Environmental Civil Liability of Financing Agents in the Brazilian Law

Responsabilidade Civil Ambiental das Instituições Financeiras no Direito Brasileiro

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ABSTRACT: The article aims to present an analysis of the civil liability, regarding the environmental aspect, of financial institutions in the case of damages caused to the environment in light of Brazilian law. From Federal Law No. 6.938, dated 08/31/1981, we present some cases of its application with the Brazilian financial institutions. In addition, the Equator Principles have become key instruments in project evaluations financed by financial agents. And despite the compensation for damages caused to the environment, the Brazilian Civil Code in its art. 927 represents the basis of its rationale. However, in spite of the entire Brazilian evolutionary process in favor of environmental protection, the role of financial institutions as economic and credit agents in the application of civil liability for environmental damages should not be confused. This article is based on the hypothetical-deductive method, as well as on the analysis of bibliographical references and Brazilian legislation.

KEYWORDS: environmental civil liability; potentially polluting activities; financial institutions; stricty liability.

RESUMO: O artigo visa apresentar uma análise da responsabilidade civil, no que tange ao aspecto ambiental, das instituições financeiras no caso de danos causados ao meio ambiente à luz do direito brasileiro. A partir da legislação federal nº 6.938, de 31.08.1981, apresentamos alguns casos de sua aplicação junto as instituições financeiras brasileiras. Além disso, os Princípios do Equador passaram ser instrumentos fundamentais nas avaliações dos projetos financiados pelos agentes financeiros. E a despeito da indenização por danos causados ao meio ambiente, o Código Civil Brasileiro em seu art. 927 representa a base de sua fundamentação. Todavia, apesar de todo o processo evolutivo brasileiro em prol da proteção ambiental, não se deve confundir o papel das instituições financeiras como agentes econômicos e de concessão de crédito no que tange à aplicação da responsabilização civil por danos ambientais. Este artigo está redigido com base no método hipotético-dedutivo, bem como na análise de referências bibliográficas e legislações brasileiras.

PALAVRAS-CHAVE: responsabilidade civil ambiental; atividades potencialmente poluidoras; agentes financeiros; responsabilidade objetiva.

INTRODUCTION

Sixteen years has passed since the promulgation of Federal Act No. 6.938, dated 08.31.1981, which instituted the National Environmental Policy Act, still in force, and approved by the Federal Constitution of 1988, and the environmental liability of the agent responsible for potentially polluting activity is still discussed and object of divergence.

The aforementioned norm was the legal basis framework that brought environmental protection to the national political status in our legal system, and defined objectives, principles, guidelines, instruments, attributions and institutions which formed environmental protection foundation in Brazil.

Before 1981 there were standards dealing with environmental protection, but they were scattered legal devices, or regulations that dealt with specific aspects of environmental protection.

The National Environmental Policy Act was and continues to be the legal instrument that brought together the guidelines of environmental protection, and since its promulgation Brazil started to move from a reactive/corrective approach to a preventive approach, where environmental protection went from hindrance to economic development to being a part of it.

Therefore, section 12 of the National Environmental Policy Act regulated the obligation of financial institutions, when granting loans to projects, to demand compliance with environmental obligations.

Section 12 establishes that: The entities and organs of financing and governmental incentives will condition the approval of projects qualified to these benefits to the environmental permit, in the form of this law, and to the

fulfillment of the regulations, the criteria and the standards issued by Environment *National Council* (Conama)[1].

However the National Environmental Policy Act has not only brought the obligation of the financing agents to require credit borrowers to comply with environmental standards. It also instituted strict civil liability, where the polluter is required to indemnify or repair damages caused to the environment and to third parties, regardless of the existence of fault or intention.

In addition to establishing the strict modality for environmental civil liability, the referred infraconstitutional standard also brought an extremely comprehensive concept of polluter in its section 3, IV:

Section 3º. For the purposes set forth in this act, the following definitions shall apply: [...] IV – polluter, the natural or legal person, public or private, directly or indirectly liable for the activity that causes environmental degradation.

Thus by providing credit for a project that would cause environmental damage, could financial institutions be considered as indirect polluters, and would they be subject to strict civil liability?

