly to the State's

action, which becomes a provider of guarantees and a defender of property rights (North 1990).

The internal control is established by the individuals themselves, according to the objectives of their investments and their expectations of gains. It involves monitoring measures and the hiring of private security and defense. In other words, transaction costs are incurred in order to protect the value of the voluntary exchanges and against involuntary ones, such as thefts. Thus, transaction costs refer to an individual's opportunity cost to establish and maintain the internal control of the resources (Eggertsson 1998; Alston 2000).

For authors (i.e., Libecap and Alston 1998; North 1990) institutional changes would arise from alterations in the economic value of the resources<sup>6</sup>. The argument thus defended is that the more the value of the resource increases, the more motivated their owners feel to demand a higher definition of property rights with a view to capturing the totality of the resource income. For instance, being the real income of a resource a function of the property rights, the better the property right is defined, the higher the resource value is. Concerning land, the bigger the guarantee of the property right, the bigger the guarantee of increased future income, and, consequently, the better the capacity to use the land as collateral and the larger the market for sale.

In this sense, this type of land occupation in Brazil, in which donees and the squatters had the right of use but did not receive the legitimacy of the property, was bound to result in inefficiencies. Land exploitation, mainly based on slash-and-burn techniques, illustrates the fact that the land was used for a short-run planning. The exhaustion of soil fertility in the first years of cultivation led the squatters to advance towards frontier areas.

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<sup>6</sup> This is seen as a naive view because the changes in the property rights always involve winners and losers (Alston 1998).



Thus, property rights as a manifestation of the institutional environment define the collection of opportunities, the incentive systems and the costs associated with investments. Property rights determine the economic value of the good transacted, since the relations among firms (or within firms) depend on the definition and allocation of these rights, which only occurs - in the real world – with positive transaction costs (Coase 1937, 1954).

The reflection the NIE proposes on the efficiency of organizations is perfectly in line with the conditions of the institutional environment, in which the rules ensuring the property right allow a better economic performance.

Based on the premises above, the present study seeks a deeper understanding about the current Brazilian institutional environment by initially examining the agrarian legislation, which will be described in the following topic.

## **2. The Brazilian Land Legislation: a “*patch quilt*”**

Within the contemporary Brazilian context, the recurring debate on land conflicts has been historically translated into a series of regulations aimed at meeting the demands of contradictory and, at times, casuistic interest groups. Within this mold, the Brazilian institutional agrarian environment fuels and fosters this type of conflicts and inefficient results<sup>7</sup>.

The problem in Brazil’s agricultural lands involves disputes aimed at: making land use economically feasible and compatible with legal norms and requirements for

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<sup>7</sup> The Statute of the Land, in force as of 1964 and reformulated in 1988, deals with the so-called “*Social Function of the Land*” which, according to Roberto Rodrigues, former Minister of Agriculture, and then President of the Brazilian Agribusiness Association (ABG), published in the *Agroanalysis Magazine* in March 2002: “...*Who is that defines the Land Social Function? Is there an objective criterion? No, and any friction between employees and employers may mean that it is not being followed....the greatest concern is the lack of tranquility that is pervading the agricultural territory in Brazil, which has a negative impact on social stability and curbs investments....*”.

the preservation of natural resources; combating illegal occupancy of real property<sup>8</sup>; safeguarding areas for the perpetuation of the Indian culture and rights; and reducing the levels of land concentration through land expropriation and distribution<sup>9</sup>.

The Brazilian institutional agrarian environment is basically structured under the determinations of the Federal Constitution, the Statute of the Land and the Statute of the Indian. Together with the Civil Code norms, these institutions regulate the activities regarding land property, its use and attributions.

A critical view of the Brazilian institutional environment, according to Tocci (2005)<sup>10</sup>, is that land legislation in Brazil resembles a 'patch quilt', gradually built over time. He argues that:

...the creation of the Land Institutes to provide support to the States and of the INCRA to provide for public land registry has not truly met its objectives since they have been constantly altering the norms that cause owners to constantly adjust to the modifications, who, at times causing them to incur high costs to make new topographic maps, in face of the technologically advanced systems for land surveyance and terms that are impossible to meet, thus bringing fragility of documentation...

