

The new Brazilian Forest Code as a Harmful Subsidy: encouraging waste, punishing efficiency

1 – Is environmental legislation a barrier to food production in Brazil?

Brazil has 32% of its territory (275 million hectares) already deforested and designated for food production, an area the size of Argentina¹. Agriculture occupies a relatively small share of that total: only 57 million hectares, mostly dedicated to export monocultures such as soya and sugarcane. The three crops that form Brazil's staple diet – beans, rice and cassava – have had no change or even a net decline in planted area over the last 40 years².

Extensive cattle ranching is the main land use in Brazil, covering 211 million hectares or nearly four times the area dedicated to agriculture. Productivity is very low in this business, with an average of 1.14 head of cattle per hectare and a yearly slaughter rate of only 22%. If productivity were raised to a mere 1.5 head of cattle per hectare, all other things being equal, 61 million hectares of land with high agricultural potential could be allocated for crop expansion³. In short, Brazil could more than double its current agricultural area without cutting down a single tree or changing its environmental laws.

2 – Then why has Congress changed the Forest Code?

The old Brazilian Forest Code was a 1965 law that determined that private properties must preserve forests. It divided protected native vegetation into two categories: so-called permanent protection areas (hilltops, mountain slopes, mangroves and riparian forests), which should be left intact to preserve biodiversity, maintain water quality and stabilize soils; and so-called legal reserves, where timber production was allowed but not clear-cutting.

Over the years the Code underwent many changes designed to increase protection, yet compliance by farmers and enforcement by the government have been low. Since the late 1990s, a powerful lobby from the agricultural sector has repeatedly tried to weaken the law, so as to increase the stock of land available for production. According to the most prominent leader of the rural caucus, senator (and cattle rancher) Kátia Abreu, keeping forests is a task for the State, not for private properties⁴.

From 2005 on, the Brazilian government began to enforce the Forest Code then in force in the Amazon region, successfully reducing deforestation. In 2008, after a spike in clear-cutting, two new measures were put in place: one that determined that farmers could only access credit if they complied with the law, and another requiring that every farmer in the country geo-reference the forest remnants on their properties in a national registry, so as to become more “visible” to law enforcement. The rural caucus decided that this was too much to bear and set forth to change the legislation.

3 – What's changed from the old law?

Everything. First of all, the new law exonerates most farmers from recovering whatever vegetation they had illegally clear-cut in the past. According to the old text, if a legal reserve or permanent protection area within a property was cut down, the farmer was required to fully restore it. Now, if an area was deforested before July 2008, the owner is allowed either not to recover anything (if he is a “smallholder”, which in Brazil means having a farm up to 400 hectares in area and the area in question constitutes a legal reserve), or to recover only part of what he cut down, if it is a riparian forest, for instance. Big landowners in the Amazon who have clear-cut their legal reserves up to 2008 can comply with the new law by replanting 50% of the reserves with oil palm, for instance. By merely signing a promise to undertake partial recovery, farmers are waived from fines and other penalties. In addition, the new law creates the concept of “consolidated land use”, which may be fair if we are talking about deforestation that happened many years previously, and would not represent additional environmental nor security risk, but it is equivalent to a huge amnesty in the case of environmental crimes that happened only four years ago. The size of that amnesty has just been estimated by a new study from the Federal University of Minas Gerais⁵: 37 million hectares (about the size of Germany) that were illegally deforested will remain unrestored. The impact will be worse in the biomes that are already heavily devastated, such as the Northeastern dry forests and woodlands (Caatinga), and biodiversity hotspots of the Atlantic Forest and the Cerrado. Deforested ecosystems such as mangroves, steep slopes, regularly flooded riversides and intermittent springs no longer require any restoration, threatening the food supply and protection against flooding for millions of people.

The widespread amnesty is the main reason why in January 2013, the Chief Prosecutor's Office submitted three lawsuits against the new law to the Supreme Court⁶. According to Acting Chief Prosecutor Sandra Cureau, 39 items of the reformed Forest Code violate the Brazilian Constitution.

4 – The government says the changes do not imply increased deforestation, since the legal reserve and permanent protection area percentages are the same as in the old law. Is that true?

It is true that the rules for newly deforested areas (that is, for deforestation that happened after 2008) did not change as much as the rules for older clear-cutting. However, the new law does allow for increased legal deforestation and also changes many major protection criteria:

- 1) Riparian forests all over the country are now narrower than they used to be, thanks to a change in the criteria for measuring river widths, and now can be legally deforested.
- 2) Hilltops lower than 100 meters (which means most hilltops in Brazil) and some slopes have ceased to be permanent protection areas and now can be legally deforested.
- 3) Intermittent springs, which feed most of the rivers in Northeastern Brazil, have also lost protection and now can be legally deforested, which means an uncertain future for those rivers and the human populations who rely on them.
- 4) New occupation of mangroves by highly polluting shrimp farms is now allowed.
- 5) Legal reserves in some parts of the Amazon will be reduced from 80% of the property's area to 50%, allowing the remainder to be legally deforested.

