

THE ENVIRONMENTAL RESPONSIBILITY OF FINANCIAL INSTITUTIONS AND REGULATION: BRIEF REFLECTIONS ON THE PUBLIC CONSULTATION 85/2021 OF BANCO CENTRAL DO BRASIL – BACEN

A RESPONSABILIDADE AMBIENTAL DAS INSTITUIÇÕES FINANCEIRAS E A REGULAÇÃO: BREVES REFLEXÕES SOBRE A CONSULTA PÚBLICA 85/2021 DO BANCO CENTRAL DO BRASIL – BACEN

LA RESPONSABILIDAD AMBIENTAL DE LAS INSTITUCIONES FINANCIERAS Y LA REGULACIÓN: BREVE REFLEXIONES SOBRE LA CONSULTA PÚBLICA 85/2021 DEL BANCO CENTRAL DO BRASIL – BACEN

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SUMMARY: *Introduction; 2 Environmental civil liability – Main Bases; 3 Environmental civil liability – specific mechanisms for its effectiveness; 4 Civil environmental responsibility of financial institutions as indirect polluters - doctrinal differences; 5 CMN Resolution 4.327/2014 and SARB Normative 14/2014; 6 Public Consultation 85/2021; 7 Conclusion; References.*

ABSTRACT: The concern regarding the environment is one of the greatest marks of the 21st century. The Law also follows such trend through the creation of laws which increasingly harden the unbridled exploitation of natural resources and the application of environmental principles to economic activities, in order to guarantee the so-called “sustainable development”. However, when the financed entity generates environmental damage, the question of the environmental liability of the financing entity arises, as well as what precautions such entities should take regarding to the financed enterprises. As specific objectives, this article will study the regulation of the financial sector on the subject (CMN Resolution 4,327 / 2014 and SARB Regulation 14/2014) as well as the proposal for improvement in the socio-environmental regulation applicable to the financial sector, brought about through the Public Consultation 85, opened by the Central Bank of Brazil. As conclusion, it will be seen that the new regulation proposed by BACEN demonstrates an evolutionary leap in the treatment of socio-environmental responsibility by financial institutions, but only time will show the effectiveness of the new mechanisms created, which can be assessed by caselaw and legal opinions from analysis of environmental infractions generated by new enterprises.

KEY WORDS: Environmental civil liability; Financing entities; Conflict prevention; Sustainability.

RESUMO: A preocupação com o meio ambiente é uma das maiores marcas do século XXI. O Direito também acompanha esta tendência por

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meio da criação de leis mais rígidas, além da aplicação dos princípios ambientais às atividades econômicas, com o fim de garantir o denominado “desenvolvimento sustentável”. No entanto, quando o ente financiado gera dano ambiental, surge a questão da eventual responsabilização do ente financiador e seu dever de precaução. O presente artigo tem como objetivo verificar se as instituições financeiras são responsáveis, sob a ótica ambiental, pelos danos causados pelos entes financiados. Como objetivos específicos serão estudados a regulação do setor financeiro sobre o tema (resolução CMN 4.327/2014 e Normativo SARB 14/2014), e a proposta de aprimoramento para a regulação socioambiental aplicável ao setor financeiro, por meio da Consulta Pública nº 85/2021, aberta pelo Banco Central do Brasil. Conclui-se que a nova regulação proposta pelo Bacen demonstra um salto no tratamento da responsabilidade socioambiental pelas instituições financeiras, mas somente o tempo mostrará a efetividade dos novos mecanismos, bem como a forma que tais mecanismos serão interpretados pela doutrina e jurisprudência na análise da responsabilidade civil ambiental das instituições financeiras em caso de dano ambiental praticado por ente financiado.

PALAVRAS-CHAVE: Responsabilidade ambiental; Instituições financeiras; Prevenção de conflitos; Sustentabilidade

RESUMEN: La preocupación por el medio ambiente es una de las grandes marcas del siglo XXI. La Ley también sigue esa tendencia a través de la creación de leyes que endurecen cada vez más la explotación desenfrenada de los recursos naturales y la aplicación de principios ambientales a las actividades económicas, a fin de garantizar el llamado “desarrollo sustentable”. Sin embargo, cuando la entidad financiada genera daños ambientales, surge la cuestión de la responsabilidad ambiental de la entidad financiadora, así como qué precauciones deben tomar dichas entidades con respecto a las empresas financiadas. Como objetivos específicos, este artículo estudiará la regulación del sector financiero en la materia (Resolución CMN 4.327/2014 y Reglamento SARB 14/2014) así como la propuesta de mejora en la regulación socioambiental aplicable al sector financiero, planteada sobre a través de la Consulta Pública 85, abierta por el Banco Central de Brasil. Como conclusión, se verá que la nueva regulación propuesta por el BACEN demuestra un salto evolutivo en el tratamiento de la responsabilidad socioambiental por parte de las entidades financieras, pero solo el tiempo demostrará la efectividad de los nuevos mecanismos creados, los cuales pueden ser valorados por la jurisprudencia y dictámenes jurídicos a partir del análisis de infracciones ambientales generadas por nuevos emprendimientos.

PALABRAS CLAVE: Responsabilidad civil ambiental; Entidades de financiamiento; Prevención de conflictos; Sostenibilidad.

INTRODUCTION

The concern regarding the environment, with undoubted certainty, is one of the greatest marks of the 21st century. Never before has there been so much debate concerning the need to preserve the environment, as well as reducing the so-called human “ecological footprint” on the planet, which increasingly demonstrates that it is close to environmental collapse.

In this area, the Law also follows such trend, either through the creation of laws, which increasingly harden the unbridled exploitation of natural resources, or through judicial action, which also contributes to the application of environmental standards and principles to economic activities, in order to guarantee the so-called “sustainable development”.