Also for Zylbersztajn and Gorga, 2004, the Brazilian agrarian legislation could neither provide for the necessary reforms, nor generate institutional stability in the field:

...in practice, owners lose all constitutional guarantees of property rights, no longer having confidence to allocate productive resources. If they plant, they do not know what they will harvest, so they do not plant, do not invest, and do not care. That is the consequence of the

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<sup>8</sup> According to INCRA's Administrative Ruling 558/99, all owners or holders, under any title deeds, of rural properties with at least 10 thousand hectares were obliged to submit to a reregistry process. Those who, although notified, did not participate, were under the suspicion of being squatters. According to a survey on large rural properties, only 0.04 % of the Brazilian registered properties are suspected to be squatters; however, the corresponding territory represented 11% of the total area, thus showing a significant average percentage. The regional data were more significant, particularly in the Northern region of the country, where, for instance, 0.5% of the properties in the state of Acre encompass 63% of the total registered area and 0.3% of the suspect properties corresponded to 34% of the area in the state of Pará. To contemplate an even larger number of areas, another Administrative Rule was written by INCRA, 596/01, which included total minimum areas of 5 thousand hectares (Sabbato 2001).

<sup>9</sup> This refers to the National Agrarian Reform Program (PNRA) implanted since 1986, based on development projects aimed at expropriating unproductive lands to settle rural families. There are in this theme innumerable studies that deal with history, development and divergent results in the Brazilian model of the Agrarian Reform (Graziano da Silva 1993 1996 2001 2002; Abramovay 1992 1993 1994; Rangel 2000 and Graziano Neto 1991 1994 1996).

<sup>10</sup> Rubens Tocci is the director of a large cellulose company in Brazil (undivulged). He delivered a lecture called "*A Wide View of the Land Problem in Brazil*", as part of the Cycle of Seminars presented under the umbrella of the of the Agroindustrial System Business Study Program (PENSA-FIA) and the Brazilian Association of Rural Marketing and Agribusiness (ABMR&A), on 18<sup>th</sup> March 2005.

numerous invasions, even of productive farms, which impede planting, destroy machinery and hinder the development of economy as a whole.

Studies conducted on land conflicts in the Amazons and Pará regions (Alston; Libecap and Shineider 1994; Alston; Libecap and Shineider 1995; Alston, Libecap and Muller 1999) focused on the market of land titling have identified that the Brazilian institutional environment generates indefiniteness in land property rights, which results in less efficient social strategies.

Azevedo and Bialoskorsky (2000) had analyzed indefiniteness in land property rights in the Pontal do Paranapanema region and had evidenced a reduction of the levels of investments and soil's inadequate use (exhaustion)<sup>11</sup>. Wood et al (2001), in another study carried out in the Amazons region also observed that landowners who held regularized titles were more likely to invest. As a consequence, these owners were more motivated to maintain the soil's natural conditions, as compared to those who did not formal land title deeds.<sup>12</sup>

Regarding current conflicts involving Indians' agrarian issues, their historic ties have deepened with the agribusiness expansion. According to a July 2006 Report from the Indianist Missionary Council of the state of Mato Grosso (Cimi-MT), the Federal Government's processes of agrarian regulation have only slightly progressed since 2002 towards the demarcation of Indian lands. Another theme presented in the Cimi-MT report regard the lack of inspection activities, considered a relevant factor in the number

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<sup>11</sup> The Pontal region became a classic example of property right conflict due to the land invasions for the MST and of innumerable judicial disputes for the property. Under the perspective of the relation efficiency versus distribution, the study it presents a description of the historic occupation in region and its land squatting problem, concluding that the property rights definition is a "*basic condition*" to develop the investments. However, also it is indicated the fast agrarian reform politics as essential to reduce the uncertainties market.

<sup>12</sup> This study used the Property Right theory, but it focused on the environment and its effects on land use decisions, and in which a stronger trend was identified toward grazing practices on the part of the owners with land titles. This is seen as a negative aspect from the environmental viewpoint, i.e., the definition of the property right may not fully ensure the efficiency of organizational results.

of invasions of indigenous areas<sup>13</sup>. According to the National Indian Foundation (FUNAI)<sup>14</sup>, the processes of regulation of Indian areas are really sluggish, once they rely on the action of other federal agencies like the National Institute of Colonization and Agrarian Reform (INCRA) and the Ministry of Justice (MJ). On the other hand, the squatters and rural workers who demand lands through settlement processes carried out by the INCRA end up having their interests confronted with those of the Indian groups.

