

Restoring Brazil's Public Lands: Exploring Public- Private Partnership Options

December 2024

Authors

Cristina Leme Lopes

Senior Research Manager, CPI/PUC-RIO

cristina.leme@cpiglobal.org

Gabriel Cozendey

Senior Legal Analyst, CPI/PUC-RIO

Joana Chiavari

Research Director, CPI/PUC-RIO

Acknowledgments

This report received financial support from the Institute Climate and Society (ICS) and Itaúsa Institute.

The authors would like to thank Beto Veríssimo and the participants in the virtual meetings of the Amazônia 2030 project for their comments and suggestions. We would also like to thank Sarah Robbins, Natalie Hoover El Rashidy, Giovanna de Miranda for proofreading and editing the text, and Meyrele Nascimento and Nina Oswald Vieira for formatting and graphic design.

Suggested citation

Lopes, Cristina L., Gabriel Cozendey, and Joana Chiavari. *Restoring Brazil's Public Lands: Exploring Public-Private Partnership Options*. Rio de Janeiro: Amazon 2030, 2024.

About Amazon 2030

Amazon 2030 is an initiative by Brazilian researchers that seeks to develop an action plan for the sustainable development of the Brazilian Amazon. Our objective is to promote higher standards of economic and human development and to achieve the sustainable use of resources by 2030.

About Climate Policy Initiative

Climate Policy Initiative (CPI) is an organization with international expertise in finance and policy analysis. CPI has seven offices around the world. In Brazil, CPI has a partnership with the Pontifical Catholic University of Rio de Janeiro (PUC-RIO). CPI/PUC-RIO works to improve the effectiveness of public policies and sustainable finance in Brazil through evidence-based analysis and strategic partnerships with members of the government, civil society, the private sector and financial institutions.

Press relations

O Mundo Que Queremos

amazonia2030@omundoquequeremos.com.br

Contact

contato@amazonia2030.org.br

gustavo.nascimento@omundoquequeremos.com.br

camila.lima@cpiglobal.org

Executive Summary

The restoration of deforested and degraded public lands plays a fundamental role in promoting a new development model for the Amazon based on the sustainable use of the forest's natural resources, taking advantage of the carbon market opportunities. To reap the environmental and socio-economic benefits of large-scale forest restoration in the region, partnership models between the public and private sectors are essential to offer balanced risk management and provide incentives to attract investors.

To date, forestry concessions have been the only model adopted by the government to promote the restoration of public lands with private participation. Examples include the restoration concession project for the Flona do *Bom Futuro*, in Rondônia, and the restoration concession project for the *Triunfo do Xingu* Environmental Protection Area (*Área de Proteção Ambiental - APA*), in Pará, both of which are currently in the stage of public consultation.

There are two main reasons why forestry concessions have been adopted as the standard model for public land restoration projects. First, the Public Forest Management Law (*Lei de Gestão de Florestas Públicas - LGFP*), especially after its 2023 updates, provides specific and detailed guidelines, making it easier for the public administration to model restoration concessions. Second, the experience gained with forest management concessions has consolidated a practical framework that public agencies can apply to restoration.

However, forestry concessions have characteristics that may restrict their use for large-scale restoration of degraded public lands. In addition to being applicable only to certain land categories, forestry concessions impose strict contractual requirements and transfer most of the operational risks and burdens to the concessionaire, which can discourage the private sector from participating in this activity, especially in a complex context such as the Amazon. **In this publication, researchers from Climate Policy Initiative/Pontifical Catholic University of Rio de Janeiro (CPI/PUC-RIO) and Amazon 2030 analyze the different legal partnership models in Brazilian administrative law in order to identify key alternatives to forestry concessions for restoring degraded public lands.**

This publication identifies ordinary tenders, common public service concessions and Public-Private Partnerships (PPPs), assessing their advantages, challenges and viability in comparison to the standard forestry concession model. The analysis considers key aspects such as regulation, administrative experience, application to different land categories, risk sharing and the allocation of responsibilities between the parties. This study seeks to identify a range of legal instruments available to further the restoration of public lands and align environmental recovery with sustainability and carbon emission reduction global goals.

Before discussing the implications of applying different partnership models to forest restoration activities on public land, Box 1 presents a brief definition and examples of how these models are offered by the Brazilian government currently.

Box 1. Public-Private Partnership Instruments

Forestry concessions: These are contracts that allow the private sector to commercially exploit timber and non-timber products in public forests, in accordance with sustainable forest management practices. The concessionaire, the owner or operator of the concession, takes on socio-environmental responsibilities and makes payments to the public agency for the right to exploit.

Ordinary tenders: These are processes for selecting private partners for activities such as buying and selling goods or providing services for public agencies. They are used, for example, to supply goods and materials such as computers, furniture, hospital supplies or to hire a company to carry out work on buildings or cleaning and security services in government buildings. They do not involve public service concessions, and payment is made by the public agency directly to the contractor.

Common public service concessions: These concessions delegate the provision of a public service to the private sector, such as urban transportation, basic sanitation, electricity generation and distribution and highway management. Compensation is mainly generated by fees charged to users of the service, but may include additional payments.

