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Preface ▮ **Guilherme Guimarães Feliciano**

FÓRUM

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CHAPTER 7

THE RESPONSIBILITY OF BANKS TO RESPECT HUMAN RIGHTS UNDER THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

CHAPTER 8

DECENT WORK, THE ILO AND FINANCIAL INSTITUTIONS: A DIALOGUE FOR SOCIAL JUSTICE

The Brazilian publishing market has been very fertile, despite the known financial difficulties that have beset publishers nationwide. Titles are found on a wide range of subjects, including Labor Law and Procedural Labor Law. Themes of little or questionable relevance are often seen on the shelves of bookstores. However, time and again a great theme emerges, finally scrutinized and boasting breadth as well as depth, offering readers a qualified debate on what really matters in the light of national needs and international agendas. When we come across these titles, we usually consider two things: first, why the theme has not yet been sufficiently explored; and second, why haven't we hitherto sufficiently reflected about it ourselves.

This is the case of this collection beautifully prepared by Professors Rafael de Araújo Gomes, Lorena Vasconcelos Porto, Rúbia Zanotelli de Alvarenga, and Thaís Dumêt Faria entitled The Social Responsibility of Financial Institutions and the Guarantee of Human Rights. A subject which, by the way, converges significantly with the concerns expressed by the International Labor Organization on the occasion of the 105th International Labor Conference: in global supply chains, the financial aspect – including both available credit lines and taxation regimes – is often the link that fuels production flows and provides (and sometimes determines) the geographical option for the establishment of production units.

In this thematic framework, important questions arise. For example, under the Brazilian Constitution of 1988, what is the constitutional responsibility regime imposed on financial institutions (and, in particular, on banks and financing agents), at the social (including labor) and environmental levels? How to analyze this same responsibility based on Resolution No. 4,327/2017 of the National Monetary Council (which provides for a "socio-environmental responsibility policy" for financial institutions and the like)? Do the legal and civil models derived from the doctrine of legitimate expectations and from the social function of contracts as well as the postulates of objective good faith apply (and if so on what terms) to the responsibility of financial institutions?

And what do Public International Law and International Human Rights Law have to say in this respect in view of international treaties, universal declarations – herein understood as the United Nations guiding principles on business and human rights – and of customs per se, in relation to the so-called international "jus cogens"? What is meant by "socio-environmental risk" and what are the practical repercussions of the concept? Still in the conceptual field, how can the idea of decent work (ILO) interfere with the legal treatment of financial institutions (especially those that finance precarious or high-risk economic activities)? Finally, and from more convex perspectives, what to say about the role of these institutions in the exploitation of modern-time slave labor, about the specific role of BNDES in the Brazilian socio-labor context, or yet about the Norwegian sovereign fund for Norway's social sustainability? All of these questions are answered in this book. And despite the strategic role of the answers – especially for those who dedicate themselves to and apply Social Law –, you will not find them easily in other places.

As stated by S. ŽIŽEK "You can't change people, but you can change the system so that people aren't pushed to do certain things." Perhaps there is no better aphorism to identify the spirit of this publication. With good ingenuity, good technique and special opportunities, good people can improve institutions; and by improving institutions they can preestablish social conditions for a future of better people. Like ŽIŽEK, I do not believe in major revolutions. But I do believe in small ones. This book shows a good path along this final trail.

Brasília/DF, April 2018.

Guilherme Guimarães Feliciano

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INTRODUCTION

RAFAEL DE ARAÚJO GOMES

The topics of corporate environmental responsibility and corporate social responsibility (combined in the term socio-environmental responsibility) have been discussed and studied for more than fifty years. The debate gained momentum in the 1970s, in the wake of major environmental tragedies involving multinational corporations such as the Exxon Valdez oil spill off the coast of Alaska and the toxic gas leak at the Union Carbide plant in Bhopal, India. The release of the first scientific reports on climate change caused by human activities like the 1979 Charney Report also contributed to fuel the debate.

In the social area, several large companies were ensnared in scandals involving the use of slave labor or child labor in their production chains, with negative repercussions for business and trademarks, as was the case of Nike in the 1990s.

It should also be remembered that the deterioration of the living and working conditions of large portions of the population has decisively contributed to the outbreak of two world wars that produced destruction on an unprecedented scale. This fact, which was already obvious and notorious at the end of the two great wars, is somehow being forgotten nowadays.

However, it is not by chance that the instrument that created the International Labor Organization – the agency responsible for universalizing labor rights – was precisely the Treaty of Versailles, which brought World War I to an end. It reads: "universal and lasting peace can be accomplished only if it is based on social justice" and

"conditions of labor exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled". It was not by chance either that at the end of World War II the same principles were reaffirmed through the 1944 Philadelphia Declaration, which became the ILO Constitution.

In Brazil, the discussion about corporate social and environmental responsibility gained steam in the 1990s, as a result of the endeavor of sociologist Herbert de Souza, a.k.a. Betinho, to disseminate the concept of citizen companies. This movement led to the creation, at the end of that decade, of the Ethos Institute, which proposes to involve companies in sustainability commitments and at one point had more than 1,000 members, among them hundreds of large companies.

From the beginning, corporate social and environmental responsibility has been characterized as something spontaneously recognized by part of the business sector, a way of answering questions from different segments of society about the harmful consequences of unbridled economic activity. It is also a mechanism for controlling the risk of financial losses or reputational damage that could result from the involvement of corporations in serious environmental and human rights violations.

In its most positive and legitimate dimension, socio-environmental responsibility stems from a genuine concern about sustainability and respect for fundamental rights. In its hypocritical – and unfortunately not uncommon – dimension, socio-environmental responsibility as implemented by some companies is limited to a marketing strategy, with no impact on how the company actually runs its business.

In this second dimension, false responsibility actions correspond to what is being called "greenwashing" (and we could speak of "social washing" with respect to human and social rights). Greenwashing is the use of marketing and public relations strategies by an organization to portray a positive image among consumers and society in general, while seeking to hide the negative impacts of the activities in which it is involved.

The two dimensions share the concern to try to avoid public pressure for more stringent economic regulation, through the introduction of binding rules establishing penalties for noncompliance. As for social and environmental responsibility, in the corporate sphere behind all the existing dimensions lies the sector's attempt to keep actions within the remit of soft law rather than of hard law. Whereas the

first covers rules with a limited normative content that do not generate legal obligations, the latter refers to binding laws and treaties, with ensuing sanctions imposed by the State on violators.

In any case, the recognition of the need for some degree of responsible social and environmental behavior has become almost unanimous, including in the business world, despite the great discrepancy in the level of honesty at which these commitments are voiced.

In fact, even the economist Milton Friedman, one of the forefathers of neoliberalism, who was a harsh critic of the concept and an advocate of a minimalist corporate ethic (or, for many, an advocate of the no need for corporate ethical behavior) stated that "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud".[1] The last part of the sentence is the most meaningful but it is not always remembered by Friedman's followers: companies should seek profit, so long as they stay within the rules of the game. In other words, so long as they engage in open and free competition without deception or fraud.

However, the most popular interpretation of corporate socio-environmental responsibility is not Friedman's but John Elkington's, who coined the Triple Bottom Line concept, which would be the sustainability tripod (the three "Ps" – people, planet and profit) according to which to be sustainable a company needs to be financially viable, socially just and environmentally responsible.

After decades of prevalence of these topics in the strict field of voluntary action, without any recognition of legal duties, it has become clear that this model has run out of steam. In recent years, there has been increasing recognition of the need to advance by moving socially responsible corporate behavior into the remit of hard law, with legally binding contents.

Thus, it suffices to see that all the large corporations involved in financial and criminal scandals in recent decades had "flashy" social and environmental responsibility policies, and at the discourse level they claimed to follow appropriate standards of socially responsible behavior. Enron, which before its collapse reported revenues of $101

[1] N/A.

billion a year boosted by accounting and tax fraud, among other crimes, claimed to follow ethical and sustainable principles. In Brazil, JBS and Odebrecht, two large companies involved in the corruption scandal uncovered by operation "Lava Jato" (Carwash), whose CEOs confessed to various crimes, had until then published reports of impeccable socio-environmental responsibility. Not coincidentally, these two companies – contrary to what was informed in their reports – were also involved in very serious labor violations and amassed several court convictions (including, in the case of Odebrecht, for using slave labor).

What is more significant, however, is the fact that keeping socio-environmental responsibility policies in the restricted realm of self-regulation, in practice conflicts with the degeneration of sustainability standards under competitive pressure. Many entrepreneurs will recognize that in the long run, socially responsible behavior is more sustainable and desirable, prevents financial loss and reputational damage and is not incompatible with the search for profit. However, all it takes is one competitor to deviate from this behavior and succeed in immediately earning higher (if unsustainable) profits, for the entire industry to be pressured to reduce the level of social and environmental responsibility, since performance evaluations and demands for financial results occur in the very short term, usually on a quarterly basis.

One of the main steps towards overcoming a purely voluntary model occurred in 2008 (it is not by chance, when it is possible to feel the effects of the financial oranged crash that year) when the Human Rights Council of the Organization of American States Nations. United Nations or "Protecting, Respecting and Repairing" Framework, which implements and addresses Business Principles Guidelines and Human Rights, which will be addressed in this chapter's specific work (redirected by Rachel Davis, who was part, led Professor John Ruggie, which developed both Reference Framework and Principles), and which placed an intermediate position between "soft law" and "hard law".

Among other Principles, the document recognizes that: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".

As the UN explains (in its publication "Frequently Asked Questions About the Guiding Principles on Business and Human Rights", 2014), although the Principles are not a convention, they are a binding rather than a voluntary instrument, as they embody the content of existing international human rights treaties, including ILO

conventions and in this sense, they do not create a new right. What the Principles do is translate to the business world the consequences of existing treaties, recognizing that international rules are binding not only on States but also on individuals and legal entities including, of course, banks.

The importance of and need for socially responsible behavior are felt – and it couldn't be different – in the financial sector as well. In fact, this is the market segment in which the need for responsible and sustainable behavior is very strong, given its prominence in the contemporary economy. This is due not only to the constant financing needs of any business enterprise but also to the phenomenon of growing 'financiarization' of the global economy, which means that practically all major productive activities have a direct or indirect participation in financial institutions.

This fact was eloquently demonstrated in a study conducted by researchers from the Federal Institute of Technology in Zurich, published in 2011,[2] which concluded, by crossing information on 37 million companies and investors worldwide and using advanced computer techniques, that 737 large corporations control over 80% of the global economy. Of these, 147 companies control 40% of the economy, revealing an almost unbelievable degree of power concentration. At the top of this chain of ubiquitous corporations are the 18 financial institutions with the highest level of connections in the entire global economy and therefore with the highest control power. This group includes precisely the world's largest banks such as Citigroup, Credit Suisse, JP Morgan and Goldman Sachs, among others.

The political and social pressure for the responsible behavior of banks increased after the collapse of the world economy in 2008, which was one of the worst financial crisis ever, second only to the crash of 1929. Unquestionably, that crisis was precipitated by the irresponsible behavior of many financial institutions and financial system operators, particularly in the analysis and control of the risk to which they were being exposed, as well as by their involvement with unsustainable business models. Ultimately, the effects of that global crisis were borne not by the banks, which were rescued by national governments at the expense of sovereign debt increases, but by the general population, especially the poorest, who lost their homes and jobs.

[2] Full text available at: <https://arxiv.org/PS_cache/arxiv/pdf/1107/1107.5728v2.pdf>.

The result was stronger social and political pressure on the financial sector to correct its practices and act with greater responsibility in order to avoid the repetition of another financial collapse of such great proportions, including because very soon national governments will no longer have the budget and financial margin to promote another bank rescue operation at the expense of another massive public indebtedness.

Following the 2008 crash, some countries passed regulations providing for the duty of financial institutions to take action and comply with paradigms of social and environmental responsibility, including Brazil, Nigeria, Japan and Bangladesh.[3] Other countries, such as Peru, are discussing the implementation of these rules. Other countries yet are requiring the implementation of specific responsibility initiatives, the provision of periodic information to the public on such initiatives (with foreseeable legal consequences if false information is included in the disclosures required by law), as is the case of the UK through its Modern Slavery Act of 2015.

In Brazil, the regulation passed was Resolution No. 4,327/2014 of the National Monetary Council, providing for the implementation of a Socio-Environmental Responsibility Policy by financial institutions and other institutions authorized by the Central Bank to operate. This regulation will be addressed in a specific chapter written by Rodrigo Pereira Porto, from the Financial System Regulation Department of the Central Bank of Brazil.

This broader Resolution was preceded by Resolution No. 3.876/2010, also of the National Monetary Council, which prohibits granting rural credit to individuals or legal entities included in the Register of Employers that have kept workers in conditions analogous to slavery. The subject will be discussed in the chapter on slave labor and financial institutions, written by José Cláudio Monteiro de Brito Filho.

Before these regulations were issued, a discussion was already underway in the country, both in Brazilian doctrine and case law, about the liability of financial institutions acting in the capacity of lenders for environmental damages, based on the Brazilian Constitution of 1988, Law 6,938/81 and other legal instruments. This subject will also be discussed here in chapters written by Raimundo Simão de Melo, Alexandre Lima Raslan, Caio Borges, and Afonso de Paula Ribeiro Rocha.

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[3] In this respect see "Banks and Human Rights: A Legal Analysis" (UNEP Finance Initiative, 2015) and "Moving Forward with Environmental and Social Risk Management" (International Finance Corporation, 2014).

In fact, there is no need to convince banks, at least at the discourse level, of the importance of socio-environmental responsibility or of the need to asses and prevent socio-environmental risk. This is characterized by the risk of granting credit to or investing in business enterprises tainted by serious environmental or human rights violations (topic addressed here by Jean Rodrigues Benevides and José Maximiliano de Mello Jacinto). Financial institutions themselves write about the subject better than anyone else.

One of the champions of this perspective is the UN Environment Program Financial Initiative, a partnership between the United Nations and the financial sector which includes, through voluntary participation, representatives of the world's largest banks as well as institutional investors and insurance companies.

Among the statements of the Financial Initiative are:

> We believe that an economically efficient and sustainable global financial system is a necessity for long-term value creation. Such a system will reward long-term responsible investment and benefit the environment and society as a whole. ("UN Principles for Responsible Investment").

> We members of the financial services industry recognize that sustainable development depends upon a positive interaction between economic and social development, and environmental protection, to balance the interests of this and future generations. We further recognize that sustainable development is the collective responsibility of government, business, and individuals. We are committed to working cooperatively with these sectors within the framework of market mechanisms toward common environmental goals. ("UNEP Statement by Financial Institutions on the Environment & Sustainable Development").

In 2014, the Brazilian Federation of Banks issued SARB Regulation No. 14, containing more rules than those provided in Resolution No. 4,237/2014. This resolution establishes, inter alia, that contracts signed by banks must contain at least clauses providing for "the obligation of the borrower to comply with applicable environmental legislation" and "the obligation of the borrower to comply with labor legislation, especially regulations on occupational health and safety and the absence of labor analogous to slavery or child labor". It also provides for the bank's ability to terminate the contract before the end of its term if the client is found to have committed serious environmental and labor violations.

By way of another example, one of the largest Brazilian banks announces in its Sustainability Guidelines its intention to:

> (…) as a first priority, to permeate its organizational culture with the principles of socio-environmental responsibility, with this becoming effected in the day-to-day running of the Organization. To be coherent and credible, this stance must occur from within the Organization, reconciling administrative and business practices with the institutional discourse.

The bank also states that "the drive for a socio-environmental responsibility stance is a continuous process, requiring the commitment of all areas", and that it "wishes to use important position and nationwide coverage to become a benchmark for socio-environmental responsibility, through continuous innovations in its initiative".

All the guidelines, policies and reports on sustainability and socio-environmental responsibility of the largest banks operating in Brazil have similar provisions.

Many other examples could be mentioned, such as Norway's Sovereign Wealth Fund managed by a bank linked to the Central Bank of Norway, which has a high social sustainability standard that has become a global benchmark. Labor Prosecutor Lorena Vasconcelos Porto discusses this subject in a specific chapter.

Therefore, the question is not whether banks must comply with the rules of socio-environmental responsibility. The financial institutions themselves adamantly admit to this obligation. It is important to know, however, whether these forecasts translate into reality, that is, whether they shape the daily behavior of companies in running their business. It is also important to know what the consequences will be if the banks fail to comply with what they recognize as necessary and pledge to obey.

The Labor Prosecutor's Office (MPT in the Portuguese acronym) has been trying for years to find out whether banks are following, in practice, the responsibility rules already established.

Thus, in 2012 the MPT initiated an investigation to verify whether Resolution No. 3,876/2010, which prohibits granting rural loans to individuals and legal entities engaged in slave labor, was being monitored and complied with. In this a case, a public civil action had to be filed in order to obtain all the information on the issue, as most financial transactions are protected by bank secrecy rules.

In addition, in 2016 the MPT conducted civil investigations of the largest banks operating in the Brazilian market, in order to check how the socio-environmental responsibility policies required by Resolution n. 4,327/2014 were being designed and implemented.

These investigations revealed that there is still a very large gap between discourse and practice in the sector, and that very little is done in relation to the actions announced by financial institutions in their guidelines, internal regulations and accountability reports.

This finding does not come as a surprise. The UN came to a similar conclusion in the Global Corporate Sustainability Report 2013. Based on a survey of nearly 2,000 companies in 113 countries, the report found that although many companies have succeeded in defining social responsibility targets and policies, most still fail when it comes to enforcing them.

In the Brazilian case, MPT investigations unearthed many cases of financial institutions, both large and small, that have failed to comply with Resolution No. 3,876/2010 by granting rural loans to individuals and legal entities included in the Federal Government's 'dirty list' of slave labor. Some of the country's largest banks have repeatedly infringed the rule, in flagrant contradiction with their own publicly disclosed responsibility policies and in violation of other national and international commitments.

In several cases, the money involved came from the National Bank for Economic and Social Development (BNDES, which in this book is the subject of a specific chapter written by Alessandra Cardoso). When asked about it, BNDES officials admitted not only to several cases of loans of public money to individuals and entities involved with slave labor, but also that it did not directly oversee compliance with the conditions imposed on loans, as this was the responsibility of partner banks.

In another case, a large bank included in its internal regulations the possibility of granting loans to clients found to have used slave labor and child labor, that is, clients that the bank itself identified as being involved in these violations. Another bank, for certain lines of credit, expressly prohibited its sustainability department from taking into account labor-related issues in its assessment of socio-environmental risk.

None of the large banks were able to demonstrate to the MPT a single case of credit restriction imposed on their clients for any serious

violation of human and fundamental rights other than slave labor, including the exploitation of child labor, for example.

None of the large banks were able to demonstrate in any of their contracts the existence of provisions establishing the client's obligation not to engage in serious human rights violations, such as slave labor, child labor and deaths due to working conditions. The only contracts that contained such provisions were those related to loans involving money from the BNDES – rather than from the bank itself. In these cases, it was clear that the social clause had been included in the contract because of the socio-environmental responsibility policy of the BNDES and not of the other bank involved in the operation.

It was found that one of the banks even announced publicly that it included clauses providing for socio-environmental obligations in all its contracts. However, the analysis of the contracts showed that all they contained was a statement from the client that the loan money would not be used for purposes that could cause social damage.

The clause was drafted in such a way as to make it clear that the client was not assuming any obligations, as evidenced by the wording of the following clause of these contracts on the prevention of acts of corruption, in which the client "declares and undertakes" not to misuse the funds. That is, in the case of socio-environmental responsibility, the phrase "and undertakes" is excluded, in order to rule out the need for any action by the bank in the event of proven cases, for example, of slave labor, child labor or deaths caused by working conditions.

Consistent with the absence of contractual provisions, none of the major banks were able to prove the existence of any type of internal compliance mechanism that enabled monitoring the socio-environmental behavior of their clients during the execution of contracts.

It was also found that both the training and qualification of bank employees who implemented the socio-environmental responsibility policy were rather unsatisfactory. In addition, in most cases these courses did not even mention social issues such as slave labor and child labor, and employees were never actually taught how to identify signs of socio-environmental risk.

