



Playing musical chairs with land use obligations: Market-based instruments and environmental public policies in Brazil



Geoffroy Filoche ^{*},¹

Senior Research Fellow, Institut de Recherche pour le Développement (IRD), France

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ABSTRACT

In Brazil, market-based instruments focusing on land use dimensions are increasingly promoted as a means to make public environmental policies effective. Landowners and farmers call for more flexible regulations and economic incentives to adopt ecologically sound practices, while public agencies and conservation NGOs seek new ways of financing and legitimising legal standards. Market-based instruments are considered by these actors as having the potential to both achieve their own goals and conciliate all interests. As a result, legal frameworks (including cap-and-trade systems, biodiversity offsetting and payments for ecosystem services) are being designed which allow to exchange land use rights and obligations. Under a sociolegal approach, this article provides an overview of such instruments. It shows to what extent they may entail a reconfiguration of the burden sharing and the priority setting of nature conservation. Depending on how actors use legal standards, their responsibilities may be eased and the level of conservation may be lowered, both facts that raise significant controversy.

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1. Introduction

Environmental conservation is a recurrent subject of intense political controversy in Brazil. As evidenced by the debates surrounding the recently adopted Forest Code (Schwartzman et al., 2012; Soares-Filho et al., 2014), most rural landowners (both large and small) consider that the land use obligations they must abide by are too important or too rigid, and ignore them more often than not (Rajão and Georgiadou, 2014; Arima et al., 2014; Alarcon et al., 2015). Meanwhile, environmental policies are confronted by problems originating in public institutions themselves. State agencies lack manpower and/or political will to address law violations, while protected areas are dramatically underfunded, a fact that more often than not jeopardizes their enforcement (Medeiros et al., 2012). As a result, environmental standards are far from effective (Börner et al., 2014; Pinho et al., 2014; Aubertin, 2015).

Such a crisis in the command-and-control approach appears to go hand in hand with growing interest in market-based instruments. A large array of putative virtues is often assigned to these instruments, when compared to the logic of command-and-

control: it is believed that the changing of behaviour is more likely to occur through economic incentive than by force, and it is argued that such instruments allow for flexible implementation that can adapt regulations to the actual situation of each actor (Muradian et al., 2013; Lockie, 2013). Market-based instruments may be defined as regulations that encourage appropriate environmental behaviour through price signals rather than through explicit instructions (Hahn and Stavins, 1991). They are supposed to provide incentives for private agents to act in ways that further not only environmental aims but also their own financial goals (Stavins and Whitehead, 1997). Not a new idea, these instruments have been epitomized by cap-and-trade systems, which work in the following way: the public institution sets a global limit to the amount of pollution that can be emitted, creates permits that allow the holders to emit some predetermined percentage of that total limit, distributes the permits, and then allows firms to trade these. In theory, if properly designed and implemented, market-based instruments allow any desired level of pollution cleanup to be achieved at the lowest overall cost to society, by providing incentives for the greatest reductions in pollution by those firms that can realize these reductions at the lowest cost (Strahilevitz, 2000).

The notion of market-based instrument has evolved in the last decade to include a new approach which is driven by the concept of ecosystem services (Pirard, 2012; May, 2011). Firstly, this approach aims to acknowledge that environmental obligations – both actions (carrying out land management activities) and abstentions (not

^{*} Present address: UMR GRED, IRD/Université Paul-Valéry Montpellier 3, Site Saint-Charles, Route de Mende, 34 199 Montpellier Cedex 5, France.

E-mail address: geoffroy.filoche@ird.fr

¹ Past address: Universidade Federal de Goiás (UFG), IESA – Campus II, Conjunto Itatiaia, Goiânia 74691-300, Brazil.

using the land in a productive way) – have a cost. Secondly, it aims to take into account the fact that environmental obligations produce ecosystem services which benefit society. Ecosystem services may be economically evaluated, and turned into a commodity which may be purchased by actors (who previously benefited freely from them) through institutional settings known as payment for ecosystem services (PES) (Corbera et al., 2007; Wunder et al., 2008). Even if there is debate as to what PES actually has to do with markets (Muradian and Rival, 2012), the virtues of efficiency and effectiveness that standard economic analysis attributes to the market are commonly projected onto such instruments (Boisvert et al., 2013).

Market-based instruments are nowadays much debated in Brazil. They are considered by a significant number of Brazilian actors as an innovative way of implementing environmental policies, and are increasingly taken into account by national regulations (Pokorny et al., 2012). A first approximation of the political scene may read as follows. Some large and small landowners (including farmers and cattle breeders) seek to expand what they are allowed to do within the environment (Sparovek et al., 2010; Reydon et al., 2015). They justify their claims by arguing that existing standards are illegitimate or that their role has been misconstrued, and call for more flexibility in the implementation of the law (Paulino, 2012). Some environmental NGOs such as The Nature Conservancy and Conservation International have come to privilege market-based instruments as a means to attract donors (Pieck and Moog, 2009). Some political leaders and public institutions whose role is to design policies and manage the national natural heritage may also welcome market-based instruments as an opportunity to obtain the financial means needed to implement protected areas, and as an argument to convince private actors to accept their environmental responsibilities (Hall, 2008). At the same time, such instruments are seen by some NGOs as a way to commoditize nature or favour the interests of the dominant class (e.g. large landowners or big industries). For example, the *Grupo Carta de Belém*² denounces that the federal state does not take its responsibilities in environmental issues while easing the burden of politically influential actors (Grupo Carta de Belém, 2011).