Public-Private Partnerships (PPP): These are contracts for large projects, with high initial investment, in which the fees paid by users do not fully cover the costs, requiring additional compensation from the public agency. Examples include the construction and operation of metro lines and public lighting networks. There are two types: **sponsored concessions**, in which the private sector is compensated by fees and public contributions, and **administrative concessions**, in which payment comes exclusively from the public entity.

Forestry Concession is the only model that currently has specific regulations for forest restoration, established by the LGFP. The private sector is responsible for planting and conserving the area and bears the costs of restoration, where compensation primarily occurs through the sale of carbon credits. The ownership of the carbon credits belongs to the public authorities, but the LGFP allows these credits to be transferred to the private sector.

Forestry concessions are already being implemented by both federal and state governments. The advantage of this model is that it is well established and there are existing regulations. However, in forestry concessions, the private sector assumes most of the financial and operational risk, and has little flexibility to pass on costs to the government. There are also some limitations on the type of land where it can be implemented. Finally, forest concessions are already being implemented by both federal and state governments.

The **Common Bidding** does not have specific regulations yet for forest restoration, but could be implemented through the New Bidding Law (Law no. 14,133/2021). Common bidding offers a more flexible distribution of risk, adaptable to different land categories, but its use for forest restoration is still a nascent practice, requiring onerous contractual adjustments to ensure its practical applicability.

This model allows the private sector to be contracted to carry out forest planting, but with no commitment to the continued conservation of the area or accountability for the carbon credits generated. The entity is compensated by fixed payments previously agreed with the public authorities. This configuration can be very advantageous for the private sector as it reduces financial and operational responsibility. The private sector would not profit from the sale of carbon credits, since they would be owned exclusively by the government.

The ordinary tender for the service of forest planting without the exploitation of carbon credits or any other environmental service could be a valuable option in fully protected areas such as degraded or deforested national parks, given that the government is already responsible for monitoring and conserving these areas. According to the National Plan for Native Vegetation Recovery (*Plano Nacional de Recuperação da Vegetação Nativa – PLANAVEG*), there are 1.3 million degraded hectares in protected areas making common bidding an alternative with great potential for restoring specific areas in protected areas, without impacting the use of forestry concessions and common concessions for this same purpose.

The **Common Public Service Concession**, governed by the Concessions Law (Law no. 8,987/1995), could be applied to the restoration of public lands, provided that this activity is legally classified as a public service. However, there is not yet a consolidated legal standard for this kind of classification.

With the classification, the common public service concession could be used as a contractual model in which the private sector carries out the forest planting and continuous conservation of the area, assumes the operating costs and is compensated by the sale of carbon credits. In this model, ownership of the credits initially belongs to the public authorities and is transferred to the private sector via stipulations in the contract. The Chico Mendes Institute for Biodiversity Conservation (*Instituto Chico Mendes de Conservação da Biodiversidade* - ICMBIO) Law (Law no. 11,516/2007) expressly provides for the use of concessions for environmental services, including restoration activities; this example provides the legal viability of this model.

In addition, the common public service concession is applicable to various land categories, broadening its scope (compared to forestry concessions) and ensuring greater likelihood of implementation. However, as with forestry concessions, the distribution of risks is also rigid, with the private concessionaire assuming most of the financial and operational risks. Despite this, the Concessions Law allows public agencies significant flexibility to redefine the economic and financial balance of the contracts in the event of significant changes in the economic or regulatory scenario.

The **Public-Private Partnership (PPP)** model, governed by Law no. 11,079/2004, can be used for restoration projects on degraded or deforested public lands, provided that restoration is considered a public service and that these projects depend financially on public contributions to be viable.

In this model, the private sector takes on the responsibility of planting and ongoing conservation of the area. The entity relies on financial support from the public authorities to supplement the income from the restoration activity, including through carbon credits. Ownership of the carbon credits initially belongs to the public authorities, with the possibility of transfer to the private sector, as stipulated in the contract.

PPPs offer flexibility in the division of risk between the public and private sectors and can include specific counterparts for the private partner who assumes responsibility for the security and surveillance of the area. Because of this, the PPP model is more attractive in regions of high vulnerability and complexity, such as the Amazon. The confirmation of a legal framework for restoration as a public service remains a major challenge. Another challenge is the complexity of financial structuring, including demonstrating the need for public contributions to guarantee the economic viability of the project, and ensuring the commitment of public resources.

It is important to note that the use of common concessions or PPPs to restore public lands can face legal challenges related to the principle of specificity. This principle holds that when there is already a specific law for a type of partnership (e.g. the LGFP for forestry concessions) that law should prevail, limiting the implementation of common concessions or PPPs for these projects.

Furthermore, regardless of the legal partnership model adopted, restoration projects on lands occupied by Traditional Peoples and Communities (*Povos e Comunidades Tradicionais* - PCT) must incorporate socio-environmental safeguards guaranteeing the right to Free Prior and Informed Consultation, respect for territorial and cultural rights, the participation of communities, a fair distribution of benefits and the monitoring and security of territories.