These and other problems lead us to conclude that much still needs to be done to translate social and environmental responsibility – which is universally recognized by the business sector – into concrete reality and business management practice. And a key element for that to happen is the recognition that the issue will never be satisfactorily

as long as it remains restricted to the spheres of self-regulation and adhesion to purely voluntary agreements and programs that have no repercussions in case of non-compliance and lack instruments for the exercise of some level of public control.

After all, as already mentioned, market pressures virtually preclude socially responsible action by any company that comes across a competitor seeking additional advantage through environmental and social violations that allow them – albeit unsustainably in the long run – to reduce their costs and raise their profits.

In the case of banks, this competitive pressure is experienced very directly, with enormous repercussions for the success of their business. If a bank is truly committed to implementing a serious socio-environmental responsibility policy and denies loans to clients involved in human rights violations but is faced with a competitor that in practice fails to observe any socio-environmental responsibility parameters, employers will not feel the need take corrective measures. This type of client will insist on the violations committed, which obviously increases its profit, and will simply migrate to the second bank, with which it will carry out all its financial transactions. Even if the first bank's intention is genuine and it recognizes that in the long run having these clients in its portfolio will bring in disadvantages, the first bank will soon be pressured to surrender because it will not be willing to silently lose its place in the market.

It is obvious that if the second bank publicly admitted to its actual practices and intentions (for example, by stating in its ads that it had no problem doing business with clients engaged in slave labor and child labor), it would experience significant losses, especially damage to its reputation (which is a valuable asset in the banking sector) and scare away clients with an ethical profile. The difference here – as this circumstance erodes the possibility of actions of corporate social responsibility based on voluntarism alone – lies in the fact that the offender, obviously, will never publicly admit to such a behavior and will adopt a discourse on responsibility that on paper cannot be distinguished from that of its competitor.

The capitalist enterprise is a fabulous mechanism for wealth generation and efficient resource allocation but a lousy tool for the spontaneous generation of socially desirable behaviors that are not profitable. If left on its own without any State intervention to enforce a legal framework, the market is capable of incorporating any productive

practices conducive to profit increases, including slave labor and child labor, as seen so many times throughout history.

Therefore, the evolution of corporate socio-environmental responsibility requires more than encouraging the spontaneous involvement of business enterprises and entrepreneurs (which already exists). It requires action by control and regulatory agencies (including the Central Bank, the Public Prosecutor's Office and the Judiciary, besides civil society) in overseeing and punishing violators and opportunists, i.e., those who fail to comply with the "rules of the game" and seek to obtain an advantage over the competition through socially irresponsible behavior, while being careful enough to hide it behind a false and empty discourse on responsibility.

This means recognizing that socio-environmental responsibility is not a mere option, it is not something that financial institutions can choose to have or not to have, at their sole discretion. Socio-environmental responsibility is a legal obligation. Therefore, recognizing its exact contours is the current task on which those engaged in the topic need to focus their attention.

The objective of this book, organized jointly by the Public Labor Prosecutor's Office and the International Labor Organization is to promote a debate around these issues by exposing existing problems and suggesting ways to bring the good intentions that are already being flawlessly stated by financial institutions closer to reality.

JOINT AND SEVERAL LIABILITY OF BANKS AS PROJECT FINANCE INSTITUTIONS FOR DAMAGE TO THE WORK ENVIRONMENT

RAIMUNDO SIMÃO DE MELO

1 Introduction

This paper aims to discuss the liability of banks for damage to the work environment and to the health of their permanent and outsourced workers and service providers, in light of the need not only to take preventive action regarding the work environment but also to review aspects of civil liability for damages resulting from the employer's omission both collectively and individually.

Addressing the harmful effects of banking work on the health of workers is not an easy task, given the great economic and political apparatus that protects one of the world's most profitable businesses: the banking industry. The task becomes even harder when the focus shifts to protecting the workers' health, which requires confronting the great economic interest of the banks, whose main objective is to permanently increase their profits at any cost, including by requiring employees to go above and beyond their work capacity. This is routinely seen in the form of insurmountable demands on workers at all levels to meet pre-determined targets. This is why sickness rates remain so high among bank employees.

Although there are enough legal grounds in Brazil to demand the implementation of preventive measures and to hold employers liable for harms to the workers' health (Brazilian legislation is advanced and protective in this regard), there is still an epidemic of

occupational diseases in the banking sector, including ostemuscular or mental diseases among others. Hence the opportunity and pertinence to bring up the discussion of such an important topic in this book, not only to offer inputs to lawyers, judges, prosecutors and other law professionals, but also to encourage jurists to reflect upon the harm caused by inadequate work environments to the health of bank and outsourced employees, in addition to serious human, financial and social consequences for them and their families as well for the country's economy and for society.

2 Work and human dignity under Brazilian law

The term "work" is derived from the Latin *tripaliare* and *tripalium*, a three-staked instrument used to inflict suffering or agony and to torture people. That is, in primitive times work was considered penalty or punishment. Over time, work has gained the meaning of something dignifying for humanity, something that people can subsist on by selling their strength to an employer or service recipient. Therefore, work today is a way of life for people to earn money honestly and live a decent life. It also gives people the pleasure of being useful in an organized society. This is what is provided for in the laws of most countries worldwide. This is what is provided for in Brazilian law, especially the Federal Constitution of 1988, which in Article 1 establishes as the foundations of the Federative Republic of Brazil, inter alia, the dignity of the human person and the social values of labor. Article 170 of the Constitution states that the capitalist economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard, among others, for the principles of environment protection and the pursuit of full employment. Article 170 is complemented by Article 196, which establishes that health is the right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at universal and equal access to actions and services for its promotion, protection and recovery.

Recognizing the dignity of the human person entails ensuring the physical, intellectual, moral and psychological well-being of workers, as well as a healthy environment to fulfill their obligations and consequently obtain the financial resources necessary to meet

their needs, for the purpose of enjoying a better quality of life.[1] Human dignity, therefore, is the first and foremost foundation for protection against painful work.

Specifically about work, Article 7 and Item XXII of the Federal Constitution ensure the rights of urban and rural workers, among other rights aimed to improve their social condition and reduce work-related risks through health, hygiene and safety rules. The term health as used in the law is generic and means body, soul and mind, since the ultimate goal is to reveal that its scope of application and protection includes, in addition to physical health, the intellectual and psychic capacity of the human person, which can vary from person to person.[2]

In other words, in our legal system work is not and cannot be considered a punishment or a way to wear out and damage the working human being, but rather a decent way of life.

As Christiani Marques asserts,[3] "It is unquestionable, therefore, that work is an essential element of life. Thus, if life is the human being's most important legal interest and work is vital to the human person, the integrity of workers must be respected in their daily life, since adverse acts will consequently affect the dignity of the human person."

When hiring workers, whether as salaried employees or self-employed workers, employers have the responsibility to provide them with decent working conditions, in a way that preserves their health and physical and psychological integrity. Thus, it is incumbent upon employers to take all possible collective and individual measures to avoid injury and harm to workers, since inhuman and degrading treatment is prohibited by the Brazilian Constitution (Article 5, Item III: "no one shall be submitted to torture or to inhuman or degrading treatment").

3 Right to a healthy and safe work environment

Brazil has one of the most advanced legislations on environmental protection, including the work environment (FC, Article 220, Item VIII), with the main objective or protecting life.

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1 Christiani Marques, A proteção do trabalho penoso, LTr, São Paulo, 2007, p. 40.
2 Ibidem, p. 23.
3 Op. cit., p. 21.

Thus, Law 6,938/81 defines environment as the set of physical, chemical and biological conditions, laws, influences, and interactions that enable, protect and govern life in all its forms (Article 3, Item I).

This definition of the National Environmental Policy Law is broad. It should be noted that the legislator chose an open legal concept in order to create a positive space for application of the legal norm. This is in full line with the Federal Constitution of 1988, which in the head of Article 225 seeks to protect all aspects of the environment (natural, artificial, cultural, and work environments) by stating that "all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life".

Thus, the Constitution provides for two legally defined dimensions of environmental protection: an *immediate* dimension – the quality of the environment in all its aspects – and a *mediate* one – the health, safety and welfare of the citizen, expressed in the concepts of *life in all its forms* (Law 6938/81, Article 3, Item I) and *quality of life* (FC, head provision of Article 225).[4]

Particularly about the work environment, the Brazilian Constitution establishes as a fundamental social right of workers a safe and secure work environment, as seen in Article 7 and Item XXII:

> The following are rights of urban and rural workers, among others that aim to improve their social conditions: (…) XXII – reduction of employment-related risks by means of health, hygiene and safety rules.

This is undoubtedly the most important right of workers, which aims to protect their health and physical and mental integrity due to and on account of work provided to a service recipient.

Equally important is Article 196 of the Brazilian Constitution, according to which:

> Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at universal and equal access to actions and services for its promotion, protection and recovery.

Therefore, if all have the right to an ecologically balanced environment and to full health, it cannot be different for workers, who

[4] Raimundo Simão de Melo, Direito ambiental do trabalho e a saúde do trabalhador, p. 29.

are one of the engines of the country's economy and help create the national wealth.

4 The employer's duty to protect the workers' health

If on the one hand workers have the right to the reduction of employment-related risks through health, hygiene and safety rules, on the other employers have the duty to implement these rules, as provided for in Article 2 of the Consolidation of Labor Laws (CLT):

> An employer is considered as the business enterprise, individual or collective, which, assuming the risks of economic activity, admits, hires and directs the provision of personal service.

The employer owns the business and, as such, assumes the risks inherent in its activities, as established by law, because it is the employer and not the workers who earns the profits of the business.

The CLT is crystal clear about the employer's duty to preserve the health of workers by complying with health, hygiene and safety rule as follows:

> **Art. 157** – An enterprise shall be required to:
>
> I – observe and enforce the provisions governing occupational safety and health;
>
> II – inform its employees, by means of internal instructions, of the precautions to be taken against employment accidents and occupational diseases;
>
> III – take such measures as are ordered by the competent regional authority;
>
> IV – facilitate supervision by the competent authority.

Law No. 8213/91, which provides for pension benefits, establishes in Article 19, §§ 1, 2 and 3 that:

> **§ 1** – The business enterprise is responsible for taking and using *collective* and *individual* measures for the protection and safety of workers' health" (emphasis added).
>
> **§ 2** – "Failure by the business enterprise to comply with occupational safety and health rules is an offense punishable by fine".

> **§ 3** – "It is the duty of the business enterprise to provide detailed information on the risks of the operation to be performed and the product to be handled.

Briefly, NR 17, item 1.7 of Ordinance 3.214/77 states that:

> An employer shall be required to:
>
> a) Observe and enforce legal and regulatory provisions on occupational health and safety;
>
> b) Prepare service orders on occupational safety and health informing employees through notifications, posters or electronic media;
>
> c) Inform workers of:
>
> I – occupational hazards that may arise in the workplace;
>
> II – means to prevent and limit these risks and measures taken by the business enterprise;
>
> III – results of medical examinations and complementary diagnostic tests to which the workers are subjected;
>
> IV –results of environmental assessments carried out in the work environment.
>
> d) Allow workers' representatives to follow up the inspection of legal and regulatory precepts on occupational health and safety.
>
> e) Determine the procedures that should be adopted in the event of an occupational accident or illness.

The above-mentioned legal provisions and other provisions found in the Brazilian legal system clearly show the duty of employers or service recipients to take all collective and individual measures to prevent risks in the work environment, among which those that are more effective to eliminate risks to workers' health should prevail, with the aim to avoid occupational accidents and illnesses.

Thus, in order to demonstrate the existence of harm to workers' health due to environmental risks in the work environment, employers must prove that they have fulfilled all their obligations under the law. Failure to do so will entail bearing the consequences of remediation.

It is obvious that workers also have obligations as regards preserving their physical and mental integrity, as seen in Article 158 of the CLT:

> An employee shall be required to:
>
> I – "Observe the rules governing occupational safety and health, including the instructions referred to in item II of the preceding article;

> II – Cooperate with the business enterprise in applying the provisions of this Chapter.
>
> Sole paragraph – An employee shall be at fault if he/she refuses without a valid reason to: a) comply with the instructions issued by the employer under item II of the preceding article; b) use the personal protective equipment provided by the business enterprise.

5 Civil liability for damages to the work environment

Civil liability for damage to the work environment and harm to workers' health has the double legal nature of both a sanction and a remedy.

While civil liability is generally based on the commission of an offense, in the case of liability for damage to the environment it makes no difference whether the act is lawful or unlawful, licit or illicit. All it takes is the existence of a harmful act for the offender to bear the consequences and be held liable for it regardless of fault or intention to damage the environment.[5]

However, more important than any financial compensation is to remedy the damage caused by reestablishing the status quo ante. Thus, in case of deforestation of a protected area, the polluter has the obligation to replace the destroyed trees. This is what happens, mutatis mutandis, in relation to the polluted or degraded work environment. An example of such an environment is factory pollution caused by the excessive noise of new equipment that fail to meet regular standards. In this case, the employer must take the necessary steps to keep the noise within the standards allowed by the legislation in force, in order to avoid harm to workers' health. But in addition to this step, which corresponds to an obligation to do (take preventive measures), the employer or service recipient and other responsible parties, as the case may be, will bear the costs of a generic compensation[6] for collective damage caused to both the environment and workers' health, pursuant to Article 1 of Law No. 7,347/85, as recognized by the doctrine and admitted by labor case law.[7]

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[5] See Nelson Nery Junior, Responsabilidade civil por dano ecológico e a ação civil pública, p. 133.

[6] The proceeds of this compensation will be invested in a specific fund to remedy the damage, which in the labor area, according to the understanding of both the doctrine and case law is the FAT (Workers' Support Fund).

[7] COLLECTIVE MORAL DAMAGE. Once established that the defendant has violated collective bargaining rights by infringing on public order rules that govern work- and

In addition, a court decision may demand a cash payment to force the responsible party or parties to take the measures required by law.

Where providing remedy for any damage caused to the work environment is impossible, compensatory damages in the amount to be determined by the judge in the specific case is imposed as a sanction.[8]

Special mention should be made of Édis Milaré's lesson on the subject:[9]

> Compensation in cash is admitted only where restoration is not viable – either factually or technically. This economic remedy is therefore an indirect way of remedying the damage. In any event, in both cases of compensation for environmental damage, the lawmaker seeks to impose a cost on the *polluter*, with a twofold main objective: to provide an *economic response* to the damage inflicted on the victim (an individual or society) and to *discourage similar behaviors* by the polluter or others. The effectiveness of one or the other depends directly on the certainty (inevitability) and timing (speed) of the remedial action.

It should be noted that there are various aspects of civil liability for damage to the environment, including the work environment and workers' health (FC, Article 5, Items V and X; Article 7, Items XXII and XXVIII; 225, § 3; Law 6,938/81, Article 14, § 1; new Civil Code, Article 927, sole § and; other provisions contained in the Constitution and in infraconstitutional laws).

Very importantly, the Federal Constitution of Brazil (Article 225, § 3) establishes that behaviors and activities harmful to the environment, including the work environment (Article 200, Item III) subject offenders to *criminal and administrative sanctions*, independent of the *obligation to remedy the damage*. As seen, the Constitution provides for cumulative sanctions (criminal, civil and administrative), which protect different objects and are subject to different legal regimes and jurisdictions.

Item XXII, Article 7 of the Federal Constitution refers specifically to the work environment and establishes that it is the right of workers

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worker-related health, safety, hygiene and the environment, compensation for collective moral damages is due, as the defendant's attitude affects the sense of dignity, lack of appreciation and consideration, with repercussions for the community and great harm to society (Ac. TRT 8th Region, 1st Panel – RO 5309/2002, Rapporteur: Judge Luis Ribeiro, tried on 12.17.02; DOEPA of 12/19/02, Book 3, p.1).

[8] See Nelson Nery Junior, Responsabilidade civil por dano ecológico e a ação civil pública, p. 133.

[9] Public civil action for damage to the environment, p. 147.

and, as a consequence, the duty of employers, service recipients and other jointly and severally liable persons to reduce employment-related risks by means of health, hygiene and safety rules.

These and other legal provisions provide for the liability of employers or service recipients and other parties liable for damage resulting from work in inadequate conditions and in unhealthy, dangerous and painful environments or due to work-related accidents and occupational diseases. With respect to the work environment, these responsibilities are of administrative, social security, labor, criminal, and civil nature.

Civil liability requires remedying the damage caused to the maximum extent possible, from recomposition of the damaged asset, where possible, to its replacement or compensation in cash.

It is known that most occupational accidents and diseases are associated with an inadequate and unsafe work environment. This inadequacy may be due to the lack of personal protection equipment or collective environmental prevention measures. Other assumptions are linked to the risk of the business of employers or service recipients, which may be compounded by lack of safety and special care.

This can lead to environmental damage, such as contamination by pollutants, oil spills that make the floor slippery, or a high level of noise at the workplace, causing illnesses and accidents. On the one hand, there is an environmental damage; on the other, this damage results in harm to the health and physical and psychological integrity of workers, leading employers, service recipients and other parties to be held jointly and severally liable.

As for liability for environmental damage generally considered, liability is strict in nature, as a corollary of a worldwide trend in this regard. Regarding strict liability, there is no longer any doubt in the Brazilian legal system, which is founded on the Federal Constitution (Article 225, § 3) and worded as follows:

> Conduct and activities harmful to the environment subject offenders to criminal and administrative sanctions, regardless of the obligation to remedy the damage caused.

Before 1988, the ordinary civil law (§ 1, Article 14 of Law 6,938/81) already provided for the strict liability of the polluter:

> Without prejudice to the application of the penalties provided for in this article, it is the obligation of polluters, *regardless of the existence of fault*, to compensate or remedy the damage caused to the environment and to third parties as a result or their activity (emphasis added).

In this sense, as stated by Celso Antônio Pacheco Fiorillo, the doctrine understands that[10]:

> Civil liability for damage to the environment is strict, as Article 225, Paragraph 3 of the Federal Constitution establishes the […] 'obligation to remedy the damage caused' to the environment without requiring any subjective element for establishing civil liability. As already pointed out, Article 14, § 1 of Law 6,938/81 was incorporated by the Constitution by providing for *strict* liability for damage to the *environment* and also to *third parties*.

In this respect, it is important to emphasize the understanding that the recognition of Law No. 6,938/81 by the Brazilian Constitution of 1988 also established the strict liability of the party causing the environmental damage with respect to individual interests for the damage to the environment, besides, of course, meta-individual interests, as stated by Carlos Roberto Gonçalves[11]:

> In the field of civil liability, the basic legal instrument in our country is the 'National Environmental Policy Law' (Law No. 6.938, 8.31.1981). The main virtue of this law is that it establishes the strict liability of the party causing the damage and the protection not only of individual but also of supra-individual interests (diffuse interests due to damage to the environment to the detriment of the community at large), giving legitimacy to the Public Prosecutor's Office to file civil and criminal liability actions for damage to the environment.

In this case, evidence of the fault of the party causing the damage as well as of the unlawful nature of the act is irrelevant, as liability for the environmental damage is corroborated by the idea that those who create the risk as a result of a certain activity must remedy the ensuing damage. In this case, evidence of action or omission by the agent as well as the damage and causal relationship between the act and the damage to the environment and to third parties will suffice.

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[10] Celso Antonio Pacheco Fiorillo, Curso de Direito Ambiental brasileiro, pp. 43/44.

[11] Responsabilidade civil, pp. 87/88.

This objective liability is based on the idea of holding the polluter and generator of the damage liable not only for the costs of remedying the damage but also for prevention, remediation and repression measures. This does not mean that this liability gives the polluter a free pass to damage the environment. The primary objective of any environmental policy is to prevent damage through mechanisms such as full remedy, in order to discourage practices harmful to the environment and human beings, since the environment and workers' health are a matter of public order.

Especially with regard to liability for damage to the environment, the objectivist theory is based on the risk of the activity. As a result, polluters must fully assume all risks arising from their activity (the integral risk theory) and have the duty to compensate including where the damage is due to a fortuitous event or force majeure, as recognized by the doctrine. An example of a damage to the work environment that has already occurred is the existence of noise above the permitted legal levels, with cases of professional deafness among workers. An example of the imminent occurrence of damage is the inappropriate and uncontrolled use of agrochemicals by agricultural workers.