1 REGULATORY NORMS AND FINANCIAL INSTITUTIONS SELF REGULATION IN ENVIRONMENTAL MATTERS

Despite the section 12 of Federal Act No. 6.938/81 expressly refers to financing entities and government incentives, it is discussed whether compliance with this legal obligation would not extend to private entities and financing bodies, due to the uniqueness and indivisibility of the National Financial System.

However, it is not possible to conceive that only public financial institutions would be required to demand credit borrowers to comply with environmental legislation, and private institutions should be exempt from this obligation.

If this were the case, not only would this differentiation affect the supply of credit in the market, since it would bring burdens to some and not to others. It would also confront the constitutional provision contained in section 192, which states that the National Financial System is structured in such a way as to promote the balanced development of the country and to serve the interests of the community.

On the other hand, private financial institutions eventually felt the pressure of society and the international market, which, in a growing movement,

1 Conselho Nacional do Meio Ambiente.

became less and less tolerant of economic development at any cost and began to voluntarily adhere to the protocols and principles that instituted the need to include socio-environmental variables in the analysis for granting credit.

In 1992, the Declaration of the Banks for the Environment and Sustainable Development was one of the first acts that involved environmental lending. This document was drawn up on the initiative of the United Nations Environment Program (UNEP) and was initially signed by more than 30 commercial banks from 23 countries, including the *Bank of the State of São Paulo* (BANESPA)[2], and later the National Bank for Economic and Social Development (BNDES)[3].

In 1995, a working group was created in Brazil by the federal government, with the objective of facilitating the incorporation of the environmental variable in the process of management and concession of official credit. The result was the Charter of Principles for Sustainable Development, also known as the Green Protocol, and the main public financial institutions (BNDES, Bank of Brazil, Caixa Econômica Federal, *Northeastern Brazil Bank*, Bank of the Amazon[4]) signed to it.

So far, it has been noticed that in Brazil only public financial institutions have signed to the two initiatives. This scenario underwent a change in 2003, with the emergence of the Equator Principles.

The Equator Principles were drafted by IFC (International Finance Corporation), and initially the minimum environmental and social responsibility criteria outlined in this document would be applied to projects with a total cost equal to or greater than US $ 50 million. In its third revision, the Principles are now applicable to projects worth more than $ 10 million.

According to its official website[5], 70% of international project finance operations in emerging countries are carried out by private banking institutions that signed these principles.

More recently, on 04.25.2014, the National Monetary Council (CMN) published Resolution No. 4.327, which determines the establishment and implementation of the Social-Environmental Responsibility Policy (PRSA) by financial institutions and other institutions authorized to operate by the Central Bank.

From here we have a standard that is clearly addressed to all national financial institutions, both public and private.

2 Banco do Estado de São Paulo.

3 Banco Nacional de Desenvolvimento Econômico e Social.

4 Banco do Brasil, Caixa Econômica Federal, Banco do Nordeste do Brasil e Banco da Amazônia.

5 www.equator-principles.com

In order to regulate the development and implementation of the *Social and Environmental Liability Policy* (PRSA)[6], *Brazilian Federation of Banks* (Febraban)[7] published on 28.08.2014 the Brazilian *Banking Self-Regulation System 14* – SARB[8]. It provides for mandatory inclusion of contractual clauses to require compliance with environmental legislation, obligation of the borrower to monitor its activities, and of its direct and relevant suppliers, to mitigate environmental impacts, as well as the possibility of early maturity of the debt in the event of an environmental license cancellation of the financed enterprise.

We could say here that these instruments of banking regulation and self--regulation stem from a greater awareness of financial institutions regarding the importance of their role in sustainable development.

However we cannot disregard the fact that signing up to these instruments and the adoption of their guidelines directly affect the business of financial institutions, since environmental problems in the financed project can affect the value of the assets pledged and depreciate the equity of the financed enterprise, thus hindering the receipt of the amount granted in credit.

In addition the risk of being side by side with the entrepreneur in the dock, assuming equally or fully the costs of repairing the damage caused, has also been a great incentive to the development and adoption of environmental assumptions in the granting of credit.

2 THE ENVIRONMENTAL LIABILITY IN BRAZIL

Civil liability in Brazilian legislation is based on section 927 of the Civil Act, and deals with the obligation to indemnify an injury arising from non--compliance with a legal obligation:

Section 927. Anyone who, by an unlawful act (sections 186 and 187), causes harm to another, is obliged to repair it.