Finally, it is important to say that the risks associated with the carbon market and the restoration of public lands in the Amazon are inherent to the context of forest restoration in the region and are therefore common to all contractual models. The Amazon is particularly vulnerable to illegal activities such as illegal logging, deforestation or settlements. These risks affect any partnership model, as all concessionaires, bidders or partners need to guarantee the integrity of the area in order to maintain the viability of the restoration and the permanence of the carbon credits.

In both forestry concessions and other models, strong territorial governance is important, and exposure to losses in the event of degradation by third parties is independent of the type of contract. However, in the case of PPPs, the government could, *a priori*, assume part of the costs of security and surveillance of the area, which would not be feasible in other contractual models. This characteristic of PPPs makes them potentially more attractive in vulnerable regions of the Amazon, where security costs can be significant or even make it impossible for private entities to be interested in restoration projects.

Table 1 below compares the four public-private partnership models mentioned for forest restoration projects, detailing key points for the practical application of each one. Each model has a different approach to regulation, responsibility for restoration and risk-sharing between the public and private sectors, as well as ownership of the carbon credits generated.

The table summarizes the conditions in which each model can be applied, the advantages offered and the main challenges for its implementation. These factors are key to deciding the most suitable model for restoring public areas efficiently and safely.

Table 1. Application of Partnership Models for Forest Restoration

Partnership model	Existence of specific regulations for restoration?	Features	Ownership of carbon credits	Advantages	Challenges
Forestry concessions	Yes. Public Forest Management Law (<i>Lei de Gestão de Florestas Públicas</i> - LGFP)	<p>The private company carries out the forest planting and is responsible for conservation of the area.</p> <p>The private sector bears the costs of restoration and is paid for the carbon credits.</p> <p>Socio-environmental liabilities are provided for in the LGFP.</p>	By the public authorities, with the possibility of transfer to the private partner provided for in the LGFP.	<p>Specific and detailed regulations in the LGFP, with recent amendments for restoration projects.</p> <p>Model is well established.</p>	<p>Private companies bear socio-environmental burdens, and the distribution of risks is strict in the LGFP.</p> <p>The existing regulations do not apply to all land categories.</p>
Ordinary Tenders	No. However the New Bidding Law (Law no. 14,133/2021) can be applied.	<p>The private sector carries out all of the forest planting and the public authorities are responsible for conserving the area.</p> <p>Private companies are compensated by fixed payments, agreed in advance by the public authorities.</p>	By the public authorities.	<p>New Bidding Law establishes greater flexibility and the distribution of risks.</p> <p>Applicable, in principle, to any category of land.</p>	<p>Forest planting is not a common activity in the list of services contracted by the public agency.</p> <p>Public authorities need to have the resources to pay for the services up front and later be able to sell carbon credits.</p>
Common Public Service Concessions	No. However the Concessions Law (Law no. 8,987/1995) can be applied.	<p>The private company carries out the forest planting and is responsible for the conservation of the area.</p> <p>The private sector bears the costs of restoration and is compensated with carbon credits.</p> <p>Restoration needs to be considered a public service.</p>	By the public authorities, but with the possibility of transfer to the private partner, to be defined in the public notices and concession contracts.	<p>Applicable, in principle, to any category of land.</p> <p>ICMBio law (Law no. 11,516/2007) allows public service concessions in Protected Areas.</p>	<p>The Concessions Law establishes a rigid distribution of risks between the private sector and the public authorities.</p> <p>Innovation necessary to characterize restoration as a public service.</p> <p>The LGFP may take precedence over other legislation because of the principle of specificity.</p>
Public-Private Partnerships (PPP)	No. However the PPP Law (Law no. 11,079/2004) can be applied.	<p>The private company carries out the forest planting and is responsible for the conservation of the area.</p> <p>The private sector bears the costs of the restoration and is compensated with carbon credits, but the government also pays for the operation.</p> <p>Only for projects where the financial viability depends on public funding.</p> <p>Restoration needs to be considered a public service.</p>	By the public authorities, but with the possibility of transfer to the private partner as defined in the public notices and contracts.	<p>The PPP Law establishes a more flexible distribution of risks between private and public partners.</p> <p>Applicable, in principle, to any category of land.</p> <p>Public authorities bear part of the investment.</p>	<p>Innovation necessary to characterize restoration as a public service.</p> <p>The LGFP can take precedence over other legislation because of the principle of specificity.</p>

Source: CPI/PUC-RIO, 2024

Introduction

Approximately 21% of the Amazon's original forest has been decimated, an area equivalent to 84 million hectares,¹ the result of a process of disorderly occupation over the last few decades. This massive deforestation has left vast areas degraded and many completely abandoned. Approximately 15 million hectares—an area comparable to the size of the US state of Michigan—could be allocated to forest restoration.²

A key aspect in this context is that about half of deforestation in the Amazon occurs on public lands. Although most public forests still retain their forest coverage, deforestation has increased significantly in recent years.³

Given this scenario, it is essential not only to strengthen policies to prevent deforestation, but to implement restoration policies that contribute to the recovery of native vegetation and generate environmental and socio-economic benefits for the region. The carbon credit market can help bring in the resources needed to encourage and scale up restoration projects, guaranteeing a return on investments, and also foster a value chain associated with restoration.

