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Reconciling Opposites: The Original Conflict on Mining, Indigenous Lands and Development

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Abstract: Following a series of disputes between the Judiciary and Legislative branches in Brazil, and in the face of yet another myriad of lawsuits focusing on a range of issues regarding indigenous lands, the Brazilian Supreme Court set up a conciliation process and, among the specific issues, proposed conciliation on the issue of mining on indigenous lands. The article seeks an answer to the question of whether reconciliation on the matter is possible and, to do so, it intertwines Brazil's colonization process with mining by identifying what we have chosen to call the "original conflict". This conflict brings two dichotomous positions face to face: the first is based on indigenous cosmovisions that understand that mankind cannot be dissociated from nature, and interpret mining as the activity of "earth eaters"; while the second is explained mainly through a vision that values nature in the form of natural resources and that exploits mining as means for development and growth. After the theoretical development of the original conflict, the article unfolds how this conflict continues to have repercussions and how it develops on the Brazilian legal framework, analyzing the constitutional and infra-constitutional levels and arriving at an analysis of the dispute surrounding Bill 191/2020. The article is developed through a bibliographical, legal and jurisprudential review, adopting as a theoretical reference the understanding coined by Horacio Machado Araóz in his work "Mineração, genealogia do desastre" (Mining, genealogy of disaster), according to which the roots of the modern world lie in the mining geography of Latin America. The article arrives at the understanding that there is no conciliation

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possible on the theme of mining on indigenous land, and that there is a need for greater defense and certainty about indigenous rights, including the need for indigenous people to have stewardship over their rights, including the autonomous management of their lands.
Keywords*:* Mining; Colonialism; Brazilian Law No 14.701/2023; Indigenous Rights; Sustainability

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A. Introduction

In a context of intense dispute over the demarcation and possibility of mining indigenous lands in Brazil. In an immediate legislative backlash to the judgment made by the Supreme Federal Court (STF, Brazil's highest court), which had ruled unconstitutional the "temporal milestone thesis[1]", the Brazilian parliament issued Brazilian Law no 14.701/2023, which "regulates art. 231 of the Federal Constitution, to provide for the recognition, demarcation, use and management of indigenous lands" and embraces the temporal milestone thesis. In this scenario, various constitutional actions have been brought before the STF, including Declaratory Action for Constitutionality No. 87 (ADC 87)[2], Direct Actions for Unconstitutionality Nos. 7582, 7583 and 7586 (ADIs 7582, 7583 and 7586), and Direct Action for Unconstitutionality by Omission No. 86 (ADO 86).

In the conjuncture of these constitutional actions, under the rapporteurship of Minister Gilmar Mendes, a Special Composition Commission was proposed with the declared aim of seeking conciliation on multiple socio-environmental rights linked with indigenous peoples and indigenous lands. Amongst those rights and issues is the matter of mining on indigenous lands.

In this context, the object of this research becomes even more important, as it focuses on analyzing and understanding the historical relationship between Brazil—its diverse population and different peoples—and mining, in order to identify common socio-environmental elements and historical focal points. By understanding the origin or constitutive

1 According to this thesis, indigenous peoples would only have the right to the lands they traditionally occupy if they were physically on those lands at the time of the promulgation of the 1988 Constitution of the Republic, which occurred after 21 years of an openly anti-indigenous military dictatorship, see *Rachel Dantas Libois / Robson José da Silva,* Marco temporal, Supremo Tribunal Federal e direitos dos povos indígenas: um retrocesso anunciado. Percursos 2021. The thesis arose from the Brazilian Supreme Court, which, in ruling on a specific case—known as the Raposa Terra do Sol Case—recognized the right of indigenous peoples to their territory, basing this recognition on the presence of 19 "conditions", including the fact that the indigenous peoples occupied the territory on the date the Federal Constitution was promulgated, *Thiago Rafael Burckhart*, Direitos Indígenas e Jurisdição Constitucional: uma análise crítica do caso Raposa Serra do Sol, Florianópolis 2019.

2 Supremo Tribunal Federal (STF), Ação Declaratória de Constitucionalidade n. 87 (ADC 87).

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element of mining-related conflicts in Brazil, it seeks to lay the foundations for a debate on the need for new parameters for resolving conflicts—whether these conflicts emerge from legal or juridical debates, or steam from large-scale mining disasters—such as the dam collapses which occurred in Mariana, in 2015, and in Brumadinho, in 2019.[3]

Furthermore, the present cannot be explained without the past, because "only the interpretation that reconstructs the genesis of the lived reality can actually be convincing".[4] Thus, in order to understand the unique—and problematic—relationship between Brazil and mining, it is crucial to reconstruct the genesis of mining and the contrasts of interests that are in play in Brazil, in order to understand the roots of the conflict.

Reconstructing the lived reality by analyzing the foundations of mining in Brazil goes beyond the matter of legislative and judicial disputes, and plays an important role in approaching and interpreting the fundamental aspects of the recent socio-environmental disasters in Brazil caused by mining (namely, the Mariana and Brumadinho disasters). That is, it is important to understand these disasters not as dissociated facts, divorced from their roots, but as constitutive elements in a chain of events linked to the larger reality from which they emerge, enabling the identification of how recent mining conflicts can reconstruct historical problems and reproduce conflicting positions, as tracing the broader context of economic, territorial and symbolic domination is necessary to reconstruct the totality.[5]

To achieve this goal, the article identifies one "original conflict" and unfolds through the analysis of said conflict, which is characterized by two different cultural and collective perspectives on mining in Brazil. The first is based on ancestral, markedly indigenous knowledge, and concerns an understanding that does not dissociate humankind from nature, and which has its epitome in the idea of the *"cannibal gold"*.[6] The second is explained mainly through a vision that values nature in the form of *natural resources* and that is based on the incessant struggle for *development* and growth—markedly of mercantile, capitalist and socio-economic systems.

3 The reference made concerns two mining waste dam failures that rank among the world's worst socioenvironmental disasters in the mining sector. These are the collapse of the Fundão dam, managed by Samarco (Vale S.A. and BHP), in Mariana, in 2015, and the collapse of the Córrego do Feijão dam, managed by Vale S.A., in Brumadinho, in 2019. In the first case, approximately 60 million cubic meters of toxic mud were dumped along a 663 km stretch of rivers, causing 19 direct deaths, destroying the homes of approximately 1,200 families, and affecting 35 different municipalities. In the second case, contamination by toxic substances in the mud extends over more than 300 km of river and caused 272 direct deaths - most of them employees of the mining company, who were having lunch in the cafeteria, located downstream from the dam, at the time of its collapse, see *Klemens Augustinus Laschefski*, Rompimento de barragens em Mariana e Brumadinho (MG): Desastres como meio de acumulação por despossessão, 2020.

4 *Jessé Souza*, A elite do atraso: da escravidão a Bolsonaro, Rio de Janeiro 2019, p. 14

5 Ibid., p. 39.

6 *Davi Kopenawa / Bruce Albert / Beatriz Perrone-Moisés*, A queda do céu: palavras de um xamã yanomami. Editora Companhia das Letras, São Paulo 2015, p. 356.

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After analyzing the historical and constitutive elements of this "original conflict", we move on to an investigation to identify, in the Brazilian legal framework, milestones that highlight (and attempt to deal with) this conflict, combining indigenous rights and mining, reinforcing the existence and legal/jurisprudential internalization of this dichotomy. Afterwards, the persistent and current existence of this conflict, to which a definitive solution has not yet been found in the Brazilian legal and judicial sphere, is emphasized through the analysis of the disputes behind Bill 191/2020, which are more important than the bill itself, as it reproduces, in the most part, the same interests that now are to be "conciliated".