Another example where Indians are involved in conflicts is illustrated by the recent publication of FUNAI's Normative Instruction 003 of June 2006, according to which besides the prohibition to rent Indian lands, set forth in the Statute of the Indian, the federal police can apprehend agricultural machines and equipment found in areas infringing the instruction.

This Instruction also confronts a quite common reality in states such as Mato Grosso and Mato Grosso do Sul, in which the rent of part of the Indian lands, in partnership with the Indians, are common practices. These partnerships are economically feasible for growers and Indian cooperatives, ensuring not only income generation, but also a lesser dependence of the Indians on tutelage or legal guardianship bodies. Nevertheless, partnerships of this type are considered harmful by FUNAI, Cimi and Non-Organizational Organizations (NGOs), insofar as they act as mechanisms of exploitation and threaten the preservation of the culture and natural environment<sup>15</sup>.

This brief introduction sought to illustrate the ambiguities and discrepancies found in the Brazilian institutional environment regarding land use, with a view to describing

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<sup>13</sup> According to the Cimi-MT, 30 out of the 80 Indian lands from Mato Grosso are invaded by farmers, mineral prospectors and timber dealers.

<sup>14</sup> Foundation established by the Federal Government's Law 5,371 of 5 December 1967.

<sup>15</sup> One of the most studied cases on rent and agricultural partnerships concerning Indian lands regards the Kadiwéu Indians from the state of Mato Grosso do Sul. Known as "*horsemen Indians*", because were very skilled at breeding large-sized animals. Up to the end of 1980, FUNAI managed their contracts with ranchers and paid the taxes. From then on, contracts became the direct responsibility of the Kadiwéu Reserve Indigenous Communities Association (ACIRK). As of the 1990s the Federal Government started withdrawing the tenant farmers, a fact which, eventually resulted in the isolation of the Indian community, given that no alternative livelihood was ensured. (ISA – News Bulletin from 26/07/2006).

the bases of the Brazilian legal structure enveloping the agrarian issue. This paper will now present the interactions existing among the legislation under the Federal Constitution, the Civil Code, the Statute of the Land and the Statute of the Indian, as well as their main implications to the agrarian issue.

## 2.1. The Federal Constitution

The Chapter “Fundamental Rights of the Person”, Article 5, Sections XXII e XXIII of the 1988 Federal Constitution, dealing with property, presents the following principles:

- a) “are ensured the property rights”;
- b) “properties shall meet their social function”.<sup>16</sup>

Concerning properties and social functions, Article 186 of the Constitution provides that:

The social function is met when the rural property simultaneously complies, according to criteria and degrees set forth by law<sup>17</sup>, the following requirements:

- I – rational and adequate use;
- II – adequate use of available natural resources and preservation of the environment;
- III – compliance with resolutions regulating labor relations;
- IV – exploitation promoting the well-being of owners and workers.

Together with the provisions set forth in the 2002 Civil Code, the private property is institutionally established, as can be read on its Article 1.228: “*Owners are entitled to use, enjoy and dispose of the thing and the right to recover it from anyone who unfairly possesses or holds it*”.

Thus, in comparison with the 1916 Civil Code, properties took on a different intrinsic meaning, in which the landowner’s right to use, enjoy and dispose of the good

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<sup>16</sup> In Vera (2006) the conceptualization and application of “social function of property rights” in Brazil are argued from the analysis of the land conflicts represented by MST and the interpretation of concept “*productivity*” of land. The study it detaches the lack of coherence and technique base in part of the judiciary don’t seen its effect of second-order of decisions creating negative externality that increase the uncertainty in the business environment and affect the economic growth.

<sup>17</sup> Law 8.629, Article 6, of 25 February 1993.

is no longer “*fully guaranteed*” but rather, is “*granted*” to the owner. This characterizes a new pattern of property right, with a higher “*sociability*” involved in the property right, in detriment to the “*private right*”.

To meet the social function of the land, and thereby ensure the property rights, agents must comply with the provisions set forth in Article 186 of the Federal Constitution and consider the Paragraphs of Article 1,228 of the Civil Code regarding the exercise and privation of property.

