

Mongabay Series: Amazon Agribusiness, Global Forests

Analysis: the Brazilian Supreme Court's New Forest Code ruling

by Sue Branford and Maurício Torres on 7 March 2018

- *Last week Brazil's Supreme Court rejected a legal challenge by environmentalists, upholding the constitutionality of most, though not all, of Brazil's New Forest Code – legislation crafted in 2012 by the powerful bancada ruralista agribusiness lobby in Congress.*
- *The 2012 code is weaker than the old Forest Code, which was approved in 1965, but never well enforced.*
- *Many environmentalists have expressed concern that the high court ruling endorses legislation that prioritizes the economic importance of industrial agriculture over basic environmental protections.*
- *Conservationists also say that the decision rewards those who have illegally infringed on environmental laws at a time when*

pressures on forests are growing more intense, especially in the Amazon. This story includes a chart that provides a detailed analysis of the environmental pros and cons of the Supreme Court decision.



Brazil's Supreme Court. Photo by Nelson Jr. / SCO/STF

The Supreme Court ruling (<https://news.mongabay.com/2018/03/brazil-high-court-forest-code-ruling-largely-bad-for-environment-amazon-ngos/>) on 28 February on the constitutionality of Brazil's New Forest Code, described by some as "the most important environmental ruling (<https://www.socioambiental.org/pt-br/noticias-socioambientais/stf-considera-constitucional-grande-parte-do-novo-codigo-florestal>) in Brazil's history," is being met with dismay by many of the nation's environmentalists. That's because — despite the contrary views of high court ministers — environmentalists feel the ruling places the economics of commercial agribusiness above environmental protections.

The ruling, say conservationists, also serves as a major setback at a time when many scientists and environmentalists are calling on Brazil to take firmer measures to stem increasing deforestation, particularly in the Amazon, and to meet the country's Paris Agreement carbon cut pledge (<https://news.mongabay.com/2017/11/as-negotiators-meet-in-bonn-brazils-carbon-emissions-rise/>).

Rodrigo Justus, the lawyer of the Brazilian Confederation of Farming (CAN), expressed satisfaction (<http://www1.folha.uol.com.br/ambiente/2018/02/stf-mantem-anistia-a-desmatadores-no-codigo-florestal.shtml>) at the ruling. "Most of the law, including its main elements, was recognized as constitutional," he said.

"It was a difficult judgement to make, mixing science with law, as when you ask: what is more important, so many thousands of jobs or a forest in such-a-such place?"

Environmentalists disagreed: "We didn't expect to transform the Forest Code but we hoped that aspects, like the amnesty [for illegal deforestation carried out before 2008], would be corrected," said (<https://www.jota.info/stf/stf-valida-quase-todo-codigo-florestal-e-desagrada-ambientalistas-28022018>) Nurit Bensusan, coordinator for the Program of Socioenvironmental Rights and Policies at the NGO Instituto Socioambiental (ISA, the Social-Environmental Institute). It didn't happen: "The ruling is a reward for those who deforested illegally and a punishment for those who didn't."

Top scientists are also worried because the Amazon appears to be close to "a point of no return

(<https://advances.sciencemag.org/content/4/2/eaat2340>)" — an ecological tipping point at which forest will convert to savannah.

Scientists Carlos Nobre and Tom Lovejoy, evaluating the combined impacts of forest conversion, climate change, and increased wildfires (<http://www.pnas.org/content/113/39/10759>), say this tipping point is likely to occur (<https://news.mongabay.com/2018/03/amazon-forest-to-savannah-tipping-point-could-be-far-closer-than-thought-commentary/>) when the Amazon is 20-25 percent deforested. The region is already at 17 percent deforestation at least, putting the region dangerously close to the tipping point.



Forest fragmentation in the Brazilian Amazon. Photo by Rhett A. Butler / Mongabay

An evolving forest code

Until the New Forest Code (Lei 12.651 (http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12651.htm)) was approved in 2012, the primary law regulating deforestation was the Brazilian Forest Code (Lei 4.771 (<http://www2.camara.leg.br/legin/fed/lei/1960-1969/lei-4771-15-setembro-1965-369026-publicacaooriginal-1-pl.html>)), passed in 1965 by the country's military government. Although the military suppressed many forms of opposition, it sought to protect the country's forests at a time when coffee and sugarcane monocultures were taking over more and more land.

However, many analysts say that the 1965 code was not effectively implemented, and didn't stem the tide of rapid deforestation that had begun to occur as cattle ranching and soy and corn production took hold in the Amazon. Thirty years after the code was approved, Brazil recorded its highest rate of Amazon deforestation ever, with over 29,000 square kilometers cleared in 1995 (https://rainforests.mongabay.com/amazon/2004_deforestation.html).

By 2012 Brazilian agriculture had changed, with the rapid advance of industrial agribusiness, which was expanding from the center-west deep into the Amazon basin. Large scale farmers had also by then gained a powerful political voice, and were well represented by the *bancada ruralista*, the biggest lobby in Congress. The ruralists pressed for a radically revised forest code that would reflect agriculture as the most important sector of the Brazilian economy.

