

NEW BRAZILIAN ENVIRONMENTAL CRIMES LAW: AN ANALYSIS OF ITS EFFECTIVENESS TO PROTECT THE FORESTS OF AMAZONIA¹

BRITO, BRENDA,¹ BARRETO, PAULO² and ROTHMAN, JOHN³

¹ Lawyer, Vice Executive Director and Research Assistant at Imazon, Rel Mario Covas Km01, Pass Pan, brendabrito@amazon.org.br

² MSc Forest Science (Yale/USA), Senior Researcher at Imazon, D'arco, Conj Village Pan D'arco, n 09 Ananindena, Para, Brazil, pbarreto@amazon.org.br

³ Senior Attorney, U.S. Environmental Protection Agency, Region 9, 811 York Street, #307, Oakland, California, 94610, rothman.john@epa.gov.

SUMMARY

In order to evaluate the effectiveness of the new Brazilian environmental crimes law, we analyzed 55 judicial actions involving forestry crimes in the federal courts of Belém, the capital of Pará. Pará is the Brazilian state that currently accounts for 40% of Amazonian logging. We identified the kinds of crimes committed, and the kind of penalties assessed and collected. We then identified the main obstacles to effective enforcement against environmental violators and propose some solutions to these problems. We conclude that the two principle obstacles to effective enforcement arise from 1) the ineffective communication among the agencies responsible for applying the law and 2) inability to apply penalties resulting from environmental crimes to environmental projects. In order to resolve these problems we propose: 1) adaptation for Pará of models of communication that have already been used successfully in another part of Brazil; and 2) use of environmental funds to enable penalties for environmental projects to be used for environmental purposes.

1 INTRODUCTION

The Amazon occupies 59% of Brazil's territory, holding one fifth of the world's biodiversity.² It is the largest tropical forest in the world, but increasing deforestation has adversely affected the regional biodiversity and may well be leading to climate change both locally and globally. The principal causes of deforestation are cattle ranching and predatory logging. The ranchers and loggers disregard labor laws; lack required licenses; and lack required management plans. For example, there are reports that between 50 and 80% of logging

is conducted illegally.³

Given the economic and social importance of the forest sector for the region – it generates more than 350 thousand direct and indirect jobs and about US\$2.5 billion of gross income per year⁴ – the federal government and some state governments are promoting sustainable forest management. The governmental actions include increased monitoring of forest resources and, for legitimate forest uses, the development of support programs such as credit, training and settlement of land title problems. The federal government is also negotiating a loan from

the World Bank to invest in sustainable forestry and one state government (Acre State) has obtained a loan from the Inter-American Development Bank for infrastructure and forestry development.

At the same time, the Brazilian legislature has written new laws to aid environmental enforcement. The most important innovation was the Environmental Crimes Law of 1998 and its implementation in 1999. The new law greatly broadens liability for environmental violators. The new law improves the ability of administrative agencies to apply administrative sanctions; establishes the responsibilities of corporations for environmental violations and damage; turns more environmental violations, such as illegal logging, into crimes with higher penalties (up to US\$ 16 millions⁵); and provides quicker judicial procedures for many environmental crimes.

In order to find out if this new law has been of aid in protecting the forests of Pará, the Brazilian state that currently accounts for 40% of Amazonian logging, we analyzed 55 judicial actions involving forestry crimes in the federal courts of Belém, the capital of Pará. We identified the kinds of crimes committed, and the kind of penalties assessed and collected. We then identified the main obstacles to effective enforcement against environmental violators and propose some solutions to these problems.

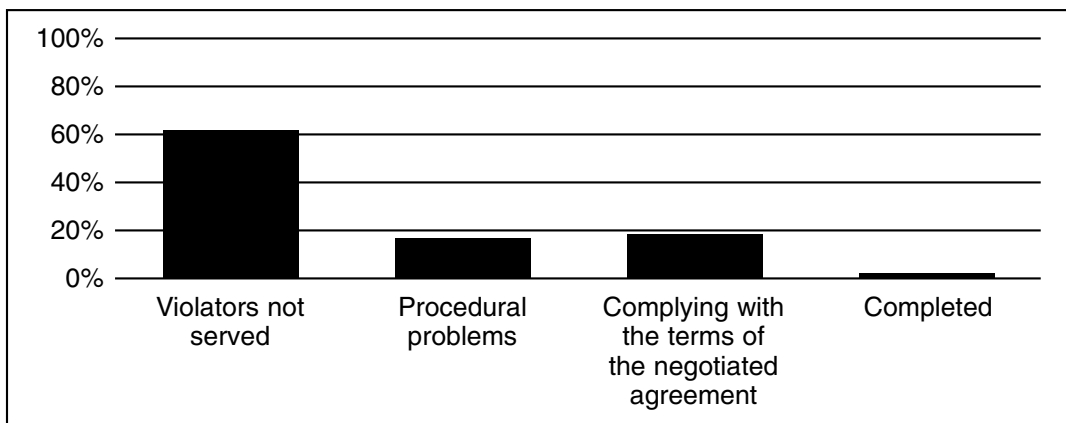
In Brazil, enforcement of forestry laws uses criminal law and procedure. Criminal liability for environmental crimes is enforced exclusively by the Ministério Público⁶ which bases its prosecutions on information and cooperation provided by the federal environmental agency, IBAMA. IBAMA has been the main monitor of the logging activity in Amazônia. Typically, a prosecution by the Ministério Público for a forestry crime quickly calls for a negotiation aimed at settlement. This negotiation takes place under the auspices of the court in the presence of the judge.