## **2.2. The Civil Code**

The provisions of the above-mentioned Article 1,228 establish that:

- 1°) The right to property shall be exercised in consonance with its social and economic finalities so as to, in accordance with that established in a special law, conserve the fauna, flora, natural beauties, ecological equilibrium and the historic and artistic works, as well as avoid water and air pollution.
- 3°) Owners may be deprived of the thing, in cases of disappropriation, under pretext of need, public utility or social interest, as well as on requisition, in case of imminent public danger.
- 4°) Owners may also be deprived of the thing should the claimed property be an extensive area, in uninterrupted possession and in good faith for over 5 (five) years, of a considerable number of people, and should they have made, alone or as a group, works and services considered by the judge as socially or economically relevant.
- 5°) Concerning the previous provision, the judge shall establish a fair indemnity due to the owner; once the price is paid, the sentence shall be valid as a title for the registry of the property on behalf of the possessors.

According to the legislation in force, the environmental aspect also takes on relevance in determining the land property rights, which is equivalent to prioritizing actions aimed at the preservation of natural resources (Paragraph 1). Besides that, as per Paragraphs 3 and 4, social interest is itself a sufficient condition for the disappropriation of areas, which means promoting the interests of less favored social groups.

In this case, the Statutes of the Land and of the Indian provide the basis for the application of governmental policies relative to the use of occupied or economically exploited areas.

### **2.3. The Statute of the Land**

Created in 1964, the Statute of the Land is described by Law 4,504, which regulates the rights and obligations concerning rural properties, aimed at the execution of the Agrarian Reform and the advancement of the Agricultural Policy.

By agrarian Reform is understood the package of measures aimed at promoting better land distribution, through modifications in the regime of its possession and use so as to meet the principles of social justice and generate productivity increase.

The term 'Agricultural Policy' refers to the range of measures supporting land property, which are destined to guide the rural economy and agricultural activities, so as to ensure full employment allied with the country's need for industrialization.

Concerning land access, Article 2, conditioned by the social function, informs that land property fully performs its social function when it:

- Favors the well-being of owners and workers who work there, as well as their families;
- Maintains satisfactory productivity levels;
- Ensures the conservation of natural resources; and
- Follows the legal provisions that regulate fair work relations between those who possess the land and those who farm it.

The Statute of the Land sets forth the rights of rural workers and indigenous populations on its Paragraphs 3 and 4. The former anticipates the permanence of agriculturists on the land in compliance with labor contracts, whereas the latter ensures the right to the possession of the land they occupy, or which is attributed to them, according to the special legislation that rules the guardianship regime extended to them. This special legislation refers to those oriented by the FUNAI and its bylaws.

For the present research, the conditions anticipated by the social function of the land and its special laws are relevant to the understanding of the institutional environment described in the case. Moreover, inserting the approach to the legislation on indigenous people is also necessary, as a supplement to the analysis.

## 2.4. The Statute of the Indian

Created by Law 6,001 of 19 December 1973, the Statute of the Indian regulates the juridical situation of the Indians or Sylvan<sup>18</sup> and their communities, aimed at preserving the Indian culture and territories.

Regarding the guarantee of possession of the land, Paragraphs V e IX of Article 2 of the Statute determine the voluntary permanence in their habitat and the permanent possession of the lands they already inhabit, as well as their exclusive usufructs of the natural resources. This determination is supported by Article 231 of the Federal Constitution that defines: *“Recognition is hereby granted to the Indians...social organization, customs, languages, beliefs and traditions and their original rights to the land which they originally occupied, and it shall be the purview of the Union to demarcate those lands and to protect and ensure respect for all of the Indians' possessions”*.

According to Article 18, Indigenous Community lands cannot be the subject of leasing or rent or any act or juridical operation that restricts the full exercise of direct ownership by the community of indigenous peoples or by the natives of the Forest. Its first paragraph sets forth that *“ In these areas, any person foreign to the tribal groups or indigenous communities is prohibited to hunt, fish or explore the fruits or products of the land, or any farming, cattle raising or extractive activities.”*

Concerning Occupied Lands, Articles 22, 23, 24 and 25 define the right to permanent possession of lands inhabited by Indians and the rights to the exclusive usufructs of the natural resources therein existing.

Under the terms of Article 198 of the Federal Constitution, the occupation of indigenous lands shall not be dependent on their delimitation, which shall be ensured by

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<sup>18</sup> Any individual of pre-Colombian origin and ancestry whose cultural characteristics distinguish him from the national society is an Indian or a “Silvicola” (a denizen of the forest).



the federal agency in charge. This agency is the National Indian Foundation, FUNAI, which, in the case at point, appears as an integral part of the land conflict.