With the support of President Dilma Rousseff, the *bancada ruralista* pushed through the New Forest Code that drastically reduced the parameters of environmental protection and brought generous benefits to a wide range of rural elites, farmers, ranchers and land-grabbers, some of whom had been illegally cutting down forest for many years.

Among other measures, the 2012 code freed farmers from an obligation, enshrined in the earlier code, to reforest an area of 41 million hectares (158,300 square miles) — an area the size of the state of California and a reforestation effort that, were it to happen, could be crucial to Brazil achieving its Paris Climate Agreement carbon reduction target.



One minister, one vote

Many environmentalists and social movements reacted in horror to the passage of the 2012 New Forest Code. In response in 2013, the General Attorney's Office (Procuradoria Geral da República), the highest level of the Federal Public Ministry (MPF), and the left-wing political party, PSOL (Socialism and Freedom Party), went to court with four legal actions, claiming that 58 of the 84 articles of the New Forest Code infringed the Brazilian constitution and should be withdrawn. All 58 articles, they said, were favorable to deforesters and removed environmental protections guaranteed under the 1965 code.

As the Supreme Court debated the code this February, conservationists were cautiously optimistic they would win on most articles. At first, the ministers (who voted separately) were tied, five voting for and five voting against. Then, on 28 February, Celso de Mello cast the tie-breaking vote, mostly against the environmentalists. This came as a surprise because on many occasions Celso de Mello had spoken in support of conservation, saying that the environmental rights of future generations should prevail over economic and business interests. He had also expressed (<https://www.socioambiental.org/pt-br/noticias-socioambientais/stf-considera-constitucional-grande-parte-do-novo-codigo-florestal>) the view that deforestation had already reached "extremely serious proportions" in Brazil.

Instead, Celso de Mello cast his deciding vote largely in favor of the constitutionality of the less strict 2012 New Forest Code. Particularly shocking to environmentalists was the Supreme Court's judgement that deforesters who illegally cleared forest before 22 July 2008 will not be forced to pay the fines they were given.

Conservationists regard this as an amnesty that will encourage further destruction. "It sends a sign that there is no problem in illegally deforesting because one day you'll be forgiven", said (<https://istoe.com.br/amazonia-nao-esta-longe-de-virar-savana/>) Carlos Nobre, a respected member of the Brazilian Academy of Sciences. "At some point Congress will pass a law that regularizes what you have done, and so it will go on."

The Temer administration disagrees. The Advocacia-Geral da União (the Federal Attorney General's Office), which represents the government in legal proceedings, said that deforesters had to make good the damage they had done. "This isn't an amnesty but the conversion of the fine into

a requirement to carry out environmental services and the debts will only be forgiven when this is done," the AGs office said (<https://www1.folha.uol.com.br/ambiente/2018/02/stf-mantem-anistia-a-desmatadores-no-codigo-florestal.shtml>). Put simply, the illegally deforested land will have to be reforested, something that conservationists believe will not happen without much more rigorous enforcement measures.

Some analysts believe the ruling casts doubt on the capacity of Brazil's judicial system to deliberate on highly complex technical questions regarding the environment. Márcio Santilli, founder member of ISA, told Mongabay that, while certain ministers recognized the fundamental principles of environmental law, "some ministers had difficulty in evaluating the practical implications of the various legal regulations under discussion," — an evaluation which certain ministers seemed to recognize (<https://www.socioambiental.org/pt-br/blog/blog-do-isa/retrocesso-ambiental-consolidado>) themselves.

According to scientist Philip Fearnside, there was another problem: a concerted public relations campaign by agribusiness. "In the days before the ruling, there was an avalanche of stories in the press promoting the ruralists' point of view, and these opinions were repeatedly highlighted on television, which reported this propaganda as if it were scientific information," Fearnside said.



2012 Forest Code now law of the land

The high court having decided, no further appeals are possible.

However, the ministers' decision isn't all bad news for the environment.

In an editorial (<https://www.socioambiental.org/pt-br/blog/blog-do-isa/retrocesso-ambiental-consolidado>), ISA said that it was important not to overlook that some part so the ruling represented real victories and that advances had been made in the way the environment is viewed in Brazilian law.

"The legal basis on which the ministers made their votes confirmed essential elements of socio-environmental law, and this will act as a compass for future decisions in the Legislative and in the Executive." It added that the plenary of the Supreme Court had "recognized the consequences of deforestation in Brazil and its intimate connection with climate change, loss of biodiversity, water supply and the quality of life." For many, these advances may seem like crumbs of comfort, but they are important none the less, say experts.

The Forest Code ruling: an environmental balance sheet

The high court decision was not altogether one-sided. The ministers ruled in favor of some environmental protections, and against others. The following chart maps out the decision highlights and their impacts.