The research is carried out through a bibliographical, legal and jurisprudential review, adopting as a theoretical reference the understanding coined by Horacio Machado Araóz in his work "Mineração, genealogia do desastre" (Mining, genealogy of disaster), according to which the roots of the modern world lie in the mining geography of Latin America, which is responsible for forming the basis for the development of the current capitalist system.[7] The legal review deals with the review of the legal framework, aimed at identifying normative acts in which it is possible to verify the existence and establishment of differentiated treatments to be given to mining projects on indigenous lands and non-indigenous lands by virtue of this qualification. The jurisprudential review concerns the identification and analysis of relevant judgments in which the differentiation between mining projects in indigenous and non-indigenous areas is the core or determining factor of the conflict or its solution. Furthermore, the research adopts a comparative method that contrasts and intertwines two dichotomous positions on mining (what is referred to here as the "original conflict"). The temporal delimitation of the analysis of the relationship between Brazil and mining is precisely the initial moment when these two perspectives began their opposition: the colonization of Brazil by Portugal. The analysis is developed by investigating the relationship between these two perspectives, separated by an "abyssal line", which coexist and oppose each other in the same country.[8]

The initial hypothesis of the research is that it is not possible to reconcile the dichotomous positions presented with regard to mining on indigenous lands. The premise of the research is that an in-depth understanding of the "original conflict", which lies at the heart of a historical relationship that reconstitutes and gives a new guise to colonial relations of exploitation and hoarding, is fundamental to establishing alternatives for resolving future collective conflicts related to socio-environmental mining disasters.

7 *Horacio Machado Araóz*, Mineração, genealogia do desastre: o extrativismo na América como origem da modernidade, São Paulo 2020.

8 *Boaventura de Sousa Santos*, Para além do pensamento abissal: das linhas globais a uma ecologia de saberes. Revista Crítica de Ciências Sociais 78 (2007), p. 71.

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B. The Original Conflict: The Opposing Worldviews and the Indigenous Understanding of Naturalness

Mining-related conflicts have gained attention in the Brazilian context over the last decade, encompassing a broad spectrum of conflicts that range from those arising from socio-environmental disasters resulting from dam collapses—such as the cases of Mariana in 2015, and Brumadinho in 2019—to conflicts relating to illegal mining in preserved areas, including even conflicts concerning the shifting interests in the ore explored and the advances of mining over new areas (focusing, for example, on the growing interest in ores associated with more refined technological production, such as lithium). However broad this spectrum may be, all mining-related conflicts ultimately refer to the same issue: the existence of mining.

Mining, as a fact with its social, political, economic and environmental dimensions, has a prior element at its core, which refers to the relationship between the human and the non-human, between man and the environment. Reconstructing the genesis of mining-related conflicts therefore requires an analysis of this relationship, which is at the root of the mining practice itself. It is precisely in this relationship (between man and nature) that an "original conflict" is identified, marked by dichotomous positions: the first has its bases on indigenous knowledge and does not dissociate man and nature, understanding both as part of a whole. The second, on opposition, distinguishes man from the environment, placing mankind in a position above nature, which is valued in the form of *natural resources* or *environmental services*.

With regard to the first position—the indigenous understanding of the world as a whole—it is important to consider that the idea of "indigenous" is not an indigenous idea, but rather a colonial designation that levels different peoples with great differences and socio-cultural-linguistic diversity. However, the colonial idea of "indigenous" contradictorily allows multiple peoples to come together in a single cause and fight for it. In the words of Fausto Reinaga, "we are not indigenous, but it is as indigenous people that we are going to liberate ourselves".[9] Although there is a vast diversity of indigenous populations, cultures, knowledge and beliefs, "if there is one extremely widespread concept that these peoples agree on, it is that everything that exists in the world is the product of cultivation and care relationships between different species".[10]

In these complex relationships, what matters is not the owner—identifiable by a legal document—but the relationship of care that directly connects beings. Rather than owner-

9 *Bruno Malheiro / Carlos Walter Porto-Goncalves / Fernando Micheloitti,* Horizontes amazônicos: para repensar o Brasil e o mundo, São Paulo 2021, pp. 222-224.

10 *Charles R. Clement / Carolina Levis / Joana Cabral de Oliveira / Carlos Fausto / Gilton Mendes dos Santos / Francineia Fontes Baniwa / Mutuá Mehinaku / Aikyry Wajãpi / Rosenã Wajãpi / Gabriel Sodré Maia*, Naturalness is in the eye of the beholder. Frontiers in Forests and Global Change, Frontiers in Forests and Global Change 4 (2021), p. 210.

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ship, the relationship is characterized by a mutual respect and recognition between the many forms of life in connection with each other.[11]

This perspective is based on the comprehension that everything is natural, and that humanity is just another part of this organism called "Earth", in such a way that "I do not perceive that there is anything that is not nature".[12] Thus, it is important to understand the Earth as a breathing being with a heart, "not a deposit of natural resources" .[13] This understanding includes an "ethic that imposes limits on the human uses of the forest"[14], as catastrophe will befall everyone, "unless we understand that respect for others is the condition for everyone's survival".[15]

Thus, different indigenous cultures, with their different knowledge and know-how, have different worldviews and interpretations of the world, but agree upon the impossibility of dissociating humanity from nature. This manufactured and fictitious separation, which perceive humans as being apart and superior to its own concept of nature, marks the change in the relationship between humans and land/naturalness and constitutes the "original conflict" regarding mining. It comes from an organicity based on ignoring ties that unite everything that is human and non-human:

> *"The idea of us humans detaching ourselves from the earth, living in a civilizational abstraction, is absurd. It suppresses diversity, denies plurality of forms of life, existence and habits. Offers the same menu, the same costumes and, if possible, the same language for everyone."*[16]

This segregating vision is understood as the "original sin", a radical rupture, physical and metaphysical between the earth, and the bodies and populations,[17] which creates its own anomalies in order to justify itself. In order to fill the structural gaps left by this fragmented vision, different mechanisms are created, through which the relationship between the human and the non-human could be interpreted. In this regard, "both the concept of natural resources and of ecosystem services are based on an understanding of naturalness that is devoid of agency, on the belief that objects exist to be exploited and are understood within the logic of the market".[18] Lourenço highlights that even the concept of "environment" displays human centrality and the instrumental valuation of nature in relation to the human, as environment designates what surrounds us, and the simplistic reduction of naturalness to "natural resources", downgrades everything (including every form of life, human and

11 Ibid., p. 210.
12 *Ailton Krenak*, O amanhã não está à venda, São Paulo 2020, p. 6.
13 *Kopenawa et al*., note 6, p. 14.
14 *Clement et al.,* note 10, p. 211.
15 *Claude Lévi-Strauss*, Présentation. Chroniques d'une Conquête, Ethnies 14 (1993), p. 7.
16 *Ailton Krenak*, Ideias para Adiar o Fim do Mundo, São Paulo 2019, p. 12.
17 *Machado Araóz*, note 7, p. 253.
18 *Clement et al.,* note 10, p. 211.

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non-human) that composes naturalness to an utilitarian perspective on which its value is related to the market value given to its "resources" capable of being exploited.[19]

This view, which distances humanity from the caring relationships it has with the non-human world, as both an active and passive subject, is particularly important when it comes to mining. It is this segregation that allows and justifies humanity, under the premise of making use of "resources", to cause destruction through excavations in search of minerals—which is strictly forbidden according to multiple indigenous worldviews. According to Yanomami[20] leader David Kopenawa[21], "the whites don't understand that by extracting minerals from the earth, they spread a poison that invades the world and that, in this way, it will end up dying", adding to his explanation, Kopenawa et al. pontyate that from the minerals emerges a "dense, yellowish metal smoke, an epidemic smoke so powerful that it is launched like a weapon to kill those who approach it and breathe it in".[22]

Miners, therefore, are understood as "earth eaters", capable of destroying and razing entire territories—and the earth itself—and relegating everyone to death. Through the actions of these "earth-eating" miners, "the rivers of the forest will soon turn into muddy puddles, full of motor oil and garbage". Mining and its tailings "make the waters sick and the flesh of the fish soft and rotten. Those who eat them risk dying of dysentery, stripped bare, with violent stomach pains and dizziness". Kopenawa adds that death awaits not only those who directly ingest the water, but also those affected through the holistic system which is disrupted by mining, stressing that death may come from thirst, seeing that "by dirtying the springs of the rivers, they will all die and the waters will disappear with them. They will flee back into the earth. Then, how will we quench our thirst? We will all die with parched lips". Thus, when they destroy the earth with their bombs and great machines, "the earth will be torn apart and all its inhabitants will fall into the world below".[23]

19 *Daniel Braga Lourenço*, Qual o valor da natureza? Uma introdução à ética ambiental, São Paulo 2019, p. 30.