Both the Federal Constitution (Article 225, § 3) and Law No. 6,938/81 (Article 14, § 1) apply to any environmental area, whether natural, artificial, cultural or work-related.

Especially with respect to the latter, the Constitution (Article 200, Item VIII) states that the Unified Health System (SUS) is responsible, inter alia, for contributing to the protection of the environment, including the work environment.

Civil liability for damage and threats of damage to the work environment becomes considerably important, since the work environment is more than a mere labor right. It is a fundamental right of workers as citizens and human beings, based on Article 1 of the Constitution, which includes among other foundations of the Federative Republic of Brazil the social values of labor and the dignity of the human person, which are not dissociated from the existence and maintenance of a safe, healthy, wholesome and adequate work environment.

Furthermore, strict liability for environmental damage is based on the fact that Environmental Law is a matter of public order of inalienable and diffuse ownership, as provided in the Federal Constitution (Article 225). This is justified in the environmental aspect of work, since he right to quality employment and in safe and decent

conditions is the foundation of the Federative Republic of Brazil, as established in Articles 1[12] and 170[13] of the Constitution.

6 Joint and several liability for damage to the environment

An important aspect of civil environmental liability concerns the joint and several liability of those that through their business activity cause damage to the environment or increase the possibility of risk to the environment.

In fact, the head of Article 225 of the Brazilian Federal Constitution establishes that:

> All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.

As inferred from the Constitution, this is a matter of joint and several liability of the State and society, including those who benefit from an activity harmful to the environment.

On an infraconstitutional basis, Article 942 of the Civil Code provides for joint and several liability by establishing that:

> The property of the party responsible for the offense or violation of the right of another shall be subject to remediation of the damage caused; and if the offense has more than one author, all authors shall be jointly and severally liable for the damage.
>
> Sole paragraph. The parties specified in Article 932 are jointly and severally liable with the authors and co-authors.

Cross claim is possible between jointly and severally liable parties, as stated in Article 934 of the Civil Code.

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[12] Art. 1 - The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: (…); I - the dignity of the human person; II – the social values of labor and of the free enterprise.

[13] Art. 170 - The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: (…); VI - environment protection; (…); VIII - pursuit of full employment.

Thus, the party that fails to fulfill a duty of environmental protection and prevention will be jointly and severally liable, since the healthy, balanced and global environment is a right of all and a duty of the State and society, as provided in Article 225 of the Federal Constitution.

With respect to the work environment, this issue is very relevant for groups of business enterprises (§ 2, Article 2 of the CLT) as regards outsourcing activities and services and means of labor intermediation. In these cases, those who make up the production network will be jointly liable for the damage caused to the work environment and workers' health, as provided for in Article 932, Item III and Article 942, sole paragraph of the Civil Code. According to the latter, the co-authors and all parties stipulated in Article 932 are jointly and severally liable with the authors, namely the employer or principal, in relation to their employees, servants and agents for offenses committed in carrying out their work or because of it.

Joint and several liability also applies to situations of projects and activities financed by banks, as will be explained in the following section.

7 Joint and several liability of banks as project financing institutions for damage to the work environment

A complex topic with important repercussions involves the responsibility of banks that finance project for policies and measures to prevent risk in and damage to the work environment.

Contracts between business enterprises, sometimes consortia, for the execution of construction works and real estate projects with the participation of one or more financial institutions, which provide the funds area a common practice. Thus, since the parties are linked to one other there is a coalition or network, and each participant is characterized as an indispensable element in the economic operation. In addition, a question arises: who is responsible for ensuring a safe and adequate work environment? Is it just each company that hires the workers or all those involved, i.e. contracting companies and banks financing the project or undertaking?

At first sight it may seem that the financial institution would have no environmental responsibility, since it is a mere executor of the works or projects – but solely as a provider of funds – and therefore has no link to the workers involved.

However, the solution is not that simple. It should be remembered and pointed out that a healthy, safe and adequate work environment is a fundamental social right of workers, as established in Article 7, Item XXII of the Federal Constitution of Brazil:

> The following are rights of urban and rural workers, among others that aim to improve their social conditions: (…) XXII – reduction of employment related risks by means of health, hygiene and safety rules.

Thus, according to this constitutional provision, when workers are hired for the execution of services, the service recipients have the obligation to provide decent working conditions, while preserving the dignity, hygiene, safety and health of workers as a way to protect their health and life, which are the most important assets.

No human being can be subjected to indecent working conditions, since the value of labor is the set of attributes assured to workers in a decent job that ensures them not only a minimum wage to survive, but the enjoyment of and respect for the fundamental social rights of workers, without which the attributes of the personality and dignity of human beings in a free, fair and solidary society are violated (FC, Article 3 and Item III).

If the liability for damage to the environment is joint and several, as stated in the previous item (FC, Article 225), it seems logical, under the Brazilian legal system, that banks and other financial institutions that finance projects also participate in the coalition with the companies implementing the projects that they are financing, as well as in the definition of policies and measures to prevent risk to the work environment and to the health and physical integrity of the workers involved. They should also be jointly and severally liable for any damage that may occur. It happens that each participant (companies and institutions financing the projects) is characterized as an indispensable element to the economic operation, which is one and the same.

A common example today is when a bank, as the implementing agency of the National Urban Housing Program finances real estate projects that will be implemented by companies, which in turn will subcontract part of the services, thus forming a chain, a true "spider web" that makes it difficult to establish liability for the damage caused. Well, if all legal entities and/or individuals involved in the projects seek to obtain profits, they should respond strictly and jointly for a safe,

healthy and adequate work environment and for the healthy quality of life of workers, not only by law but also based on a financial, economic, social and human rights logic (FC, Article 225 and § 3).

The institutions financing these projects take upon themselves the express duty to supervise working conditions and the work environment as well as compliance with fiscal, tax, social security and labor laws, as a pre-requisite for releasing the tranches of the loan, as is usually seen in the clauses of these financing contracts.

Indeed, the effective fulfillment of these obligations, which is supervised by the banks and institutions financing the projects, is not limited to the mere formal presentation of documents, but to effective respect for the constitutional rights of workers and the rules and regulations of the Ministry of Labor and Employment governing the work environment.

The fulfillment of these obligations is provided for in the Brazilian Federal Constitution, Article 170 and items thereof:

> The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: (…) III – the social function of property; (…) VI – environment protection; (…) VIII – pursuit of full employment(…)

First of all, it is not difficult to notice that under the Brazilian Constitution the mechanisms governing the activities of economic institutions must consider and respect human work, which ranks high in the world of work and in the set of principles of the economic order. As seen in the head of Article 170, the economic order is founded first on the appreciation of the value of human work and then on free enterprise. In other words, free enterprise should be at the service of human work and not the other way around.

The appreciation of the value of human work, which is highlighted in the head of Article 1 of the Federal Constitution, is intentionally reaffirmed in Article 170. That is, the lawmakers pointed out that free enterprise and market operation should not be dissociated from the appreciation of the value of human work, because capital as such must be at the service of human beings, since all things in this world – including the globalized world – turn around them.

Thus, as rightly put by Celso Antonio Pacheco Fiorillo:

> The Federal Constitution of, 1988 by establishing in its fundamental principles the *dignity of the human person* [Article 1(III)] as a basis for interpreting the entire constitutional system, adopted an explicitly anthropocentric vision (with inevitable impacts on the entire infraconstitutional legislation – including environmental legislation), according Brazilians and foreigners living in the country (Articles 1(I), and 5 of the Constitution) a central position in relation to our positive law system. (Course on Brazilian Environmental Law, 13th Edition, pp. 68/69, São Paulo: Saraiva, 2012).

These statements allow us to conclude that the right to a healthy and balanced environment is focused on meeting the needs and guarantees of life, and in the case of the work environment, of human life. This is unequivocal.

Likewise, the "social function of property" mentioned in Item III of Article 170 is also an indirect reference to the value of work, since it establishes that private property must be compatible with the collective interests of society and workers.

It is common, for example, for BNDES financial collaboration contracts to impose a series of requirements on borrowers. These requirements are related to socio-environmental aspects of the projects financed, such as complying with environmental, tax, labor and social security legislation and taking, during the term of the contracts, steps and actions to avoid or remedy damage to the environment and to occupational safety and medicine that may be caused by the project.

Therefore, it is more reasonable to require financial institutions to comply with their own socio-environmental responsibility policy through concrete actions for implementing the conditions agreed in their own contract. This should prevent them, in the future, from being held jointly and severally liable with the borrower for damage caused to the work environment and to workers' health.

Construction companies involved with work analogous to slavery, deaths from work-related accidents, informal employees and non-payment of social contributions, among other illicit acts, must not be allowed to implement projects funded with public money from the BNDES, Banco do Brasil and the Federal Savings Bank.

Therefore, project finance institutions have the duty to develop and permanently improve financial products, methodology, and analysis, monitoring and evaluation instruments that incorporate socio-environmental criteria in the light of national or international benchmarks; address social and environmental dimensions as a strategic

issue in the analysis of loan applications as well as in managing the assets and assessing the risk of borrowers and projects; monitor the impact of the loan on the creation of decent jobs and take into account their human rights policies; promote in the projects supported eco-efficiency, the use of socially and environmentally sustainable processes and products and of management systems for the entire supply chain and the reduction of greenhouse gas emissions; promote and guide actions to prevent and mitigate adverse social and environmental impacts; implement internal procedures for assessing risk and conducting a social and environmental analysis of borrowers and projects; implement methodologies for evaluating borrowers, assessing credit risk and monitoring and evaluating the impacts of projects financed.

These principles are in line with Resolution No. 4,327/2014 of the National Monetary Council, which establishes the guidelines to be followed in the design and implementation of the Social-Environmental Responsibility Policy (PRSA, in Portuguese) by financial institutions.

In addition, in 2014 the Brazilian Federation of Banks issued Standard SARB No. 14, which contained rules other than those established in Resolution No. 4,237/2014, providing, among other things, that contracts signed by banks must contain, as a minimum, clauses establishing the obligation of the borrower to comply with applicable environmental and labor legislation. This includes especially rules on occupational health and safety and the inexistence of labor analogous to slavery or child labor, as well as the right of banks to early termination of contracts in cases of serious environmental and labor violations by the client.

Therefore, there are principles for fulfilling the above provisions, which call for effective compliance by banks with their Social and Environmental Responsibility Policies, as a mandatory and legally required conduct to prevent the financial institution from being held jointly liable for damage caused by their clients to both the natural environment and the work environment.

Law No. 1,1105/2005, which provides for the use of Genetic Engineering techniques and the release of genetically modified organisms into the environment, establishes the joint liability of banks financing biotechnology projects. Article 2 § 4 states that:

> Public and private, national, foreign or international organizations that finance or sponsor activities or projects referred to in the *head* of this article shall require the submission of a Biosafety Quality Certificate

> issued by CTNBio, lest they will be held jointly liable for any effects arising from non-compliance with this Law or its regulations.

In the same line, Article 12 of Law No. 6938/81 establishes that:

> Government finance and incentive entities shall condition the approval of projects eligible for these benefits on licensing under this Law, as well as on compliance with the rules, criteria and standards issued by CONAMA.

Law No. 6,938/81, by introducing the Polluter Pays Principle by means of direct or indirect civil liability for environmental damage, exposes financial institutions in Brazil to legal risk, by establishing in § 1 of Article 12 that:

> Without prejudice to the application of the penalties provided for in this article, the polluter is deemed responsible, irrespective of the existence of fault, for indemnifying or remedying damage caused to the environment and to third parties by their activity (…)

As seen, under the law the financial institution has the obligation to verify whether the borrower is complying with environmental legislation.

As for the understanding that the financial institution is jointly and severally liable for any environmental damage caused by the borrower, the issue has been discussed in the courts, as seen in the report of Justice Herman Benjamin from the Superior Court of Justice (STJ) in Special Appeal No. 650728 (2003/0221786-0 of 12/02/2009), considering the indirect polluter and strict liability and that the financial institution can be held responsible for environmental prevention and liable for any environmental damage that may be caused as a result of its omission:

> **HEADNOTE**: 1 (…) 13. For the purpose of determining the causal link in the environmental damage, those who do it, who do not do it when they should do it, who allow others to do it, who do no mind that others do it, and who benefit when others do it are made equal.

This is joint and several liability.

This, of course, should lead Brazilian financial institutions to worry about the legal risk arising from project finance, forcing them to

implement environmental criteria in their loan operations, to mitigate the legal risk of such operations.

Therefore, the joint and several liability of banks that finance projects for the prevention of environmental risks in the work environment and for any ensuing damage is established by law, because the lender has the legal duty to verify whether the borrower is complying with environmental legislation.

8 Conclusions

Under the Federal Constitution of Brazil, human labor is not a commodity and therefore is afforded legal protection in the search for full employment, with respect for the human dignity of workers and the social values of labor. Thus, it is the duty of employers, service recipients and other jointly and severally liable parties to ensure safe, healthy and adequate work environments to preserve the quality of life of workers, with respect for the principles of social value of labor and dignity of the human person.

By preventing and remedying environmental damages, our Federal Constitution and ordinary laws ensure the strict and joint liability of those responsible for environmental degradation, including the direct and indirect polluter and those who finance activities harmful to the environment. Also, those who do it, who do not do it when they should do it, who allow others to do it, who do no mind that others do it, and who benefit when others do it are made equal (STJ, Special Appeal 650728).

In view of the above and in conclusion to the reflections provided in this brief paper, we can affirm that the joint and several liability of lenders for damage to the work environment arises from socio-environmental responsibility, which is founded primarily on the Federal Constitution of Brazil, in infraconstitutional laws and in Resolution No. 4,327/2014 of the National Monetary Council, which sets the guidelines to be followed by financial institutions in the design and implementation of their Social-Environmental Responsibility Policy (PRSA).

This responsibility is intended to benefit the environment, including the work environment, and preserve the health of workers and society at large, as a corollary of responsible investment.

In addition, sustainable development, which is one of the most important environmental principles, depends on the positive interaction

between economic and social development and environmental protection, to balance the interests of present and future generations, as established in the head of Article 225 of the Brazilian Constitution.

It should be pointed out that the principle of sustainable development is a collective responsibility of governments, corporations, individuals and society, as Article 225 of the Federal Constitution states that "all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, *and both the Government and the community shall have the duty to defend and preserve it for the present and future generations*" (emphasis added).

Therefore, the question is not whether banks should comply with the rules of socio-environmental responsibility, since the financial institutions themselves adamantly admit to this duty, although practice shows that there is a great distance between the socio-environmental theoretical discourse and the reality of what they sustain, with concrete damage to the environment, including the work environment, and immediate repercussions for the health and dignity of workers.

As can be seen, socio-environmental responsibility is not a mere choice of banks that finance projects, and they cannot, at their discretion, accept or reject it, because socio-environmental responsibility is a legal duty deriving from constitutional and legal mandates in Brazil. Therefore, recognizing the exact contours of this responsibility is a current and urgent task that requires the attention of those who dedicate themselves to the subject, among whom the author of this article is included by offering this doctrinal contribution.

In view of the above and under Brazilian law, banks and institutions that finance projects must be objectively and jointly responsible for preventing environmental risks and jointly and severally liable for any damage caused to the work environment and workers involved in these projects.

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CHAPTER 2

THE SOCIO-ENVIRONMENTAL RESPONSIBILITY OF FINANCIAL INSTITUTIONS UNDER THE FEDERAL CONSTITUTION OF BRAZIL

ALEXANDRE LIMA RASLAN

1 Introduction

It is widely known that the Brazilian Constitution enacted in 1988 still represents a moment of rupture with the preceding historical period. The reestablishment of the Brazilian political order put the various sectors represented in that constituent assembly in a perspective in which each of them, in its own way, pursued its own interests.

Therefore, the scenario that the original member of the constituent assembly aspired to three decades ago is in line with what Paulo Bonavides summarizes as the *material concept* of Constitution, as essential in a political charter, that is, "the set of rules pertaining to the organization of power, the distribution of competence, the exercise of authority, the form of government, and the individual and social rights of the human person".[1]

It should also be noted that this overlapping needs to be understood first from a historical perspective, so as to enable safely circumscribing its scope and identifying the effects that it may produce,

[1] BONAVIDES, Paulo. Curso de Direito Constitucional. São Paulo: Malheiros, 2015, p. 80.

such as for example in the case of fundamental rights, as pointed out by Maurizio Fioravanti[2] and Georges Abboud.[3]

Here, a caveat is in order: the process of constructing and reasserting rights and guarantees in general is not restricted to the linearity which, if hastily adopted, clouds the proper understanding of social phenomena. As a result, one neither interprets the present accurately nor accepts that this process can indeed experience advances and setbacks.[4]

It is precisely at this point that constitutional perspectives and expectations are caught in a permanent process of convergence and divergence, leading to crises of interests that must indisputably be solved in order to reduce as much as possible what I propose to name *power deficit* of the normative force of the Constitution.

Because of methodological imposition, this paper focuses on the reciprocal overlapping between fundamental rights[5] and the social function of property,[6] especially in a constitutional environment in which free enterprise[7] must be ensured according to the law without prejudice to social rights,[8] as pointed out by Nelson Nery Junior and Georges Abboud.

Revisiting the theme, which was compiled in an unprecedented academic research in 2009[9] and resulted in the pioneering publication in 2012 of the book *Responsabilidade Civil Ambiental do Financiador* (Environmental Civil Liability of the Financial Institution)[10] gives us

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2 FIORAVANTI, Maurizio. Los Derechos Fundamentales: apuntes de historia de las constituciones. 5th ed. Madrid: Trota, 2007.

3 ABBOUD, Goerges. Jurisdição Constitucional e Direitos Fundamentais. São Paulo: Revista dos Tribunais, 2011.

4 RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, pp. 183-184.

5 NERY JUNIOR, Nelson; ABBOUD, Georges. Direito Constitucional Brasileiro: curso completo. São Paulo: Revista dos Tribunais, 2017, pp. 264-266, 275-276.

6 NERY JUNIOR, Nelson; ABBOUD, Georges. Direito Constitucional Brasileiro: curso completo, pp. 298-300.

7 NERY JUNIOR, Nelson; ABBOUD, Georges. Direito Constitucional Brasileiro: curso completo, pp. 456-457.

8 NERY JUNIOR, Nelson; ABBOUD, Georges. Direito Constitucional Brasileiro: curso completo, pp. 349-364.

9 RASLAN, Alexandre Lima. Meio Ambiente e Financiamento: a relação sob a perspectiva da propriedade e da responsabilidade civil ambiental das instituições financeiras. Catholic University of de São Paulo. 2009. 313p.

10 RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012.

the pleasure of, by reaffirming the fundamental principles, strengthen those conclusions.

New reflections, legal changes and relevant facts have inspired efforts already made for constantly updating the subject.[11]

2 Social function: point of convergence of socio-environmental responsibility of financial institutions

In the preamble to the Declaration of the Rights of Man and of the Citizen of 1789, the French Revolution established that men were to be ensured some dignity, which should be preserved, based on the principles of liberty, equality and fraternity. It is known, however, that *equality* was the focal point of those interests. The abolishment of several institutions and trade guilds met the longing for *liberty*. *Fraternity* was initially a very abstract evocation, a "civic virtue" in the Declarations of 1789 and 1791. In turn, fraternity was belatedly established as a principle in the French Constitution of 1848, item IV of the Preamble.

The enjoyment of individual liberties and the accumulation of private property, therefore, already catered to those revolutionary interests, providing the feeling of dignity in that historical period. In the scenario of classical liberalism, fraternity was not afforded the same importance as freedom and equality. Certainly, this gap still contributes, at least unconsciously, to the understanding of the legal concept of property and full enjoyment thereof.

With the process driven by the French Revolution (1789), the right to property was enshrined in Article 544 of the French Civil Code (1804), thus ensuring absolute power to the owner. This power was further enhanced by the Industrial Revolution, leading to an increase in the exploitation of natural resources, labor, etc., as well as in the consumption of goods and services, all encouraged by mechanization and new technologies. However, the reaction to those liberal ideals which no longer responded to the expectations of the transition from the nineteenth to the twentieth century – in relation to either property or state abstention – was soon to come.