Single paragraph. There will be an obligation to repair the damage, regardless of fault, in cases specified by law, or when the activity normally developed by the perpetrator of the damage implies, by its nature, risk to the rights of others.

From the aforementioned legal provision, it can be deduced that, as a rule, civil liability in Brazilian law is based on fault, being necessary the existence of three elements for its configuration, such as intention or fault, causal nexus and damage.

6 *Política de Responsabilidade Socioambiental.*
7 Federação Brasileira de Banco (Febraban) – *Brazilian Federation of Banks.*
8 *Sistema Brasileiro de Autorregulação Bancária.*

Strict civil liability is an exception, and will only be admitted, as provided in the sole paragraph of section 927, when so clearly defined in law, or when the activity of the perpetrator of the harm entails a risk to the rights of another.

Thus, section 14 paragraph 1, Federal Act No. 6.938/81 clearly states that in cases of environmental damage, liability will be strict, as the causative agent will be held responsible and obligated to repair or indemnify the damages that he caused regardless of the existence of fault or intention.

The legislator opted for this type of civil liability since it is understood that it would be a very heavy burden for society to prove the volatile element of the polluter. This would mean that, in addition to the polluter is using environmental goods for his own benefit, he would still benefit from the difficulty of proving his intention to cause damage, once again on the collective burden of bearing the loss caused.

In spite of dispensing with the need to prove the deceit or guilt of the agent causing the damage, to establish strict liability, it is essential to have a causal link between the activity and the damage caused, and the actual existence of the damage.

In excluding the fault of the elements forming the civil liability, both in the sole paragraph of section 927 of the Civil Act and section 14 paragraph 1 of Federal Act No. 6.938/1981, the assignment of civil liability becomes a risk.

With regard to the sole paragraph of section 927, the legislature clearly stated that strict civil liability would be based on the theory of risk created, that is, the one that by its activity causes injury to another has the obligation to indemnify it.

In this case, it is essential to have a causal link and prove the damage, and in this modality the invocation of the exclusions of unlawfulness, that is, the fortuitous case/force majeure and the third fact, are admitted.

With respect to the strict liability provided for in the *National Environment Policy* Act (PNMA)[9], both a part of the doctrine and the jurisprudence have defended the application of the theory of integral risk, which relativizes the existence of the causal nexus, and does not admit the exclusions of illegality.

Thus with respect to the entrepreneur, the direct polluter, who actually performs the activity that caused the environmental damage, we have no doubt regarding the application and pertinence of strict liability. However, when we talk about strict environmental civil liability based on the theory of integral risk, we no longer follow the same understanding of the dominant doctrine, since

9 *Política Nacional do Meio Ambiente.*

it is a kind of exception liability, and only if the norm of environmental law defines it clearly in its statement that accountability would be based on integral risk, we understand that in an extensive manner one must apply the theory of risk created, as stipulated in the sole paragraph of sction 927 of the Civil Code.

With regard to civil liability of financial institutions that have granted credit for a project that has ultimately caused environmental damage, we have two potential situations. On one hand, the financial institution follows the entire protocol, requests the pertinent environmental permits, verifies compliance with the conditions and quality standards imposed by the environmental body, and confirms that all mitigating and compensatory measures will be adopted by the entrepreneur.

In this case, we believe that it is difficult to characterize the financial institution as an indirect polluter, and thus, its strict civil responsibility, since it took all necessary measures and that would be within its scope to verify the regularity of the company.

However, it is not part of the company's decision-making process, and is not present on the daily basis, and for this reason, the activity of the financial institution is not related to the damage caused. The claim that if there had been no financing of the potentially polluting activity, it would not exist and consequently, the damage would not be caused, it is fragile, as if the act of financing alone could cause harm.

On the other hand, if the financial institution is aware of its duty of diligence, it did not do it, or did it in an inadequate and incomplete way, and the damage occurred, the financial institution would be liable to environmental liability, but based on fault theory, i.e. it is necessary to prove a conduct, and the cause and effect relationship between the negligence/omission of the bank and the damage.

In this sense, our country Courts have positioned themselves, although there are not many decisions on the subject.