However, due to the complexity of human activities, of course, the application of environmental standards raises numerous questions, which sometimes end up in the Judiciary. Likewise, in eagerness to preserve the environment, the restrictions created (either by legislation or by measures imposed in lawsuits), sometimes, become the cradle of new questions.

Among the legal instruments for the protection of the environment, environmental civil liability gains prominence, being this the most powerful instrument applicable in case of environmental harm. In addition to repairing the environmental damage itself, the exemplary punishment of degraders also has a pedagogical bias, sending signals to other market agents to be more zealous with the environment in their economic activities.

Still on the environmental civil liability field, several issues arise from the application of this institute, in particular, with regard to the liability of indirect agents involved in environmental harm and the extent to which it is reasonable and proportional to extend the institute of environmental civil liability within the intricate economical chain. In this bias, there is a doubt concerning the responsibility of financing agents in the event of environmental harm, a topic that will be the subject of this study.

Rarely large works and enterprises are made possible without financing. However, when the financed entity generates environmental harm, the question arises of the environmental liability of the financing entity, as well as what precautions such entities should take in relation to the financed enterprises.

In order to seek answers to such questions, the present article has the general objective of verifying whether financial institutions are responsible, from an environmental perspective, for the harms caused by the financed entities.

As specific objectives, this article will study the regulation of the financial sector on the subject (CMN Resolution 4,327 / 2014¹ and SARB Regulation 14/2014) (FEBRABAN, 2014, online) as well as the proposal for improvement in the socio-environmental regulation applicable to the financial sector, brought about through the Public Consultation 85/2021², opened by the Central Bank of Brazil.

In relation to the adopted scientific method, the deductive method was chosen, as the descending reasoning will be used, starting from a larger theoretical analysis on environmental civil liability, for the specific question on the liability of the financing agents on the environmental damage caused by the financed entities.

This research can be characterized as a qualitative research, focusing on the study of the environmental liability by the financing agents, and bibliographic-documental research carried out from the study of the applicable legislation and *res judicata* on the theme, in order to classify it, regarding its objective, as exploratory.

2 ENVIRONMENTAL CIVIL LIABILITY – MAIN BASES

Environmental civil liability is based on Article 225, of the Federal Constitution, which guarantees: “everyone has the right to an ecologically balanced environment, a common use asset of people and essential to a healthy quality

¹ BRASIL. Resolução do Conselho Monetário Nacional nº 4.327/2014. Disponível em: http://www.bcb.gov.br/pre/normativos/res/2014/pdf/res_4327_v1_O.pdf. Acesso em: 16 fev. 2023.

² BANCO CENTRAL DO BRASIL. Consulta Pública 85/2021. Disponível em: <https://www3.bcb.gov.br/audpub/DetailharAudienciaPage?1>. Acesso em: 16 fev. 2023.

of life, imposing itself on the public authorities and the collectivity the duty to defend and preserve it for present and future generations". Paragraphs 2 and 3, of the aforementioned constitutional article, state that anyone who causes damage to the environment must repair the damage, regardless of criminal and administrative sanctions. If the environmental harm comes from the legal economic exploitation of a natural resource, the damage must be repaired, as established in environmental licensing.

environmental civil liability differs from general liability according to the basic principles of Environmental Law. The first principle to be cited is the precautionary principle, which can be summed up by the adage "*in dubia pro natura*". For Benjamin (1998), by the precautionary principle, "the potential degraders impose the burden of corroborating the harmlessness of their proposed activity, especially in those cases in which any damage may be irreversible, difficult to reverse or of a large scale"³.

In this light, in environmental civil liability, by applying the aforementioned principle, until the contrary is proven, the potential degrading activity is considered illegal and is subject to judicial interference.

Another basic principle of environmental civil liability lies in the "polluter pays" and "user pays" principle. In this sense, anyone who causes degradation of the environment (the polluter), or wants to exploit natural resources with inevitable degradation of the environment (the user), must bear the costs of its activity. So explains the authors (2011):

Such a principle is, in truth, a "principle of social solidarity", insofar as it imposes on the agent to avoid degradation and, having failed to avoid it, must answer for the damage caused. Thus, the element that differentiates the polluter-pays principle from traditional responsibility is that it seeks to remove the burden of economic cost from the collective's shores and direct it directly to the user of environmental resources.⁴

188

Benjamin (1988)⁵ adds that there is a hypothesis of subsidy for the one that depletes a natural resource and does not compensate the community, which is why, by the principle of the paying user, such subsidy is avoided, with the incorporation of the consumption cost of the collective good in the final price of its products and services.

In view of such explanations, it appears that, from the perspective of environmental civil liability, the cost of environmental harm, which normally has the characteristic of reaching an undetermined number of victims in society, is directed to the polluter, preventing the community from bearing such a burden.

Finally, another principle that underlies environmental civil liability is the "principle of full reparability for environmental damage". According to Benjamin (1998), "for this principle, all forms and formulas, legal or constitutional, of exclusion, modification or limitation of environmental repair, which must always be integral, ensuring effective protection to the ecologically balanced environment, are prohibited"⁶.

In view of the above, these are the basic principles that subsidize environmental civil liability, and, in general, it is shown that it differs from general civil liability for its main purpose is to protect the community, holder of the right to a balanced environment, and not just a specific individual.

3 ENVIRONMENTAL CIVIL LIABILITY – SPECIFIC MECHANISMS FOR ITS EFFECTIVENESS

The infraconstitutional legislation had the responsibility to create new mechanisms to give effectiveness to the environmental civil liability provided for in the constitutional text. In this sense, Federal Law No. 6,938 / 1981 (Law

³ BENJAMIN, A. H. V. Responsabilidade Civil pelo Dano Ambiental. Revista de Direito Ambiental. RDA 9/5. Jan-mar/1998.