20 The Yanomami are an Amerindian group who live in the Brazilian and Venezuelan Amazon, with around 21,000 Yanomami living in the Brazilian area of the territory alone. The Yanomami first gained international notoriety as a result of publications about them in the 1950s and 1960s (see *Kopenawa et al*., note 6, p. 557). More recently, the Yanomami have returned to the headlines due to various incursions into their territory by illegal miners, which have brought them death and destruction, see *Oswaldo Braga de Souza*, O que você precisa saber para entender a crise na Terra Indígena Yanomami, Instituto Socioambiental. A technical note released by the Amazon Environmental Research Institute (IPAM) in 2024 reports that between 1985—the start of the "gold rush" in the Amazon—and 2022, the Yanomami Indigenous Territory "saw a more than 20,000-fold increase in the area of mining, from 15 ha to 3,278 ha", see IPAM (Instituto de Pesquisa Ambiental da Amazônia), As cicatrizes do garimpo em terras indígenas da amazônia brasileira, April 2024, https://ipam.org.br/wp-content/uploads/2024/04/NT11_portugues.pdf (last accesssed on 1 November 2025).

21 Shaman and spokesperson for the Yanomami indigenous people.

22 *Kopenawa et al.,* note 6, p. 357.

23 Ibid., pp. 336-359.

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The utilitarian understanding of nature denies the intrinsic value of naturalness and creates an hierarchy in which humankind is separated and superior to all the other subjects that are endowed in this relationship between the different forms of life.[24] This false hierarchy is still alive nowadays through the understanding of "nature", in a system in which the production of wealth depends on the depredation of sources and means of life: "capitalizing on Nature— including forms of conservacionism—is the death of Nature".[25]

In the Yanomami culture, it is believed that news of the existence of metals reached the ancestors of the whites, which is why they crossed the oceans to look for minerals in Brazil.[26] Undeniably, the "original conflict" arose from colonization, forged through violence and based on two false premisses, according to Machado Araóz: the first false premise is that all culture, knowledge and technology from the colonies were inferior and outdated, and the second is that the new continent would be home to wealth and resources understood as endless—which justified the destruction of both culture and resources.[27]

C. Deepening the Original Conflict Through Colonization and Extractivism[28]: Development for the Earth-Eaters

Recounting his first contact with the "whites", Kopenawa reported that "crowds of these angry outsiders suddenly appeared from all sides and soon surrounded all our houses.[29]

24 *Felício de Araújo Pontes Júnior / Lucivaldo Vasconcelos Barros*, A Natureza como sujeito de direitos: a proteção do Rio Xingu em face da construção de Belo Monte, Descolonizar o imaginário: debates sobre pós-extrativismo e alternativas ao desenvolvimento, São Paulo 2016, p. 428.

25 *Machado Araóz*, note 7, p. 457.

26 *Kopenawa et al.,* note 6, p. 359.

27 *Machado Araóz*, note 7, pp. 92-100.

28 The concept of extractivism adopted here is not to be confused with "extrativismo" commonly used in Brazil, which refers to the activities of collecting and removing small volumes of nature. In Brazil, the closest translation to the concept adopted here would be "predatory extractivism". Scholars have approached extractivism from different perspectives and defined different variants (neoextractivism, agrarian extractivism, green extractivism and others), delimiting their analysis in relation to the type of resource, its specific effects and/or the role of the state, for example, see *Ben M. McKay*, Agrarian extractivism in Bolivia, World Development 97 (2017), pp. 199-211. This article adopts the broader concept of "extractivism", as elaborated by Acosta positioning extractivism as "a mechanism of colonial and neocolonial plunder and appropriation (...) forged in the exploitation of raw materials essential for the industrial development and prosperity of the global North", *Alberto Acosta*, Extractivism and neoextractivism: two sides of the same curse, Beyond development: alternative visions from Latin America 1 (2013), p. 62. Thus, the core of the concept of extractivism is based on the extraction of large sums of naturalness - or nature, or natural resources - to provide for international agents (countries, markets or corporations), in a dynamic based on the socialization of socio-environmental damage, left in the localities where extractivism takes place, and the concentration of profits, which are closed, in the form of enclaves, and remain in the hands of the exploiting agents.

29 *Kopenawa et al.*, note 6, p. 336.

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They searched frantically for something evil that we had never heard of and whose name they kept repeating: oro-gold". The Yanomami leader's account represents a first contact, which was also made many years before by different indigenous populations, many of whom did not survive to tell their stories.

In order to impose its perspective on the relationship between the human and the non-human, guaranteeing the exploitation of the colony in favor of the metropolis, a mechanism was forcibly imposed by the "whites" depicted in David Kopenawa's report. The mechanism was extractivism, which was based on the exploitation of slave labor and of land and nature for the plundering and appropriating of the "resources" from the colonies. As such, extractivism does not take into account any of the relationships of care nor any concept of sustainability, being solely based on the exploitation of bodies and raw materials indispensable for the industrial development and prosperity of the Global North.[30]

Thus, not only the first contact, but also the development of the relationship between colonizers and colonized portrays a process of violence, of making invisible and erasing native populations, their knowledge and cultures. Beyond genocide, this story—to which traces the "original conflict" is about exploitation, hoarding and looting.

It is founded on disqualifying as poor, backward and insufficient the knowledge and ways of living of a large part of the world's population, such as those based on relationships of care, due to the fact that these ways of reproducing knowledge and life do not conform to what was (and is) needed for the capitalist production and accumulation system.[31] Through extractivism, this "new", imposed, relation meant the complete disregard of the many different forms of lives torn apart by private appropriation of land and nature/naturalness: it is the colonial way of dealing with differences, an instrumental and pragmatic notion of nature as an obstacle.[32]

The "original conflict" arose and became a constitutive element for the analysis of mining from the colonization process onwards, especially through the implementation of extractivism. In this sense, the extractivist basis of colonial economies, such as Brazilian, created not only geoeconomic, ecological, and political asymmetries in the world and inside the exploited countries, but was also the economic and political foundation of the oligarchic regimes in Latin America that continue to reverberate to this day. As a result, "the exploration of natural resources became, from that time to our days, 'government programs', state policies".[33]

In this sense, points out a clear similarity between the geopolitical tactics adopted by current fronts aimed at deepening and spreading mining and the first whites sent to the

30 *Acosta*, note 28, p. 63.

31 *Miriam Lang*, Introdução: alternativas ao desenvolvimento, in: Gerhard Dilger / Miriam Lang / Jorge Pereira Filho (eds.), Descolonizar o imaginário: debates sobre o pós-extrativismo e alternativas ao desenvolvimento, São Paulo 2016, pp. 28, 30.

32 *Malheiro et al.,* note 7, p. 54.

33 *Machado Araóz*, note 7, p. 184.

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colonies to put colonial exploitation projects into practice: "the dirty work is done by miserable, violent and unprepared men, but those who finance and control the system, naturally taking the profit, are safe and comfortable away from the front".[34] This similarity pointed out by Kopenawa reinforces Machado Araóz's conclusion that modern mining in Brazil is the "reproduction of colonial extractive practices", which on the one hand generate wealth and accumulation, and on the other spread destruction.[35]

In the umbilical and inseparable relationship between extractivism and colonialism, mining emerges as the most extreme form of extractivism. As such, mining in Brazil is not just an "exploitation of natural resources", but a pattern of power that, to this day, structures, organizes and regulates social life as a whole around the appropriation and exploitation of nature (including human bodies). Extractivism is the perennial mark of Brazil's colonial origin and, as such, modern mining is inseparable from colonialism and capitalism: it is its foundation.[36]

As extractivism—and therefore mining—is the perennial element of Brazil's colonial origins, reverberating and being reproduced in different guises to this day, it becomes relevant to take into account the fact that extractivist practices demand the separation between the colonized and the colonizer, the zone of exploitation and the zone of accumulation. This separation comes in multiple layers, ranging from the geographical separation to the discourses and practices aimed at justifying and enabling the looting-accumulation duality.

From a legal standpoint, the separation between the zones of exploitation and of accumulation is explained, according to Boaventura de Sousa Santos, by the imposition of an "abyssal" cartographic line, which divides the legal and juridical system into two: one side of the "abyssal" line would be guided by the "regulation/emancipation" paradigm, used to concurrently regulate social relations and generate emancipation to its population; while the other side would be ruled by the "appropriation/violence" paradigm, put into place to enable the appropriation of wealth to justify violence against its population.[37]

In the same way that Machado Araóz states that mining is a pattern of power that, to this day, structures, organizes and regulates social life[38], Santos argues that "the 'abyssal' cartographical lines that used to demarcate the Old and the New World during colonial times are still alive in the structure of modern occidental thought and remain constitutive of the political and cultural relations held by the contemporary world system"; "there isn't accumulation without a center and a periphery".[39] It separates two sides with opposite functions: the peripheral is subordinate, structurally dependent, and provider of exogenous

34 *Kopenawa et al.,* note 6, p. 23.
35 *Machado Araóz*, note 7, p. 19.
36 Ibid., p. 257.
37 *de Sousa Santos*, note 8.
38 *Machado Araóz*, note 7, p. 257.
39 See also *de Sousa Santos*, note 7, p. 71.