To support this effort, the federal government amended the Public Forest Management Law (*Lei de Gestão de Florestas Públicas* - LGFP) in 2023, allowing forestry concessions to be applied to the restoration of degraded public forests. The change in the law now expressly provides for the possibility of transferring ownership of carbon credits from the granting authority to the concessionaire.

In addition, the new version of the National Plan Native Vegetation Recovery (*Plano Nacional de Recuperação da Vegetação Nativa* - PLANAVEG), for the period 2025 to 2028, includes the restoration of public lands as a new goal. According to PLANAVEG, 1.3 million hectares in federal Protected Areas and 1.7 million hectares in Indigenous Lands can be restored.⁴

1 Santos, Daniel et al. *Fatos da Amazônia 2024*. Amazon 2030, 2024. bit.ly/3TS4YRi.

2 Amazon 2030. *Amazônia 2030: Bases for Sustainable Development*. Belém: Instituto do Homem e Meio Ambiente da Amazônia, 2023. bit.ly/3Z6Lz0O.

3 Gandour, Clarissa and João Mourão. *Fighting Deforestation in the Amazon: Strategic Coordination and Priorities for Federal and State Governments*. Rio de Janeiro: Climate Policy Initiative, 2022. bit.ly/FightingDeforestationAMZ.

4 MMA. *Consulta Pública sobre o Plano Nacional da Vegetação Nativa - Planaveg 2025-2028*. 2024. Access date: November 10, 2024. bit.ly/4fHocC6.

To date, forestry concessions have been the only model adopted by the government to promote the restoration of public lands through partnerships with private entities. Examples include the restoration concession project for the Flona do *Bom Futuro*, in Rondônia, and the restoration concession project for the *Triunfo do Xingu* Environmental Protection Area (*Área de Proteção Ambiental - APA*), in Pará, both of which are currently at the public consultation stage.

There are two main reasons why forestry concessions have been adopted as the standard model for public land restoration projects. Firstly, the LGFP, especially after its 2023 updates, provides specific and detailed guidelines, making it easier for the administrators to initiate restoration concessions. Secondly, the experience accumulated with forest management concessions has consolidated a practical framework that public agencies can apply to restoration.

However, forestry concessions have characteristics that may restrict their use for large-scale restoration of degraded public lands. In addition to being applicable only to certain land categories, forestry concessions impose strict contractual requirements and transfer most of the operational risks and burdens to the concessionaire, which can discourage the private sector, especially in a complex context such as the Amazon.

Faced with these challenges, it is essential to explore alternative forms of partnership between the public and private sectors that enable a more balanced division of risks and offer financial and contractual incentives to attract investors to restoration activities on public lands.

This publication identifies the potential of the different legal partnership models provided for in Brazilian administrative law in order to promote the restoration of degraded public lands. The advantages and challenges of forestry concessions, ordinary tenders, common concessions and Public-Private Partnerships (PPPs) are analyzed, including regulation, administrative viability, application in different land categories, risk sharing and responsibility for investments.

The goal of this analysis is to offer public agencies and expanded set of legal instruments to apply to the restoration of public lands in Brazil, create sustainable economic development in the Amazon and contribute to national and global climate commitments.

Forestry concessions as a Standard Model for Restoring Degraded Public Forests

General Aspects of Forestry Concessions

Forestry concessions are regulated by the LGFP⁵ and delegate public forest management to private entities for the commercial exploitation of timber and non-timber goods. This exploitation must be carried out under the sustainable forest management regime, which ensures that the forest regenerates within certain timeframes. To gain the right of exploitation the private entity pays the public authority, qualifying this concession as an onerous delegation.⁶ Concessionaires also have socio-environmental responsibilities associated with the asset granted (public forest) and their activities therein.

Although there are similarities between forestry concessions and public service concessions—such as longer contractual terms and the possibility of termination—these concessions are regulated by different rules and serve different purposes: the provisions on forestry concessions prioritize the sustainable economic exploitation of the forest, while public service concessions aim to guarantee the continuity of services.⁷

The prevailing view in the legal literature is that forestry concessions do not constitute public service concessions, because (i) they have no end users, (ii) they directly satisfy the interests of the concessionaires and not of the community,⁸ and (iii) the economic exploitation of forests is not an activity exclusively owned by the state.^{9,10} Because of these characteristics, forestry concessions are considered to be a type of concession for the use of a public asset,^{11,12,13,14} aimed at the economic exploitation of the forest by private agents.^{15,16}

5 Law no. 11,284, March 2, 2006. bit.ly/3s9ocHt.

6 Oliveira, Raul M. Freitas de. "Concessão florestal: exploração sustentável de florestas públicas por particular." PhD diss., University of São Paulo, 2010. bit.ly/3B2wq8v.

7 Ibid.

8 Leal, Augusto A. Fontanive. *Direito ambiental e florestas públicas*. São Paulo: JusPodivm, 2022.

9 Ibid.

10 Di Pietro, Maria S. Zanella. *Uso privativo de bem público por particular - 3ª edição*. São Paulo: Atlas, 2014.

11 Leal, Augusto A. Fontanive. *Direito ambiental e florestas públicas*. São Paulo: JusPodivm, 2022.

12 Marques Neto, Floriano de A. *Bens públicas: função social e exploração econômica: o regime jurídico das utilidades públicas*. Belo Horizonte: Fórum, 2009.