[11] RASLAN, Alexandre Lima. O Estado da Arte da Responsabilidade Socioambiental do Financiador. In: YOSHIDA, Consuelo Y. Moromisato et al. (Coord.). Finanças sustentáveis e a responsabilidade socioambiental das instituições financeiras. Belo Horizonte: Fórum, 2017, pp. 45-56.

Reacting to the status quo, the Mexican Constitution of 1917 was the first to ensure the rights of workers by providing for fundamental rights. On the same occasion and in the same direction, the new Mexican order reestablished private property, imposing upon it the obligation to meet the interest of the people, according to Article 27. The social as well as the environmental dimensions of property are thereby asserted.

In Europe, social rights are raised to the level of fundamental human rights in the period following World War I (1914-1918), which ultimately impacted on the right to property as well.

The German Constitution of Weimar (1919) inspired the establishment of social democracy in the West, alongside the Mexican Constitution of 1917. The new German order added some essentially social rights to the list of classical individual rights and guarantees. In particular, it innovated by enshrining the social function of property in Article 153, which exhorted that "property entails obligations" and "its use shall also serve the public good". In the German Constitution of 1949, which is still in force, this provision is contained in Article 14, Item II. The German members of the constituent assembly of 1919 were also concerned about the economic order, conditioning the "market" on economic freedom. Article 151 provided for respect for human dignity by establishing that "the economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured". In Article 152.1, contractual and economic freedom began to qualify property, which had already been ensured in the previous German Constitutions.

Although this paper has no intention to draw a time line, the importance of pointing out some historical facts requires mention to the Declaration on the Human Environment that came out of the Stockholm Conference (1972). Brazil's adherence to the Declaration without reservation links the interpretation to Principle 1, under which "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". It should be noted that although with some delay and still under the aegis of the previous constitution, Brazil passed Law No. 6938/1981, the National Environmental Policy, internally implementing environmental protection, human health, etc., in view of the use of environmental resources.

In Brazil, under the impact of this global trend the Federal Constitution of 1988 aligns the economic and financial order with appreciation of the value of human labor and free enterprise. The perspective, therefore, is to ensure a dignified existence for all, with social justice. To that end, the expectation must be met through compliance with, inter alia, the principles of private property, social function of property and environmental protection, in accordance with Article 170, Items II, III and VI of the Brazilian Constitution.

But before taking this implication as a novelty, it is worth reaffirming that Brazil's constitutional tradition has long aligned property with social function. The Brazilian Constitution of 1946 provided for the function of property. Article 147 established that "the use of property shall be conditioned to social welfare (…)". Later, in the 1967 Constitutional Reform, Article 157 as currently worded established that: "The economic order is intended to achieve social justice, founded on the following principles: (…) III – the social function of property; (…)". Subsequently, Constitutional Amendment No. 1 of 10.17.1969 maintains the link between property and social function by establishing in Article 160 that besides economic order, social order requires compliance with the principle of the social function of property: "The economic and social order is intended to achieve national development and social justice, founded in the following principles: (…) III – the social function of property; (…)".

It is clear, therefore, that despite the social and environmental progress experienced until to the beginning of this twenty-first century, the analysis of the course of history in the last hundred years, starting with the Mexican Revolution of 1917, allows us to say that there is still a considerable gap between perspectives, expectations and materialization of constitutional wishes.

Reducing these constitutional frustrations requires reviewing some premises, such as those about property, without any intention to establish or reinvent the concept. For that purpose, it suffices to experience the encounter with the reality of the *credit-dependent market* to identify in the constitution the socio-environmental responsibility of financial institutions.

The first necessary reflection is the promotion of an extended, and therefore adequate, interpretation of the concept of property. One should expect neither a useful defense of the environment nor an effective defense of the dignity of the human person when focusing on real estate alone.

Pontes de Miranda argued that in a very broad sense property is linked to social function, which transcends the law of corporeal things and comprises credit: "in a very broad sense, property is the domain or any property right. This concept goes beyond the law of things. *Credit is property*. In the broad sense, property is every right arising from the occurrence of a rule of the law of things (Code of Criminal Procedure, Articles 485, 524 and 862). In an almost coincidental sense, it is all rights over corporeal things and literary, scientific, artistic, and industrial property. In the strictest sense, it is only the domain.[12] Property, therefore, should not be identified exclusively with the possibility of physical ownership. Pontes de Miranda states that "the thing that is the object of property today is not only the corporeal thing".[13] It should be noted that this comment was made in light of the Federal Constitution of 1946. The Federal Constitution of 1988 asserts that "the law has accepted that the notion of thing is not naturalistic or physical; it is economic and social".[14]

The latest national doctrine, represented here by Gilmar Ferreira Mendes, Inocêncio Mártires Coelho and Paulo Gustavo Gonet Branco also favors an expanded constitutional concept of property by pointing out that the German Constitution of Weimar (1919) guaranteed property rights beyond movable and immovable property. It emphasizes the prestige of "property value, including several property-related situations arising from relations of private law or not". In addition, it announces that "this change in the function of property was fundamental for abandoning the idea of the necessary identification between the civilistic concept and the constitutional concept of property".[15] Thus, mortgage, pawn, bank deposits, intended wages, shares, equity interests, patent and trademark rights among others are subject to social function.[16]

Therefore, *economic activity* in the broad sense is also linked to social function, as inferred from Article 5, Item XIII, and Article 170,

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[12] MIRANDA, Francisco Cavalcante Pontes de. Tratado de Direito Privado. 4. ed. São Paulo: Revista dos Tribunais, 1983, Special Part, Volume XI, p. 9.

[13] MIRANDA, Francisco Cavalcante Pontes de. Tratado de Direito Privado. 1983, Special Part, Vol. XI, p. 15.

[14] MIRANDA, Francisco Cavalcante Pontes de. Tratado de Direito Privado. 1983, Special Part, Vol. XI, p. 15.

[15] RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, p. 79.

[16] MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. Curso de Direito Constitucional. 2008, pp. 424-425.

sole paragraph of the Brazilian Constitution. Operating in the capitalist regime constitutionally adopted by Brazil implies, undoubtedly and without exception, that *free enterprise* owes respect to social function. And it should be pointed out here that not all economic activity is undertaken directly and exclusively by the owner, but rather by third parties who, in the *enterprise-based scheme* must comply with the constitutional principles and legal provisions, whether in defense of the private outcome or in respect for collectivity.

An example of this assumption comes from Law No. 6,404/1976 (Brazilian Corporation Law), which clearly provides for the *social function of the enterprise* by assigning this duty to the controlling shareholder, in accordance with the sole paragraph of article 116: "Article 116. A controlling shareholder is a natural or legal person, or a group of persons bound by a voting agreement, or under common control that: (…) Sole paragraph. A controlling shareholder *shall use its controlling power in order to make* the corporation accomplish its purpose and *perform its social role* and shall have *duties and responsibilities* towards the other shareholders of the corporation, those who *work for the corporation* and the *community in which it operates*, the rights and interests of which the controlling shareholder *shall loyally respect and heed*".

And here something of extreme importance deserves to be highlighted: financial institutions in Brazil must be established as corporations, under Article 18 of Law No. 4,595/1964 (Law on Monetary Institutions, Banking and Credit). This is a fact that deserves to be mentioned, since a word such as *loyalty*, so loaded with duty towards the other, towards those to whom it is owed, is not usually found in laws. The gravity of the signs that make up the type is then perceived: *shall use the power* in order to *perform its social role* due to the *duties and responsibilities* towards those who *work in them*, besides the duty to be *loyal*, to *respect and to heed the rights and interests of the community where they operate*. Well, this is one of the essential points of the abundant substrate of the socio-environmental responsibility of financial institutions, which confers a degree of concreteness to the social function of financial (economic) activity.

When commenting on the aforementioned Article 116, Fabio Konder Comparato clarifies the implication between *corporate activity*, *controller* and *social function*, warning that *control power*, although it does not coincide with property, is linked to a *legal duty* of the corporate and economic activity: "When production goods are integrated into corporate exploration, as we have seen, the social function under

discussion is no longer a power-duty of the owner, but of the controller. In spite of the elementary character of the distinction, it is important to reaffirm here that *control power is not mistaken for property*. It is not a real right, therefore, of an absolute character, focused on one thing, but a *power of organization and direction* that involves people and things. The cause of this persistent conceptual confusion is undoubtedly due to the fact that in the capitalist regime, the power of corporate control is based on the ownership of capital or of the securities representing corporate capital".[17]

At this point, special mention should be made of *production goods*, such as money, currency and credit among others which, when directed at or incorporated into the production system[18] are affected by the social function. With regard to production goods, it is worth pointing out that they can be used to promote trade or produce goods and services, since productive activity is characterized not only by processing but also by the *assignment of value* to what is produced.[19]

Thus, activities related to production or the granting of incentives or credit, either private or public,[20] have gained fundamental importance in the establishment of the *superstructure* of the credit system, which has served as a *medium* for the transcendence of the Industrial Revolution and, more recently, of the Digital Revolution, by pressuring the stock of environmental resources available in nature.[21]

It should therefore be concluded that financial resources for the production of goods or services are subjected to social function, in its socio-environmental dimension. This includes funds from the capital of the party carrying out the work or activity or from an equally private third party, like the sponsor, as well as from those funds set aside or aimed to integrate government incentive or public or private, national or international financing programs.[22]

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[17] COMPARATO, Fábio Konder. Função Social da Propriedade dos Bens de Produção. Revista de Direito Mercantil, Industrial, Econômico e Financeiro. São Paulo: Revista dos Tribunais, nº 63. Year XXV (New Series). July/Sept. 1986, p. 77.

[18] COMPARATO, Fábio Konder. Função Social da Propriedade dos Bens de Produção. Revista de Direito Mercantil, Industrial, Econômico e Financeiro. 1986, p. 72.

[19] COMPARATO, Fábio Konder. Função Social da Propriedade dos Bens de Produção. Revista de Direito Mercantil, Industrial, Econômico e Financeiro. 1986, p. 73.

[20] RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, p. 84.

[21] COMPARATO, Fábio Konder. Função Social da Propriedade dos Bens de Produção. Revista de Direito Mercantil, Industrial, Econômico e Financeiro. 1986, p. 72.

[22] RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, pp. 217-221.

Public or private financing of economic activities that use environmental resources, therefore, is linked to social function. Thus, it must be established in an express infraconstitutional provision, in accordance with Article 10 of Law 6,938/1981 (National Environmental Policy), for example, as well as at a higher level. It should be noted that the Brazilian Constitution of 1988, especially in Title VII, "The Economic and Financial Order", structures, under Chapter I on "The General Principles of the Economic Activity", a principiologic framework with Articles 170 to 181, in addition to Article 192,[23] which frames Chapter IV, "The National Financial System".

Pinto Ferreira[24] and Edvaldo Brito[25] point out that Article 192 of the Brazilian Constitution of 1988 is a novelty in Brazilian constitutional history, inspired by the German Constitution of Weimar of 1919 and the Basic Law of the Federal Republic of Germany of 1949, whose Title X is dedicated to the "Financial Regime" (*Das Finanzwesen*), as well as the 1976 Constitution of the Portuguese Republic, which addresses the "*Financial and Tax System*" in Title V. These references reinforce the profile of modern constitutions, such as Brazil's, in which not only political or civil rights but also social and economic rights are addressed with *supremacy*. The Brazilian financial system, which is recognized as integrated with the economic order, is expressed in such a way as to require that its actors, financial institutions and borrowers promote human well-being and dignity.

It should be stressed that the social function of the national financial system is embodied in Article 192 of the Constitution, i.e., that it is "structured to promote the balanced development of the country and to serve the collective interests". It is an instrument for the realization of citizenship, human dignity and solidarity, reinforcing the foundations and objectives of the Federative Republic of Brazil from the perspective of Article 1, Items II and III, and Article 3, Items I and IV. The infraconstitutional assertion of the *social function of the contract* according to Article 421 of the Civil Code complies with the constitutional provision and binds the parties to liability – in this case,

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[23] RASLAN, Alexandre Lima. Environmental Liability of the Financier. Porto Alegre: Livraria do Advgado, 2012, p. 94.

[24] FERREIRA, Pinto. Comentário à Constituição Brasileira. São Paulo: Saraiva, 1994, v. 6, p. 530.

[25] BRITO, Edvaldo. A Constituição Federal Brasileira 1988: interpretações. Rio de Janeiro: Forense Universitária. Dom Cabral Foundation. International Academy of Law and Economics, 1988, pp. 394-395.

for example, the financial institution and the borrower – as a way to prevent and repress abuses and deviations, binding them to the social interest of the contract.[26]

Confirming the constitutional wish, Law No. 4,595/1964 (Law on Policy and Monetary, Banking and Credit Institutions) also finds no opposition to express references to social function. It should be noted that Article 2 creates the "National Monetary Council, for the purpose of formulating the currency and credit policy as provided for in this law, aiming at the economic and social progress of the Country". And Article 3, Paragraph IV, establishes that the policy of the National Monetary Council will aim to "guide the investment of the resources of financial institutions, both public and private; with a view to promoting favorable conditions in the different regions of the country for the harmonious development of the national economy". Financial activity, therefore, should contribute to the balanced development of the country and the interests of the collectivity. This is another important aspect showing that financial institutions are anchored in social function.[27]

And here, at this exact point, there is room for the assertion that in addition to the interpretations of regulations and already reinforcing them, financial activity is essentially an *ancillary activity* intended to provide *objective conditions* for other economic activities, as Sidnei Turczyn concludes: "On the other hand, it can be said that in the capitalist regime, while economic activity in general is a *core activity*, financial activity, although indispensable, is an *ancillary activity*, that is, it facilitates the implementation of the other types of economic activities. This also contributes to assigning financial activity a special nature".[28]

Public or private financial activity, regardless of whether it is a source of public or private financing, is bound to the objectives of Article 192 of the Brazilian Constitution, thus fulfilling the social function, since according to Fábio Konder Comparato "if property is included among fundamental rights, it should be subject to the legal regime that is common to such rights."[29]

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[26] RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, pp. 236-240.

[27] RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, pp. 93-97.

[28] TURCZYN, Sidnei. O Sistema Financeiro Nacional e a Regulação Bancária. São Paulo: Saraiva, 2005, p. 34.

[29] COMPARATO, Fábio Konder. Função Social da Propriedade dos Bens de Produção. Revista de Direito Mercantil, Industrial, Econômico e Financeiro. 1986, p. 76.

Reaffirming what we have been advocating, the idea of function translates into the power to assign property a specific purpose by promoting it and keeping it strictly linked to a special objective, such as the defense of the environment and of fundamental rights. The power of social expression, which qualifies the function, links that particular purpose to the collective interest and is not satisfied with catering exclusively to the property owner, and should therefore seek the conciliation of interests, under penalty of punishment as provided by law.[30]

Finally, public monetary or credit policies should only enjoy constitutional protection when they concomitantly meet the social function required by Articles 5, Item XXIII, and 170, Items III and VI, with special attention to the defense of the environment and of social and economic rights, in addition to fundamental rights.[31]

3 Conclusion

The materialization of constitutional expectations depends, inter alia, on the proper understanding of the historical and legal fundamentals that must be used as assumptions for drawing conclusions that avoid paralysis or setbacks in the defense of fundamental rights, for example.

The case of socio-environmental responsibility of financial institutions is in line with this movement that requires having hindsight knowledge and acting in perspective. It is never too much to affirm that the social themes that gave rise to the environmental concern historically are now evident.

It is necessary, therefore, to re-evaluate old prejudices which, anchored in epistemological obstacles, hinder the progress of science.

According to the conclusion of another study on the same topic, the proposal renewed here is that the economic instruments must promote, in a preventive way, the defense of socio-environmental interests, without prejudice to the possible remediation of the damage. This requires acting beforehand against not only the ideological

[30] RASLAN, Alexandre Lima. Environmental Liability of the Financier. Porto Alegre: Bookstore of the Lawyer, 2012, p. 98.

[31] RASLAN, Alexandre Lima. Responsabilidade Civil Ambiental do Financiador. Porto Alegre: Livraria do Advogado, 2012, p. 98.

discourse that hinders the progress of any rational discussion but also the ignorance of the legal reality and, above all, of the market reality (externalities).

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THE ROLE OF RESOLUTION NO. 4,327/2017 AND THE SOCIO-ENVIRONMENTAL RESPONSIBILITY OF FINANCIAL INSTITUTIONS[1]

RODRIGO PEREIRA PORTO

1 Introduction

A regulatory proposal submitted by the Central Bank of Brazil on the social and environmental responsibility of financial institutions and other institutions that are part of the National Financial System (SFN) was extensively discussed during the United Nations Conference on Sustainable Development (commonly referred to as Rio+20 Conference). On April 25, 2014, the National Monetary Council (CMN) issued Resolution No. 4,723 regulating the matter (BCB, 2014).

In summary, Resolution No. 4,327 of 2014 establishes guidelines for SFN institutions on the design and implementation of a Socio-Environmental Responsibility Policy (PRSA). It defines the concept of socio-environmental risk, encourages stakeholder participation in the policy-design process, and establishes the need to subject its identification, assessment, and control to a pre-existing risk management unit of the institution, such as the credit and operational units.

The rule also determines that the governance structure of the institution should be compatible with its size, the nature of its business

[1] The views expressed in this article are those of the author and do not necessarily reflect the official position of the National Monetary Council or of the Central Bank of Brazil.

and the complexity of services and products offered. In addition, it provides for the development of a plan of action defining the actions required for adjusting the organizational and operational structure of the institution, if necessary, as well as the routines and procedures to be followed under the policy guidelines, according to a schedule specified by the institution.

This aspect contributes to the effectiveness of the rule and its enforcement according to the principles of both proportionality – i.e., the PRSA must be compatible with the nature of the institution and the complexity of its activities and financial services and products – and relevance – i.e., the scope of the policy should consider the degree of exposure of the institution's activities and operations to socio-environmental risk.

It is worth highlighting that the rule addresses the need for discussion, within the organization, of its socio-environmental responsibility, thus formalizing its institutional commitment established by the highest decision-making spheres of the organization, according to its own policy. Among several possible concepts applicable to the phrase "socio-environmental responsibility", the World Bank (referred to in Doane, 2004) states that it

> (…) describes a company's responsibilities towards all its stakeholders in its operations and activities. Socially responsible companies consider the full scope of their impact on communities and on the environment when making decisions, balancing the needs of stakeholders with their need to make a profit.

Resolution No. 4,327 of 2014 seems to be a praiseworthy and original initiative. It would be praiseworthy in that it seeks to overcome a constant challenge in the entire regulatory process: institutions would tend to take costly measures only when they noticed that a possible violation of the regulation could be detected and severely punished, as already observed by the Organization for Economic Cooperation and Development (OECD, 2010). This type of behavior reflects a growing inefficiency from the economic point of view: spending on solutions aimed solely at complying with existing legislation while procedures fail to interfere synergistically in the company's production processes can be counterproductive.

Understanding how Resolution No. 4,327 of 2014 faces this dilemma requires realizing that the cost of complying with the rule must

be justified by increased productivity and reduced risks. To that end, the regulation in question does not intend to dictate to the institutions what they should do to integrate the socio-environmental issue in their business strategy and relationship with stakeholders. However, it determines that they should do it with respect for their particularities. Each institution may have a different policy that is consistent with the wishes of its controllers and the expectations of its stakeholders.

Thus, the institutions should inform their stakeholders – including the Central Bank of Brazil – of their institutional position regarding their socio-environmental responsibility. To that end, the financial institution's Executive Board and Board of Directors, where these exist, should take into account the nature of the institution's activity, the profile of its clients and investors, the degree of exposure to risk the institution is willing to accept, among other peculiarities that reflect the diversity of segments operating within the SFN.

In turn, the rule is original in that it strengthens the socio-environmental responsibility of financial institutions. The originality of the rule lies particularly in preventing banks, in response to certain social and environmental issues that arise in the course of their operations, from acting unpredictably and inconsistently over time, since the institutional policy is especially useful to guide this conduct from now on.