2 DIFFICULTY IN FINDING THE ALLEGED VIOLATORS AND SERVING PROCESS

In the 55 cases we analyzed, only one had already been completed (see figure 1). The rest were in various procedural phases. In 62% of the cases the alleged violators had not been located and served and in 16% the cases were caught in various procedural binds including a jurisdictional problem between the federal and state judicial systems. In 20% the violators were complying with the terms of settlements that had been negotiated with the MP.⁷

The difficulty in serving process was the main cause for the delay in prosecution. The practice of the Federal Court in

Figure 1: Phases of 55 Lawsuits on Forestry Crimes



Belém has been, for those who do not reside in Belém, to mail the notification of violation and the date for settlement conference. If the defendant does not appear on the appointed date, then the Federal Court contacts a court in the municipality of the defendant's residence to serve process. Unfortunately, most rural municipalities in Pará lack personnel to serve process. Moreover, even when the municipality does send someone to serve process, there is no guarantee of success. For example, in one case, the alleged violator lived in Portel, a city 204 miles away from Belém. The process server could not serve the process because there was no boat available to get to the alleged violator's house, which was on the other side of the river.

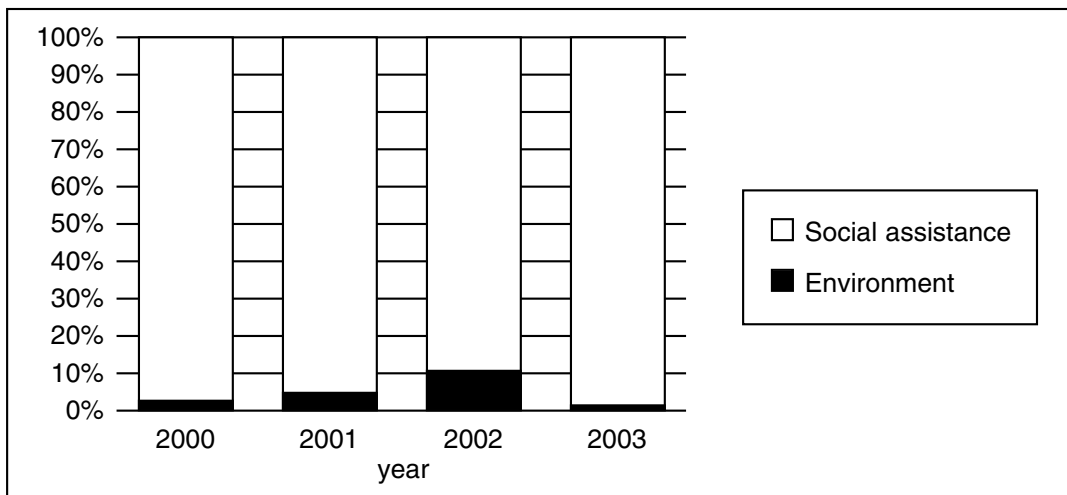
In other situations, the communication between the process servers and the courts has been deficient, even by telephone. They have failed in serving processes on time and have not communicated that to the court before the conference date. They also have had problems in finding alleged violators who have moved. All of this causes delay. Delay (and the possibility that the penalty will never need to be paid) reduces the deterrent effect of the prosecutions.

3 PENALTIES FOR ENVIRONMENTAL CRIMES DO NOT GO TOWARD ENVIRONMENTAL PROJECTS

We have observed that the terms of most of the negotiated settlements in Pará have provided for social assistance - particularly donation of medicines and food - but very little for the environment (see figure 2). Typically the only environmental element in the settlements was the provision of seedlings of valuable tree species. This is true even though the environmental crimes law explicitly calls for repair of environmental damage.

We noted, from talking with prosecutors, that it is hard to know what damage is caused by a specific crime. Therefore, the application of penalties to specific environmental damage is difficult for logging crimes in the Amazon. This problem is aggravated by the lack of information, resources and clear procedures. For example, there is no clear and tested procedure for directing funds to environmental projects. As a result, prosecutors aimed penalties at social assistance - a procedure that has been for long used for judicial settlements of non-environmental violations. This is a problem not only in Pará, but certainly in other parts of Brazil.

Figure 2: Proportion of amount for social assistance and environment



In Brazil, the Ministério Público has the power to order investigations from the federal agencies, but not to pay for them. The requested institutions must pay and most of the time there are no resources available. For instance, in two of the cases that we sampled, the federal court requested information from the federal environmental agency, IBAMA, about the environmental damage caused by the crime. IBAMA provided the requested information, but refused to agree to continue this kind of help due to lack of resources and the high cost of these assessments.