13 Almeida, Fernando D. M. de. *Contrato Administrativo*. São Paulo: Quartier Latin, 2012.

14 Oliveira, Raul M. F. de. "Concessão florestal: exploração sustentável de florestas públicas por particular." PhD thesis, University of São Paulo, 2010. bit.ly/3B2wq8v.

15 Di Pietro, Maria S. Z. "Gestão de florestas públicas por meio de contratos de concessão". *Revista do Advogado* 29, no. 107 (2009): 147. bit.ly/3QkrHSM.

16 Di Pietro, Maria S. Z. *Uso privativo de bem público por particular - 3rd edition*. São Paulo: Atlas, 2014.

Advantages and limitations of forestry concessions

Forestry concessions have become the standard model for the restoration of public lands due to the detailed and specific regulations of the LGFP and the experience accumulated at federal and state level (as in Pará) with concessions for forest management. This experience facilitates the implementation of concessions for restoration.

The LGFP was originally designed to regulate forest management, an activity with a significant potential for environmental impact during the extraction of timber from preserved forests. In granting private entities the right to exploit the area, the LGFP requires the concessionaires to carry out work at their own risk and assume obligations to protect the granted area, which includes monitoring and conservation measures to mitigate environmental damage. The extensive list of burdens in the LGFP reflects the intensive and high-impact nature of logging, and ensure that the concessionaire is fully responsible for the risks associated with the extraction.¹⁷

In 2023, the LGFP was amended to allow the use of forestry concessions to restore degraded areas and to enable the sale of carbon credits.^{18,19,20} The amendment exempts concessionaires from liability for damage caused by third parties, as long as they promptly report the incident to the authorities. Although the duty of vigilance remains, reporting allows the concessionaire to avoid responsibility for damage. The government has sought to reduce the risks of restoration concessions by introducing contractual clauses that redistribute some responsibilities between the parties, exploiting loopholes in the LGFP to increase protections for the concessionaire.

An example of this is the *Bom Futuro* National Forest restoration concession in Rondônia, which distributes risks between the government and the concessionaire. It covers the environmental damage caused by third parties (such as territorial invasions or fires), as provided for in the LGFP, as well as risks related

17 Law no. 11,284, March 2, 2006. bit.ly/3s9ocHt.

18 Law no. 14,590, May 24, 2023. bit.ly/3MocmAG.

19 Law no. 11,284, March 2, 2006. bit.ly/3s9ocHt.

20 Carbon credits are financial securities representing the amount of carbon dioxide that a given project has stopped emitting or captured from the atmosphere through technological processes, forest restoration or conservation.

to legislative changes and illegal occupations. This division of risks respects the structure of the LGFP and maintains substantial requirements of the concessionaires, who still remain responsible for a large part of the operational and protection obligations.²¹

In contrast, the concession for the *Triunfo do Xingu* state APA, in Pará, adopts a more conservative approach to risk. In this project, the contractual division of risk focuses mainly on absolving private entities from responsibility for environmental crimes committed by third parties, such as intentional illegal burns carried out by invaders. Thus, while the *Bom Futuro* National Forestry concession explores some additional flexibilities, the APA *Triunfo do Xingu* concession applies a more conservative distribution of risks that reflect the minimum requirements of the LGFP.²²

Regardless of how risk is allocated in the contract, in areas of high land risk in the Amazon the duty of vigilance requires a series of actions to monitor and protect the integrity of the area granted. These actions, although essential to prove compliance with the duty of vigilance and exempt the concessionaire from liability for damage caused by third parties, do significantly increase operating costs and increase financial risks.

Another limiting factor for forestry concessions is the restriction of use to certain categories of land. Forestry concessions cannot be applied in PCT territories, full protected areas, Sustainable Development Reserves (*Reservas de Desenvolvimento Sustentável* - RDS), Extractive Reserves (*Reservas Extrativistas* - RESEX), Wildlife Reserves and Areas of Relevant Ecological Interest, unless the activity is expressly provided for in the respective management plans. When applicable to RDS and Resex, the planning and implementation of forest restoration concessions must also guarantee the meaningful participation of local communities.

These limitations do not necessarily make the use of forestry concessions for restoration unfeasible. However, the implementation of a large-scale restoration policy on public lands, especially in the Amazon, may require greater flexibility for projects where forestry concessions are not viable. This means expanding the list of legal instruments for partnerships between the public and private sectors.

21 PPI. *Management units in the Bom Futuro National Forest/RO*. 2024. bit.ly/3Va39zE.

22 SEMAS. *Consulta Pública da Unidade de Recuperação Trinfo do Xingu*. 2024. bit.ly/3OmzL5G.

Important Differences between Restoration and Forest Management

The regulation of partnerships for restoration should be distinct from the regulation of concessions for forest management for two key reasons. First, to prevent the restrictions applicable to management from becoming an obstacle to large-scale restoration policies. Second, because management and restoration have different assumptions regarding the nature of the activities, the context of the specific public lands where they are carried out and the costs and benefits involved for the entrepreneurs and the community.²³

The assumptions of a forest management concession include: (i) logging as an activity, (ii) operating in conserved forests, (iii) predominantly private benefits for the concessionaires, who act at their own risk, and (iv) collective and diffuse environmental impact risks, justifying the restrictions imposed by the LGFP.