Thus, the regulation in question, in essence, is not a mere inspection instrument of this Central Bank focused on the management of socio-environmental risk, but also seeks to reinforce corporate governance mechanisms to strengthen relations between the institution and other stakeholders.

It is inevitable, however, to question the real need for a rule ordering SFN institutions to develop such a policy, given the current voluntary commitments in the financial industry regarding best socio-environmental practices and the apparent economic incentives existing in the market. It seems to be a fair and pertinent question for discussing the timeliness and suitability for regulating the subject. Among the various possibilities for responding to this problem, some comments to support a personal opinion in this regard are provided below.

2 The issue of socio-environmental risk

The business of a financial institution is to take risks. According to good financial doctrine, the return should be proportional to the risk

incurred. By definition, this means that the financial intermediation process, however regulated, still maintains a component of uncertainty in the decision-making process, and this inefficiency does not exempt the institution from risks such as financing activities that may generate negative impacts large enough to outweigh the benefits of the activities to society itself.

On the side of financial institutions, there are several reasons that encourage the greater involvement of financial institutions with socio-environmental issues. Certainly, the concern about potential liabilities arising from social and environmental impacts caused by borrowers is a relevant intersection between the banking business and the socio-environmental issue.

The United Nations Environment Program – Financial Initiative (UNEP-FI) has long pointed out (UNEP, 2004) that banks have been redefining their lending processes in order to identify relevant environmental issues (and, as a result, social issues as well) related to different types of projects. Social liabilities, for example, may influence the quality of credit in a variety of ways, such as fines that may weaken the borrower's economic and financial performance.

The fact is that any economic losses resulting from exposure to socio-environmental factors are not limited to the sphere of credit risk. The creditor's (banks) liability for borrower's activities that degrade social or environmental conditions in financed projects is a relevant legal risk due to court orders.

The US example illustrates the effect of legislation on the socio-environmental behavior of financial institutions. The potential for environmental liabilities of banks may arise from a variety of federal and state laws in the United States of America, where the main law in this respect is the so-called "Comprehensive Environmental Response, Compensation and Liability Act" (also known as CERCLA or Superfund) (FDIC, 1993). CERCLA establishes a legal framework that creates a potential liability arising from the costs of remedying environmental damage to the current owners of contaminated properties, or even to former owners who may be responsible for the damage.

Despite providing for an exception for creditors and banks that do not participate in property management, US Supreme Court decisions have ruled that many banking institutions would actually own or operate projects with substantial environmental impacts and therefore are subject to the costs of remedying environmental damage provided for in the said legislation (FED, 1991).

At the national level, the environmental legislation in force provides, a priori, for the strict and joint liability of financial institutions for environmental damage caused by projects financed by them. A relevant aspect emphasized by the Law on Environmental Crimes (Law No. 9,605 of 1998) is related, according to Morais (2000), to the possibility of establishing criminal liability of either the legal entities that caused the environmental damage, whether it has occurred by decision of their legal representatives or contractual representative in the interest or benefit of their entity or of whoever in any way has contributed to the crime, to the extent of and proportional to their culpability.

Other exposures to risk are clearly perceived in the banking business. Various assets, such as stocks and other securities issued by companies associated with the use of labor analogous to slavery, for example, may experience a decrease in value, which results in a greater market risk for the banks' treasury.

In Brazil, the launch of the 1995 Green Protocol signed between the Ministry of the Environment (MMA) and the main federal public banks led to a voluntary commitment made up of principles for the inclusion of responsible socio-environmental practices in loan agreements. In the private banking sector, the movement is influenced by multilateral organizations such as the International Finance Corporation (IFC), the Inter-American Development Bank (IDB) and others which, when transferring funds to banks require the implementation of a socio-environmental management system in their lending operations. However, the greatest progress has occurred since 2003, when the largest private banks joined the Equator Principles and resumed the discussion of self-regulation of socio-environmental responsibility in the financial system.

In August 2008, the Green Protocol was renewed by the parties and in 2009 it was followed by a Memorandum of Understanding between the MMA and the main private banks in the country.

Therefore, the risks and the need to manage them, coupled with new business opportunities, seem to indicate that there would be enough incentives for a proactive behavior of financial institutions towards greater socio-environmental responsibility.

3 Market failures

Voluntary initiatives by financial institutions have led to some progress in the search for the convergence of economic, social and environmental dimensions in various business strategies. Large discrepancies, however, have been identified in relation to the level of commitment of financial institutions in the different segments of the SFN, including public banks, national private banks, and private foreign-owned banks. This discrepancy has reached concepts, governance structure and standards related to both the inclusion of socio-environmental aspects in the activities of financial institutions and the dissemination of information and stakeholder involvement.

A relevant aspect related to the heterogeneity of the system refers to the governance model for socio-environmental responsibility. Although some institutions have established standardized governance structures, others do not see the issue as relevant. This difference in approach suggests that there are not enough incentives to address the establishment of actions and related competencies that guarantee compliance with a minimum management standard. The differentiated perception of market mechanisms to integrate actions of a socio-environmental nature in the institutions' businesses, in order to generate benefits to them, is hampered by market failures.

The summary report of the Green Finance Study Group (GFSG), a component of the G20 in the period 2016-2017 (UNEP Inquiry, 2017), issued recommendations in response to the commitment of their respective leaders at the Hangzhou Summit in China to seek balanced, sustainable and strong growth. This report lists a number of barriers to the development of a green (and generally responsible) finance market such as:

I – Externalities: The economic concept of externality is related to social costs and benefits perceived as a result of a given action. If a project that benefits someone imposes costs on third parties, these costs should be considered in the analysis of the project's economic viability. Uncertainties about the socio-environmental impacts of an action or the responsibility of each institution, coupled with the absence of pressures internal or external to the organization, make it difficult to integrate in interest rates the costs and social benefits of a given financed project;

II – Market asymmetry: Many investors are interested in investments that preserve the socio-environmental responsibility of capital, but usually fail to recognize which investments are appropriate;

III – Lack of technical capacity: Many financial institutions and institutional investors (such as pension funds) are not yet fully informed of the risks they face, which includes underestimating costs to prevent their money from finding a socially irresponsible project.

Thus, even in the face of rational arguments that indicate the need for proactive behavior by financial institutions to minimize risk and enable new business opportunities, market failures and its typical barriers lead institutions to behave in an unpredictable and inconsistent way.

This unpredictability and inconsistency may arise from the search for short-term profits (a behavior possibly exacerbated by instability in the economic and political context), in parallel with the opportunistic behavior of an institution or a group of institutions (through lobbies for changes in legislation, formation of oligopolies, etc.).

4 The role of Resolution No. 4,327 of 2014

By editing Resolution No. 4,327 of 2014, the CMN seems to have recognized the need for regulation to mitigate market failures, strengthen the soundness of financial institutions (through risk reduction), and increase efficiency (improved corporate governance, increased competition and adhesion of the financial system to public policy objectives).

By creating a minimum standard, which applies distinctly to all financial institutions, the regulator seems to have signaled that it does not welcome unpredictable and inconsistent behavior as a result of the effective enforcement of the rule.

The concern about risk reduction in the rule is clearly perceived through compliance guidelines established for all institutions, such as integration of the socio-environmental component into pre-existing risk management systems such as the credit system, and the development of a database – to inform credit and investment analysis – containing the losses arising from socio-environmental issues.

Moreover, Resolution No. 4,327 of 2014 seems to justify itself by requiring a corporate governance structure to address the matter that

is compatible with the size of the institution, the nature of its business and the complexity of its services and products. Determining that the institution should maintain such a structure minimizes the risk of lack of institutional support for initiatives that seek to include the theme in the sphere of the institution's strategic and operational decisions and contributes to finding a solution to minimize the problem of information asymmetry inside and outside the organization.

From the perspective of efficiency, the regulation defines minimum standards of conduct that further reinforce market discipline, favoring greater transparency and competition. This thought can be explained by the incentive to both the participation of stakeholders in the design of the institutional policy and the preparation of reports showing the actions taken in lines with the PRSA.

Regulatory action in the midst of a still refractory environment due to market failures minimizes the costs for financial institutions of complying with the rule and enhances synergies among its various areas. A positive aspect is the fact that the rule is not a one size fits all instrument, that is, a role that applies equally to all SFN institutions, despite the diversity of segments operating within the system.

This is particularly important in assessing the liability of financial institutions for any crimes that may be committed by their clients. The risks taken by financial institutions are part of the business and are justified by the importance of the financial service for the development of the economy and social well-being, and it is up to the rules to help define responsibility limits for the proper control or mitigation of risks to the economic order and social well-being.

Regulation in this sense is not intended to eliminate the risk of the financial activity or to establish an identical responsibility standard for all institutions, but rather to afford greater legal certainty to the financial business. Therefore, the institution should be liable for any socio-environmental degradation effect caused by its clients where it creates a risk situation due to its activity, unless it can prove that appropriate and reasonable measures to avoid it have been taken. In this case, their respective PRSA and corresponding actions may further clarify, from the perspective of the Judiciary, the real responsibility of the financial institution.

From this perspective, understanding the social role of the financial institution is an important factor to determine its responsibility. Also important is combining this social role with the performance of

other institutional forces aimed at curbing any conduct harmful to society, including those provided by the State.

For example, granting a loan to a legal entity (which by definition is not intended for a specific use previously defined in a contract, such as financing a specific activity), limits the possibilities of the financial institution to foresee whether the funds will be used to support projects in which employee-employer relations are not legal and reasonable. On the other hand, preventive measures may be taken, such as periodic evaluations of information on the company's registration, which enable, for example, checking periodically whether the client is identified by the Ministry of Labor and Employment as having subjected workers to labor in conditions analogous to slavery. Preventive measures do not eliminate the risk of social or environmental impact and are defined according to the policy of each institution. This definition depends on the size of the operation, its importance in relation to the total loan portfolio, the risk of the segment financed, the client's history, etc.

There are, therefore, economic incentives brought by regulation that encourage transparency and good governance practices to improve the efficiency and soundness of the institutions. It is possible to infer that the rule, in this sense, reduces market failures arising from information asymmetry and the opportunistic behavior of institutions.

The role of the SFN in this area is definitively included on the market agenda. Strengthening the socio-environmental responsibility of the financial sector is essential for the good performance of the economy and for the quality of life in society. In fact, the SFN has an important role in channeling financial resources to induce good socio-environmental practices in the economy, thus reinforcing the effectiveness of public policies (such as those aimed at sustainable development).

On the subject, Dr. Daniel Schydlowsky, former Superintendent of Banking, Insurance and Private Pension Fund Administrators in Peru (SBS), states that the "conflict related to socio-environmental issues is one of the factors for systemic risk: socio-environmental conflicts cause externalities, which, by contagion, affect third parties and reach the macroeconomic level" (UNEP-Inquiry, 2015).

It is a fact that the CMN regulation is already the subject of a wide national and international debate and is usually cited as a reference to inform the design of policies by other financial regulators in several international forums. An example is the Sustainable Banking Network,

a forum made up of regulators and associations from the international financial industry, which operates with the technical support of the IFC.

5 Conclusion

The analysis of Resolution No. 4,327 of 2014 shows a regulation essentially based on principles. Despite the potential benefits of an approach of this type, there is the risk that its effectiveness will be significantly reduced if some assumptions fail to be verified.

Stakeholders need to be engaged either in the process of designing and reviewing institutional policies or in exercising the power to apply social pressure to balance interests between the parties. The Central Bank of Brazil, as a stakeholder, has competent jurisdiction to ensure the efficiency and soundness of SFN institutions, which is the reason for expecting its effective action in inspecting compliance with the regulations, with emphasis on the process of socio-environmental risk management.

It is also possible to infer that social pressures can affect companies from the same sector in different ways, which also contributes to uncertainties about the behavior of SFN institutions. Proximity to urban centers, location in areas of great social interest and the history of the institution can strongly affect the company's sensitivity to community pressure.

The level and quality of reports and other information published by the financial institution may contribute to further engage other stakeholders, with a view to better monitoring its socio-environmental performance and impact on the institution's economic and financial results from a perspective both internal and external to the organization.

Some recommendations, at both national and international levels, are already in place to facilitate and standardize the information tools to be disseminated by the institutions, such as the Task Force set up by the Financial Stability Board (FSB), called TCFD – Task Force on Climate-related Financial Disclosures. In June 2017, the TCFD published its final report containing recommendations based on four subject areas that represent the focus of the organizations' operating structure: governance, strategy, risk management, metrics/targets. From the perspective of the financial sector, the Task Force Report presents a specific dissemination guide for the banking sector, containing aspects related to strategy, risk management and metrics (FSB, 2017).

The recommendations for transparency and reporting are voluntary but reinforce best practices aimed at strengthening risk management, corporate governance structures and, more comprehensively, a more efficient allocation of capital in the economy and the adequate pricing of products and services within financial systems. Considering the rule providing for the establishment of the PRSA, the dissemination of international best practices for the publication of information is timely in that it helps to give visibility to the actions and results achieved by the institutions, in order to add value to shareholders and other stakeholders.

In general, CMN regulations do not represent in themselves a single solution to enable the sustainable financing of the economy with socio-environmental responsibility. But for its characteristics, the rule reinforces the operation of a SFN that is more resilient to socioenvironmental risks and therefore more responsive in the mobilization of resources in tune with programs and public policies on the theme. In this context, coordination between market institutions and the State is an important element for the success of any public policy aimed at the responsible financing of the economy.

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CHAPTER 4

WHAT IS SOCIO-ENVIRONMENTAL RISK?

JEAN RODRIGUES BENEVIDES

JOSÉ MAXIMIANO DE MELLO JACINTO

1 Introduction

Have you ever been exposed to a risky situation?

At first, you might mistake risk for danger. Danger is a condition with potential to cause damage. For example, the risk of an occupational accident is related to various situations of danger, such as the lack of protective equipment or workers' training. Risk is the probability of a given event occurring and, where it occurs, the impacts it can generate. ISO 31000 defines risk as the effect of uncertainty on objectives, and an effect is a deviation from the expected.

The term can be used in different contexts, and individuals, companies and organizations alike may be exposed to different types of risk, such accident, image, operational, legal and financial risk. Perhaps the banks are clearer on the subject, because assessing the risks involved in their operations is inherent in their activities.

Socio-environmental risk exists when the impacts of a given event are associated with social and/or environmental aspects. Exposure to this type of risk occurs when in carrying out their activities, individuals or legal entities are in some way related to situations that may cause social or environmental damage. These potential impacts are not always easy to identify and, in some cases, can cause significant losses to the parties concerned.

According to Resolution 001/86 of the National Council for the Environment (CONAMA), an environmental impact is the physical, chemical or biological change in the environment brought about by any form of matter or energy resulting from human activities, which either directly or indirectly affect the health, safety and well-being of the population, as well as social and economic activities, the biota, the aesthetic and sanitary conditions of the environment, and the quality of natural resources.

2 Beware of socio-environmental risks! They can be higher than you think

Often, disasters occur because those involved, especially entrepreneurs, ignore or take on a high level of socio-environmental risk in their activities. Could this have been one of the factors that contributed to the huge disaster in the municipality of Mariana/MG, in 2015, when a tailing dam collapsed? In this case, considering the high potential of impacts related to the mining activity and the size of the project, the risk may have been under-assessed or improperly managed. The impact was so great that it is virtually impossible to estimate its financial effects. The situation was further aggravated by irreparable losses of lives and natural resources, significant economic and financial costs and damage to the reputation and image of the companies involved. Events such as this have an impact on the company, its workers, investors, communities and municipalities affected, as well as on several other actors such as the company's suppliers and public institutions involved.

Other risk situations may involve companies that fail to follow or do not properly follow the social and environmental practices of their suppliers, which often do not even comply with current legislation, indulging in violations such as disrespect for human rights. An example is the case of a multinational designer brand that had its name related to labor analogous to slavery found through labor inspection in a company that supplied clothes to its retail store network.

These are examples of companies with different types of exposure to socio-environmental risk, either directly or indirectly linked to their activities. These situations are becoming increasingly common, due either to stricter legal requirements or to monitoring by control agencies and civil society, which now consider social and environmental responsibility in a more objective and comprehensive manner.

Based on the theory of integral risk, civil liability for environmental damage – be it damage to the environment per se (public environmental damage) or a violation of individual rights (private environmental damage) – is strict, according to the provisions of Article 14, Paragraph 1 of Law 6,938/ 1981, which establishes the polluter pays principle.[1] In this context, whoever causes the damage has the legal duty to remedy it, and indirect polluters may also be held liable within the scope of their responsibilities.

The social and economic context in which we live and the permanent evolution of communication systems broadens this view of the practices and behaviors of people and corporations. Anyone with a smartphone or a social network can record, comment and share something that someone did and that hurt their values and beliefs. If this someone happens to be a legal entity, there is more scope for social and legal judgment by requiring the integration in its management and service model of measures that consider aspects involving its businesses relationships and the places where its activities are developed.

3 Evolution of the risk concept

The first attempt to define the term risk dates back to circa 3,200 B.C. According to a publication by ECON-IT2,[2] a group of people in the Tigris and Euphrates River Valley called Asipu counseled people who were in a dangerous situation by analyzing the scale of the problem, the alternatives and the consequences of each alternative. This perception of risk changed over time and some facts were essential to the development of the theory of risk, such as the publication of Pascal's Theory of Probability in 1657 and the Life Expectancy Table created by Halley, better known for his namesake comet. Then, already in the context of the theory of risk in the late eighteenth century, Laplace presented a study estimating death probability and life expectancy with and without vaccination against smallpox. Statistical methods then began to be used to assess risk and aspects of human health as well as the risk quantification process.

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1 Responsabilidade civil objetiva por dano ambiental privado – published by João Beltrão & Advogados.

2 ECON-IT2: multidisciplinary group of seven partner organizations from six countries, with the support of the European Community - The Origin of Risk Assessment.

Among the types of risk identified, socio-environmental risk addresses specifically social and environmental issues, which was not the case before, when these issues were not addressed or were embedded in the other risks. Socio-environmental risk is the possibility of occurrence of losses due to social and environmental damage, generally related to pollution, health and safety, impacts on communities and threats to biodiversity.

3.1 Environmental aspects of risk

The environmental aspects of risk are related to the possible occurrence of damage to the physical and biotic environment. In the physical environment, because of some type of contamination or change in the properties of soil, water or the atmosphere, or to impacts that may contribute to climate change. In the biotic environment, due to damage caused to living natural resources, especially flora and fauna. In this sense, an activity or any type of human intervention must be carefully implemented. For the proper operation of a business enterprise, a hydroelectric plant, an airport, a road or even a housing development, the requirements to avoid or minimize potential impacts must be met. The instrument for attesting to this compliance is the environmental license, which permeates all phases of the project: prior license; installation license; and operation license. It should be pointed out that not every environmental agency has a proper structure to conduct the environmental licensing process properly.

3.2 Social aspects of risk

The social aspects of risk are generally associated with working and employment conditions, community health and safety, involuntary resettlement, and socioeconomic issues, such as disruption of productive activities and damage to cultural heritage. These elements can be enhanced when traditional or indigenous communities are involved. These topics are related to human rights that require special attention and some issues are becoming increasingly relevant, such as those involving accessibility for people with disabilities, any kind of prejudice or disrespect for the guarantee of the rights of children and adolescents, considering their situation of social vulnerability.

4 Socio-environmental responsibility in the productive sector

In today's world, as a result of the incorporation of new activities and technologies, risk assessment becomes even more complex, because in addition to natural and spontaneous events there are others directly linked to human actions, whose causes are not only accidental and whose impacts are not always known. These actions interfere with the environment or some of its components and may cause positive impacts such as employment generation and economic growth in a region, or negative impacts on the environment or on the quality of life of the population.

The implementation of activities with economic, financial and social objectives, in addition to the technical issues inherent in the business, requires a proper management model to control any ensuing impacts. In this sense, the various actors involved – entrepreneurs, investors, financial institutions, civil society, environmental agencies, and stakeholders – must each act within the scope of its competence to ensure sustainable projects that take into account economic, financial, environmental and social variables.