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supply, while the center is where expropriation, genocides, ecocide and epistemicide becomes accumulation.[40]

This is a pattern of geographical domination, with the division of the world system into center and periphery, as proposed by Immanuel Wallerstein.[41] In this sense, Aníbal Quijano adds that a pattern of ethnic domination has also been imposed, dividing and hierarchizing peoples into races.[42] Therefore, in the same way that European modernity is constituted and produced by the exploitation of America, the idea of superiority/ inferiority between peoples and continents is produced in the violent encounter between different peoples and also translates into an epistemological hierarchy. European and Eurocentric knowledge is presented as superior to the knowledge of the original peoples of America and the trafficked peoples of Africa, and this is clearly reflected in the forms of relationship between man and nature, including mining.

Through colonization, the abyssal line, which currently divides the world through the concept of "developed" countries (under the "regulation/emancipation" paradigm) and "developing" countries (under the "appropriation/violence" paradigm[43]) was drawn. The distinction of developed, underdeveloped/developing substitutes the logic of colonies versus central countries, "which had a 'right' to plunder the former because of their supposed biological and cultural superiority", maintaining the same roles as before in the international division of labor and naturalness, but with sustained through different arguments.[44] Quijano explains this continuity of the division of labor through the understanding of an imposed "coloniality of power" which, even after the end of the proper colonization process in America in the 19th century, remains in the structures of power, encompassing the most diverse range of power: economic and social and racial.[45]

The complex system of relationships and mechanisms devised to justify and enable colonization has not been effectively confronted, dismantled or had its deleterious effects repaired. On the contrary, this system of relations has merely moved on to more convenient formats that suit the demands of the times: Brazil has never properly addressed its foundation over slavery and the deep inequities that resulted from it, and the colonial exploitation

40 *Machado Araóz*, note 8, p. 124.

41 *Immanuel Wallerstein*, World-systems analysis: An introduction, Durham 2004.

42 *Anibal Quijano*, Colonialidade do poder, Eurocentrismo e América Latina, in: A colonialidade do saber: eurocentrismo e ciências sociais. Perspectivas latino-americanas, CLACSO, Consejo Latinoamericano de Ciencias Sociales, 2005.

43 For more information on the different paradigms on the different sides of the abyssal line, see *de Sousa Santos,* note 6.

44 *Lang*, note 30, pp. 28, 30.

45 *Quijano*, note 41.

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system transitioned to an international division of labor based on the idea of an "ideal way of life"[46], founded on wealth and accumulation.[47]

When bringing the perspective of the "abyssal" line to Brazil's internal relations, the emergence of the phenomena of self-imperialism and internal colonialism is highlighted, as an autophagic figure of a country devouring itself.[48] Such phenomena highlight the interior of political borders, founded on the internal development of colonized nations where, replacing external colonial rule the notion of domination of natives by natives emerges, giving rise to new notions and questions about independence and development.[49] In this regard internal colonialism articulates the conquest and the establishment of domination and transformation of local societies, the reproduction—through new forms—of the structures through which the colonial order was configured, reinforcing the continuity of a cultural, social, and political hierarchy established by the colonial order.[50] It depicts the advances made within Brazil against part of its territory and population, enabled through the use of the same colonial discourses, adapted to a current context: the sacrifice of the "other" the invisible, the backward, the obstacles to growth and that "are used to living in limbo" and, therefore, "are not like us, nor do they have our needs".[51]

The discourse and practice of self-imperialism or internal colonialism advances against those relegated to the "other side" of the "abyssal" line. The appropriation/violence paradigm is practiced not by the absence or complete distinction of applicable law, but by the imposition of a true State of Exception, which, associated with political discourse focused on the incessant pursuit of growth and development, justifies the lack of implementation of rights and the vacuum in state action[52]—resulting in situations such as the perpetu-

46 To be able to sustain this way of life, a very small portion of the world's population constantly seeks access to the totality of the planet's resources - whether "natural resources", cheap labor, or the capacity of the environment to absorb contamination and waste. "In other words, luxury and saturation of some are built on the spoliation of others" (*Lang,* note 30, p. 24). For more about the "Imperial Lifestyle", see *Ulrich Brand / Markus Wissen*, Modo de vida imperial: sobre a exploração dos seres humanos e da natureza no capitalismo global, São Paulo 2021.

47 *Maristella Svampa*, As fronteiras do neoextrativismo na América Latina: conflitos socioambientais, giro ecoterritorial e novas dependências, São Paulo 2019, p. 9.

48 *Benjamin Moser*, Autoimperialismo, São Paulo 2016, see also *Bruno Malheiro*, Grandes projetos de mineração na Amazônia: o governo bio/necropolítico do território e os processos de territorialização e de exceção, Revista Nera 59 (2021).

49 *Pablo Gonzáles Casanova*, Sociologia de la explotación, Mexico City 1969, p. 186.

50 *Luis Tapia,* Dialéctica del colonialismo interno, Madrid 2022, p. 197.

51 *Verena Glass*, O desenvolvimento e a banalização da ilegalidade: a história de Belo Monte, in: Gerhard Dilger / Mirian Lang / Jorge,Prereira Filho (eds.), Descolonizar o imaginário: debates sobre pós-extrativismo e alternativas ao desenvolvimento, São Paulo 2016, p. 423.

52 *Giovanni Martins de Araújo Mascarenhas*, State of Exception and Internal Colonialism: The Construction of the Belo Monte Power Plant in Brazil, World Comparative Law 56 (2024), pp. 611-632.

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ation of violations against indigenous rights, those as described in the report "Yanomami under attack: illegal mining on Yanomami indigenous lands and proposals to combat it".[53]

However, there have also been legislative and judicial progress to protect traditional populations against self-imperialist or internal colonialist advances. The Brazilian Federal Constitution of 1988 (the first after a twenty-year period of business-military dictatorship) expressly protected indigenous rights, including a provision that makes mining incursions (at least legal ones) on indigenous lands more difficult. Nevertheless, the Federal Constitution expressly provides for the need for a subsequent law to complement the constitutional provision and regulate mining on indigenous lands. More than thirty-five years after the promulgation of the Constitution, there is still no such law, despite the fact that more than thirty bills have been (or are currently being) processed in the National Congress.

D. The Brazilian Legal Framework on the Original Conflict

Machado Araóz, while pointing out that colonial models are reproduced to this day, understands that the instrumentalization of colonization under new guises, its pragmatics and rhetoric, require the development of a legal discourse and technical-legal and administrative institutions in order to be legitimized.[54] It is a matter of establishing parameters and legitimacy for relationships that replace the colonial model without, however, altering its essence based on the exploitation of territories and bodies, which continues under the paradigm of "appropriation/violence", for the enrichment of different subjects and territories, under the paradigm of "regulation/emancipation"[55].

It is from this perspective that legislative advances must be interpreted, seeing that, despite providing for protections to be granted to indigenous peoples (especially with regard to protection against mining, with attention to the original conflict already outlined), those legislative advances are not accompanied by public policies for their effective implementation.

53 The report, originally titled Yanomami sob ataque: garimpo ilegal na terra indígena Yanomami e propostas para combatê-lo" describes the advances in illegal mining in Yanomami indigenous territory with a focus on the year 2021, described as "the worst moment of invasion since the indigenous land was demarcated." It points to mining as the cause of systematic human rights violations against indigenous communities, as well as being responsible for the destruction of water bodies, increased deforestation, and "an explosion" in cases of contagious diseases, see Hutukara Associação Yanomami / Associação Wanasseduume Ye'kwana, Yanomami sob ataque: garimpo ilegal na Terra Indígena Yanomami e propostas para combatê-lo, Instituto Socioambiental, 2022, https://acervo.socioambiental.org/acervo/documentos/yanomami-sob-ataque-garimpo-ilegal-na-terra-indigena-yanomami-e-propostas-para (last accessed on 1 November 2025).