The Supreme Federal Court, in a monocratic decision of minister Roberto Barroso, issued in 2015, legitimized the decision of the Federal Regional Court of the 1st Region in 2000[10], recognizing that Caixa Econômica Federal could not be held liable for any environmental damage resulting from a project, since it was not the responsible for the activity[11]:

> CONSTITUTIONAL AND CIVIL PROCEDURE – CIVIL ACTION ORIGINATING – CONFLICT OF ATTRIBUTIONS BETWEEN MPF AND MPE – ANY

10 AgIn 1997.01.00.064333-4/AC, Rel. Convocado Juiz Antônio Sávio Chaves, J. 07.11.2000.

11 ACO 2475. Rel. Min. Roberto Barroso, Julgado em 24.08.2015, publicado em DJe-168 em 27.08.2015.

> IRREGULARITIES IN REAL ESTATE FINANCED BY THE FEDERAL ECONOMIC BOX – ATTRIBUTION OF THE STATE PUBLIC MINISTRY – 1. In accordance with the guidance still in force in the STF, this Court is responsible for adjudicating conflicts of jurisdiction between members of the Federal Public Prosecutor's Office and the States (article 102, I, f, of the Federal Constitution). 2. The demonstration that Caixa Econômica Federal acted only as a financial agent in the strict sense, responsible for the release of financial resources for the acquisition of property already built, and not as an executing agent of federal public policies for housing promotion, responsibility for possible environmental damage caused by the existence of uneven sewage on the property. Precedent of the Superior Court of Justice. [...]

In a decision handed down by the Federal Regional Court of the 1st Region in case the civilian environmental liability of BNDES was sought along with other actors for environmental damages caused by mining activity, it is clear the application of the fault liability of the financial institution[12]:

> As for the BNDES, the mere fact that it is the financial institution responsible for financing the mining activity of CMM[13], in principle, it does not legitimize it to appear in the passive area of the demand. However, if it proves to be in the ordinary course of action that the said public company, even when it was aware of the occurrence of serious environmental damage that reflects significant environmental degradation or that it was aware of the occurrence of such damages, released intermediate or final portions of the resources for the mining project of the said company, there, it will be responsible jointly with the other entities for the damages caused in the property in question, by virtue of the norm registered in art. 225, caput, § 1, and respective sections, notably items IV, V and VII of the Major Law.

In this judgment, the mere act of financing activity that subsequently causes environmental damage lacks a causal link. However, if it becomes clear that the bank was aware of or has become aware of the injury to the environmental good, and still it continued to fund the project, the causal link is established when faced with the conduct of the financial agent.

In addition to these two decisions, we can cite other judgments that address the issue in the same way: ApCiv. 25,408, judged by the Court of Mato Grosso on April 17, 2001; AgIn 2008.04.00.027923-6/SC, judged by the Federal Regional Court of the 4th Region on October 21, 2009; ApCiv 1.0775.11.001630-7/002, judged by the Court of Justice of Minas Gerais on 07.11.2012; and, AgIn 1.433.170, judged by the Superior Court of Justice on December 9, 2014.

12 EDAG 2002.01.00.036329-1, Rel. Des. Fed. Fagundes de Deus, 5ª Turma, J. 15.12.2003.

13 *Companhia Mineira de Metais.*

It is important to keep in mind that there is a fine line between the legal duty of financial institutions to verify the environmental regularity of the projects financed and the transfer of the inspection duty that belongs to the State. It is not the responsibility of the financial institution to interfere in the activity of the entrepreneur to carry out counter-proof of the presented evidences of compliance with the environmental legislation and norms.

It is not for the financial institution to analyze whether the valid environmental permit presented does not have any type of nullity, or if it was obtained with the correct environmental study. Just as it is not up to the financial institutions to question whether the effluent discharge standards imposed by the competent environmental agency and which are being addressed by the entrepreneur are the appropriate standards for that activity.

We cannot disregard the fact that if the financing agents were equal to the direct polluter in terms of civil liability, this factor would lead to an increase in the rates of credit[14] charged due to the increase in credit risk, as well as a of the concept of polluter.

This also what happened in the United States in the early 1990s. After the publication of the Comprehensive Environmental Response, Compensation and Liability Act – CERCLA, a law issued in December 1980, the US Environmental Protection Agency (EPA) was in charge to carry out the decontamination of contaminated areas and to charge those responsible for the costs and damages related to this contamination.