4 POTENTIAL SOLUTIONS

4.1 Improving Prosecution

Delays in the prosecution of environmental matters in Pará appear to be caused by the deficient communication among institutions. Some experiments in the municipality of Blumenau – south of Brazil – suggest a solution to this problem.

In Blumenau, the Environmental Police⁸ (the inspectors), MP and Federal Court agreed to improve their coordination to enforce the environmental crimes law. To that end, the federal court reserved two days per week for environmental negotiations. Therefore, when the environmental police served process, they also assessed a fine and scheduled a negotiation because they knew when the federal court would be available. The environmental police then advised, by electronic mail, both the court and MP of: i. the fine; ii. the date for the negotiation; and iii. the successful service of process. As a result, the court and the MP were prepared on the day of negotiation. About 95% of the violators attended the negotiations within 30 days of violation, which compares to only 16% for the 16 cases in Belém.

A system similar to that used in Blumenau could be adapted to Pará and other states in Amazônia that have experienced difficulty even serving process for environmental matters. To improve prosecution all of these agencies will need more resources. However, we think that with or

without new resources, a key element will be better coordination between the agency responsible for inspections and monitoring. In the case of Pará, this would be IBAMA, the Ministério Público and the courts.

4.2 Strengthening Environmental Conservation and Recovery Through Environmental Funds

As we have discussed, the penalties that result from prosecution of environmental crimes are not used to help repair or protect the environment but are mostly used instead for social assistance. We suggest sending penalties and other relief to trust funds aimed at repair of environmental damages or protection of the environment. Lacking a clear nexus between the violation and a particular environmental harm, which is the norm, the penalty or other relief could be placed in a fund that would be devoted to environmental projects. These trust funds could also support the work of environmental agencies.

The kind of fund most appropriate for this purpose would be an endowment fund, which collects money for investment using interest and dividends for its projects. The main advantage of an endowment fund is the ability to investing in long terms projects. In Brazil, there is at least one a good example of such an endowment fund: the Brazilian Biodiversity Fund (Funbio)⁹. Funbio has been providing financial support to public and private projects concerning biodiversity conservation and sustainable development.

Another kind of fund that would be suitable would be a sinking fund, which collects money to be used for designated purposes. Its goal is to spend all of its money on projects consistent with those proposes. The disadvantage of sinking funds is the difficulty in supporting long term projects because of the unforeseeable future budgets. In Brazil, sinking funds are more common than endowment funds. One example is the Fundo de Defesa de Direitos Difusos,¹⁰ a national fund for protection of consumer and environmental matters.

5 CONCLUSION

Two principle obstacles to the enforcement of the environmental crimes law arise from: 1) the lack of effective communication among the agencies responsible for applying the law; and 2) inability to apply penalties resulting from environmental crimes to environmental projects

In order to resolve these problems we propose: 1) adaptation for Pará of models of communication that have already been used successfully in another part of Brazil; and 2) use of environmental funds by the Ministério Público and courts to enable penalties for environmental projects to be used for environmental purposes.

6 REFERENCES

- ¹ This article is a partial summary of a larger study that more fully analyzes the effectiveness of the environmental crimes law. The full version in Portuguese can be found at www.imazon.org.br. We hope that an English version will soon be available on the INECE website.
- ² WWF Brasil available at www.wwf.org.br.
- ³ See: Embrapa. Relatório sobre o diagnóstico dos projetos de manejo florestal no estado do Pará – Fase Paragominas. Belém: Embrapa/Cpatu PA, 1996. 94 p; Update Report on Illegal Mahogany Logging and Trade in the Brazilian Amazon. Preliminary Version. São Paulo: Amigos da Terra, 1995; Lentini et al. Forest Facts 2003. Belém: Imazon, 2004.
- ⁴ Lentini et al. Forest Facts, 2004.
- ⁵ Equivalent to R\$ 50 million.
- ⁶ The “Ministério Público” (or “MP”) is a prosecutor’s office that functions almost like a fourth branch of government. The MP functions independently of the other branches and at both the federal and state levels. According to the Brazilian Federal Constitution it is in charge of “...civil investigation and public civil suits to protect public and social property, the environment and other diffuse and collective interests” (Article 129, Section III - emphasis added). It also has exclusive authority to bring environmental criminal actions.
- ⁷ The negotiations are allowed by law and they are used in order to avoid the need for further criminal action, which take a long time to be completed and have high costs.
- ⁸ In Blumenau and other southern states the Environmental Police is the main monitoring agency for environmental enforcement. Pará also has an Environmental Police but it has not been so active in forestry matters.
- ⁹ Fundo Brasileiro Para a Biodiversidade available at www.funbio.org.br.
- ¹⁰ Conselho Federal Gestor do Fundo de Defesa dos Direitos Difuses available at <http://www.mj.gov.br/cfdd/default.htm>.