However, one key element in the debate over market-based instruments is that the positions of some actors are not clear-cut nor easily summarized. For example, political representatives in the Brazilian Congress and heads of environmental public agencies may promote or oppose market-based instruments, depending on the origin of the funds or on who can benefit from them (Comissão de Meio Ambiente e Desenvolvimento Sustentável, 2009). Market-based instruments have the potential to redefine to some extent the political field, as some traditionally-opposed actors may share some views on the issue. Payments for ecosystem services are thus considered useful by both the Confederation of Agriculture and Livestock (*Confederação da Agricultura e Pecuária do Brasil*, CNA) – an institution representing large-scale farmers and cattle breeders – and the National Confederation of Agricultural Workers (*Confederação Nacional dos Trabalhadores na Agricultura*, Contag) which represents rural workers.³

While considerable literature has been produced focusing on the relations between market-based instruments and environmental policies (e.g. Grabosky, 1995; Gunningham and Sinclair, 1999; Salzman and Ruhl, 2000; Di Leva, 2002; Ruhl and Salzman, 2007;

Lavratti and Tejeiro, 2013; Penca, 2013), little attention has been paid to the land use dimension of such relations. This article has two objectives. Firstly, it seeks to understand the ongoing processes of inception of market-based instruments in Brazilian environmental law, focusing on the consequences on land use standards, i.e. what one is allowed to do, compelled to do, and entitled to impose on others, within a given area. Secondly, it aims to show why actors (both private and public) have come to privilege market-based instruments, and what are the implications regarding the logic underlying the formation of environmental obligations. As such, the purpose is to show that such instruments not only concern (practical) modalities as to how to implement the law, but also in some cases the (political) determination of the articulation of private and collective interests vis-à-vis the environment. As the inception of market-based instruments in Brazilian environmental policies is quite new and not fully achieved, this article shows more what may happen than what actually happens. However, some experiments have taken place, and these may provide useful grounds for discussion.

The concept of legal (or juridical) field (Bourdieu, 1987) may prove useful in analyzing this situation. A field is a setting in which actors and their respective social positions are located. In the environmental legal field, each actor has a position determined by rights (to use the environment) and obligations (to do so according to given limits or modality, which reflects the fact that the land he owns is not strictly his). At the same time, the legal field theory posits that law is produced through the relations between actors and institutions in competition with each other for the control of the right to determine the law. In other words, environmental law is constructed by the set of actors who, while being determined by interests and constraints associated with their position, elaborate private revendications and confer on them a 'social problem' status. As such, the legal field theory acknowledges that law depends to a large extent on how problems are framed.

In our case, an important number of actors struggle to make society recognize the need for flexibility in enforcing the rules and pragmatism in financing the costs of implementing the rules. The Brazilian situation may be portrayed as a game of musical chairs, a metaphor acknowledging that three types of actors participate in a new setting in which environmental responsibilities are redistributed by virtue of market-based instruments. There are those who are given responsibilities, whereas they were not obliged to anything in the first place. There are those who still have the same level of obligations, only they may either be remunerated for accepting more obligations or pay for not complying. Finally, there are those who manage to decrease the intensity of their responsibility. More broadly, the metaphor depicts a situation in which many changes in the distribution of land use obligations happen in a confusing way. In effect, it may prove difficult knowing at the end of the day who must protect what. This may have important implications in terms of control, the protection level (is it as much as before?) and targets (are the protected ecosystems comparable?). This is even more the case when considering that Brazil has always had severe problems in formalizing a reliable land registry (Reydon et al., 2015).

The data conveyed encompasses an analysis of both legal standards and specialized literature, and semi-directed interviews with key actors. More precisely, representatives or technical staff from the following institutions were met in Brasília in April 2010 and October 2015: the Brazilian Forest Service (*Serviço Florestal Brasileiro*), a federal institution; the Secretariat of Biodiversity and Forests of the Federal Ministry of Environment (*Secretaria de Biodiversidade e Florestas*); the Confederation of Agriculture and Livestock (*Confederação da Agricultura e Pecuária do Brasil*, CNA); and *Instituto CNA*, an NGO funded by the CNA. In Rio de Janeiro (May and June 2014), interviews were conducted with the Secretariat of Environment of the state of Rio de Janeiro (*Secretaria Estad-*

² This organization is formed among many others by the Brazilian branch of Friends of the Earth (*Amigos da Terra Brasil*) and by Via Campesina Brasil.

³ These converging positions were for example stated during a public hearing which took place at the Senate in Brasília on 24/06/2015. See <http://www12.senado.leg.br/noticias/materias/2015/06/24/debatedores-apoiam-pagamento-por-servicos-ambientais-sem-aumento-de-impostos-e-taxas> (page accessed 29/06/2016).

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