In order to ensure the right of usufruct of the land and natural resources, and to meet the subsistence needs of those communities, Article 26, in reference to the areas of the reservations, provides that the Union is empowered to establish areas of possession and occupation by the Indians, according to the following modalities:

- a)** Indigenous reservation;
- b)** Indigenous park;
- c)** Indigenous agricultural settlement;
- d)** Indigenous federal territory;

In the case analyzed by this research, the land conflict described originates in a determination issued by FUNAI, which declared an area occupied by small producers organized into a rural association as an indigenous reservation.

The role of FUNAI in the land conflicts is established by the present Statute, as per the following Articles:

Art.34 The federal body in charge of support to the Indians can require the collaboration of the Army and Federal Police assistants to ensure the protection of the lands occupied by the Indians and the indigenous communities.

Art.35 It is responsibility of the Indian assistance body the judicial or extrajudicial defense of the rights of the Indians and the indigenous communities.

Art.36 Without detriment t the provisions stated in the previous article the Union shall adopt the administrative measures or propose, through the Federal Public Ministry, the judicial measures adequate to secure the Indians' possession of the lands they inhabit.

A more comprehensive understanding of the Brazilian institutional agrarian environment requires the analysis of the legal prerogatives that define the property rights of individuals, organizations and governments. Moreover, the action of the State becomes relevant insofar as its role is that of guarantor or property rights. The present study verified that public bodies affected the decisions of economic agents and their financial results.

As can be observed in Picture 1, serious conflicts of interest exist between the laws covering economic activities in Brazil. Thus the results of actions among squatters, landless people and Indians can take on several different forms.

*Picture 1 – Institutions, aims, agrarian view and interest conflicts*

<b>Institutions</b>	<b>Aims</b>	<b>Agrarian View</b>	<b>Conflicts</b>
<b>Federal Constitution</b>	<i>Ensure the exercise of legal and social rights.</i>	<i>Ensure the right to private property with attention to its social function.</i>	<i>Private Law vs. Social Function</i>
<b>Civil Code</b>	<i>Establish the rights and duties in the civil order.</i>	<i>Owners can be deprived from the right to the social property, with payment of indemnity in case of expropriation in order to advance social or environmental interests</i>	<i>Economic Law vs. Social and Environ 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 of their property.</i>
<b>Statute of the Land</b>	<i>Regulate the National Program of Agrarian Reform.</i>	<i>Promotion of a more equitable land distribution aiming to conform to the principles of social justice and increase in productivity.</i>	<i>Social Justice vs. Increase in Productivity</i>
<b>Statute of the Indian</b>	<i>Regulates the juridical situation of the Indians.</i>	<i>Preservation of Indian territories, recognizing original rights.</i>	<i>Original Rights vs. Property Rights</i>