54 *Machado Araóz*, note 7, p. 148.

55 *de Sousa Santos*, note 8.

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This brings us to the point that illegal mining on indigenous lands—which has never really stopped—increased by 787% in northern Brazil between 2016 and 2022.[56] In addition, data from 2024 shows that indigenous lands lost around 13,000 hectares of forest to illegal mining in 2023 alone.[57] The original conflict has repercussions in disputes over land and mining wealth, often culminating in armed incursions of illegal miners against indigenous peoples, such as those recurrently reported involving illegal miners invading the territory of the Yanomami people.[58]

It is in this context, that Gilmar Mendes (Minister of the Supreme Court) proposed the Special Composition Commission with the aim of seeking conciliation on "irreconcilable, unavailable and non-negotiable rights that were hard-won by the Indigenous in the National Constituent Assembly of 1988" (STF, ADC 87, electronic petition 48757).

According to the Conselho Indigenista Missionário, the intended conciliatory attempt "was frustrated after eight months and 19 hearings held without any resolution, consensus or legitimacy". The successive extensions of deadlines to continue the work of the conciliation table "have led to redundant debates, while imposing an even longer wait for indigenous peoples to see the rights guaranteed to them in the 1988 Constitution come into effect" (STF, ADC 87, electronic petition 50551).

At the last meeting held within the Special Composition Commission (dated April 2, 2025), the Magistrate who chaired it informed "that issues related to mining would not be the subject of discussion in the present action", not meaning that the matter of mining on indigenous lands would be removed from the conciliation procedure, but rather that "any debates on the subject would be conducted in a specific commission to be formed within the scope of ADO[59] 86" (STF, ADC 87, electronic petition 48757).

The conciliation process over mining on indigenous lands ought to be understood as an unfolding of the original conflict, trying to open the way for the development of legal discourse and technical-legal and administrative institutions to legitimize mining interest. To better understand the legal and juridical stakes at play, we move on to analyzing the current legal framework (and its internal conflicts) on the matter.

56 *Poliana Casemiro / Arthur Stabile*, Garimpo aumentou 787% em terras indígenas entre 2016 e 2022, aponta Inpe, G1, 2 November 2023, https://g1.globo.com/meio-ambiente/noticia/2023/02/11/garimpo-aumenta-787percent-em-terras-indigenas-entre-2016-e-2022-aponta-inpe-infografico.ghtml (last accessed on 1 November 2025).

57 *Hyury Potter* / *Naira Hofmeister*, Avanço de garimpo em terras indígenas alerta para novos meios de lavagem de ouro, Repórter Brasil, July 2024, https://reporterbrasil.org.br/2024/07/garimpo-terras-indigenas-alerta-novos-meios-lavagem-ouro/ (last accessed on 1 November 2025).

58 *Nathalia Williany Lopes de Sousa*, Povos Yanomami sob ataque: violências do garimpo ilegal e os estímulos de uma colonialidade estatal, 2022.

59 ADO is the abbreviation of the Brazilian constitutional review action "Direct Action for Unconstitutionality by Omission".

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I. The Brazilian Constitution on Mining in Indigenous Lands

The persistence of the "original conflict" and the divergent perspectives on mining that coexist within a single territory make it necessary for different legal parameters to exist and be applied to different projects. The differentiating parameter, in terms of the applicable legislation, chosen by the 1988 Federal Constitution was whether or not the mining project was located on (or inside) indigenous lands. This is an element which, despite having a certain objectivity, is largely insufficient to prevent conflicts and deserves to be debated.

Nonetheless, the Constitution recognizes indigenous people's original right to the land they traditionally occupy, considering as such the lands inhabited by indigenous people on a permanent basis, used for productive activities and essential to the preservation of the environmental resources necessary for their well-being and physical and cultural reproduction, according to their uses, customs and traditions.[60] The recognized right to traditionally occupied lands, however, is not to be confused with the right to ownership of the land, since indigenous lands are not the property of the respective indigenous peoples, but are part of the Federal Union's patrimony, and are only intended for the permanent possession of the originary populations, who are, however, entitled to the exclusive usufruct of the riches of the soil, rivers and lakes existing therein.[61]

By providing for the usufruct of the riches of the *soil*, the Constitution made it clear that the exclusive usufruct (and decision) over minerals and their exploitation does not belong to the indigenous people. In this sense, the Constitution states that mineral deposits, mineral resources and hydraulic energy potential are assets distinct from those of the soil for the purposes of exploration or exploitation, and that they are, in any case, property of the Federal Union.[62]

Thus, since it is clear that mineral deposits and other mining resources are not to be confused with the soil, and are the property of the Federal Union, it is up to the Union to authorize or grant the right to research and explore mining resources. As for mining on indigenous lands, the Constitution provides for the possibility of its occurrence, recognizing the need for different requirements, stipulating the need for a new law, subsequent to the Constitution, that "will establish the specific conditions when these activities take place on (...) indigenous lands".[63]

Despite the provision for a subsequent law to establish specific conditions when mining activities are to occur on indigenous lands, the Constitution has already defined the differentiating element (the location of the mining activity) at a constitutional level. It also provided for two specific requirements to be applied to mining in indigenous lands: the

60 Art. 231(1) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

61 Art. 231(1) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

62 Art. 176 Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

63 Ibid.

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requirement is that mining on indigenous lands can only be carried out with the approval of the National Congress, after hearing the affected communities, and the second is that the participation of the indigenous peoples in the economic results has to be ensured.[64]

II. The Infra-Constitutional Legislation of the Original Conflict

Although the Federal Constitution established that mining on indigenous lands would take place under the specific conditions stipulated by law, since the promulgation of the Brazilian Constitution (October 5, 1988), more than thirty different bills have been presented to regulate the issue, and to date none of those have been converted into law.[65] There are, however, normative acts that predate the Constitution that regulate the matter and which, in the absence of complementary legislation provided for by the Constitution, continue to guide the matter at the legal level. In this regard, there is Law No. 6.001, of 1973, which institutes the so-called "Indigenous Statute", which deals in general with indigenous peoples in Brazilian society, and Decree No. 88.985, of 1983, responsible for regulating the provisions of the statute that deal specifically with mining on indigenous lands.

The Indigenous Statute merely points out that the exploitation of "subsoil riches" in areas belonging to indigenous peoples, or to the Union and occupied by indigenous people, will be carried out in accordance with the legislation, providing that any mining in indigenous lands are subject to "prior understanding with the Indigenous assistance body" and that it ought to be carried out with indigenous participation in the results of the exploitation.[66]

Decree 88.985/83 is responsible for specifically regulating the exploitation of "subsoil riches" on indigenous lands. It complements the "Indigenous Statute" (Law No. 6.001/73) by proposing that research authorizations and mining concessions on indigenous lands "or presumably inhabited by indigenous people" will only be granted "to state-owned companies that are part of the federal administration" and only "when it comes to strategic minerals necessary for national security and development".[67]

Thus, Decree 88.985/83 proposes a change in the differentiating element, establishing the need to comply with specific legislation not only for projects actually located on indigenous lands, but also for those located on lands "presumably inhabited by indigenous people". Furthermore, it also proposes two new requirements: the first is that only "strategic minerals" (an undefined juridical concept) necessary for "national security and development" (also undefined juridical concepts) could be explored; the second is that the

64 Art. 231(3) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

65 *Guilherme Carneiro Leão Farias*, Mineração e garimpagem em territórios indígenas: suas balizas no estado pluriétnico e multissocietário brasileiro, Revista de Direitos Humanos e Efetividade 6 (2020), pp. 1-22.

66 Art. 45 Lei nº 6.001, de 19 de dezembro de 1973. Presidência da República, 1973.

67 Art. 4 Decreto nº 88.985, de 10 de novembro de 1983, Presidência da República, 1983.

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exploration of minerals in areas subjected to the specific requirements regarding indigenous peoples could only happen through state-owned companies controlled by the federal administration.