⁴ HUPFFER, H. M.; WEYERMULLER, A. R.; WACLAWOVSKY, W. G. Uma análise sistêmica do princípio do protetor-recebedor na institucionalização de programas de compensação por serviços ambientais. Ambient. soc., São Paulo, v. 14, n. 1, p. 95-114, jun/2011. Disponível em: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1414-753X2011000100006&lng=en&nrm=iso. Acesso em 10 mar. 2021, p. 101.

⁵ BENJAMIN, A. H. V. Responsabilidade Civil pelo Dano Ambiental. Revista de Direito Ambiental. RDA 9/5. Jan-mar/1998.

⁶ BENJAMIN, A. H. V. Responsabilidade Civil pelo Dano Ambiental. Revista de Direito Ambiental. RDA 9/5. Jan-mar/1998, p. 94.

of the National Environmental Policy) brought in its article 14, paragraph 1, that “without hindering the application of the penalties provided for in this article, the polluter is obliged, regardless of the existence of fault, to indemnify or repair the damages caused to the environment and to third parties, affected by its activity”.

In view of such legal regulations, it is common ground that environmental liability is objective, based on the theory of interal risk. For Jefferson Aparecido Dias and Ewerton Ricardo Messias (2018), this means that the “agent causing the damage, regardless of fault, has the obligation to indemnify and repair the damage, not applying the exclusion of liability in the event of unforeseeable circumstances, force majeure or third party’s exclusive fault, requiring only proof of the causal link.

In this sense, in the scope of environmental civil liability, it is enough that the causal link between the activity and the environmental damage is proven to arise the duty to indemnify.

In the national courts, the rules on environmental civil liability have gained new nuances to reinforce their effectiveness, as is the case of item No. 999, faced by the Supreme Federal Court, which determines that “the claim for civil reparation of environmental damage is impermissible”. According to the menu of Extraordinary Appeal 654833 / AC, which put an end to the aforementioned topic, reported by Minister Alexandre de Moraes, judged on 04/20/2020:

4. The environment must be considered a common heritage of all humanity, in order to guarantee its integral protection, especially in relation to future generations. All the conducts of the Public Estate Authorities must be directed towards full internal legislative protection and adherence to the pacts and international treaties that protect this fundamental human right of the 3rd generation, to avoid prejudice to the community in the face of an affectation of a certain good (natural resource) for an individual purpose.
5. The repair of damage to the environment is a indispensable fundamental right, and it is imperative to recognize imprescriptibility with regard to the restoration of environmental damage⁷.

However, the recognition of the imprescriptibility of environmental damage by the STF, despite its binding force, does not exhaust all doubts on the subject, since environmental civil liability can occur in different ways. As Carvalho (2020) correctly points out:

[...] e reimbursement forms, which do not directly alter the degraded environment, are the other indemnities: the collective moral damage, the individual moral damage, the personal property damage, the intercurrent damage, the reimbursement by the person responsible for the damage of the expenses made by a third party or by the administration for in natura recomposition they prescribe, they are claims covered by the general rule of the Civil Code and they prescribe within their own time. The prescription does not run from the date of the damage, but from the date on which it became known or took effect, even years later.

It is not yet possible to predict the consequences and implications of the thesis affirmed by the Superior Court of Justice and, now with binding force, by the Supreme Federal Court. STF Theme nº 999 was extracted from serious facts, of great environmental impact and with enormous damage to the indigenous population; but there are others that are simpler, of lesser expression and that are lost or exhausted in time, or of heritage reflex only. Adding the imprescriptibility of the environmental damage to the failure to recognize the *fait accompli*, until when can we go back in time? As mentioned by Minister Mauro Campbell Marques in the embargoes for the declaration of the aforementioned judgment, “even if, if it were not so, the legal security imposed by CR/88 itself would be extremely flexible, especially because the history of environmental degradation in Brazil is rich : we would be authorizing, nowadays, the filing of damages actions related to extractions that took place during the time of the Colony and the Empire, for example [...]”.

The prescription or non-prescription of environmental damage is not a closed issue; it will also go through refinements and distinctions that judges and courts will make with the usual caution⁸.

In this sense, due to the complexity surrounding the subject, which presents several facets, the indiscriminate recognition of the thesis of the imprescriptibility of environmental damage, especially when it comes to actions based

⁷ BRASIL. Supremo Tribunal Federal. Recurso extraordinário 654.833 Acre. Relator: Alexandre de Moraes. Data de Julgamento: 20 de abril de 2020. Disponível em: <https://portal.stf.jus.br/processos/downloadPeca.asp?id=15343546770&ext=.pdf>

⁸ CARVALHO, R. C. T. A prescrição dos danos ambientais. 2020. Disponível em: <https://www.conjur.com.br/2020-jul-04/ambiente-juridico-prescricao-danos-ambientais>. Acesso em 10 mai. 2021.

on individual environmental damage and of an exclusively patrimonial character, contrary to what is intended by the STF, can bring more insecurity to the legal field, showing that the matter is not completely solved.

Another point that still causes controversy comes from the interpretation of article 3, of Law 6.938 / 1981, which defines that it is “polluter, the natural or legal person, of public or private law, responsible, directly or indirectly, for an activity that causes environmental degradation.”. Based on this article, in the decision of Special Appeal 1.071.741 / SP, reported by Minister Herman Benjamin, judged on 3/24/2009, the interpretation of this article was coined as follows:

For the purpose of determining the causal link in urban-environmental damage and eventual passive solidarity, are considered those who do, those who do not do it when they should do it, those who do not care what they do, who are silent when it is up to them to report, those who finance and who benefits when others do.

[...] 4. Regardless of the legal qualification of the degrader, public or private, under Brazilian law, civil liability for environmental damage is of an objective, solidarity and unlimited nature, being governed by the polluter-pays principles, inintegrum repair, the priority of repair in natura, and favor debilis, the latter to legitimize a series of techniques to facilitate access to justice, including the inversion of the burden of proof in favor of the environmental victim. Precedents of the STJ⁹.