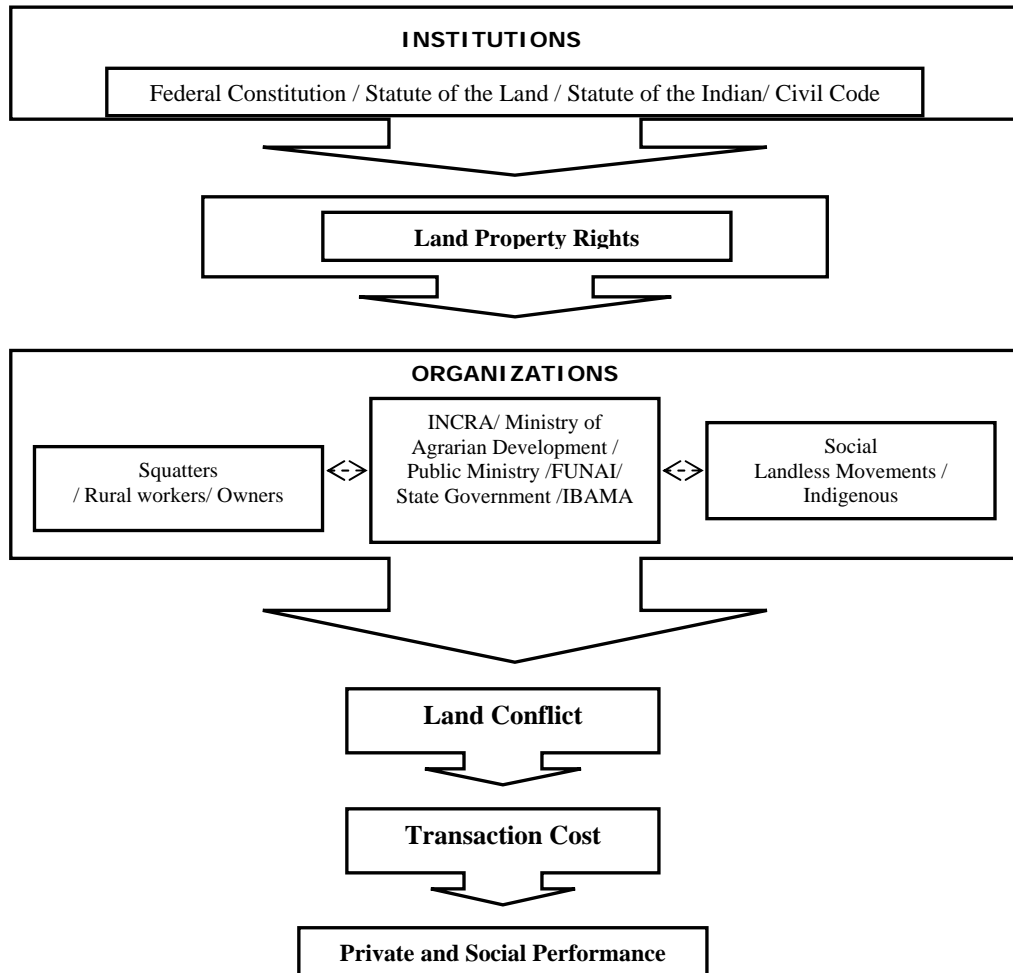
*Source: elaborated by the authors.*

The results of Picture 1 allow building Figure 2 below, which presents a systemic scheme of the institutional environment and of the way the transaction costs emerge as a function of the conflicts.

The institutional environment is based on the laws and norms governing the relations among organizations, which, in the case in point encompass the Federal Constitution, the Civil Code, the Statute of the Land and the Statute of the Indian. The organizations correspond to the economic agents: agriculturists, cattle ranchers, social

groups, indigenous groups and the following public entities: INCRA, FUNAI, Federal Public Ministry (MPF)<sup>19</sup> and Federal Revenue among others.

*Figure 2 - Institutional Environment and Performance*



*Source: Williamson (1985). Adapted by the authors*

Transactional relations among organizations occur within an institutional environment which, based on the conflict, foster an increase in the transaction costs, once the judicial processes are expensive, slow and uncertain in their results, which depend on a subjective analysis of the Courts. This means that relations are unstable due

<sup>19</sup> It is integrated to the Brazilian Public Ministry established by Law 75/1993 and it has as one of the main attributions the “*Defense of the People*” based in: the national patrimony, the public and social patrimony, the cultural patrimony, the natural environment, the rights and interests of the collective, especially of the indigenous communities, the family, the child, the adolescent and the elderly.

to the inconsistency of this system, which, in turn, sparks increases in land conflicts.

### **3. The Case of Mongaguá Producers' Association**

The conflict that illustrates the study case of this research is characterized by a judicial dispute between FUNAI, mediated by the Public Ministry, and Mongaguá Producers Association. Thus, it does not regard private lands trespassing, but small farmers working public lands without property titles.

#### **3.1. History**

Mongaguá is a Brazilian city located in the southern coast of the State of São Paulo, with an area of 152 <sup>2</sup>sq km and 13 km of beaches. It is bordered by the cities of Praia Grande and Itanhaém<sup>20</sup>. It has a population of 35,000 inhabitants, 135,000 of whom are floating or non-resident<sup>21</sup>; and its main economic activities are tourism, commerce and services.

In 1948, the city of Mongaguá, previously belonging in the city of São Vicente<sup>22</sup>, was incorporated as a District into the city of Itanhaém under Law 233, to be finally emancipated from Itanhaém on December 31, 1959.

History has it that in the 16th century the Tupi-Guarani Indians were the first inhabitants of the areas along the rivers Mongaguá and Iguapeú. Mongaguá is an indigenous word meaning "Sticky Water"<sup>23</sup>.