In addition, in order to protect the interests of indigenous peoples, the Decree also establishes that mechanized mining can only be carried out "in compliance with the requirements that the National Indigenous Foundation—FUNAI establishes".[68] Among the possible requirements to be established by FUNAI is the right to demand, on the part of the companies benefiting from the research and mining authorization, the adoption of "precautionary measures aimed at preserving indigenous culture, customs and traditions"[69], in addition to the possibility of determining the stoppage and interruption of research and mining work "when damage to indigenous culture, customs and traditions is verified".[70]

Finally, the same Decree 88.985/83 states that FUNAI will represent the interests of the Union and will revert "to the benefit of the Indigenous and indigenous communities, the economic results arising from mining exploitation", including compensation and rents due for occupying the land.[71]

Decree 88.985/83 raises, albeit incidentally, an important discussion about the differentiating element chosen by the Constitution. The decree goes beyond the Indigenous People's Statute, as well as beyond the 1988 Constitution, by choosing as the differentiating element not only the location within indigenous lands, but also the location on lands presumably occupied by indigenous people. The definition of the differentiating element is extremely important, as it defines the legal contours of the original conflict—the existence or not of specific requirements and protection to deal with the original conflict.

E. Inside or Out: the Inadequacy of Identifying the Zone in Which the Mining Project is Located as the Only Differentiating Element

As explained above, the 1988 Federal Constitution chose an objective element as the determining factor for whether or not to apply the specific requirements for regulating mining. This differentiating element is the geographical location of the mining project, whether or not it is located on indigenous land.[72]

In practice—in addition to the absence of legislation that should regulate mining on indigenous lands—the geographical differentiating element chosen proves to be insufficient. In short, there are two major flaws in relation to the differentiating element chosen: the first concerns the very concept of indigenous land, as it relies on the bureaucratic and political process of "indigenous land demarcation"; the second concerns the insufficiency of the

68 Art. 5 Decreto nº 88.985, de 10 de novembro de 1983, Presidência da República, 1983.
69 Art. 7 Decreto nº 88.985, de 10 de novembro de 1983. Presidência da República, 1983.
70 Art. 7(1) Decreto nº 88.985, de 10 de novembro de 1983. Presidência da República, 1983.
71 Art. 6 Decreto nº 88.985, de 10 de novembro de 1983. Presidência da República, 1983.
72 Art. 176 Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

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protection conferred by adopting the presence of mining activity within indigenous lands as a differentiating element, ignoring more adequate concepts, also provided for by the Brazilian legislation, such as "Directly Affected Area" (ADA), "Area of Direct Influence" (AID) and "Area of Indirect Influence" (AII).

I. The Legal Status of Indigenous Lands

The Brazilian Constitution of 1988 recognizes indigenous rights to the lands they traditionally occupy, giving indigenous people permanent possession of these lands and, to this end, defines indigenous lands as those

> *"traditionally occupied by the indigenous, those inhabited by them on a permanent basis, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions."*[73]

It turns out, however, that the process for a given territory to effectively acquire the status, or legal qualification, of indigenous land is not as succinct as a brief reading of the constitutional provision might make it seem. In order for the right of a given indigenous people to the land they traditionally occupy to be recognized, an administrative procedure (demarcation process) is required. In this context, the 1988 Constitution provided not only that the Federal Union would be responsible for demarcating indigenous lands, but also that "The Union shall conclude the demarcation of indigenous lands within five years of the promulgation of the Constitution".[74]

As can be seen from the persistent absence of the law that would deal with the development of mining projects on indigenous lands, the Brazilian Constitution establishes commitments for the Brazilian state that have not always been fulfilled as planned. This is the case with the demarcation of indigenous lands, which, according to the constitutional text, should have been completed in 1993 (but, in practice, there is still a large part of the traditional lands that remain undemarcated).

The regulation for the land demarcation process only came eight years after the Constitution was promulgated, through Decree No. 1.755/96. It states that the demarcation process is an administrative procedure through which the boundaries of each traditionally occupied territory are made clear. Furthermore, demarcation is based on anthropological work, complemented by ethnohistorical, sociological, legal, cartographic, environmental

73 Art. 231(1) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

74 Art. 67 Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988

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and land studies to be carried out by the National Indian Foundation—FUNAI, an entity of the federal administration.[75]

Once the studies have been completed and public bodies and civil entities have expressed their opinions, a Detailed Delimitation and Identification Report (RCID) is presented, characterizing the indigenous land to be demarcated.[76] Once this report has been approved, FUNAI must publish a summary of it in the official journal (Diário Oficial da União), including a descriptive memorial and a map of the area, and the states or municipalities in which the area is located may express their opinion from the start of the demarcation procedure up to ninety days after the summary is published.[77] Once the period for manifestations is over, FUNAI must, within sixty days, forward the procedure to the Ministry of Justice so that it can, within thirty days, take the final decision—which may be to declare the limits of the indigenous land and determine its demarcation, to disapprove the identification, or even to prescribe additional steps to be taken.[78] If the Ministry of Justice determines that the indigenous land ought to be demarcated, the demarcation will be finalized by means of a presidential decree, and FUNAI, within thirty days of the publication of the decree, will register the land in the real estate registry office responsible for the area.[79]

As can be seen, the decree provided for various deadlines and procedures to be adopted and followed in the procedure for demarcating indigenous lands. This, however, has not been effective in curbing the state's delay in fulfilling its constitutionally prescribed duties. As a consequence, there are currently 255 indigenous lands with demarcation processes that have already begun but have not been finalized.[80]

The most important reason for the delay and lack of effectiveness to the demarcation of indigenous lands is the influx of political interests that have arisen over land occupation in Brazil.[81] These include discussions that are disguised as juridical matters, such as the supposed existence of a "temporal milestone", which would restrict indigenous lands to those occupied by indigenous people at the time when the 1988 Constitution was promulgated, and not those traditionally occupied (as the Constitution states)[82] up to openly political positions, such as when the then candidate for the presidency of Brazil, Jair Bolsonaro

75 Art. 1 Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

76 Art. 2(6) Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

77 Art. 2(8) Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

78 Art. 2(10) Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

79 Art. 5 Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

80 Instituto Socioambiental (ISA), Por que a demarcação de Terras Indígenas não avança? Entenda, 2024, https://www.socioambiental.org/noticias-socioambientais/por-que-demarcacao-de-terras-indigenas-nao-avanca-entenda (last accessed on 1 November 2025).

81 Ibid.

82 *Libois / da Silva,* note 1.

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(who was elected that year) announced that he would not demarcate a single centimeter of indigenous land.[83]

In any case, before the constitutional duty to demarcate indigenous lands has been fulfilled, adopting the criterion of whether or not the mining project is located within an indigenous land is insufficient, as it leaves out 255 indigenous lands with demarcation processes that have already begun but have not been finalized. However, even if the differentiation criterion encompassed all indigenous lands with ongoing demarcation processes, it would still be insufficient, as it establishes a geographical restriction of which environmental damages are unaware.

II. Damages That Go Beyond Borders

In the field of international environmental law, since the mid-1970s, there have been milestones recognizing that environmental issues go beyond any boundaries set by man. From "The Limits to Growth"[84] (1972), through the "Convention on Long-Range Transboundary Air Pollution"[85] (1983), to the "Our Common Future"[86] report (1987), the certainty of the inadequacy of restricting protection (and action) to borders seems unequivocal.

However, the Brazilian legal provisions that attempt to deal with the original conflict on mining go against the grain of science and international law, restricting the applicability of any specific protection to the occurrence of mining *inside* indigenous lands. In this way, any protection is limited to an element that has proven to be ineffective when it comes to environmental damage.

The insufficiency of the differentiating factor "being on indigenous land" is exemplified by two practical cases:

The first case concerns the collapse of the mining tailings dam owned by Samarco, BHP and Vale, which occurred in Mariana, Minas Gerais, Brazil, in 2015. In this case, the mining did not take place directly on indigenous land, in such a way that no differentiated legal requirements, however protective, would be applicable according to the differentiation factor in force. However, once the dam broke, the spread and repercussions of the damage caused significantly exceeded any property boundaries, to a level in which the technical report developed by the Brazilian Institute for the Environment and Renewable Resources (IBAMA) pointed out that "the level of impact was so profound and perverse in various

83 De Olho nos Ruralistas, "Nem um centímetro a mais para terras indígenas" diz Bolsonaro, 8 February 2018, https://deolhonosruralistas.com.br/2018/02/08/nem-um-centimetro-mais-para-terras-indigenas-diz-bolsonaro/(last accessed on 1 November 2025).

84 Club of Rome (1972), https://www.clubofrome.org/publication/the-limits-to-growth/ (last accessed on 11 December 2025).

85 United Nations Convention on Long-Range Transboundary Air Pollution (1983).

86 World Comission on Environment and Development (1987), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (last accessed on 11 December 2025).