Based on this decision, the question arises about the responsibility of the indirect polluter on the environmental damage caused. A perfunctory analysis of the topic would lead to the conclusion that environmental civil liability must cover the entire production chain in which the polluting entity is inserted. According to Jefferson Aparecido Dias and Ewerton Ricardo Messias (2018):

It appears that the environmental civil liability is objective, solidary, integral and imprescriptible, therefore, anyone who, directly or indirectly, contributes to the occurrence of an environmental damage will be liable to be held responsible, individually or jointly, regardless of any evidence of fault, to fully repair the damage that has occurred, and there is no possibility of such liability lapsing over time¹⁰.

However, as the analysis made by Carvalho on the judgment of issue n° 999, of the STF, will it be responsible for the entire economic chain for the environmental damage caused, in particular, financial institutions that have financed a certain enterprise or work that has generated pollution, is the adequate answer to the question?

4 CIVIL ENVIRONMENTAL RESPONSIBILITY OF FINANCIAL INSTITUTIONS AS INDIRECT POLLUTERS - DOCTRINAL DIFFERENCES

Large enterprises are hardly ever carried out exclusively with the capital of entrepreneurs themselves. In these cases, there is usually the figure of the fomenting financial institution, which lends the necessary financial resources for the completion of such works.

In this sense, based on the aforementioned STJ judgment, associated with the theory of integral risk, many argue that financing agents should be held environmentally responsible for the pollution caused by the financed entities.

⁹ BRASIL. Supremo Tribunal Federal. Recurso Especial Nº 1.071.741 - SP (2008/0146043-5). Relator: Herman Benjamin. Data de Julgamento: 24 de março de 2009. Disponível em: https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=4715617&num_registro=200801460435&data=20101216&tipo=5&formato=PDF. Acesso em: 16 fev. 2023.

¹⁰ DIAS, J. A.; MESSIAS, E. R. Responsabilidade civil contratual e extracontratual frente à responsabilidade civil ambiental: uma análise sob o Direito pós-moderno. *Rev. direitos fundam. democ.*, v. 24, n. 1, p. 243-265, jan./abr. 2019. Disponível em: <https://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/1276>. Acesso em: 31 mai. 2022, p. 257-258.

In this sense, Jefferson Aparecido Dias and Ewerton Ricardo Messias (2019) state that:

[...] financial institutions, by limiting themselves only to documentary analyzes, failing to carry out a substantial analysis of the impact that the project may cause, as a criterion for project approval, and to supervise and monitor this project during implementation and conclusion the institutions become responsible alongside the authors of the damage [...]¹¹.

For defenders of the responsibility of financial entities as indirect polluters, two additional questions still arise: when does the liability of financing agents begin and how long this responsibility should last.

According to Mirra (2017), “the initial moment of characterizing the civil liability of financiers is the signing of the financing contract, regardless of whether the funds have already been delivered or not”. In this sense, once the financing contract is signed, there is also the duty to indemnify, in case the policyholder generates pollution.

In this same line of reasoning, Mirra (2017) also argues that “while the financing contract lasts, the financier responds objectively and jointly for the environmental damage caused by the degrading activity”, and any default by the policyholder would not remove this responsibility.

Regarding the lender’s environmental liability after the loan agreement is paid off, Mirra (2017) informs that there is a divergence in the doctrine:

Ana Luci Esteves Grizzi, Cintya Izilda Bergamo, Cynthia Ferragi Hungria and Josephine Eugenia Chen understand that, after the final term of the financing contract, there is no longer any need to talk about the financier’s civil liability, except in the case of the latter granting the loan without full compliance with environmental standards, when it will respond without any time limitation. Annelise Monteiro Steigleder and Alexandre Lima Raslan maintain that the financier’s civil liability persists at a later time, as long as the causal element that permits the imputation of responsibility can be extracted, which is not always easy in practice¹².

Conversely, part of the doctrine argues that financial institutions, when acting in compliance with the pertinent legislation, taking due caution, cannot be responsible for the environmental damage caused by the financed entities, especially when there is no direct link between financing and the pollution. Authors who defend this theory say that it would be unreasonable and not proportional to extend environmental civil liability indiscriminately, under penalty of creating more legal uncertainty on the subject.

Lauro (2016), cites the following practical example as a reason to defend the non-liability of financial institutions in case of environmental damage:

As a practical example, we bring the American case entitled United States vs. Fleet Factors Corporation, the first court case in which the American Court analyzed the civil liability of banks for repairing the environmental damage caused by the borrower. In this process, the government pleaded the remediation of a contaminated area by the textile industry, Swainsboro Print Works, with the industry and the bank as defendants, Fleet Factors Corporation, since this, in addition to having granted the financing, had a real guarantee on the property and the equipment in the area. The case was adjudicated in 1990, and as prescribed by Tosini, the American Court held the bank responsible for the environmental damage caused by the borrower, condemning him to remedy the property, under the argument that it could have the capacity to interfere in the borrower’s waste management decisions. After this decision, a survey conducted by the Association of American Banks found a 46% drop in financing for dangerous activities. According to Reis, this decision generated legal uncertainty for the financial sector, evidenced by the lapse of objective and sufficient criteria for a reasonable interpretation of what could configure the degree of interference that would allow the financial institution to be held responsible for the damages caused by its borrowers.

¹¹ DIAS, J. A; MESSIAS, E. R. Responsabilidade civil contratual e extracontratual frente à responsabilidade civil ambiental: uma análise sob o Direito pós-moderno. *Rev. direitos fundam. democ.*, v. 24, n. 1, p. 243-265, jan./abr. 2019. Disponível em: <https://revistaeletronica.rfd.unibrasil.com.br/index.php/rfd/article/view/1276>. Acesso em: 31 mai. 2021, p. 260.

¹² MIRRA, A. L. V. A responsabilidade civil ambiental das instituições financeiras. *Conjur*, 2017. Disponível em: <https://www.conjur.com.br/2017-nov-25/ambiente-juridico-responsabilidade-civil-ambiental-instituicoes-financeiras>. Acesso em: 16 fev. 2023.