5 – Can there be a gold rush to deforestation as a consequence of the change?

Yes. The new text sends a clear signal of impunity to farmers and ranchers. Since crime has paid so far, future crimes might also be committed and forgiven. Moreover, since it will be difficult for the government to prove if a given area was really clear-cut before July 2008, a rush toward deforestation for subsequent “consolidation” might happen. The Brazilian Applied Economic Research Institute (Ipea) has calculated such “moral risk” at 18 million hectares⁷.

In fact, there is evidence that this is already happening. After dropping consistently for four years in a row, deforestation rates in the Amazon are spiking again – a 26% increase during the period from August 2012 to February 2013 compared to the same period one year earlier, according to the government⁸; or a 91% increase between the two periods according to an independent survey⁹.

6 – Does the new law enhance the competitiveness of Brazilian agriculture?

One might think so, since what the new law really is about is deregulation. Whenever you deregulate a sector of your economy, removing barriers created by the State and allowing the private sector to unleash its creative power, you theoretically become more competitive. The dismantling of the Brazilian Forest Code, however, is likely to have the opposite effect. First of all, it undermines the very resources agriculture depends upon: soil and water. By relaxing forest recovery rules, it allows fragile areas such as slopes and riverbanks to be occupied, increasing the risks of siltation, erosion, and mudslides.

Secondly, it destroys the level playfield that the old law created among farmers. According to the old law, everybody had equal environmental obligations. The new Forest Code puts a farmer who complied with the previous legislation at a competitive disadvantage in relation to his neighbor who clear-cut his entire property and will now be allowed to keep a larger production area and face no penalties. In this sense, the law acts as a harmful subsidy. Many large-scale grain producers in the agricultural state of Mato Grosso, for instance, were already recovering their permanent protection areas in compliance with the old law when the new one was passed.

Deregulating land use the way Brazil did stimulates land waste and punishes efficiency and productivity. After all, why should a rancher invest on fertilizers and other technology to increase the support capacity of his pastures, when he can just pressure the government for more free land – and get it?

7 – But still, a “weak” law with a strong enforcement is better than a make-believe law that's perfect on paper but impossible to enforce. In this sense, the new Forest Code is surely progress?

If only. To begin with, the new Code is not even a single piece of legislation. It is a composite of two pieces: the law itself and an executive act passed some months later that fills the gaps left by the presidential veto to the main text. One cannot be applied without referring to the other. Furthermore, this Frankenstein legislation has parameters that are subjective and hard to verify, such as past deforestation dates and relative farm size. Defining the exact obligations of each landowner depends on those complex criteria, each one full of loopholes.

Even the mechanisms created to allow for improved enforcement are dubious. The new law requires 5 million-plus landowners in Brazil to register within a national forest registry (CAR) in two years, which means an average 12 thousand new registries per business day, or one every two seconds, an unprecedented pace for anything to happen in Brazil. It also envisages the full recovery of whatever forest lands are still left within the next 20 years. That would require replanting one million-plus hectares every year, mostly with native species. No innovative methodology, finance or institutional framework for such a daunting task is even close to being in place one year after the law was passed.

8 – What about smallholders? They form the bulk of Brazilian agriculture, and simply could not afford to comply with the old Forest Code. The new rule ensures that everybody will have to replant some forests but at the same time it loosens the grip on smallholders, since the smallest farms will have to recover the least.

Smallholders have been used as a smokescreen to cover up the real interests behind the change in the law – deregulating land tenure and exonerating medium and large cattle ranchers and farmers from fines and other penalties. First of all, let us recognize that there was indeed a compliance problem with what we call in Brazil family agriculture. However, those farmers could obtain more flexible requirements without the changes put in place by the new Code, which relaxes requirements for a much larger contingent of farmers and ranchers who are far from any definition of “family agriculture”. Indeed, before Congress dismantled the Forest Code, the government was already preparing a decree to exempt this segment of producers from full compliance. As proof of the real beneficiaries of the new Code, legislators decided to exempt from legal reserves not only family farms (which have a legal definition in Brazil according to property size and tenure), but all properties up to 4 “módulos fiscais”, a measure of land area that can exceed 400 hectares – which are hardly small-scale family operations under any definition.

Besides, the new law makes it easier for smallholders to occupy land that is prone to landslides, erosion, or flooding. It leaves unprotected some areas that are vital for the production of drinking water, and for the reproduction of fish, shellfish and other key resources that sustain quality of life, revenue, food supply and the traditional lifestyles of rural communities in Brazil.

9 – OK, let's admit it – the law isn't perfect. But it was a necessary change, one that brings security to investors and solves the conflict between food production and environmental regulations. Now there is peace in the countryside at last. Can't we just move forward, please?

To answer this question you have to take a step back and observe the big picture in Brazil. The country has risen from a net importer of food in the 1970s to being on the verge of becoming the world's number one agricultural powerhouse. A third of Brazil's GDP comes from agribusiness, and grain exports have repeatedly kept the balance of payments afloat.