Points where the Supreme Court ruling was favourable to the environment

What the 2012 New Forest Code said:	What the New Forest Code meant on the ground	<u>What the Supreme Court ruling means:</u>
Permitted deforestation within Areas of Permanent Preservation (APPs) for infrastructure projects, disposal of solid residues, and construction of sports installations.	Permitting such projects allowed deforestation along river banks, leading to soil / water contamination, silting, water supply problems and increased flooding risk.	These projects can no longer be carried out in APPs.
Permitted, when there was no alternative, deforestation in APPs of projects assessed to be of public utility, of social interest, or to have low environmental impact.	Led to erosion and silting of rivers, with a detrimental impact on water supply and flooding.	Strengthens the regulation so that deforestation is allowable for these projects only when there is no alternative.
Areas with Intermittent springs no longer need to be designated APPs.	Harmed water supplies, farming activities and local climate,	All areas with springs, whether intermittent or not, must become APPs.
Benefits given to small property owners were extended to demarcated Indigenous Territories and to titled traditional communities.	Regulation excluded from these benefits non-demarcated Indigenous Territories and traditionally occupied communities without land titles.	All Indigenous Territories and traditionally occupied communities, whether or not demarcated or with land titles, must receive the same treatment as small rural properties with respect to regulations for the protection of vegetation.

<u>Points where the Supreme Court ruling was unfavourable to the environment</u>		
What the New Forest Code said:	What the New Forest Code meant on the ground:	What the Supreme Court ruling means:
The starting point for demarcating an APP, previously the highest point of a river's flooding, was changed to the average level of the river, thus reducing the size of the APP.	Permitted more deforestation of areas near river banks, provoking soil and water contamination and silting, with a detrimental impact on water supplies and an increased risk of flooding.	Upheld the regulation and rejected the claim that it was unconstitutional.
Permitted farming in floodplains on small rural properties	Damaged soil and water quality, harmed water supplies, interfered in reproduction of fauna and increased flooding risk.	Upheld the regulation and rejected the claim that it was unconstitutional.
Allowed small and medium-sized properties to install facilities for fish farming within an APP.	Ecosystems, fauna and flora ran the risk of contamination because fish farming uses potentially harmful chemicals.	Upheld the regulation and rejected the claim that it was unconstitutional.
Allowed low-cost housing and urbanization projects to be built on mangroves and sand banks considered to possess a "compromised ecological function."	These projects can harm fish and crustacean lifecycles, damage fauna and riverine populations, increase river bank erosion, and silt up navigable channels, basins and lagoons.	Upheld the regulation and rejected the claim that it was unconstitutional.
Permitted economic activities in areas with an incline of more than 45% and on hilltops.	Increased the risk of mudslides and floods, which can cause death, material damage and erosion.	Upheld the regulation and rejected the claim that it was unconstitutional.
Abolished the reforestation requirement for economic activities carried out on slopes with an angle of between 25% and 45%.	Increased the risk of mudslides, floods and silting of rivers, threatened water supplies and increased the risk of flooding.	Upheld the regulation and rejected the claim that it was unconstitutional.
Permitted reduction of the Legal Reserve (area that can't be deforested on a property) from 80% to 50% in municipal districts where 50% of the area is covered by conservation units or Indigenous Territories, and in states where these same protected areas occupy 65% of the territory.	Increased significantly the area that could be legally deforested.	Upheld the regulation and rejected the claim that it was unconstitutional.
No longer obligatory to create a Legal Reserve for forest cleared to make way for hydroelectric power, highways and railroads.	Led to a reduction in native forest.	Upheld the regulation and rejected the claim that it was unconstitutional.

Permitted inclusion of an APP in the calculation of the size of the Legal Reserve.	Led to a reduction in the area of native vegetation.	Upheld the regulation and rejected the claim that it was unconstitutional.
Permitted the compensatory replanting of forest to occur outside the farm but in the same biome.	Allowed compensatory reforestation to take place thousands of miles away, not reducing the damage done in the area of deforestation.	Upheld the regulation and rejected the claim that it was unconstitutional.
Permitted the planting of exotic species in the reforestation of a Legal Reserve.	Made it unnecessary to replant the original forest, contributed to spread of exotic species, and harmed native flora and fauna.	Upheld the regulation and rejected the claim that it was unconstitutional.
Permitted continuation of farming activities on Legal Reserves illegally deforested before 22 July 2008.	Relieved the deforester from legal obligation to restore the area illegally degraded. Rewards deforester with permission to go on farming in the deforested area.	Upheld the regulation and rejected the claim that it was unconstitutional.
Provided an amnesty for penalties (including fines) imposed for illegal deforestation before 22 July 2008, provided that offender registered with Environmental Regularization Program (PRA).	Promoted idea that environmental crimes would not be punished, and illegal deforestation would be rewarded. This measure punished those who had followed the law, while increasing expectation of further amnesties and future easing of environmental regulations.	Upheld the regulation and rejected the claim that it was unconstitutional.
Removed obligation to replant Legal Reserves deforested illegally before 22 July 2008 and to replant APPs removed from water sources.	Rewarded illegal deforesters, strengthened belief in impunity for those breaking the law, and increased expectation of further amnesties and changes in environmental laws in the future.	Upheld the regulation and rejected the claim that it was unconstitutional.

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