Due to this crisis in the credit supply, due to the legal uncertainty established by the above decision, in 1996 the Law of Responsibility, Compensation and Responses to Global Environmental Impacts, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was amended to insert provision that would restrict the scope of the lender's environmental liability, with the establishment of more objective criteria, obligations and rigid attributions to be observed by financial institutions prior to contracting financing, under penalty of their co-responsibility¹³.

Antunes; Fernandes (2016, online) also argue that the application of the deep pocket doctrine may imply the “non-responsibility of the owners of polluting activities that, in one way or another, are linked to larger production chains, given that the responsibility will automatically transfer to the one with the greatest economic resources”.

From these concepts, it is extracted that the widening of accountability to financial institutions, as indirect polluters, in an indiscriminate way, in addition to improperly allocating the cost of pollution to third parties, through the bank spread, can also be interpreted as a true safe-conduct by the real responsible ones for the environmental damage, since financial institutions would end up bearing the cost of pollution only because they have more resources than the degrading entity.

Likewise, obliging financial institutions to carry out audits and inspections to monitor the financed entities, in addition to not finding any legal subsidy, would also be a way to unduly transfer to the individual an activity that must be performed exclusively by the State. Antunes; Fernandes (2016), in this same sense, affirm that:

Environmental control activities cannot be outsourced to financial institutions, as it seems to be the background that involves the decisions criticized in this article. There is no doubt that financial institutions, when demanding the appropriate documentation relevant to granting credit, play an important role, however, this role cannot expand, either because there is no legal basis for it, or because it would imply unnecessary and unreasonable increase the cost of money, as a performance audit, environmental studies, the conditions of operation of projects and so many other controls under the responsibility of environmental agencies would certainly be included in the cost of the money to be transacted¹⁴.

In view of the above, when extending the environmental liability to financing agents, in a preliminary analysis, it may seem an adequate measure of protection to the environment. However, when analyzing the practical consequences that such an interpretation generates, especially when analyzing the North American experience, it is seen that holding financial institutions accountable, without analyzing their role in environmental damage, in addition to legal insecurity, also induces in the increase in the cost of capital and restriction on obtaining credit, generating economic backwardness for the country.

5 CMN RESOLUTION 4.327/2014 AND SARB NORMATIVE 14/2014

Financing contracts, like any contract, must perform their social function. In this sense, when defending that financial institutions should not be held responsible for environmental damage caused by the financed entities, it obviously does not mean that they should grant loans without taking any care in favor of the environment.

In this sense, Law 11.105 / 2005 can be cited, in its article 2, paragraph 4, which determines that financing agents must demand the “Biosafety Quality Certificate, issued by CTNBio, under penalty of becoming co-responsible for the possible effects resulting from the non-compliance with this Law or its regulation”. The same occurs in the

¹³ LAURO, B. C. A responsabilidade civil ambiental do financiador: o papel das diligências ambientais. In: *Inspere – Instituto de Ensino e Pesquisa*. São Paulo, 2016, p. 20-21.

¹⁴ ANTUNES, P. B.; FERNANDES, E. A. Responsabilidade civil ambiental de instituições financeiras. *Genjuridico*, 2016. Disponível em: <http://genjuridico.com.br/2016/07/15/responsabilidade-civil-ambiental-de-instituicoes-financeiras/>. Acesso em: 16 fev. 2023.

granting of agricultural credit, which can only be granted to owners of rural properties that are registered in the Rural Environmental Registry, under the terms of the Forest Code¹⁵.

In addition to the legal articles described above, special attention should be paid to CMN Resolution 4,327 / 2014 and SARB Normative 14/2014.

According to the aforementioned CMN Resolution, in its article 1, it informs that the aforementioned standard aims to regulate “the guidelines that, considering the principles of relevance and proportionality, must be observed in the establishment and implementation of the Social and Environmental Responsibility Policy (PRSA) by financial institutions and other institutions authorized to operate by the Central Bank of Brazil”. In its article 8, it is said that “the institutions mentioned in art. 1 must establish specific criteria and mechanisms for risk assessment when carrying out operations related to economic activities with the greatest potential to cause socio-environmental damage”.

In this sense, despite the efforts of the Central Bank of Brazil (BACEN) to create specific regulations to guide the activities of financial entities in favor of environmental responsibility, the standard created did not create specific parameters to be adopted by the institutions.

It was up to Normative nº 14, 2014, of the Banking Self-Regulation System (SARB) to present specific guidelines on the environmental responsibility of the financial sector. The analysis of the normative leads to highlighting some important articles:

Art. 11. In the contracts for the Transactions referred to in article 9, clauses will be provided for that, at least, establish:

- I - The borrower’s obligation to observe the applicable environmental legislation;
- II - The obligation of the borrower to observe the labor legislation, especially the norms related to occupational health and safety and the absence of work analogous to slavery or child labor;
- III - The ability of the Signatory to anticipate the maturity of the operation in cases of revocation of the environmental license, when applicable, and of a condemnatory sentence that has become final, due to the borrower’s practice, of acts that imply child labor, labor analogous to slavery, criminal profit from prostitution or damage to the environment;
- IV - The borrower’s obligation to monitor its activities in order to identify and mitigate unforeseen environmental impacts at the time of contracting the credit;
- V - The borrower’s obligation to monitor his direct and relevant suppliers with regard to environmental impacts, respect for social and labor laws, occupational health and safety standards, as well as the absence of slave-like or child labor¹⁶.

The analysis of the article above indicates mandatory clauses that must be included in the financing contract, with emphasis on item “III”, which allows the financing resources not to promote business activities that generate social or environmental damage. Thus, once the relevant socio-environmental legislation is proven to be in breach, it will be up to the financing agent to cease making resources available to the financed entity that violates.