It is natural that farmers and ranchers should also rise to become a powerful political force and then impose their will on governmental policies. And the agriculture lobby in Brazil today wants – and is getting – the same thing Wall Street bankers wanted and received from the US government before the subprime crisis: deregulation. What this really means is that they want to be able to exercise unlimited property rights on their own land and expand their operations into publicly held lands. However, the Brazilian Constitution constrains those rights, as it states that private forests are a common good of all Brazilians. So the rural lobby has to find other ways to maximize their stock of cheap land. And it is doing so at remarkable speed.

In 2011, even before changing the Forest Code, Congress passed a law that weakened the federal environmental agency Ibama, by taking away its power to impose fines on illegal deforestation in farms that had received environmental licenses from the states. In 2012 there was the change in the Forest Code. In 2013, the same representatives and senators are trying to pass a Constitutional Amendment that submits to previous Congressional approval the establishment of new protected areas and the delimitation of indigenous lands and quilombos (communities formed by descendants of runaway slaves), today a prerogative of the Executive. Assaults on land reform and labor legislation are also on their wish list. So, in the Brazilian political context, the dismantling of the Forest Code was merely a successful test of this newly gained power, rather than an attempt to bring the rule of law to the Brazilian countryside.

10 – Does Brazil have the necessary tools and technology already in place to increase productivity without having to indulge in new deforestation or occupying land that should actually be reverted back to forest? After all, one thing is theory. In practice, technology is expensive and not all farmers and ranchers can afford it.

It does, and that's what's most staggering about Brazil. Since 2010 the federal government has been giving US\$ 1 billion-plus in bank credit at subsidized interest rates to farmers who want to recover degraded pastures (where productivity usually falls below half a head of cattle per hectare) and therefore make more money. This is part of the national climate change mitigation plan, which Brazil offered as its voluntary target at the Copenhagen climate summit in 2009. The plan has a target of increasing support capacity of 15 million hectares of pasture. But it has had a slow takeoff and the meeting of this target is now jeopardized, among other things because of the sector's focus on weakening the Forest Code instead of increasing productivity. In the end, Brazilian ranchers had access to a win-win solution at the same time that Congress was debating the Forest Code, and they simply decided to suspend investments in cost-effective technologies while they waited for a political fix.

11 - Where do we go from here?

Today's main challenge is to ensure a future where forests are effectively protected and become a national priority. In spite of all its shortcomings, the new Forest Code (and the old one too, for that matter) could, if correctly implemented, give birth to a sustainable, forest-based economy in Brazil. The compensation or recovery of an estimated 26 million hectares of native forests could create thousands of jobs and supply timber and other forest products in a sustainable fashion in the future, ensuring at the same time the effective protection of remaining native forests. However, one year after its entry into force, there is no sign of that future on the horizon.

The Brazilian government still regards the environment as a barrier and an expense rather than as an investment and economic opportunity for development. Federal environmental expenditure has been held constant at US\$ 250 million since 2000¹⁰. No forest development strategy exists in the country that harbors the world's largest stock of tropical forests. Almost no effort has been done to control growing deforestation in all biomes outside the Amazon region, and deforestation is now picking up in the Amazon itself.

In order to meet the challenge of enforcing the new Forest Code, Brazil needs a crash program, consisting of both adequate finance and institutional arrangements. The Brazilian government should commit itself to:

- Implement the National Forest Registry (CAR), extending it to every farmer in Brazil within the next two years, as provided by the new law;
- Boost credits and incentives for large-scale recovery of forests, while implementing law enforcement on private properties;
- Encourage state-level legislation to reduce greenhouse gas emissions that is complementary to national legislation;
- Put in place a stimulus package for the development of local productive arrangements involving forest products and ecotourism;
- Make massive investments in the expansion and consolidation of the network of protected areas in all biomes;
- Monitor and control all illegal deforestation, in the Amazon, as well as in all biomes outside of the Amazon, eventually leading Brazil to zero deforestation.
- Design and implement a strategic plan for the large-scale expansion of a social and environmentally sustainable agriculture, focused on already deforested unproductive areas.
- Actively defend the Brazilian Constitution and legislation against amendments and proposals to stop the establishment of new protected areas, to reduce or extinguish existing protected areas, or to undermine the rights of indigenous peoples and other cultural and social minorities.
- Cut subsidies to and discourage investments in sectors and activities promoting deforestation, degradation, slave labor, land appropriation and invasion of protected areas.

Without giving forests the same support and differentiated treatment it gives to large sectors of the economy such as agroindustry, energy, mining and manufacturing, the Brazilian government will not fulfill the promise it has made to society of integrating production and protection and of making Brazilian agriculture more sustainable, as well as more efficient and competitive in the long run. What's more, it will remain powerless against the assaults of the most backward sectors of agribusiness against Brazil's future and against the common asset of all Brazilians.

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