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<sup>20</sup> Mongaguá is 91km away from the main city of the state of São Paulo, São Paulo. Other cities nearby are: Santos: 43km; Bertioga: 60km; Guarujá: 45km; São Vicente: 30km; Praia Grande: 20km; Itanhaém: 18km and Peruíbe: 43km.

<sup>21</sup> The non-resident population occupies the city during the holiday season, from December to March and in June.

<sup>22</sup> Recognized as the first colonial town in Brazil, it was founded on January 22, 1532 by the Portuguese Martim Afonso de Souza.

<sup>23</sup> Other names were attributed to the region such as: "*Land of the Saints of the Miracles*" and "*Land of the Priests*".

### **The creation of the Mongaguá Rural Producers Associations**

As of 1990, the occupation process in Mongaguá intensified in the region along the Bixoró River, next to the Atlantic Forest<sup>24</sup>. Small farmers joined a few families that had already lived there for 25 years. As a way to organize this community, the “*Association of Rural Producers of the Three Rivers of Mongaguá*” was founded on February 26, 1992, in reference to three rivers: Mineiro, Bixoró and Aguapeú. At the end of 1994, two years after the Association had been established, the squatters comprised 70 families (over 200 people) working the land and representing an occupied area of 1,090 hectares<sup>25</sup>.

The main crops grown by these small producers were: rice, beans, manioc, banana and “*pupunha*” or pejibaye<sup>26</sup>.

In 1992 the INCRA set up a registry of those families in order to collect data on the occupation and regulation of the territory by using their enrolment registers at this institute and the rural land tax (ITR) statements at the Federal Revenue. The region was also home to an Indian tribe of the Tupi-Guarani linguistic family represented by approximately 50 people. According to an interview with dwellers, the relation between the families of squatters and Indians was harmonious and without land conflicts.

### **3.2. The conflict between the producers and FUNAI**

A judicial dispute was started between FUNAI and the Rural Producers Association. Under Governmental Order of the Ministry of Justice of 22 Jun 1994, FUNAI determined that the land occupied by the squatters was in fact indigenous land.

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<sup>24</sup> The region is located a 2 km away from the Highway that runs by the city (Padre Manoel da Nóbrega).

<sup>25</sup> Agrarian unit of measurement. 1 hectare = 10.000 sq m.

<sup>26</sup> The fruit of a multi-stemmed palm tree (*Bactris gasipaes*), which naturally replaces the varieties *Euterpe (açai)* and *Euterpe edulis* (known as *juçara*). Legally authorized, its crop is precocious and permanent. The first harvest occurs in the second year of cultivation, whereas traditional varieties take up to eight years to bear fruit.

The lawsuit and the appeals lingered on until 2002. In 2003 a Public Civil Suit was brought by Public Ministry against FUNAI, supported by Art.231 of the Federal Constitution<sup>27</sup>. The object of the suit was the traditionally occupied territory “*Terra Indígena Guarani do Aguapeú*” with approximately 4 thousand hectares for 48 inhabitants.

The defendants were represented by thirteen families who belonged to the Association and who had not yielded to FUNAI’s pressures to accept an indemnity value for the leaving the land. Indemnities appeared significantly underestimated to the rural workers, since they seemed not to be equitable to the improvements made during the years of occupation.

The rural workers’ plea regarding FUNAI’s position was based on the following claim: most Indians who lived there had come from other regions and, therefore, that was not a traditional area of Indian occupation. According to the records, only in 1992 had this community settled in the region, coming from other regions (neighboring areas, mainly from the South of the country).<sup>28</sup>

Another point contested by the defendants referred to the inconsistency between the concomitant determinations of an indigenous area and an electric power implementation project for the region. In 1996, the State Government approved the project, which was implemented through a partnership between the private company *Elektro* (Elétrica e Serviços S/A) and the State Bank Nossa Caixa<sup>29</sup>.

This context expresses forms of unstable transactions within the ruling institutional environment marked by conflicts and maladjusted actions among public

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<sup>27</sup> “Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy ....”.

<sup>28</sup> During the appeal filed by the members of the association, a police report that was presented showed a trespassing complaint by a dweller, which had occurred in 1992. That was considered as evidence of the period the Indians arrived in the region.