Still following the analysis of Normative 14/2014, the following article also deserves mention:

Art. 14. New investments to be made by the Signatory in companies in which it holds partner rights, which ensure the institution’s preponderance in corporate resolutions, the power to elect or dismiss the majority of managers, effective operational control or corporate control, must be preceded assessment carried out by the investor to verify the degree of adherence to its socio-environmental policies.

Paragraph 1. The objectives of the socio-environmental audit, which should focus on the company that is the object of the investment, its subsidiaries or other companies that are relevant to the

¹⁵ BRASIL. Lei n. 11.105, de 24 de março de 2005. Regulamenta os incisos II, IV e V do § 1o do art. 225 da Constituição Federal, estabelece normas de segurança e mecanismos de fiscalização de atividades que envolvam organismos geneticamente modificados – OGM e seus derivados, cria o Conselho Nacional de Biossegurança – CNBS, reestrutura a Comissão Técnica Nacional de Biossegurança – CTNBio, dispõe sobre a Política Nacional de Biossegurança – PNB, revoga a Lei no 8.974, de 5 de janeiro de 1995, e a Medida Provisória no 2.191-9, de 23 de agosto de 2001, e os arts. 5o, 6o, 7o, 8o, 9o, 10 e 16 da Lei no 10.814, de 15 de dezembro de 2003, e dá outras providências. Diário Oficial, Brasília, DF, v. 142, n. 58, Seção 1, p. 1-5, mar. 2005a. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/111105.htm. Acesso em: 22 fev. 2023.

¹⁶ FEBRABAN. Normativo SARB 014/2014. Disponível em: <http://cms.autoregulacao bancaria.com.br/Arquivos/documentos/PDF/Normativo%2014%20SITE.pdf>. Acesso em: 22 fev. 2023.

Transaction, should be:

- I - evaluate any social and environmental liabilities of the company;
- II - verify the compliance by this with the current socio-environmental legislation;
- III - evaluate, when applicable, direct and relevant suppliers of the company with respect to items I and II.

§2 The documents to be requested, at the discretion of the Signatory, will depend on the activity developed by the Company, and the existence of certifications by the standards NBR ISO 14001 (Environmental Management System), OHSAS 18001 (Health and Safety Management System) should be considered. Occupational Health) and NBR ISO 26000 (Social and Environmental Responsibility Management System)¹⁷. (FEBRABAN, 2014, online).

The aforementioned article aims to prevent financial entities from entering into businesses that are in disagreement with the socio-environmental policy adopted by them, in accordance with that described in CMN Resolution 4,327 / 2014. It is worth mentioning the quality standards that should be sought in companies in which financial institutions join as partners, in the form of paragraph 2 above transcribed.

Another important point of Normative No. 14/2014 is in article 17, transcribed below:

Art. 17 For all cases in which a property is received in guarantee, the Signatory, complying with the principles of relevance and proportionality, at its discretion, shall:

I - make it appear in a contractual instrument or require a declaration, issued by the contractor or whoever represents him, that the property under warranty is not restricted to use, including restrictions related to zoning, land parceling, preservation of archaeological and historical heritage, restriction activities due to insertion in APA (Environmental Preservation Area) or APP (Permanent Preservation Area), which meets the requirements imposed by Organs competent bodies;

II - make it appear in a contractual instrument or require a declaration, issued by the contractor or whoever represents him, that the property subject to the guarantee is not located in lands of indigenous or quilombola occupation, as defined by the competent authority; and

III - have the power to win the operation in advance or require the replacement of the guarantee if, during the term of the contract, it is found, by the competent authority, that the property subject to the guarantee: (i) has restrictions on use, including restrictions related to land parceling, preservation of archaeological, paleontological and historical heritage, or that the borrower does not comply with requirements established by the competent agency; (ii) is located in lands of indigenous and quilombola occupation and conservation units, as defined by the competent authority¹⁸.

The analyzed article demonstrates the concern that rural credit resources are not used to promote economic activities in areas of conflict with traditional communities or in areas with environmental limitations. Once again, there is the figure of early maturity of the loan contract if the aforementioned socio-environmental restrictions are identified, which does not allow the financing resources to continue to foster situations that create environmental damage.

Normative 14/2014 also sought to regulate measures for the registration and control of activities carried out by financial entities, establishing that they must record “data referring to losses resulting from socio-environmental damages for a minimum period of 5 (five) years from their identification” (Article 19). In this sense, the registration of environmental losses by financial entities will allow the improvement of practices in favor of environmental protection.

Also worth highlighting, is Article 22, of the self-regulation, which determines that financial entities must prepare and publish an annual report on compliance with their PRSA, showing the sector’s concern with the transparency of the measures in favor of the environment taken by financial institutions.

Thus, while the BANCEN Resolution sought to have a principled character, it was up to the self-regulation of the banking sector to establish specific parameters that should be taken by financial entities in favor of socio-environmental responsibility. However, according to Antunes and Fernandes (2016, online), in the aforementioned regulations “there is no obligation for financial institutions to carry out studies and analyzes that go beyond the limits

¹⁷ FEBRABAN. Normativo SARB 014/2014. Disponível em: <http://cms.autorregulacaobancaria.com.br/Arquivos/documentos/PDF/Normativo%20014%20SITE.pdf>. Acesso em: 22 fev. 2023.

¹⁸ FEBRABAN. Normativo SARB 014/2014. Disponível em: <http://cms.autorregulacaobancaria.com.br/Arquivos/documentos/PDF/Normativo%20014%20SITE.pdf>. Acesso em: 22 fev. 2023.

of the legally required, it is not reasonable that they act as if they were institutions responsible for environmental control bodies”.

In this sense, the regulation now analyzed, at no time, created the obligation to inspect and monitor the activities of the financed entities, which is criticized by those who defend the environmental civil liability of financial institutions in case of environmental damage.