A survey conducted by Ernst & Young[3] with institutional investors from several countries indicates that non-financial information has gained importance in decision-making for new investments. According to the study, 61.5% of respondents believe that environmental, social and governance risks are relevant to companies in all sectors of the economy. This percentage is practically twice the 33.7% recorded in the first year of the study.

According to Ethos Institute,[4] a sustainable and responsible business is the activity oriented towards the generation of economic, financial, ethical, social, and environmental value, whose results are shared with the parties affected. Sustainability and social responsibility bring the long-term perspective to the business model, considering that there is no sustainable economic growth without social progress and environmental conservation. In order to guarantee sustainability, the participation of all – entrepreneurs, financial institution, society and the public sector – is fundamental.

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[3] Ernst & Young (2015) – Tomorrow's Investment Rules 2.0.

[4] Ethos Insitute: Indicadores Ethos para Negócios Sustentáveis e Responsáveis (Ethos Indicators for Sustainable and Responnsible Business).

In this sense, risks must be properly managed in all types of economic activity, since there is a direct and indirect relationship with people, communities and the environment, as well as with other companies, whether suppliers or clients. Some sectors have a greater potential to generate environmental impacts, such as the agricultural and cattle farming, forestry, industrial and mineral extraction sectors, and are therefore subject to the environmental licensing process. In turn, because they have less potential to generate impacts, trade and service activities in principle would not require licensing.

Some sectors need to be systematically analyzed, such as civil construction, which has a high potential for generating impacts on the environment, considering its entire chain of suppliers and clients. As an activity that requires a significant amount of (mostly unskilled) labor, it is largely exposed to labor-related aspects, such as health and safety and lawful hiring procedures. It should be pointed out that despite the improvement in meeting socio-environmental requirements, companies in this sector still appear in official lists of employers using labor analogous to slavery.

In addition to the aspects directly linked to the activities, the risk in the supply chain also needs to be considered. The definition of social and environmental criteria in the procurement of goods and services may encourage good socio-environmental management practices, thus avoiding risks for the company arising from non-compliance with (social/labor and environmental) rules and legislation by its suppliers.

Socio-environmental risk is therefore real and may affect productive activities and, if not properly managed, may have repercussions for other risks. The benefit of understanding and managing it increases when companies begin not only to improve their management practices and relationship with their employees, clients and suppliers but also to consider the positive and negative, direct and indirect impacts of their activity on the community and on areas around their facilities and operations.

5 How the management of socio-environmental risk by banks can influence the business system

As institutions that financially support production and consumption activities, banks comply with the regulations that determine the integration of social and environmental issues into

the risk management process. However, the still incipient process of analysis of socio-environmental aspects in loan operations needs to be improved.

These rules brought new obligations to financial institutions which, guided by the principles of relevance and proportionality, have begun to improve and adopt procedures and routines to classify, analyze and control socio-environmental risks in their activities and operations as well as to keep records and control of losses arising from social and environmental damage for a period of five years. The efficiency and improvement of the process of socio-environmental analysis of clients and projects and in corporate operations contribute to the proper management of social and environmental risks, with direct and indirect impacts on the socio-environmental management practices of the business system.

For banks, this management becomes more challenging due to the extent of their involvement in financial intermediation with clients (individuals or legal entities) and all the diversity of activities and behaviors of these clients. By including socio-environmental criteria in their credit and investment policies, for example, financial institutions influence a significant number of business enterprises to comply with legal requirements related to the environment and society, as well as to labor aspects of their workforce, including outsourced workers.

The ability of banks to influence their clients to comply with the law and meet the social and environmental requirements of their activities may vary according to the type of financial operation. Credit operations are divided into loan and financing. In the latter funds have a specific destination, such as acquisition of goods or construction works. In project finance, in addition to assessing the client, the lender also verifies the project's compliance with socio-environmental requirements. On the other hand, for operations whose funds do not have a specific destination, such as working capital, the analysis is less comprehensive and generally restricted to checking the client's level of compliance with legal requirements.

In addition to the type of operation, the amount of credit and the nature of the activity financed may influence the extent of the risk assessment. Some banks conduct a client-specific socio-environmental analysis also for working capital operations, as long as they involve significant amounts of money and are intended for greater impact activities.

6 Compliance with socio-environmental regulations and project finance

When financing large projects, which generally entail greater exposure to socio-environmental risk, banks, mainly those that are signatories of the Equator Principles,[5] take measures that go beyond checking legal compliance. In addition to the requirement of licenses, grants and certificates demonstrating compliance with social and environmental regulations, financial institutions classify the projects according to their impacts and exposure to socio-environmental risk.

For projects of greater impact and risk, an independent socio-environmental due diligence is conducted to verify compliance and monitor the socio-environmental programs developed, according to previous studies (EIA/RIMA[6]) approved by the licensing agencies. The expert opinions of entities working in specific areas, such as the National Indian Foundation (FUNAI) and the National Historical and Artistic Heritage Institute (IPHAN), are also required for the environmental licensing of projects that may affect indigenous lands and communities or cultural assets.

It is worth noting that in the process of the project's risk assessment and classification by financial institutions, without prejudice to other areas, some of them are more sensitive and influence the level of exposure to socio-environmental risk: (i) critical habitats in the area covered by the project; (ii) need for resettling families; (iii) indigenous communities and lands in areas directly or indirectly affected; and (iv) relevant cultural heritage sites in the project area. Also worthy of attention are possible changes in the economic dynamics of traditional communities and the significant migratory flow of workers in the case of large projects.

Other relevant social issues to be verified in the risk analysis process include prior consultation with affected communities, which should be thorough and transparent. In addition, it is important to establish a permanent communication channel with the communities affected by the project. In relation to work and employment, it is important to check the legality of the process to hire permanent and outsourced staff and the existence of an adequate Occupation and

[5] Equator Principles: Financial sector benchmark for identifying, evaluating and managing socio-environmental risks in projects.

[6] EIA/RIMA: Environmental Impact Study and Environmental Impact Report.

Health and Safety System (OHS) to eliminate or minimize the possibility of accidents and injuries to the workers' health. The extent of the analysis of all socio-environmental aspects should be consistent with the type and size of the project to be financed.

In large infrastructure projects, such as hydroelectric plants, highways, ports and airports, the impacts tend to be even greater. This requires an effective risk management that includes the necessary social and environmental programs. These programs should cover the project pre-construction, construction and operation phases. In the pre-construction phase it is essential to have an institutional relations program with the effective participation of the parties involved, i.e., entrepreneurs, state, municipality, government agencies and civil society. This interaction facilitates the implementation of the entire project, especially works in the surrounding region to be carried out in the affected communities as part of mandatory environmental compensation. These include investments in environmental sanitation, paving and construction of hospitals and schools.

If not effectively implemented, previous programs may jeopardize the construction schedule and start-up of the activity. This can affect the lending bank as well, especially if the credit operation is structured in the project finance modality, whose main repayment source are the revenues generated by the project operation. This situation entails a greater involvement of the bank, since the success of the operation will depend on the project's performance.

In the construction phase, the impacts are even more evident and the implementation schedule of socioenvironmental programs are more intense. In this sense, intervention for the resettlement of families is certainly one of the most sensitive aspects and requires joint action by the entrepreneur, municipal authorities and civil society. These actions must be monitored at all stages: registration of the local population; provision of housing or compensation funds; transfers; and follow-up after completion of the process. Resettlement in construction works close to large urban centers, including when they involve a small number of families, can be more critical than in remote areas. This is due to the difficulty of getting an agreement between the parties regarding the availability of similar properties that are in good standing and in an appropriate location.

After the start of operation there will probably still be social and environmental programs to be completed and others that will be monitored once the undertaking starts operating. Demobilization

starts as the works are completed. Areas with temporary interventions, such as lodgings, sheds, workshops, borrow pits, and roads, should be recovered, and all workers discharged from their activities should receive support from the entrepreneur in returning to their communities and, in some situations, in their preparation and training to work in other activities.

It is worth noting that even in the operation phase, projects should be monitored either to meet the conditions of the environmental operating license (LO), including to prevent it from being suspended or to ensure compliance with the socio-environmental programs defined in the Basic Environmental Plan (PBA).[7] In a hydroelectric plant, for example, programs to monitor water quality and minimum reservoir flow, fish stock and diversity, and guarantee of productive activity for fishermen and riverine communities are essential to the project's sustainability during its operation period.

Other activities such as mining and industry also require continuous monitoring of socio-environmental aspects. These types of projects have impacts that can cause significant damage to the health and safety of communities due to the heavy traffic of machines and vehicles, the risk of contamination and silting of water courses, or air or noise pollution from these activities.

7 Regulation of socio-environmental risk in financial institutions

Banks, like other businesses, obviously do not like to bear losses in their operations, and one of the basic principles for the balanced maintenance of their operations is a good risk assessment. Socio-environmental risk can entail significant potential losses and is identified as a component of various types of risk to which financial institutions are exposed. Hence the importance of this theme, considering the growing concern in the financial system about this type of risk and the losses it can generate.

Proper risk management prevents financial institutions from supporting activities that violate legislation or endanger public health

[7] PBA – Basic Environmental Plan: Document that is part of the environmental licensing process and presents the set of socio-environmental programs with the necessary preventive, mitigating and compensatory measures in relation to the physical, biotic and socioeconomic environments.

and the environment. This ensures greater security to their operations, avoiding legal and regulatory sanctions and financial losses, in addition to material and reputational damages resulting from non-compliance with legal requirements or with the commitments undertaken by the institution. The financial system follows the guidelines established in the Basel Accords, which are international regulations establishing capital requirements for banks to cope with risks. In particular Basel III,[8] which requires greater capital reserve for longer term operations and lower liquidity assets.

Banks operating in Brazil must comply with the guidelines of the National Monetary Council (CMN) and the Central Bank of Brazil (BCB), in tune with Basel, by managing their risks and identifying the required regulatory capital ratios. Risk management structures should identify, assess, evaluate, monitor, report, control, and mitigate the risks to which they are exposed, including socio-environmental risk.

According to the study on the Current Stage of the National Financial System in the Green Economy,[9] Brazil leads the rank with regard to the main international agreements on sustainability for the financial sector, such as the Equator Principles, the Principles for Responsible Investment (PRI) and, more recently, the Principles for Sustainability in Insurance. Although there is still a way to go, this is not a reversible trend and the Central Bank already believes that socio-environmental risk plays a relevant role in financial operations and therefore must be properly monitored by banks.

These socio-environmental issues became more prominent after the publication of CMN Resolution No. 4,327[10] of April 2014. This regulation provides for the guidelines of the Social and Environmental Responsibility Policies (PRSA) of banks, with emphasis on the governance and management of socio-environmental risk. Until then, as a rule, only large institutions addressed these issues within the scope of their activities, but there was no standardization. In this sense, the regulation was a milestone as it reinforces the need for proper management of socio-environmental risk considering its relevance, that is, the level of exposure in relation to the bank's activities.

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[8] Basel III: Agreement between central banks worldwide aimed to make the financial system more resilient, improve risk management and governance practices, and increase transparency.

[9] Study on the financial system and the green economy – GVces/FGV-EAESP.

[10] CMN Resolution No. 4,327/14: http://www.bcb.gov.br/pre/normativos/res/2014/pdf/res_4327_v1_O.pdf.

8 Voluntary agreements and self-regulation in banking

One of the first movements related to social and environmental responsibility was the signing of the Green Protocol[11] in 1995 between public banks and the Ministry of the Environment (MMA). In the protocol, banks undertake to implement effective policies and practices in terms of socio-environmental responsibility. In 2008, a new commitment was signed between the parties, strengthening the established principles and setting more specific guidelines to be followed. The following year, the Brazilian Federation of Banks (FEBRABAN) signed a similar document with the MMA, with the participation of private banks.

Other voluntary and relevant agreements in the process of integrating social and environmental issues into the banks' activities are the Principles for Responsible Investment (PRI)[12] and the Equator Principles.[13] The PRI's approach is to integrate environmental, social and governance factors into investment decisions to better manage risks and generate long-term sustainable returns. The Equator Principles are a set of guidelines to finance projects that may have negative impacts on the population and the environment.

Currently, 91 financial institutions worldwide, including the largest banks operating in Brazil, are signatories to the Equator Principles, which is the most important socio-environmental risk management instrument for project finance, especially projects structured in the project finance modality, which require greater participation of the financial institution. It is common for more than one bank to participate in this type of operation, forming a consortium, which will divide the funds to be used and the risks to be taken among its members.

To implement the Equator Principles, financial institutions use the IFC Performance Standards,[14] which are benchmarks internationally recognized as best socio-environmental practices and should be used

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[11] Green Protocol: The banks signatories to the protocol undertake to finance development with sustainability, through credit lines and programs that promote the quality of life of the population and environmental protection.

[12] PRI: initiative of investors in partnership with the United Nations Environment Program (UNEP FI) and the UN Global Compact https://www.unpri.org/about.

[13] Equator Principles: http://www.equator-principles.com/.

[14] IFC Performance Standards https://www.ifc.org/wps/wcm/connect/dfa5bc804d0829b899f3ddf81ee631cc/PS_Port: eight performance standards on sustainability uguese_2012_Full-Document.pdf?MOD=AJPERES.

to avoid, reduce or compensate for negative impacts caused by the financed activity. They address topics to be verified in the project analysis and monitoring: environmental and social management system; work and employment conditions; resource efficiency and pollution control; community health and safety; land acquisition and involuntary resettlement; conservation of biodiversity; indigenous peoples; and cultural heritage.

In addition to the laws, regulations and voluntary agreements to be fulfilled, financial institutions must comply with the regulations established by FEBRABAN under the Banking Self-Regulation System (SARB).[15] The System proposes to establish a commitment by the banks to their consumers, recognizing that it is possible to go beyond legal requirements. SARB014[16] formalized guidelines for banks' social and environmental practices in their business and relationship with stakeholders.

9 Final considerations

Socio-environmental risk is not yet considered as significant in the context of integrated management, when compared to other types of risk. However, it presents situations in which the related impacts, where they occur, can cause irreparable financial and reputational damage. The topics involving social and environmental issues are becoming increasingly present and gaining importance for society and corporations.

One of the fundamental points for greater efficiency in socio-environmental risk management would be to promote the value and structural improvement of the official agencies responsible for issuing licenses, concessions and certificates. This would certainly incentivize the productive sector to improve practices related to the socio-environmental responsibility of its activities. Environmental agencies, for example, often lack the physical structure and technical capacity to conduct environmental licensing. This situation directly impacts the speed and technical qualification of the licensing processes, either in the analysis of previous environmental studies (EIA/RIMA) or in the definition of conditions for the licenses issued.

[15] SARB: Banking Self-Regulation System Guide for Banking Self-Regulation System.
[16] SARB014/2014: SARB014 text.

An even more critical situation is observed for checking individuals' and legal entities' compliance with mandatory social issues. Unlike environmental issues in which there is greater availability for consultation, social and labor aspects still lack effective instruments to enable checking social compliance by an entrepreneur or activity. In this sense, it is essential that consultation instruments be made available through certificates or official lists, either positive or negative, certifying that an individual or a legal entity complies (or not) with the basic guidelines of respect for human rights and current labor in force.

The improvement of these instruments for verification of compliance with social and environmental regulations, even if unable to guarantee that the expected requirements for a truly sustainable economy will be fully met, could contribute positively to a change of attitude in the relationship of entrepreneurs and investors with the population and the environment. The availability of reliable information in more agile inquiry channels may induce financial institutions to adopt a more judicious and quick selection process in their credit operations, taking into account the compliance and socio-environmental practices of their clients and of the projects to be supported.

This situation may contribute to improve the risk assessment process and the inclusion of socio-environmental risk in the rating[17] of clients and operations and may reduce costs and shorten the time for the credit granting process. By directly influencing the credit risk grading, social and environmental issues will probably gain relevance in the entire productive sector, thus promoting the implementation of best social and environmental responsibility practices.

Banks have recently started the process of registering data on losses due to social and environmental damage. As a result, in addition to complying with CMN Resolution No. 4,227/14 on social and environmental responsibility and with the rules on capital adequacy, they will be able to improve their risk management procedures, which is essential in the banking system. This register will enable creating a history of socio-environmental aspects that entail greater exposure to risk and the size of these losses, which will be reflected in the procedures for evaluating clients and projects.

Finally, it is important to note that even though there is strong regulation for the financial sector and voluntary practices are being

[17] Rating: risk classification; risk grade.

adopted to strengthen socio-environmental responsibility, banks and the entire productive sector still have a long way to go before we have a sustainable economy in which economic, financial, social and environmental requirements are considered. This is a one-way street, but the pace of this change may be influenced by the evolution of legal requirements, the performance of the productive sector itself, and effective demands from civil society and entities dedicated to the defense of social interests.

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SOCIO-ENVIRONMENTAL RESPONSIBILITY AND IMPLICIT OBLIGATIONS OF BANKS AND FINANCIAL INSTITUTIONS BASED ON THE SOCIAL FUNCTION OF CONTRACTS, OBJECTIVE GOOD FAITH AND THE THEORY OF CONTRACTUAL NETWORKS

AFONSO DE PAULA PINHEIRO ROCHA

LUDIANA CARLA BRAGA FAÇANHA ROCHA

1 Introduction

The purpose of this article is very unpretentious within the scope of a relevant book such as this. Rather than raising awareness of the significance and importance of other articles that reach the heart of major issues in the construction of a decent work agenda in the face of macroeconomic issues, this article aims at something simpler: to investigate legal support foundations for deeper discussions about the role, if any, of banks and financial institutions on the decent work agenda.

Therefore, if on the one hand this article will be more technical and less engaging, on the other it is expected to serve as support for the other articles.

The article starts by providing an outline of the central context. The social function of contracts, objective good faith and contractual networks interact to build a matrix that allows deriving implicit and unwritten obligations for the various economic institutions that are

structured in the productive process. It seeks to demonstrate that the Brazilian legal system already recognizes, although implicitly, this interaction in several concrete episodes and that awareness of this legal phenomenon is important to adequately define the form of management and limits of use.

The following section addresses the position of banks and financial institutions, both in theory and in practice in Brazilian law, setting guidelines for the imputation of implicit obligations and guidance for possible liability for illegal labor practices.

Finally, the article presents its conclusions and procedural proposal of how to perceive financial institutions within the scope of action of the Public Labor Prosecutor's Office and other state and social entities, as well as the legitimate level of influence expected in the action of private entities.

2 Outlining the central context: "The social function of contracts from a dynamic perspective"

The central question that this article seeks to address could be initially stated as follows: Is it possible to legally demand behaviors from banks and financial institutions other than those expressly required by laws and contracts voluntarily entered into by these entities?

Notice that to a greater or lesser degree, it is actually possible to induce behaviors in financial institutions, through either the perception of the consumer market or indirect incentives of the macroeconomic policy. But not only the perception of the consumer market. Through their actions, institutions such as the Judiciary and the Public Prosecutor's Office are capable of inducing changes in the corporate cultures and behaviors of economic institutions. Proof of that is what can be called the "race to compliance", especially in view of the great corruption schemes revealed by the multiple operations of the Public Prosecutor's Office and the Federal Police in recent years. Banks and financial institutions were not immune to this trend.

Social rules, procedure standards developed by competitors, many are the factors that can guide corporate behavior, but all these examples lack the coercivity that ordinarily derives from the law or the private autonomy of the will. The legal enforcement of a course of conduct requires two factors: adequate legal reasoning and acceptance of judicial courts to adjudicate claims.

Therefore, the initial question can be reworded: Is it possible to find legal grounds for imposing obligations that are not expressly provided by law?

In the new wording, the question evokes a positive response almost immediately. In fact, the perception that open clauses are legislative resources that enable using legal standards that incorporate an ethical guiding principle of the judge to solve a specific case is not at all original. They are mechanisms that enable incorporating mandatory contents not previously specified that contain the same coercibility of legally expressed behavioral commands.

It should be noted that the point is not whether such clauses are appropriate or even if they are used inappropriately. For the reasoning that is being constructed, it is enough that they are perceived as an effective concrete fact of Brazilian law.