The assumptions of a restoration concession are: (i) forest recovery as an activity, (ii) action in degraded or deforested areas, (iii) collective and diffuse benefits, such as the capture of atmospheric carbon by restoring forest cover, and (iv) restoration costs borne mainly by the concessionaire. Although restoration also brings profit to the concessionaire, the main benefit is the collective gain that restoration provides.

Given the limitations of the LGFP and the public interest nature of restoration,²⁴ it is advisable to consider other legal partnership models that could make a large-scale restoration policy viable, especially in cases where forestry concessions are not suitable or do not attract private interest.

23 Chiavari, Joana and Cristina L. Lopes. *O direito ambiental e a restauração florestal na Amazônia*. Folha de S. Paulo. 2024. Access date: October 5, 2024. bit.ly/3AzjKp0.

24 Concessions of environmental assets generate benefits beyond those directly related to the end activity granted. Learn more at: Acocella, Jessica and Helena M. Z. Rotta. "Green concessions, ESG agenda and its positive impacts." *Revista BNDES* 28, no. 56 (2021): 475-500. bit.ly/40YrAUA.

Alternatives to forestry concessions in partnership projects for large-scale restoration

This section sets out to analyze alternative legal models to forestry concessions to enable large-scale restoration projects on degraded public lands, an approach that is still little explored. In line with the recent Brazilian Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social – BNDES*)²⁵ on the commercialization of carbon credits and Payments for Environmental Services (PES), which evaluated potential partnerships in public lands such as national parks, national forests, extractive reserves and areas destined for land regularization, this paper broadens the scope of discussion to critical additional categories of public lands.

By advancing the identification of new partnership models fit for restoration, this publication deepens a fundamental discussion on the use of public service concessions (common and PPPs) and concessions for the use of public goods and ordinary tenders to broaden the range of alternatives for forest restoration policies.²⁶

Common Bids

Ordinary tenders, regulated by the New Procurement Process and Administrative Contract Law,²⁷ apply to a variety of contracts with the government for the purchase, sale and rental of goods and for the provision of services that meet the needs of the public authority, but which do not characterize a public service. For example, they are used to supply items such as computers, furniture, hospital supplies or to hire companies to provide information technology, cleaning and security services in government buildings. In the case of restoration, public agencies can contract a private partner to carry out forest planting services.

25 BNDES. *Análise jurídica - Projetos de carbono e outros PSAS*. 2024. bit.ly/3ZtwesF.

26 Another important recent effort is the publication by the Arapyaú Institute which elevates questions such as how to determine the best form of “public concession” contract applicable to the activity. It also presents the challenge of implementing restoration projects on land occupied by traditional peoples and communities. Learn more at: Instituto Arapyaú. *Brazilian Private Sector Pre-Competitive Actions on Forest Restoration*. 2024. bit.ly/4lignOX.

27 Law no. 14,133, April 1, 2021. bit.ly/3NayeMI.

Common bidding offers certain advantages: the New Procurement Process and Administrative Contract Law does not impose a list of burdens and allows for a flexible distribution of risks, adjustable to each party's ability to manage them.²⁸ In addition, the model is applicable to various land categories, making it more adaptable to different regions and contexts. Currently, the use of ordinary tenders in restoration projects is unusual and unfamiliar to government contractors and, although the New Tender Law can be used to contract forest planting projects, additional regulations would provide greater legal certainty and flexibility in the execution of these projects.

The common bidding model for forest restoration could be applied to degraded public areas within Full Protected Areas, such as national parks, where the aim is to plant native species, without requiring ongoing management by the private partner. As stated in PLANAVEG, there are 1.3 million degraded hectares in Protected Areas. In this case, the government could hire a specialist company to carry out the planting and recovery of native vegetation. The government would pay simply for those particular services rendered, without any additional revenue negotiation nor the need to enter into contract for economic exploitation of the area. Once the planting is complete, responsibility for long-term monitoring and conservation would remain with the government, which is already responsible for managing these protected areas.

28 Law no. 14,133, April 1, 2021. bit.ly/3NayeMl.

In addition to providing flexibility in the distribution of risks and responsibilities, the application of common bidding could be a straightforward option for the restoration of areas in land categories where the government already has established administrative and monitoring operations.

Common Concessions

In common public service concessions, a private entity takes over from the government to manage public works, such as transportation or sanitation. The main rule regulating these partnerships is the Concessions Law,²⁹ applicable to contracts in which the concessionaire is compensated primarily by the fees paid by users of the public service.

In addition to the main income from fees, the Concessions Law allows the contract to include sources of ancillary income, as long as the central object continues to be the provision of the public service. Thus, the concessionaire can, in some cases, commercially exploit areas related to the service, such as renting commercial space in a transport station, adding to the project's profitability without involving further direct payments from the public authorities.