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ecological strata that it is impossible to estimate a timeframe for the fauna to return to the site".[87] In that case, one of the most affected populations was, and remain to be, the Krenak indigenous people, whose lands lie on the banks of the river over which the tailings spill occurred (Rio Doce), and whose way of life was seriously disrupted—made impossible by the death of the river—not to mention the damages caused to at least two other indigenous populations who were also affected by the advancing wave of tailings mud.[88]

The second case concerns the construction of the Belo Monte hydroelectric plant, which had its initial project modified, reducing the planned flooding area in order to avoid the incidence of specific legislation protecting the rights of indigenous peoples.[89] Regardless of the fact that specific protective legislation was not applied due to the change of the flooded area, the rights of indigenous and traditional peoples were directly affected and violated, especially due to the drastic reduction in the flow and water level of the Xingu River, which would not provide these populations with enough water to meet their needs (especially for transportation, food and economic activities based on fishing), since "in a 100 km stretch, the river's flow will decrease drastically, remaining at levels of severe drought throughout the year. This could be fatal for a number of animal and plant species".[90]

It is clear that the location of a mining project within an indigenous land is an insufficient differentiating factor to provide effective protection for indigenous populations, given the original conflict over mining. In this sense, Brazilian environmental legislation itself offers alternatives through the concepts of "Directly Affected Area" (ADA), "Area of Direct Influence" (AID) and "Area of Indirect Influence" (AII), thus conceptualized by IBAMA's Normative Instruction 125/2006:

> *"Directly Affected Area (ADA) - the area directly affected by the implementation and operation of the activity, taking into account the physical, biological and socio-economic changes and the particularities of the activity.*
>
> *Area of Direct Influence (AID) - the area subject to the direct impacts of the implementation and operation of the project. Its delimitation should be based on the social, economic, physical and biological characteristics of the systems to be studied and the particularities of the project, considering in the case of this project, with regard*

87 Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis (IBAMA), Laudo Técnico Preliminar: impactos ambientais decorrentes do desastre envolvendo o rompimento da barragem de Fundão, em Mariana, Minas Gerais, 2015, https://www.ibama.gov.br/phocadownload/barragem defundao/laudos/laudo_tecnico_preliminar_Ibama.pdf (last accessed on 1 November 2025), p. 24.

88 *Thiago Henrique Fiorott / Izabel Cristina Bruno Bacellar Zaneti*, Krenak pela morte do Rio Doce/ Uatu, no desastre da Samarco/Vale/BHP, Brasil. Fronteira: Journal of Social, Technological and Environmental Science 6 (2017), pp. 127-146.

89 *Mascarenhas*, note 51.

90 *Pontes Júnior et al*., note 22, p. 435.

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to the physical and biotic environments, the area subject to physical interventions (works and operational services).

Area of Indirect Influence (AII) - the area actually or potentially threatened by the indirect impacts of the implementation and operation of the activity, encompassing the ecosystems and the socio-economic system that may be impacted by the changes occurring in the AID."[91]

The concepts defined by the Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis (IBAMA) offer alternatives to the original conflict and to the indigenous and non-indigenous perspectives on the choice of a differentiation element to be applied to mining. Instead of delimiting the application of specific requirements only to mining projects located within indigenous lands (which restricts protection even in relation to the ADA), one could think of a differentiation factor based on the existence of indigenous lands (homologated or not) within the project's Area of Indirect Influence (AII).

In any case, the repercussions of this practical differentiation still falls far short of what was envisaged by the constituent legislator, since the law designed to deal with the issue has not yet been enacted, with the specific requirements to be applied being limited to those already existing in the legislation. Of the more than 30 (thirty) different bills presented to regulate the issue[92], Bill 191/2020 deserves to be highlighted: it is the most recent bill, and one that has received the most focus (and has even been treated as a priority) by the government of President Jair Bolsonaro (2019-2022).[93]

F. The Interests Behind Mining in Indigenous Lands: Lessons from Bill 191/2020

The "original conflict" develops and gains nuances in the political sphere—whether aiming to legislate, or to leave the matter unregulated. The various lawsuits that have been placed under the conciliation procedure emerge from disputes that ultimately aim to enable and justify the unbridled advance of extractivist mining—with indigenous lands as the battlefront for this advance. These same interests also recently moved Bill 191/2020, and the lessons learned from that bill may be useful for the current dispute.

Bill 191/2020 was presented during Jair Bolsonaro's administration (2019-2022), to regulate § 1 of art. 176 and § 3 of art. 231 of the Constitution to "establish specific conditions for the research and mining of mineral resources and hydrocarbons and for the use of water resources for generating electricity on indigenous lands". It was drafted by the Executive Branch, signed by the former Minister of State for Mines and Energy, Bento Albu-

91 Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis (IBAMA), Instrução Normativa IBAMA Nº 125, de 18 de outubro de 2006, 2006, https://www.icmbio.gov.br/cepsul/images/stories/legislacao/Instrucao_normativa/2006/in_ibama_125_2006_revogada_recifesartificiais_revogada_in_ibama_22_2009.pdf (last accessed on 1 November 2025).

92 *Farias,* note 64.

93 Câmara dos Deputados-A, Lista de prioridades do governo traz 45 propostas, 2022.

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querque, and the former Minister of State for Justice, Sergio Moro, and presented to the Legislature in 2020. In March 2022, the last year of Bolsonaro's administration, his head of government submitted a request for Bill 191/2020 to be processed through the *urgency regime* in order to speed up its processing and subsequent approval.[94]

In terms of content, Bill 191/2020 proposed, in its first article, that the specific requirements for mining on indigenous lands would not apply to a series of situations (lands owned by indigenous communities governed by their own laws, areas in the process of demarcation, "reduced capacity" electricity generation activities, energy transmission and distribution activities). In addition, article three of the bill proposed that the only specific conditions for mining on indigenous lands would be those already established, a repetition of the minimum conditions already laid down in other legal texts (technical studies, consultation with the affected communities, authorization from the National Congress, and the participation and compensation of the affected communities).

In this proposal, consultation with the affected peoples, the only moment for indigenous participation, is merely advisory and not decisive, allowing mining activities to go ahead even with the express refusal of the indigenous peoples, depriving them of agency over their territories and rights. In this sense, in order to make the possibility of mining on indigenous lands more flexible, the proposed text mitigates indigenous territories and rights.

Bill 191/2020 came in the wake of political movements aimed at expanding mineral exploration in Brazil, under the justification of "economic growth", in this context,

> *"Indigenous territory is seen as a place for the potential exploitation of wealth, given that environmental preservation within traditional territories is superior to non-demarcated territories.*
>
> *On the national political scene, a new gold rush in the Amazon has been encouraged by the federal executive branch, which defends the economic exploitation of indigenous territories, making use of a developmentalist discourse, defending economic "progress" that meets the economic interests of multinational mining companies, interests that have been pressured by the political agents who proposed the creation of PL 191/2020 to regularize mining in traditional territories."*[95]

When analyzing the political context and the economic interests that accompany proposals aimed at legitimizing mining on indigenous lands, Curi points out that Brazil is part of a neoliberal context that confuses economic growth with development through a notion

94 Câmara dos Deputados-A, Lista de prioridades do governo traz 45 propostas, 2022.

95 Articulação dos Povos Indígenas do Brasil (APIB), Nota Técnica n. 01/2022 - AJUR/APIB, 2022, p. 18,

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of progress centered on macroeconomic elements which disregards social, environmental, cultural and humanistic values.[96]

Thus, the logic of such proposals, which are gestated through socio-environmental damage in search of specific profits for specific sectors—such as Bill 191/2020 and Brazilian Law no 14.701/2023—confuses price and value, ignoring the dichotomy between the principles that underpin the different indigenous cosmovisions and the destructive search for short-term profit, especially in relation to what is at the focus of the original conflict. As a result, politicians supported by mining interests seek measures to guarantee the exploitation of the underground of indigenous lands through a minimal sharing of the economic benefits of this activity with the indigenous communities involved.[97]

The priority given by former president Jair Bolsonaro's administration to Bill 191/2020, however, generated strong social repercussions that ensured that the bill did not advance in parliament.[98] Important demonstrations, including mobilizations in front of parliament[99], public notes from the Federal Public Prosecutor's Office (Ministério Público Federal)[100] and public notes by non-governmental organizations reinforced the contrast between PL 191/2020 and the rights to an ecologically balanced environment and the rights of indigenous peoples.[101]

The Association of Indigenous Peoples of Brazil (APIB), in its technical note on Bill 191/2020, defends the understanding that the practice of mining on indigenous lands is, in itself, a practice that violates human rights and fundamental rights of indigenous peoples.[102] APIB asserts that territory is a structuring element of indigenous existence and that "mining projects tend to cause direct interference in the entire organic structure of indigenous peoples, polluting rivers, contaminating fish, bringing diseases, spreading drug use among indigenous people, etc.".[103]

The Federal Public Prosecutor's Office summarizes its position on the bill by concluding that the approval of the bill would lead to "the destruction of important environmentally

96 *Melissa Volpato Curi*, Aspectos legais da mineração em terras indígenas, Revista de Estudos e Pesquisas, FUNAI, Brasília 4 (2007), p. 225.