In this context, possibly the most famous open clause under civil law is precisely objective good faith in contracts. It works as an ontological link between private autonomy and expressed legal duties. Although the legislative decree refers to "good faith" without subsequent qualification, the doctrine distinguishes between subjective and objective features. The latter is the focus of the text. According to Judith Martins-Costa:

> In turn, 'objective good faith' means – according to the connotation arising from the interpretation of § 242 of the German Civil Code, of a large expansionist force in other systems, as well as from that attributed to it in common law countries – a model of social conduct, archetype or legal standard, according to which 'each person must adjust his own conduct to this archetype, acting as a righteous man would act: with honesty, loyalty, probity'. Under this objective model of conduct, the concrete factors of the case are taken into account, such as the personal and cultural status of those involved, and a mechanical enforcement of the standard, of a merely subsumption type is not accepted (COSTA, 1999, p.411)

Objective good faith has the monogenetic function of creating legal duties. It imposes duties that do not arise directly from express law or from terms agreed in the underlying contract, but from a complementation by doctrine and case law of what is understood by the courts as care and probity contractual behavior. As summarized by Antônio Lago Júnior:

> Therefore, at the current stage of the law, it is understood that any legal mandatory relationship contains, in addition to the main duties of provision arising from the exercise of the autonomy of the will of its subjects, other duties, called instrumental and "avoluntaristas"[1] duties arising automatically from the principle of objective good faith – i.e., regardless of an express legal or contractual provision. (LAGO JÚNIOR, 2013, pp. 230/231)

Particularly with regard to the labor reality, on many occasions the Superior Labor Court (TST) ratified decisions that identified the non-provision of adequate personal protective equipment;[2] poor training on the use of safety equipment[3] and general non-compliance with health and safety regulations[4] such as violation of obligations implicit in the employment contract.

Closely linked to good faith is the enshrined principle of the social function of contracts. Expressly provided for in Article 421 of the Civil Code, it establishes that the law must consider the effects of contractual relations for the community, taking into account the burden imposed on society and inducing the contracting parties to integrate this social burden in their conduct pattern. The freedom to contract shall be exercised: 1) by virtue of; and 2) within the limits of the social function of contracts. As explained by Judith Martins Costa:

> The phrase "by virtue of" indicates concomitantly: a) that the social function of contracts constitutively integrates the way of exercising the subjective right (contractual freedom); b) which is its foundation, thus recognizing that every and any contractual relationship has, in varying degrees, two distinct dimensions: one that is intersubjective and relates the parties to each other); another that is trans-subjective and links the parties to determined or non-determined third parties. Thus, the social function does not operate as an external limit only, as it is also an integrative element of the function field of private autonomy in the realm of contractual freedom. (COSTA, 2005, p.50)

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1 Duties of conduct between the parties to a contract that derive not from an autonomy of the will, but from good faith. (TN)

2 TST – Interlocutory Appeal (AIRR) 2350-31.2013.5.23.0101 – 3rd Panel – Justice Mauricio Godinho Delgado, Rapporteur – DJe 3.31.2015.

3 TST – AIRR 0002980-49.2011.5.12.0009 – Justice Mauricio Godinho Delgado, Rapporteur – DJe 09.18.2015 – p. 1477.

4 TST – Appeal (RR) 0000198-91.2012.5.05.0021 – Justice Mauricio Godinho Delgado, Rapporteur – DJe 3.13.2015 – p. 2704; TST – RR 771-10.2013.5.04.0511 – 3rd Panel – Justice Mauricio Godinho Delgado, Rapporteur – DJe 12.18.2015.

Thus, it is legally possible to consider the extra-party effects of private contracts. For this reason, it is possible to derive civil liability for intervention in and effects for third-party contracts, as defined by the Superior Court of Justice in Special Appeal No. 1,316,149 – SP, establishing the thesis of the contractual "third offender".

Well, it is already a fact that the social function of contracts allows including in legal questions the relevance and effects of contracts vis-à-vis other effects external to the contractual relationship and to the principle of relativity of contracts. Objective good faith, in turn, enables identifying implicit obligations for the contracting parties.

In addition to the effects of these two principles, it is not at all unfeasible that it would be possible to legally consider the identification of the implicit obligations of the contracting parties (objective good faith) not only between each other but vis-à-vis third parties affected by the private contractual relationship (social function of contracts).

Thus, considering the reasoning structure hitherto reasonable, another relevant question arises: If the existence of implicit obligations of the contracting parties vis-à-vis third parties affected by the private contract is possible, to what extent should the effects vis-à-vis third parties be considered? Or rather, how to identify the relevant third parties for this integrative perception of objective good faith and social function of contracts?

This is where the third party of the tripod of this study's proposal comes into play. This is the perception of the phenomenon of related contracts and contractual networks. The relevant third parties are those that integrate the network of contracts that enable the existence of the very activity in which the contract is developed.

The complexity of social relations and productive and labor chains shows the existence of a close correlation between various contractual types that accumulate for the achievement of various social purposes:

> Related contracts are therefore the result of the hypercomplexity of current social and economic relations, as well as of the increasing specialization of activities and division of labor. Economic operations that once could be made by a single contract, either typical or atypical, now, because of the greater complexity of these and the involvement of a larger number of parties, require the conclusion of several interconnected contracts. (ENEI, 2003: 113)

It is interesting to note that related contracts are not mistaken for atypical or mixed contracts, but actually, in the coalition the contractual figures will be gathered around their own negotiating relationship, without losing, however, their autonomy, as they are still governed by the rules relating to their types (HIRONAKA, 2005).

Multiple related and interrelated contracts, in turn, may constitute a contractual network. Contractual network is understood as the set of contracts intended for a specific economic purpose and with a systematic interaction link between these several contracts that ultimately magnetize the action of several economic institutions towards the fruition of a specific economic operation or project (LEONARDO, 2003, p. 132-133). In the same line of thought, according to Ricardo Lorenzetti:

> The legal theory that enables explaining and establishing rules to solve conflicts arising from the networks needs to consider the novelty that these present. The focus cannot be on the contract, but rather on the integration of a group of contracts that act in a related way, so that the contract is an instrument for doing business. This approach enables making sure that there is a supra-contractual business purpose justifying the creation and operation of a network. The group that emerges like that is not just a conventional union of contracts, which can be analyzed by examining individual links. An understanding of the system is required, and through it the understanding of a systemic theory (Lorenzetti 1998: 197).

Therefore, we have in the juridical scope the figure of contracts that are interrelated and generate concrete impacts for the derivation of judicial decisions. Diffuse consumer litigation already has precedents in this regard.[5]

[5] The following are examples of court positions: CONTRACT NETWORKS – CIVIL LIABILITY –DATABASE ENTRIES – MORAL DAMAGE 'IN RE IPSA' – ARBITRATION – TEMPERANCE – EXTRA PETITA JUDGMENT – IMPLICIT REQUEST – RECIPROCAL LOSS OF SUIT – 1- Contractual network is the coordination of contracts that are structurally different but interconnected by an articulated and stable economic, functional and systematic link, with responsibility of all the members of the network. (TJMA – AC 38985/2010 – (101952/2011) – Judge Paulo Sérgio Velten Pereira, Rapporteur – DJe 23.05.2011 – p. 177); CONSTITUTIONAL LAW AND CONSUMER LAW – CIVIL APPEAL IN OBLIGATION TO DO SUIT W/ INDEMNIFICATION FOR MORAL DAMAGE – HEALTH INSURANCE CONTRACT – UNIMED SYSTEM – APPLICATION OF THE THEORIES OF APPEARANCE AND CONTRACTUAL NETWORKS – GOOD FAITH OF THE PERSON ADHERING TO THE CONTRACT – SOLIDARITY BETWEEN HEALTHCARE COOPERATIVES – INTERPRETATION OF ART. 25, § 1, CDC – MORAL DAMAGE –

By applying this same logic to the contractual network, it is possible to derive some obligations for the members, notably: a) conduct aimed at maintaining the system; (b) compliance with the reciprocity of the various obligations within the system; c) duty to protect the various internal relations through a commitment to loyalty and transparency (TORRES, 2007, p.88). These implicit obligations, if taken with the dynamics of the network itself, can lead to the emergence of para-contractual effects and autonomous legal consequences, surpassing the individual contracts (LEONARDO, 2006, p.440).

Thus, we come to the core of the hypothesis of this study: within contractual networks, the principles of the social function of contracts and objective good faith interact to establish a set of implicit obligations of the various members of the network to each other and to the network as a whole, even if not bound by direct contractual relations.

We choose to name this interaction among the premises of the hypothesis (objective good faith, social function of contracts and contractual networks) "social function of contracts from a dynamic perspective". If the social function of contracts focuses on atomized contracts, the perspective outlined here would be the effects of this social function for the dynamics of contracts integrated into contractual networks.

From a labor perspective, in any economic area where human labor is used there will be a set of contracts that will integrate the contractual network that enables carrying out projects in a particular economic sector: labor contracts. With the except of projects that dispense with human labor, in the web of interacting contracts there will be labor contracts.

As a logical corollary, we come to the question: Which contents and/or duties can derive from the social function in a dynamic perspective in the contractual network, particularly for workers of the various networking entities? The answer to this question must be rigorous, especially to prevent this social function of contracts in a dynamic perspective from working as a rhetorical locus capable of giving rise to any content and arbitrary imposition of conduct.

Perhaps a locus where one can seek to reinforce the view that there are implicit obligations vis-à-vis the contractual chain and

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ESTABLISHMENT – POSSIBILITY OF INDEMNIFICATION – INTERPRETATION OF ART. 5, X, FC/88 AND ART. 6, VI, CDC – APPEAL KNOWN AND PARTIAL DECISION – JUDGMENT ALTERED IN PART (ECJ – Ap 0033681-80.2012.8.06.0071 –. Maria Vilauba Fausto Lopes, Rapporteur – DJe 17.07.2015 – p. 46).

in the management theory itself. It is possible to identify in recent decades an advance in management theories in the sense that profit maximization should not be the only goal of the organizations. After all, many of the externalities generated cannot be easily qualified in monetary terms, such as: environmental degradation and harm to consumers and workers themselves (FREEMAN, REED, 1983). The notion of stakeholders indicates that institutions and corporations should consider and guide their behavior based on the legitimate interests of those with whom they interact, otherwise they will not have a sustainable performance.

Workers are undeniably stakeholders, as well as contractual links essential to the execution of any project that requires human labor. Therefore, they are necessarily included in the contractual network. Because they are in what can be called the outer layers of the contractual network, they are also in a position of greater vulnerability. Because there are multiple contracts, the relevance and influence of an individual employment contract in the network is very small. On the contrary, it is possible for the other members, for example the business enterprise and the financial institution, to adopt opportunistic behaviors vis-à-vis the network and externalize costs and damages for workers – concentrated gain, diffuse losses by workers and often prohibitive organization costs to counter this posture.

3 Banks in contractual networks and decent work

It is important to start from the notion that the integration of social and environmental indicators in the business plans of the banking sector has a great potential to influence changes in society (Barakat, 2013). In fact, financial institutions have effective veto power vis-à-vis the activities that depend on the funds securitized by them.

Therefore, an important question is whether financial institutions, especially banks, are integrated into the contractual network. Depending on the answer and supposing that the reasoning of the previous topic is valid, it will be possible to think of a set of implicit obligations of the financial institution vis-à-vis consumers, communities and workers.

Practice and empirical evidence seem to indicate that banks are effectively included in contractual networks, especially in view of the multiple mechanisms and metrics they use to track and monitor the return on their investments.

In addition, it is difficult to identify any financial institution that does not have some form of proposition for a socio-environmental responsibility policy. This assumption should be considered more than a mere marketing action if these entities are to convey an image of integrity to their clients.

International Standard ISO 26000 (Guidelines on Social Responsibility) was launched in Geneva in November 2010. It is a document that can shed light on what is expected of organizations that claim to include socio-environmental considerations in their decision-making processes and take responsibility for the impacts of their actions and projects on the environment and society. This standard shows that implementing a socio-environmental responsibility policy means effectively recognizing oneself as a member of a contractual network and that this inclusion demands a posture of care and attention towards the members of this network.

It also reinforces the notion that financial institutions are part of contractual networks. Central Bank Resolution No. 4,327/2014, which provides for the guidelines to be followed in the establishment and implementation of the Socio-Environmental Responsibility Policy by financial institutions also reinforces this notion. This regulation determines the need for planning and establishes relevance and proportionality as principles, the first being precisely the level of exposure of the institution's activities and operations to socio-environmental risk.

Therefore, the main conclusion of this study is not to establish the extent and content of the implicit obligations of banks and financial institutions to their workers, but to assert that there are implicit obligations to the workers of companies and projects that depend on the funds granted.

The combination of these factors – objective good faith; social function of contracts and contractual networks – allows for a legal construction solid enough to authorize specific implicit claims vis-à-vis banks and financial institutions, notably in the network's duty to care and protect. There is undoubtedly a set of obligations to workers.

Just like establishing implied obligations in a specific contractual relationship depends on the substrate of the legal business and the behavior of the parties, establishing the content and responsibility to the productive chain will depend on the degree of insertion of the financial institution, its posture, its control and its effective position and capacity to prevent harm to the members of the contractual network.

The multiple and significant discussions that are the subject of the other chapters of this book are essential for the discussion of which obligations and behaviors can lead financial institutions to effectively generate in the other members of the contractual network behaviors that enable achieving decent work. These entities cannot be opportunistically involved in the externalization of costs and damages vis-à-vis the members of the contractual network with reduced influence potential, notably workers.

4 Conclusion

The main conclusion of this study would be the identification of what is conventionally called the social function of contracts from a dynamic perspective, which stems from the interaction of the concepts of objective good faith, social function of contracts and contractual networks. The fundamental implication of this conception is to conclude that there is a solid legal basis to legally demand positive behaviors from a member of a contractual network towards other members of the same network, even if they are not directly bound by bilateral contracts.

Particularly for banks and financial institutions, it is possible to conclude that they are effectively part of the contractual network of the companies and projects financed by them. As a logical corollary, it is also possible to hold these entities responsbile and liable for positive behaviors towards the more external members of these contractual networks, namely the workers.

The content of these obligations is not the focus of this study, but of the other chapters that make up this book. What can be asserted is that the greater the participation of the financial institution the greater its responsibility as a result of its increased ability to affect the behavior of the network as a whole. The social function of contracts from a dynamic perspective can be a mechanism through which the many socio-environmental responsibility guidelines and policies will no longer be mere inconsequential marketing actions and promises.

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LIABILITY OF FINANCIAL INSTITUTIONS FOR HUMAN RIGHTS VIOLATIONS: A DIALOGUE BETWEEN INTERNATIONAL LAW AND THE BRAZILIAN LEGAL SYSTEM[1]

CAIO BORGES

JOANA NABUCO

1 Introduction

Civil liability of financial institutions for environmental damage caused by borrowers and beneficiaries of financing has been the subject of great attention from the legal community and the financial sector itself. Notwithstanding different positions on the subject, there is broad and shared recognition that the financial system plays a key role in promoting sustainable practices in the economy.[2] In this regard, the issue of socio-environmental responsibility of financial institutions in Brazil has been governed by state regulation and private self-regulation initiatives. The judiciary has also been instigated to decide on the type

[1] The authors are grateful for the support of Conectas Human Rights in drafting this article and to the valuable and inestimable contribution of Julia Cruz in preparing the section on ways to further integrate human rights into the national financial system. Any errors and omissions are the sole responsibility of the authors.

[2] In this regard, see: (i) SARB Regulation No. 14/2014 of the Brazilian Federation of Banks ("FEBRABAN") establishing guidelines for the design of Social-Environmental Responsibility Policies of financial institutions; (ii) Financial Initiative of the United Nations Environment Program; (iii) A/HRC/29/28 of the UN Working Group on Business and Human Rights, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/085 /68/PDF/G1508568.pdf?OpenElement>.

of liability (strict or fault-based) applicable to institutions involved in financing projects that cause environmental damage.

However, there is a gap in the debate on the socio-environmental responsibility of financial institutions in Brazil, which is the liability of financial institutions for human rights violations committed by their clients. Especially in the context of economic activities with high social and environmental impact, such as infrastructure, agribusiness and mining (but also in several other industries such as construction, oil and gas and even trade in goods and services), impacts on human rights include violations of the rights of indigenous and traditional peoples, such as not obtaining their free, prior and informed consent and occupying their territories; forced displacements of traditional communities and those living in areas surrounding the projects; restricted access to food, water and other natural resources traditionally exploited by local communities; violations of labor rights, such as subjecting workers to conditions analogous to slavery and sexual exploitation of children and adolescents; and even violations of civil and political rights, such as restriction on freedom of expression and demonstration, as well as physical and psychological violence against human rights advocates who oppose the implementation of economic development projects that fail to respect fundamental rights and the environment. Behind practically all projects with high socio-environmental impact there is one or more financial institutions, such as development banks, private banks, investment banks, and institutional investors (pension funds, insurance companies, etc.).[3]

A human rights approach to the socio-environmental responsibility of financial institutions requires a differentiated treatment that is not restricted to the mere classification of human rights issues as part of the "social" component of social-environmental responsibility frameworks of the financial sector, such as Resolution No. 4,327/2014 of the Central Bank of Brazil ("BCB"). Human rights obligations derive from a well-defined legal framework comprised of international human rights treaties and constitutional and infraconstitutional provisions, as well as soft law rules. Therefore, the human rights approach differs

[3] About the Bank for Social and Economic Development (BNDES) and cases of human rights violations in its projects see: Conectas Direitos Humanos. Desenvolvimento para as pessoas? O financiamento do BNDES e os direitos humanos. Conectas series, 2014. Available at: <http://www.conectas.org/arquivos/editor/files/Conectas_BNDES%20e%20Direitos%20Humanos_Miolo_Final_COMPRIMIDO.pdf>. Accessed on November 18, 2017.

from the concepts of socio-environmental responsibility of financial institutions from the perspective of voluntarism that still defines Corporate Social Responsibility ("CSR") initiatives.

This article proposes to discuss the role of financial institutions in the prevention, mitigation and remediation of human rights violations by analyzing how the subject is addressed by international legislation and the Brazilian legal system. Hard law and soft law will be addressed at both the domestic and national level. Among the former are human rights conventions and treaties, as well as constitutional provisions and domestic laws and regulations. At the international level, soft law rules include guidelines, recommendations and standards for state and private actors. In the national context, in terms of social and environmental responsibility soft law is expressed through protocols, codes of conduct and self-regulation initiatives. It is important to emphasize that the obligations applicable to financial institutions with respect to human rights include those that involve their internal operations and those related to credit operations, that is, those regarding the relationship of financial institutions with their clients.[4] This article focuses on the latter.

As will be shown, international and domestic legislation seem to operate apart from each other. In Brazil, the discussion focuses mainly on the controversy over the environmental civil liability regime applicable to financial institutions (fault-based, strict and full liability), while at the international level there has been progress in the debate about the type and degree of responsibility of these entities for human rights violations committed by their clients, notably in the wake of the 2011 UN Guiding Principles on Business and Human Rights ("Guiding Principles").

However, as will be seen in the following sections, each approach has its own advantages and disadvantages. Because it incorporates principles such as the polluter-pays principle, the Brazilian legal framework offers a higher level of protection to environmental rights – which in turn are human rights[5] – vis-à-vis the international benchmark,

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[4] BACKER, Larry Catá. The Corporate Social Responsibilities of Financial Institutions for the Conduct of their Borrowers: the view from international law and standards (April 16, 2017). Lewis & Clark Law Review, Vol. 21, 2017; Penn State Law Research Paper No. 8-2017. Available at: <https://ssrn.com/abstract=2953738>. p. 8.

[5] About the interrelation between human rights and environmental rights, see the following excerpt from the Final Declaration of the United Nations Conference on Sustainable Development (Rio+20): "…reaffirm the need to achieve sustainable development

i.e., the Guiding Principles. But Brazilian law is not clear about the roles and responsibilities of financial institutions in the protection and promotion of human rights. This gap, in addition to hindering accountability processes, slows down the process of integrating human rights issues into the practices and operations of institutions within the national financial system.

The article proceeds as follows. The next section discusses the human rights obligations of financial institutions from the standpoint of international legal frameworks on business and human rights, with emphasis on the UN Guiding Principles and the typology that these principles establish to set forth duties and responsibilities based on the level of involvement of a particular business enterprise in a specific violation. This typology, divided between situations in which a business enterprise "causes", "contributes" or is "directly linked" to a violation, is at the core of international debates over the role of financial institutions in the prevention and remediation of human rights violations committed by their clients.