Also known as Superfund, the law provided four types of officers: i) people who own or operate contaminated sites; ii) persons who owned or operated contaminated sites at the time of contamination; (iii) those that generate or transport pollutants, and (iv) those who dispose of those substances incorrectly on the soil or property that has been contaminated.

However, in the early 1990s, due to the United States v. Fleet Factors Corp.[15], those entities that financed those responsible in item i and ii above also became jointly liable, and should bear the costs of remediation and damages.

14 According to Waisberg and Vianna (2008: 180) "and the financier responded based on the conduct of the financier and not his, he would have no incentive to be zealous. The law, smarter than some of its commentators, has given the financier a strong incentive to fulfill its obligations to the implementation of public environmental policy: to be responsible for its actions. In doing so, it did not compromise the supply of credit, nor did it fail to efficiently protect the environment with a necessary responsible lending of credit" (Apud GUILHARDI, 2015).

15 Swainsboro Print Works (SPW), a textile manufacturer, obtained from the Fleet Factors Corporation (Fleet) loan to finance its operating capital from 1976 to 1981. In August 1979, SPW filed for bankruptcy, yet Fleet continued to finance it, and in 1981, with the suspension of the financing, the company ended up suspending its operation. Fleet then liquidated SPW's assets that were pledged as collateral (equipment and property), but did not permanently terminate the company's industrial site, while retaining its ownership. Two years later, the EPA found on the company's site about 700 drums of chemicals, and a substantial amount of asbestos

In the decision, the court understood that the financing agent did not need to be present in the day-to-day business of the company, having only the power to influence the decisions of the entrepreneur on the disposal of their hazardous waste, to be jointly responsible, thus expanding accountability of the financing agent.

That decision astonished the American financial community, and as Reis[16] rightly put it, "the fear of environmental liability ended up freezing the supply of new funding," prompting the 1996 US Congress to issue a new standard, Asset Conservation, Lender Liability, and the Deposit Insurance Protection Act, which again brought legal certainty to the subject by defining objective accountability parameters for the funding agents.

As we have already explained, according to section 192 of the Federal Constitution, the National Financial System is structured in such a way as to allow the country's economic development, which is one of the pillars of sustainable development. By expanding environmental liability in an unlimited way, credit can be made unfeasible because of the increased risk, which would cause real social disservice.

CONCLUSION

The evolution of environmental protection in Brazil is undeniable, and our Federal Constitution was one of the first in the world to raise the right to the environment as a fundamental right.

However, we can not forget the true concept of Sustainable Development, and its three pillars: Economic Development, Social Development and Environmental Protection, which have the same weight and importance.

Thus, financial institutions belonging to the National Financial System play an important role as promoters of the economy by making credit available for the development and growth of economic activity in the country.

It does not make sense to apply the liability set forth in section 14 §1 of Federal Act No. 6.938/81 to the credit grantor, in the event of environmental damage arising from the activity financed. This is a rule of exception, and for this reason must be applied sparingly and in a restrictive manner.

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in some buildings. EPA had a total cost of $ 400,000 to perform the remediation of the site. EPA sued Fleet based on CERCLA requesting reimbursement of these costs, arguing, in summary: (i) That Fleet would be the current owner and operator of the contaminated industrial site; and (ii) that Fleet was the owner and operator of the contaminated site at the time of improper disposal of toxic waste.

16 REIS, Antônio Augusto Rebello. Financiamentos e a responsabilidade civil ambiental in Tópicos do Direito Ambiental: 30 anos da Política Nacional do Meio Ambiente. Rio de Janeiro: Lumen Juris, 2011. P. 461.

If we considered the possibility of strict accountability of financial institutions and such responsibility was not standardize or the fulfillment of their legal duty to require that those financed prove the environmental regularity of the projects was not considered, there would be a great disincentive for the banks to adopt socio-environmental criteria in the concession of credit.

This does not mean that the financial institution can not be held accountable in such cases. But it is imperative to consider whether it acted negligently, or has acted negligently, for not requiring the effective verification of the environmental regularity of the project, or in an intentional way, to become aware of noncompliance with environmental norms, opted to continue financing the project.

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