<sup>29</sup> The electricity bill was charged on the basis of the consumption recorded plus the financing installment.

bodies in charge of the execution of the norms. This instability permeated the three levels of the government: municipal, state and federal. An indefiniteness is observed in the property rights: if the occupied area should be used by Indians, why did the rural workers declare ITR and sought financing for the installation of electric power? This decision implied long-run investments, which showed their interest in remaining on the land.

Picture 2 shows a brief comparison among the main actions of the organizations during the case and its inconsistencies.

*Picture 2 – Organizational actions – a comparison*

<b>Periods</b>	<b>1990</b>	<b>1992</b>	<b>1994</b>	<b>1996</b>	<b>1998</b>	<b>2000</b>	<b>2005</b>
<b>The parties</b>							
<b>FUNAI</b>	-	Initial investigation of the indigenous area	<i>Determination of the area occupied as indigenous</i>	-	Demarcation of the area as the indigenous reservation of the Guarani-Mbyá Group	Start of legal dispute	Legal decision of disappropriation of the occupied area
<b>INCRA</b>	-	Registry of families	<i>Enrolment at the INCRA and Federal Revenue</i>	-	-	-	-
<b>Rural Workers' Association</b>	Occupation	Foundation of the Association	In activity with 70 families and a 1,090-hectare-occupied area	<i>Installation of electric power</i>	Conflict of interests between the parties and reduction of association members	Start of Judicial Dispute	Withdrawal of families

*Source: elaborated by the authors*

In the beginning of 2005, the final outcome of this lawsuit favored FUNAI. The dwellers were given a period of fifteen days to leave the area and their indemnities were maintained, according to the initial value placed in judicial deposit. In 2006, INCRA made a proposal for the remaining dwellers to be re-settled in another area located in Itanhaém<sup>30</sup>.

Table 1 presents summarizes the expenditures involved in the judicial dispute.

*Table 1 - Values of the Dispute*

Description	Results*
Investments (housing, seeds, machines and tools).	US\$ 102,724
Indemnity offered by FUNAI.	US\$ 48,074
Expenses with the lawsuit (court fees and layer's fees).	US\$ 8,217
Time to resolve the conflict so far	7 years

*Source: Producers Association and the Legal Suit (of 11 families)*

*\* In absolute values prevailing during the period, converted into North-American dollars based on the average of annual exchange rate from 1998 to 2005 (Source: Central Bank).*

*(Adapted by the authors)*

The time spent to settle the conflict so far and the costs involved in the lawsuit have also been relevant to understand how investments are affected. The transaction costs increase and so do the negative economic impacts. Under the perspective of the outcome of the lawsuit and taking into account the investments made, the associates suffered significant losses, as can be seen in Table.

Even though this case has a small dimension in economic terms, it does portrait part of the reality of the conflicts existing in the Brazilian institutional environment, particularly regarding land-tenure rights. Thus, the extension of this analysis can reach other conflicting Brazilian regions, and also compare and identify factors that give rise to disputes and the measurement of the economic effects on agricultural activities.

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<sup>30</sup> According to consultations with the rural workers, this area refers to an unproductive farm found by the interested parties. In principle, the area is not large enough to accommodate all of the families.



#### **4. Conclusions**

The analysis of the case herein described illustrates a land conflict characterized by judicial disputes between public and private organizations. It could be observed that the Brazilian agrarian legislation determines an institutional environment that sparks interest conflicts of economic and social nature, which can also be attributed to the original form of occupation of the Brazilian territory. The history of land concentration has left behind a liability that is reflected in the demands of landless groups, Indians and environmentalists. Unable to leave aside the driving force of the national economy, which is usually based on large properties, the State seeks to maintain the growing demands from the so-called “excluded” population under control through a dubious legislation.

The case presented may be considered suggestive, insofar as both parties represent the demand of excluded populations. On the one hand, squatters, who became land owners as a result of public actions. On the other, indigenous people who, as nomads, had not inhabited the area in a long time. The small rural growers, through incentives from public bodies, made long-term investments and created the Association. Electric power was brought and other improvements were made. Nevertheless, even after a longer period of occupation, these associates lost the property and part of their investments. The expected result is the loss of motivation for agricultural activities in the region, given that Indians are not used to cultivation practices and depend on extractivism activities and on the commercial use of natural resources, which is authorized by law. Besides that, some or most members of the Association are likely to become underemployed in the large urban centers of the region.

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