However, it is important to highlight that, in terms of environmental licensing in Brazil, it is not uncommon for the environmental agency to try to allocate public policies to the entrepreneur, in order to solve previously existing social problems in areas to be licensed. Such an issue ends up giving rise to conditions that generate uncertainty in its implementation, causing new conflicts in the midst of environmental licensing. As Fernanda Luiza Fontoura de Medeiros and Jerônimo Pinotti Roveda (2020) explains:

It is unequivocal that problems are being transferred to the entrepreneur in licensing, which are the responsibility of the Executive Power as Public Policy and which are left out due to the lack of efficiency of that same public policy. The companies are obliged to bear a liability that did not cause any damage and which, by the way, also fell into the lap of environmental organs. Even in the case of works by the Public Power itself, licensing would not be the time to adapt or implement Public Policies that are in deficit (or that sometimes are non-existent).

However, when the environmental licensing agency starts to make such demands - socio-economic compensatory measures - it is possible to face two problems; one of them is that the agents who are responsible for the environmental licenses do not have the competence for this, their analysis must be strictly from the environmental point of view. There is no attribution in this regard in all legislation and regulations. The second problem is that thus fragile licenses are issued, with little or no environmental discipline, leaving room for sometimes a tough (and, in some cases, disproportionate) performance by the Public Ministries, which then takes on socio-economic and environmental issues, leaving the entrepreneur with his hands tied, even with a license in hand¹⁹.

As explained, it is not uncommon for conflicts to arise from the different interpretations given by the different actors who participate in the environmental licensing process, in particular, in relation to which conditions must be met by the entrepreneur to mitigate the impacts caused by his project.

Inserting financial institutions in this formula, in addition to not bringing any practical benefit to the environment, also ends up allocating a burden that it is unable to manage or resolve, especially when there is still no definitive solution found by the State itself for this type of conflict.

In this sense, despite criticisms to the contrary, it is neither reasonable nor proportionate to assign obligations to financial institutions that are inherent to Organs state bodies responsible for environmental licensing, inspection and control or even the Judiciary itself.

It should be noted that the intention of the rules analyzed here is not to exempt financial institutions from any and all liability for environmental damage caused by the financed entities. In this tuning fork, if it is proven that the financing entity did not act with the necessary caution to release the financing, without requiring the relevant legal documentation; that it does not have an adequate PRSA for its structure; or who continued to free resources for an agent who is proven to carry out practices in non-compliance with socio-environmental rules, the environmental liability rules must be applied to that.

Along the same lines, there is an emblematic case involving a public bank and a mining company, partially transcribed below:

As for the BNDES, the simple fact that it is the financial institution in charge of financing the mining activity of CMM, in principle, by itself, does not legitimize it to figure in the passive pole of the demand. However, if it becomes proven, in the course of the ordinary action, that the aforementioned public company, even aware of the occurrence of environmental damages that are serious and

¹⁹ MEDEIROS, F.; ROVEDA, J. P. Dispute Board: uma possibilidade para segurança e efetividade nos Licenciamentos do setor elétrico. In: Sion, A. O.; França, L. G. *Direito Ambiental aplicado ao setor elétrico*. Belo Horizonte, Editora Del Rey, 2020, p. 79.

grave, and that reflect significant degradation of the environment, or aware of the beginning of their occurrence, has released intermediary or final installments of the funds for the mining exploration project of the said company, then, yes, it will be up to it to respond jointly with the other entities for the damages caused to the property in question, under the norm inscribed in the art. 225, caput, paragraph 1, and respective items, notably items IV, V and VII of the Major Law. (TRF - 1st Region: AG 2002.01.00.036329-1 / MG, Rel. Des. Federal Fagundes de Deus, 5th Class, DJ of 12/09/2003)²⁰.

In view of the above, it is clear that effort of the banking sector in self-regulation is commendable, although it is not yet the definitive answer to the question involving the environmental liability of financial institutions in the event of pollution practiced by the financed entity.

6 PUBLIC CONSULTATION 85/2021

On April 7, 2021, Public Consultation 85/2021 was opened by BACEN, in order to improve CMN Resolution 4,327 / 2014. According to the introduction of the aforementioned public consultation, BACEN (2021) "has been acting proactively in proposing measures related to social and environmental issues, condensed in the term Environmental, Social and Governance (ESG)", with the aforementioned Resolution gaining prominence in international forums, in particular, in view of the global concern regarding the promotion of an economy that causes less impact on the planet.

In this sense, the new regulatory suggestion proposed by BACEN (2021) to address the socio-environmental performance of banking institutions is necessary for:

- I - maintenance of the Brazilian initiative in the establishment of rules on risk management and responsibility policy, through the incorporation of the most recent international discussions on the subject;
- II - inclusion of the perspective related to climate change in the Brazilian regulatory framework, both in terms of risk management and responsibility policy; and
- III - improvement of concepts related to risks and social and environmental responsibility, as well as improvement of normative commands²¹.

Regarding the new resolution proposed by BACEN, replacing CMN Resolution 4,327 / 2014 (BRASIL, 2014, online), some points stand out. The first one refers to the mandatory designation of a specific director for the implementation, monitoring and improvement of the Social, Environmental and Climate Responsibility Policy (PRSAC), as well as obliging financial institutions with a size greater than 1% of the Gross Domestic Product (GDP) or relevant international representation, the creation of a social, environmental and climate responsibility committee, linked to the board of directors, whose function is to monitor compliance, propose improvements, as well as supervise the director responsible for PRSAC.

Such measures are intended to create a governance structure responsible for the management of the socio-environmental activities by financial institutions, which can be demanded by inspection and control bodies and by society itself, in order to give greater effectiveness to the social and environmental actions of financial institutions.

The new proposal for a regulatory standard also indicates the obligation to disclose, on the institution's e-mail address, the social risk, environmental risk and climate risk management actions, denoting BACEN's concern with the transparency of the social and environmental actions taken by the sector by he regulated.