Therefore in theory, **common concessions could be applied to forest restoration projects through a government contract with a private partner to plant and manage a desired restoration area.** It could also be possible to compensate concessionaires through the sale of carbon credits generated by the restoration. According to the LGFP, in forestry concessions the ownership of the carbon credits initially belongs to the government, but it can transfer them to the private partner through the provisions in the concession contract. The transfer of carbon credits was a new practice that was introduced in the LGFP and, although it is not part of the traditional concept of common concessions, it could in theory also be applied in order to make restoration projects viable.

Even if the credits are treated as ancillary revenue for the concessionaire, they are an additional indirect form of payment by the government; this differs from the conventional structure of common concession contracts. But since the transfer of carbon credits has been considered feasible in forestry concessions, there is

29 Law no. 8,987, February 13, 1995. bit.ly/4hXZNtr.

nothing to prevent it from also being appropriate in public service concessions aimed at restoration. In both common concessions and in forestry concessions, the ownership of the credits and the conditions for their transfer and sale must be clearly defined in the calls for tenders and contracts. Note that in ordinary tenders, payment to the winning bidder can only be in cash, which excludes the possibility of ancillary revenues such as carbon credits.

One advantage of common concessions compared to forestry concessions is that, as with ordinary tenders, there are no restrictions on the land categories where they can be implemented, which broadens their scope of action. However, the use of common concessions for restoration is still problematic. In addition to lacking specific regulations for restoration, the Concessions Law establishes that the exercise of the concession is at the concessionaire's own risk and imposes a list of generic contractual obligations.³⁰ The distribution of risks and burdens in common concessions is not very flexible.

Next we will examine the opportunity to authorize restoration as a public service (Box 2).

³⁰ Law no. 8,987/1995, Art. 2, Art. 29 and Art. 31. Learn more at: bit.ly/4hXZNtr.

Box 2. Characterization of Restoration as a Public Service

The use of common concession models and Public-Private Partnerships (PPPs) for the restoration of public lands requires a legal standard that allows restoration activities to be classified as a public service.

Although public service is traditionally associated with essential activities, such as sanitation and transportation, Brazilian legislation currently already allows a certain flexibility to include other public interest activities. Forest restoration removes carbon from the atmosphere and preserves biodiversity, contributes directly to tackling the climate crisis, and generates broad benefits for society. These elements of forest restoration would justify its inclusion in the definition of public service.

This classification is based on both constitutional provisions and infra-constitutional rules. Article 225 of the Federal Constitution establishes that everyone has the right to an ecologically balanced environment, and that it is the duty of the public authorities and the community to defend and preserve it for present and future generations. Specifically, §1, item I imposes the responsibility to “preserve and restore essential ecological processes.” Thus, the restoration of degraded or deforested public lands is a public responsibility which could be delegated to the private sector.

The recent introduction of article 14-D of Law no. 11,516/2007 (ICMBio Law)³¹ authorizes concessions in protected areas to include in their objective the right to develop and market carbon credits and environmental services. This provision sets a precedent for considering forest restoration a public service activity, allowing it to be delegated in common concession contracts or through PPPs.³²

31 Article 14-D was included in the ICMBio Law by Law no. 14,590, May 24, 2023. Learn more at: Law no. 14,590, May 24, 2023. bit.ly/3MocmA6.

32 The BNDES study argues that: “Given these contours brought about by the LPNPSA [National Policy Law on Payment for Environmental Services], by article 14-D of Law 11.516/2007, by the Constitution and applicable to PES projects, it is reasonable to conclude that environmental services are services of public interest/public service, the beneficiary of which is the community, thus making delegation under the public service concession modality feasible.” To find out more: BNDES. *Análise jurídica - Projetos de carbono e outros PSAS*. . 2024. bit.ly/3ZtwesF.

Public-Private Partnerships

The Public-Private Partnership Law (PPP Law),³³ regulates two types of public service concessions intended for large projects that require a high initial investment, in which the fees paid by users are insufficient to cover all the costs and which require additional financial contributions from the government. In a **sponsored concession**, the private sector is compensated both by fees charged to users and by public contributions; this type of concession is applied often to projects such as the construction and operation of metro lines.

Administrative **concessions** focus on services that directly benefit the government but do not have a user fee structure. The government pays the private partner for the service, for example, in the construction and management of prisons and the management of public lighting networks. This compensation can be made in cash or in other ways provided for in the PPP Law, including by bank orders, the assignment of non-tax credits or other forms allowed in general legislation.³⁴ This flexibility allows the government to use the transfer of carbon credits as a form of payment, which expands the possibilities of financial viability for restoration projects.

PPPs can be applied to forest restoration projects in two ways. In a **sponsored concession, the private partner carries out the forest planting and management of the restored area and is compensated by public contributions as well as from the sale of carbon credits as ancillary income**. This model is suitable for projects where the carbon credits do not fully cover the costs. In the **administrative concession, the private partner also undertakes the forest planting and management, but is compensated solely by the government, either in cash or by other mechanisms, such as the transfer of carbon credits** or the rights to public property or non-tax credits.

³³ Law no. 11,079, December 30, 2004. bit.ly/3OI7OLn.