97 Ibid.

98 Brasil de Fato, Câmara sente repercussão negativa e desacelera PL que autoriza mineração em terras indígenas, 4 September 2022, https://www.brasildefato.com.br/2022/04/09/camara-sente-repercussao-negativa-e-desacelera-pl-que-autoriza-mineracao-em-terras-indigenas (last accessed on 1 November 2025).

99 Revista Galileu, Entenda a mobilização contra o PL que legaliza garimpo e ameaça indígenas, March 2022, https://revistagalileu.globo.com/Sociedade/Politica/noticia/2022/03/entenda-mobilizacao-contra-o-pl-que-legaliza-garimpo-e-ameaca-indigenas.html (last accessed on 1 November 2025).

100 Ministério Público Federal, Nota Pública—Mineração em terras indígenas, 2022.

101 Articulação dos Povos Indígenas do Brasil (APIB), note 90.

102 Articulação dos Povos Indígenas do Brasil (APIB), note 90, p. 17.

103 Articulação dos Povos Indígenas do Brasil (APIB), note 90, p. 18.

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protected areas, as well as the disruption or physical disappearance of several indigenous peoples, especially those located in the Amazon region".[104]

Although institutional and social repercussions were important in preventing Bill 191/2020 from moving forward, it was the change in the head of the federal executive branch that proved decisive for the proposal to be definitively withdrawn from the agenda.

After former president Jair Bolsonaro lost his re-election race to President Luiz Inácio Lula da Silva, the new administration submitted a request to withdraw Bill 191/2020. Signed by the then Minister of Justice, the request for withdrawal points out that the bill "opens up the possibility of a massive presence of mining activities on indigenous lands, a situation that would be capable of making the Yanomami tragedy repeat itself in many other parts of the national territory".[105] Furthermore, President Luiz Inácio himself has spoken out on the issue, pointing out that

> *"This bill was a way for former president Bolsonaro to confront the Indigenous Peoples, who were asking for progress in the demarcation and protection of their territories. Instead of helping them, the former president was always against indigenous peoples, creating mechanisms to confront these rights and make the lives of indigenous peoples more vulnerable."*[106]

However, despite the fact that the change in the executive branch of federal public administration meant that Bill 191/2020 was removed from the agenda, the gap in the legislation continues to exist, and business interests remain latent, as can be seen from the enactment of Brazilian Law no 14.701/2023, and the various constitutional actions that are awaiting judgment and are currently being processed from the perspective of a possible conciliation (between land hoarders, agribusiness, miners and loggers on the one hand, and indigenous and socio-environmental interests on the other).

G. Final Considerations

The history of mining in Brazil is intertwined with the history of its colonization. Not only the colonization process but also the advancement of mining has been historically marked by violence against indigenous peoples (among other forms of violence, such as the slavery of African peoples), but also the country has never directly and definitively addressed, in the political, economic and social spheres, the harmful hereditary socio-environmental aspects of these processes

104 Ministério Público Federal, Nota Pública—Mineração em terras indígenas, 2022.

105 Câmara dos Deputados, Mensagem nº 107/2023, 2023.

106 Fundação Nacional dos Povos Indígenas, Governo Lula pede retirada de tramitação de projeto de lei que prevê mineração em terras indígenas, 31 March 2023, https://www.gov.br/funai/pt-br/assuntos/noticias/2023/governo-lula-pede-retirada-de-projeto-de-lei-que-preve-mineracao-em-terras-indigenas (last accessed on 1 November 2025).

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In this context, the "original conflict" over mining, encompassing dichotomous positions defended on one side by the indigenous worldview, and on the other by the "earth eaters", was never resolved. On the contrary, what we see today is the repetition of the same conflict and the same logic: self-imperialism[107] and internal colonialism take the place of European colonialism and American imperialism, while the justification (the vague and poorly developed concept of development) remains the same.[108] As a result, there is a tendency for the original conflict to be reproduced and perpetuated in different areas of dispute—from the legislative and judiciary branches to conciliation tables.[109]

In the field of praxis, "the invasion of indigenous lands by non-indigenous people for the illegal exploitation of natural resources is a reality that affects almost all indigenous lands in the country".[110] In the normative legal field, it is clear that, although the Federal Constitution guarantees permanent possession to indigenous peoples of the lands they traditionally occupy and the right to exclusive use of the natural resources found therein.[111] This same Constitution leaves room for the possibility of mining exploration on indigenous lands with authorization from the National Congress and financial compensation to the populations.[112] This use of the logic of compensation for extractivist acceptance—embedded in the constitutional text—highlights the enormous lack of understanding of the Brazilian State regarding the original conflict and the reality of communities that define their territories in terms of ways of life and understand that water, land, mountain air are common goods that are not susceptible to negotiation, in such a way that no compensatory offer is sufficient.[113] The same logic of compensation—based on a profound lack of understanding of the roots of the problem (and sometimes a lack of understanding of what the problem itself is)—takes on new guises and leads to erroneous conclusions that "conciliation" is possible, overlooking the fact that the parameters for conciliation are non-existent, since one side "negotiates" patrimonial matters, and the other sees itself dealing with matters of existence and survival.

Unlike what happens in other countries (notably Bolivia, through its plurinational state), the rights of indigenous peoples in Brazil are presented as a *concession* by the State. Thus, the Brazilian State reaffirms itself as the holder of the decision-making power over the future of indigenous peoples: it is the National Congress that defines the possibility of (legal) mining exploration on indigenous lands; the Judiciary created the "temporal milestone" for the demarcation of indigenous lands; and the Executive is the branch mostly

107 *Moser*, note 48.

108 *Casanova,* note 48; see also *Tapia*, note 49.

109 *Malheiro,* note 19.

110 *Curi*, note 93, p. 222.

111 Art. 231(2) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

112 Art. 231(3) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

113 *Machado Araóz*, note 7, p. 236.

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responsible for not fulfilling its constitutional duty to demarcate indigenous lands (which should have been completely demarcated by 1993) and that still has 255 indigenous lands with demarcation processes that have already begun but have not been finalized.

The reproduction of the conflict, characterized by the facets of current times, means that indigenous rights, including the right to their lands, are constantly under threat. Indigenous victories in this conflict (such as the shelving of Bill 191/2020) represent avoided defeats, and celebration gives way to constant vigilance for the next chapters of the dispute—such as Brazilian Law no 14.701/2023 and the possibility of conciliation over the matter of mining on indigenous lands. It is certain, thus, that the proposed conciliation is, really, a form through which mining interests and the "whites" position seek to justify a "consented" mitigation of constitutionally provided fundamental rights—with such "consent" being "given" in a context of multiple fronts of aggression and offenses against such rights.

There is, however, a clear path to achieving a definitive solution to the conflict. It involves overcoming the abysmal thinking imposed since colonization, debunking the supposed superiority of the "whites" and their techniques and ways of life to establish a coexistence of mutual learning and actual respect. In this context, it is important to recognize and give stewardship for indigenous peoples over their rights, given that indigenous peoples' perspectives are alternatives for the future, as "Indigenous Peoples and local communities are efficient stewards of their territories when they have legal rights"[114] and not a portrait of the past as "developmentalists" would portrait. Learning from the indigenous perspectives is probably the best path to a really sustainable existence, overruling current abyssal thinking, as "post-abyssal thinking can be summarized as learning from the South using an epistemology of the South".[115]

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114 *Clement et al.,* note 10, p. 210.

115 *de Sousa Santos*, note 8, p. 85.

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