The new resolution also aims to oblige the PRSAC to be constantly updated, making it mandatory to review it every three years, or in the occurrence of important events such as: offering new relevant products or services;

²⁰ BRASIL. Tribunal Regional Federal da 1ª Região. Processo n.: 0042027-62.2002.4.01.0000 (2002.01.00.036329-1). Relator: Fagundes de Deus. Data de Julgamento: 12 de setembro de 2003. Disponível em: <https://arquivo.trf1.jus.br/PesquisaMenuArquivo.asp?p1=200201000363291&pA=200201000363291&pN=420276220024010000>. Acesso em: 16 fev. 2023.

²¹ BANCO CENTRAL DO BRASIL. Consulta Pública 85/2021. Disponível em: <https://www3.bcb.gov.br/audpub/DetalharAudienciaPage?1>. Acesso em: 11 fev. 2023.

relevant changes in activities, products or services offered by the institution; significant changes in the institution's business model; significant corporate reorganizations; and political, legal, regulatory, technological or market changes, including changes in consumer preferences, which significantly impact the institution's business, positively or negatively.

These are some of the main points of the new regulation proposed by BACEN for the financial sector, in an update to CMN Resolution 4,327 / 2014²², showing that, in addition to a conceptual review, BACEN is also concerned with creating governance, transparency and control mechanisms, in order to demand effectiveness in relation to socio-environmental actions taken by banking institutions.

In addition to these points, the aforementioned consultation also intends to include in other regulatory standards a proposal to include an assessment of the social, environmental, physical and climatic risks of transition, so that those are evaluated together with the other traditional risks (credit, market, liquidity and operational).

In this sense, it is worth mentioning the updating of CMN Resolutions No. 4,557 / 2017 (BCB, 2017a, online), and 4,606 / 2017²³ (BCB, 2017b, online), which creates additional obligations for the risk management of financial institutions, especially with regard to the registration of relevant management data, including referring to losses incurred by the institution, broken down into social risk, environmental risk or climate risk; monitoring the perception of customers, the financial market and society in relation to the institution's reputation in relation to social, environmental and climate issues; and the creation of mechanisms for the management of socio-environmental risks in conjunction with the other risks to which the financial institution is exposed.

It is noticed that, more and more, the BACEN regulation has increased the social and environmental obligations applicable to the financial sector, as demonstrated by the proposal exposed in Public Consultation 85/2021. Such a proposal does not yet create an express obligation to inspect the financed entities, in addition to state action, but it does require financial institutions to take additional precautions in relation to their activities, with the creation of governance bodies to monitor the socioenvironmental theme, as well as equivalence socio-environmental risks with other market risks to which financial operations are exposed.

197

7 CONCLUSION

In the course of this work, it was seen that civil environmental liability is still one of the most effective means of repair in case of environmental damage. In view of the principles that subsidize the aforementioned institute, in order for it to be effective, new mechanisms have been created by the infraconstitutional legislation, which leads to the interpretation that environmental liability is objective, based on the integral theory of risk, imprescriptible, as well as it should fall on direct and indirect polluters, in a supportive and unrestricted manner.

It happens that, not infrequently, in an attempt to protect the environment through the increasingly harsh application of environmental standards, new questions arise, since civil environmental liability has several facets and nuances.

In the meantime, the question arises about the responsibility of financial institutions, as indirect polluters, in case of environmental damage caused by an entity financed by that one.

There is dissent in the doctrine about the answer to this problem, and, based on the famous judgment of the STJ, many defend that the responsibility of financial institutions must be unrestricted.

On the other hand, those who defend the opposite argue that the unrestricted accountability of financial

²² BRASIL. Resolução do Conselho Monetário Nacional nº 4.327/2014. Disponível em: http://www.bcb.gov.br/pre/normativos/res/2014/pdf/res_4327_v1_O.pdf. Acesso em: 11 fev. 2023.

²³ BANCO CENTRAL DO BRASIL. Resolução nº 4.606, de 19 de outubro de 2017. 2017b. Disponível em: https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/19369731/do1-2017-10-23-resolucao-n-4-606-de-19-de-outubro-de-2017-19369673. Acesso em: 11 fev. 2023.

institutions is not the adequate answer to the problem, since such guidance generates an increase in the cost of credit, based on the North American experience, which can affect the country's economic development.

In this context, CMN Resolution 4,327 / 2014 and the SARB Normative 14/2014 emerge, which reflect the financial sector's concern with socioenvironmental issues. While the first standard has a more generic character, it was up to the sector's self-regulation to describe the precautions that should be taken in financial operations in favor of socio-environmental responsibility.

Such rules, however, do not translate into a way to free financial institutions from civil environmental liability in the event of damage done by an entity financed by it. In the event of a breach of any of the guidelines set out in the aforementioned regulations, the liability of the financial entity must be pursued, in the exact measure of the causal link of the financial activity in the environmental damage practiced.

Also worth mentioning, is Public Consultation 85/2011, opened by BACEN, which aims to update the regulatory framework of the financial sector, creating mechanisms of governance, control and transparency in favor of sustainable development. This regulatory renewal shows BACEN's concern with a policy focused on low carbon, in response, also, to the strong international pressures on the subject.

In this way, it is seen that the current regulatory norms studied do not end the doctrinal discussion that involves the theme, but serve as guidelines for the application of the environmental liability institute to be used with reasonability and proportionality in the analysis of the role of financial institutions on the environmental damage done by its financed entities.

Likewise, the new regulation proposed by BACEN demonstrates an evolutionary leap in the treatment of socioenvironmental responsibility by financial institutions, but only time will show the effectiveness of the new mechanisms created, which can be assessed from the decrease in the record of environmental infractions, in addition to the positive social impacts generated by new enterprises. Courts will also play an important role in defining beacons that indicate the duty of vigilance and precaution owed by funding agencies.

198

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