³⁴ Di Pietro, Maria S. Z. *Parcerias na administração pública: concessão, permissão, franquia, terceirização, parceria público-privada e outras formas - 9ª edição*. São Paulo: Atlas, 2012.

Compared to forestry concessions, PPPs offer greater flexibility in the division of risk³⁵ and in the application to different land categories. They also offer as well as the security of government cash payments, which is an important incentive given the cost of monitoring and security in highly vulnerable areas of the Amazon. However, the implementation of PPPs in public land restoration projects still requires the classification of restoration as a public service.

It is important to note that restoration projects on lands occupied PCTs, such as Indigenous Lands and Quilombola Territories, need to take into account a series of socio-environmental safeguards, regardless of the partnership model adopted (Box 3).

Finally, the use of common concessions or PPPs to restore public lands may face legal challenges related to the principle of specificity. This principle indicates that when there is a specific law for a type of partnership—such as the LGFP for forestry concessions—the law should prevail, which could limit the use of common concessions or PPPs to these projects.

35 Law no. 11,079/2004, Art. 4, VII and Art. 5, *caput*, III. Learn more at: bit.ly/3OI7OLn.

Box 3. Socio-environmental Safeguards in Territories of Traditional Peoples and Communities

The Amazon's land ownership structure is made up of a mosaic of land ownership categories, including PCT designated public lands, such as Indigenous Lands, Quilombola Territories, Protected Areas for Sustainable Use, Environmentally Differentiated Settlement Projects, as well as settlements on public land that are not currently legally designated.³⁶

In this context, partnerships between the private sector and public agencies to promote restoration projects on public lands must consider the presence of PCTs in the area and apply socio-environmental safeguards to guarantee the rights of these communities.

These safeguards must be drawn up before the bidding documents are published with the active participation of the communities, respecting their right to Free Prior and Informed Consultation. Among the safeguards are: (i) recognition and respect for territorial and cultural rights, traditional knowledge and ways of life; (ii) the role that communities will play in the projects, as active partners and not just beneficiaries; (iii) the creation of clear and fair mechanisms for distributing benefits to communities, such as employment, training and income; (iv) the implementation of monitoring, security and inspection systems to guarantee territorial integrity.^{37,38,39}

In addition, effective and transparent project governance is essential, as is the adoption of best practice protocols and continuous monitoring to ensure compliance with safeguards throughout the contract period.

36 Chiavari, Joana, Cristina L. Lopes and Julia N. de Araujo. *Panorama dos Direitos de Propriedade no Brasil Rural*. Rio de Janeiro: Climate Policy Initiative, 2021. bit.ly/PanoramaDireitosDePropriedade.

37 MPF Pará. *Nota Técnica nº 02/2023*. 2023. bit.ly/3B5C49X.

38 Forest Peoples Programme and Global Justice Clinic. "Indigenous Peoples' Rights and Carbon Markets." In *Carbon Markets, Forests and Rights: An Introductory Series*. 2023, 24-35.

39 Funbio. *Projetos de Carbono em terras indígenas*. 2022. bit.ly/3V3GBk8.

Next Steps for Forest Restoration on Public Lands

Several important challenges have been elevated and examined in this publication regarding the viability of additional models of public-private partnerships applicable for restoration projects of degraded and deforested public lands. Advancing the restoration agenda at scale, especially in the Amazon, requires these challenges to be addressed with clarity, speed and intention. Here are our recommendations:

1. **Classify restoration as a public service.** It is essential to legally designate forest restoration a public service activity in order for models such as common concessions and PPPs to be applied safely and efficiently. This legal recognition, combined with specific regulations, would expand the possibilities for partnerships and strengthen the legal certainty of contracts.
2. **Train and prepare public agencies for better risk management.** Public forest and land management entities could take on some risks that are currently the responsibility of private partners, including carbon permanence. Assessing the institutional capacity to take on and manage these risks is fundamental in order to design contracts that attract the private sector and guarantee the effectiveness of the partnerships.
3. **Create an entity to manage environmental assets.** The creation of a specialized entity to manage environmental assets, such as carbon credits, could facilitate the use of credits as a source of revenue in concession contracts and PPPs. This institutional structure, if adopted by the state of Pará, could bring greater legal and operational certainty, helping to enable contractual models and financial structures involving the commercialization of credits originally owned by the public administration.

4. **Continue assessing the efficacy of the LGFP.** The recent change to the LGFP to define the responsibility of public agencies to prevent and repress third-party illegal activities is an important step forward. However, it is necessary to assess the extent to which this provision translates in practice into more balanced risk management and a safe environment for long-term investments in restoration.
5. **Innovate calls for tenders and contracts to improve risk distribution:** Exploiting regulatory gaps in calls for tenders and contracts can be an effective strategy to improve risk distribution between the public and private sectors, making forestry concessions and other alternative contractual models more attractive and flexible for different contexts and regions.

Our analysis, recommendations and mapping of alternative restoration partnership models to forestry concessions can guide the construction of an action plan for public agencies. With the cooperation of academia, civil society and the productive sector, such a plan has the potential to promote crucial restoration activities at scale in Brazilian public lands and have a significant impact on global climate change mitigation efforts.

AMAZÔNIA 2030