The paper then discusses the human rights responsibility of financial institutions from the point of view of the environmental liability regime in Brazil. The section will not provide an exhaustive analysis of the Brazilian regulatory framework, since the topic has been extensively discussed in existing studies.[6] It is a comparative analysis of the Brazilian legal classification of the issue vis-à-vis international regulations. It also presents an analysis of attempts to change the current legal regime of strict liability and its potential consequences for advancing the socio-environmental and human rights agenda in the Brazilian financial sector.

The last section discusses ways to advance the integration of human rights into the policies and practices of financial institutions based on the experience of other countries, especially the Netherlands and Peru. It also proposes to build on opportunities provided by

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by: promoting sustained, inclusive and equitable economic growth; creating greater opportunities for all; reducing inequalities; raising basic standards of living; fostering equitable social development and inclusion; and promoting integrated and sustainable management of natural resources and ecosystems that supports inter alia economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges." Available at: <http://www.mma.gov.br/port/conama/processos/61AA3835/O-Futuro-que-queremos1.pdf>. Accessed on November 23, 2017.

6 RASLAN, 2012.

initiatives already under way in Brazil, such as the process of practical implementation of BCB Resolution No. 4,327/2014 and the Guiding Principles on Business and Human Rights in the country. The conclusions resume the main arguments and summarize the future steps proposed in previous sections.

2 Business and human rights: a lens for explaining the roles and responsibilities of financial institutions

The socio-environmental responsibility of financial institutions can be seen from the perspective of the debate over the corporate social responsibility ("CSR") of business enterprises in general, since banks and other types of financial institutions develop so-called business activities.[7] According to Backer, this discussion has two parts. The first part emphasizes the legal personality of business enterprises and the domestic regulation that imposes certain rules of conduct, based on social expectations about the behavior of business institutions. This is the case, for example, of the Law on State-Owned Business enterprises (Law No. 13,303 of June 30, 2016), which establishes, in Article 27, Paragraph 2 that "public business enterprises and semi-public corporations shall, in accordance with the law, implement practices of environmental sustainability and corporate social responsibility compatible with the market in which they operate".

The second part focuses on individual rights recognized by international human rights law (human rights treaties and conventions) and, in some cases, such as Brazil, provided for in constitutional provisions like the individual rights and guarantees established in Articles 5 to 8 of the Brazilian Constitution of 1988, as well as other rights specified in the Constitution, e.g. the right to an ecologically balanced environment (Article 225, FC/88). International human rights law imposes obligations on States (the traditional subjects of rights and duties of international law), which undertake to integrate

[7] According to Fábio Ulhoa Coelho "A business enterprise is defined as an activity whose essential mark is the attainment of profits, by offering to the market goods or services generated through the organization of production factors (labor force, raw material, capital and technology)." COELHO, Fábio Ulhoa. Opinion to the Institute for Registration of Deeds and Documents and Legal Entities of Brazil, to the Center for Studies and Distribution of Deeds and Documents of São Paulo, and to the Civil Registry of Legal Entities of Rio de Janeiro. Available at: <http://ambitojuridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=13175#_ftn6>. Accessed on November 23, 2017.

these provisions into their national legal system through processes of national ratification of international instruments. Brazil is recognized as a country with advanced human rights protection legislation and a very generous Constitution as regards the recognition of fundamental rights and guarantees. The Federal Constitution contains an extensive list of fundamental rights, as well as a set of principles that make these rights the main pillar of our Democratic Rule of Law and one of the values that govern our external relations.[8]

A third part that could be added is that of CSR as a body of rules and prescriptions of voluntary corporate conduct that express commitments beyond the minimum established by law.[9] In the latter case, the regulatory sources are, in particular, the internal policies of corporations – especially transnational corporations (TNCs) – such as codes of conduct, compliance standards, socio-environmental responsibility policies and other operational guidelines. Rules and covenants agreed upon at the level of a particular economic sector, such as oil and gas, textile, civil construction, information technology, and electronics among others are also regulatory sources of CSR. These and other sectors have formulated voluntary adhesion rules that set parameters for ethically, socially and environmentally responsible behavior. In addition to these cases, there are several examples of multi-stakeholder initiatives that bring together actors of different natures, such as governments, civil society and private companies. The Global Network Initiative (GNI), for example, is described as a "collaborative approach to protect and advance freedom of expression and privacy in the Information and Communication Technology (ICT) sector".[10] It is comprised of representatives of civil society, sector corporations, academia and investors committed to social and environmental responsibility. Corporations such as Google, Facebook and Microsoft, as well as nongovernmental organizations like Human Rights Watch and Harvard University are GNI members.

In the financial sector, the Equator Principles is an initiative of more than 90 members in 37 countries, described as a risk management

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[8] Art. 4 – The international relations of the Federative Republic of Brazil are governed by the following principles: II – prevalence of human rights.

[9] RUGGIE, John G. Just Business: multinational corporations and human rights. New York: W. W. Norton & Business enterprise, 2013. p. 68.

[10] For more information visit: <http://globalnetworkinitiative.org/>. Accessed on November 23, 2017.

framework adopted by financial institutions for determining, assessing and managing environmental and social risk in project finance.[11] Participating financial institutions, mostly large banks with international operations or which finance large infrastructure projects, undertake to integrate such principles into their internal environmental and social policies, procedures and standards for project financing operations as well as not to provide funds for "Project Finance" or "Project-Related Corporate Loans" for projects where the borrower is unable or unwilling to comply with the Principles. The latest revision of the Equator Principles in 2013 established guidelines for the classification of project risks, transparency and disclosure of information, socio-environmental due diligence, and the creation of grievance mechanisms, among other aspects.[12]

The table below presents a schematic view of soft law initiatives for the social and environmental responsibility of companies and some specific to the financial sector, classified according on the nature of participating actors (public and/or private).

[11] THE EQUATOR PRINCIPLES. General Information on the Equator Principles. Available at: <http://www.equator-principles.com/>. Accessed on November 23, 2017.

[12] THE EQUATOR PRINCIPLES. Available at: <http://www.equator-principles.com/resources/equator_principles_III.pdf>. Accessed on November 23, 2017.

Table I – Voluntary soft law initiatives for CSR and human rights protection for companies in general and the financial sector

Intergovernmental initiatives	Multi-stakeholder initiatives	Financial industry initiatives	Civil society initiatives
UN Guiding Principles on Business and Human Rights	Green Protocol	Equator Principles	Collevecchio Declaration on Financial Institutions and Sustainability
OECD Guidelines for Multinational Enterprises	Principles for Responsible Investment (PRI)	Thun Group	
Safeguards Systems of Multilateral Development Banks	UN Global Compact		
	ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy		
	UN Environment Program – Finance Initiative (UNEP FI)		
	ISO 26000		
	Global Reporting Initiative (GRI)		
	B3 Corporate Sustainability Index (formerly BM&F Bovespa)		
	Dutch Banking Sector Agreement on Human Rights		

Source: Adapted from Conectas (2014).

Despite the existence of multiple regulatory sources, corporate socio-environmental responsibility is still essentially governed by instruments of a voluntary nature. Even international law and its binding instruments are limited in their ability to generate direct human rights obligations to private companies.[13] This is because today prevails

[13] BACKER, 2017. P. 14.

the understanding that human rights regulations do not generate direct obligations to private actors – it is incumbent on the States to impose, through positive action, conduct standards expected of non-state actors towards human rights, as well as establish rules for sanctions in case of violations of fundamental rights in private relations.[14]

If the responsibility of companies for human rights in general is weak from the perspective of its legal enforceability both in international law and in the domestic framework, even more obscure is the legislation on the responsibility of financial institutions for human rights violations committed by clients in the scope of loan and finance operations. In this context, it is relevant to analyze the approach of the UN Guiding Principles on Business and Human Rights to corporate duties and obligations. These principles, as will be seen below, can be understood as an intellectual and legal formulation that seeks to clarify the distribution between the responsibilities of States and companies towards human rights, under the paradigms of international law and social expectations of ethical and moral character regarding the behavior of business actors.

2.1 The UN Guiding Principles on Business and Human Rights

In 2011, the UN Human Rights Council, which is the UN's main agency on human rights issues, unanimously endorsed the Guiding Principles on Business and Human Rights ("Guiding Principles") developed by the UN Special Representative for Transnational Corporations and Human Rights, Professor John Ruggie of Harvard University. The Guiding Principles consist of a series of guidelines for implementing the duties of the State and companies to protect human rights and provide remedy for possible abuses and, at the international level, today are the main regulatory benchmark on the matter.

[14] In this regard, see General Comment No. 24 by the UN Committee on Economic, Social and Cultural Rights. Document E/C.12/GC/24. Available at: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en>. The negotiation of an international treaty on business and human rights, the outlines of which are still not well defined, is also under way. It is unknown, therefore, whether it will result in change to some of the current paradigms of public international law. More information available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>. Accessed on November 23, 2017.

These Principles provide some relevant elements for addressing human rights abuses by corporations. The Guiding Principles rest on three fundamental pillars:

1. The duty of the State to *protect* against human rights abuse within their territory and/or jurisdiction committed by third parties, including business enterprises;
2. The responsibility of business enterprises to *respect* human rights, complying with applicable human rights law and proactively acting to identify, prevent, mitigate and remedy any damages caused;
3. The obligation of all to provide access to *effective judicial and non-judicial remedies* to victims of human rights abuses committed by business enterprises. Remedy may include, among others, apologies, restitution, rehabilitation, compensation, punitive sanctions and the prevention of harm, including through guarantees of non-repetition.[15]

With regard to the duty to "respect" human rights, the following are obligations of business enterprises: (i) have a contextualized view of the risks to the human rights that their business may cause (Principle 16); (ii) carry out human rights diligence by integrating the findings from their impact assessments across relevant internal processes, periodically tracking their effectiveness and communicate formally with stakeholders (Principles 18 to 21); and (iii) identify and prioritize points in the value chain where the risk of negative impacts on human rights is particularly severe (Principle 17).

According to Professor Ruggie himself, the "protect, respect and repair" pillars are aimed at establishing "a common global normative platform on which cumulative progress can be built, step-by-step, without foreclosing any other promising long-term development".[16] However, because they have not been subject to the process of forming international treaties and conventions, the guidelines contained in the Guiding Principles are not binding under international law. Therefore,

[15] For definitions of the various types of remedies available for victims of human rights violations, see: UN. Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Law and Serious Violations of International Humanitarian Law. Paragraphs 19-23.

[16] RUGGIE, John G. Just Business – Multinational Corporations and Human Rights". New York: W. W. Norton & Business enterprise, Inc., 2013, p. 81.

the Guiding Principles do not create new international obligations and do not add new rights to the list of internationally recognized human rights. It is, in fact, a model for designing policies on the topic of business and human rights and mechanisms for providing remedy to any violations.

Notwithstanding their value in the international legal regime on business and human rights, the Guiding Principles have their own limitations, starting from the voluntary nature of the guidelines contained therein. Because they have no binding force, States and business enterprises have the power to decide whether and to what extent they will adopt the model proposed by them. For States, flexibility is lower since the Principles refer to the whole body of international human rights law. But for business enterprises, compliance with the "duty to respect" entails understanding and acting to integrate human rights into their practices and policies, even if, in theory, violations could lead to some kind of state sanction. Moreover, because of its scope and generality, on the one hand the Guiding Principles provide tools for the development of human rights frameworks for different social contexts and areas of economic activity. On the other hand, however, because these Principles do not take into account the particularities of certain industries, they are of difficult implementation and, in certain cases, serve to legitimizing conducts that seek to exempt business enterprises from liability for human rights violations.

Therefore, the application of the Guiding Principles to financial institutions should take a specific approach that considers the sui generis and privileged position of this economic sector with respect to human rights protection. While it is true that these institutions in general are not directly responsible for human rights violations, it is also true that they play a key role in how their clients will implement the projects financed by them, including to generate positive impacts.[17]

2.2 Application of the UN Guiding Principles to Financial Institutions

Particularly relevant to the debate over the liability of financial institutions in the general context of corporate responsibility for human

[17] KINLEY, David. Artful Dodgers: Banks and their Human Rights Responsibilities. Sydney Law School Research Paper No. 17/17. Available at: <https://ssrn.com/abstract=2926215>. Accessed on November 18, 2017.

rights is the "cause", "contribute", and "directly linked" typology. These three categories were developed from hypothetical situations of a business enterprise's involvement in one or more concrete violations. According to the Guiding Principles, business enterprises must take the necessary steps to prevent, mitigate and remedy human rights impacts in which they are involved. However, the degree of liability for these impacts varies according to the level of a business enterprise's involvement in the violation in question:

1. Business enterprises that *cause* an adverse human rights impact should take the necessary steps to cease, prevent and remedy the impact.
2. Business enterprises that *contribute* to an adverse human rights impact should take the necessary steps to cease, prevent and remedy the impact to the extent of their contribution, and use their leverage over the entity causing the harm to mitigate any remaining impact.
3. Business enterprises that are *directly linked* to an adverse human rights impact should only, to the extent possible, use their leverage over the entity causing the harm to mitigate it.

Financial institutions *cause* a human rights violation when this results from their own actions, regardless of the involvement of third parties. This is the case, for example, of discriminatory hiring practices. In the case of project finance, a form of financing that is widely used for high-risk projects such as infrastructure investments, banks may become involved in human rights violations, mainly through *contribution* or *direct link* relations. Financial institutions contribute to violations when their actions or omissions encourage or facilitate such violations (for example, when the bank requires unrealistic timelines, assuming the risk that rights may be sacrificed due to time pressures, or when it finances high-impact projects without adopting proper safeguards). On the other hand, financial institutions are *directly linked* to human rights impacts when, for example, although the risk of their activities is mitigated by safeguards an impact still occurs.[18]

[18] OHCHR. Response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. Available at <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. Accessed on November 20, 2017.

Still according to the UN High Commissioner for Human Rights (OHCHR),[19] a typical situation in which a financial institution is *directly linked* to a violation is by granting a loan to a business enterprise for a project that is found to use labor analogous to slavery or that has caused the forced displacement of communities without proper mitigation and compensation measures.

The typology contained in the Guiding Principles is important in that it proposes to set, in a legal and not just moral aspect, the limits of corporate liability for concrete human rights violations. According to the Guiding Principles, companies *directly linked* to human rights impacts cannot be held responsible for providing remedy to the victims of these impacts. According to Ruggie, adverse effects can arise from the requirement that companies should take steps to mitigate and remedy human rights violations caused by entities over which they have some influence.[20] For example, a government can deliberately fail to perform its duties to protect human rights in the hope that a business enterprise will yield to social pressures and act in lieu of the government in the realization of rights.[21]

Despite the concern expressed by the former UN Special Representative on Business and Human Rights about the division of responsibilities between states and business enterprises, the typology adopted by the Guiding Principles has been misused to exempt business enterprises from liability for human rights violations on which they are involved. With regard to financial institutions, special mention should be made of the Thun Group of Banks, a group of Swiss financial institutions established to, among other objectives, study the Guiding Principles and their applicability to the banking sector.

In a report that sought to discuss the implications of Principles 13[22] and 17[23] in the context of corporate and investment banks, the

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[19] OHCHR. Corporate Responsibility to Respect – an interpretive guide. Available at: <http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf>. P. 17. Accessed on November 23, 2017.

[20] RUGGIE, John G. Clarifying the Concepts of "Sphere of influence" and "Complicity". Available at: <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-companion-report-15-May-2008.pdf>. Accessed on November 18, 2017.

[21] *Id*.

[22] "Principle 13. The responsibility to respect human rights requires that business enterprises: A. Avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur; B. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services provided by their business relationships, even if they have not contributed to those impacts".

[23] "Principle 17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights

Thun Group stated that banks are unlikely to *cause* or *contribute* to adverse human rights impacts linked to their clients' operations, since such impacts do not arise from their own activities.[24] Based on this assumption, the report concludes that the third pillar of the Guiding Principles on providing remedy for human rights violations does not apply to the banking activity.[25]

With respect to the obligation to carry out human rights due diligence (Principle 17), the report recognizes that when a bank identifies a potential direct link to adverse human rights impacts, it should seek to mitigate and prevent these harms.[26] However, according to the interpretation of the Thun Group, possible failures in the due diligence process do not change the bank's proximity to harms.[27] In other words, according to the group, in these cases the bank would not cease to be "directly linked" and therefore would not be "contributing" to a human rights impact.

The document enticed the manifestation of several actors involved in the debate over business and human rights. In a joint letter, a group of civil society organizations rebutted the assumption that banks, in general, do not cause or contribute to human rights violations.[28] The organizations also pointed out that the victims of human rights violations are holders of the right to effective remediation in all circumstances. This is because, according to the Guiding Principles, a business enterprise can play a role in providing remedy for violations to which it is only "directly linked" – which, according to the letter,

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due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence: A. Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; B. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; C. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve".

[24] THUN GROUP. Discussion Paper on implications of UNGPs 13 & 17 in a corporate and investment banks context. Available at: <https://business- humanrights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf>. Accessed on November 18, 2017.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] Significant Concerns Regarding Thun Group Discussion Paper. Available at: <https://www.business-humanrights.org/sites/default/files/documents/170214_Open_letter_to_Thun_Group.pdf>. Accessed on November 18, 2017.

should be considered "good practice" as regards businesses and human rights. In addition, the Guiding Principles establish a general obligation for business enterprises, regardless of the degree of involvement, to create effective operational mechanisms for reporting human rights violations.[29]

John Ruggie himself spoke out against the interpretation of the Thun Group. Ruggie publicly stated that unlike what is presented in the group's report, the critical distinction between "cause", "contribute" and "directly linked" does not lie in the fact that a human rights violation results from the business enterprise's own activities. In fact, there are a number of other factors that can determine in which category of involvement a particular instance may sit. They include (i) the extent to which a business enabled, encouraged or motivated human rights harm by another; (ii) the extent to which it could or should have known about such harm; and (iii) the quality of any mitigating steps it has taken to address it. According to Ruggie, asserting that a financial institution only contributes to human rights violations through its own activities means circumventing these factors entirely.[30]

The Thun Group's report also drew comments from the UN Working Group on Business and Human Rights,[31] according to which there are indeed possible scenarios in which financial institutions could cause or contribute to human rights violations.[32] According to the Working Group, contrary to what the report claims, the absence of safeguards and insufficient human rights due diligence could potentially contribute to human rights violations where a bank provides a loan for an infrastructure project that leads to widespread displacement of local communities. This is because the bank could have mitigated or prevented the harm caused by its client through the terms of its loan agreement.[33]

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[29] *Id*.

[30] RUGGIE, John G. Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context. Available at: <https://business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>. Accessed on November 18, 2017.

[31] The UN Working Group on Business and Human Rights was established by Resolution No. 17/4 of the UN Human Rights Council (Available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>) with the responsibility of deepening the debate on the interpretation and implementation of the Guiding Principles.

[32] UN Working Group on Business and Human Rights. Document SPB/SHD/UH/ff. Available at: <https://business-humanrights.org/sites/default/files/documents/20170223%20WG%20BHR%20letter%20to%20Thun%20Group.pdf>. Accessed on November 18, 2017.

[33] *Id*.

In response to a request from the network of non-governmental organizations BankTrack,[34] OHCHR issued a legal opinion on the degrees of involvement and responsibility for adverse human rights impacts and their obligation to provide remedy for that impact.[35] According to OHCHR, it is only by conducting human rights due diligence that a bank is able to identify whether and how it is involved with actual or potential adverse human rights impacts. The complexity of this process depends, in particular, on the severity of the bank's potential human rights impacts. The assessment of severity takes into account, among other factors, the types of bank's clients, its financial products and services, and the countries where its clients are located and operate. OHCHR also points out that where it is not possible to conduct due human rights diligence for all its business activities and relations, the bank should identify those activities that present the highest risk of impact and then conduct a thorough human rights diligence.[36]

In its legal opinion, OHCHR also dissects the typology "cause", "contribute" and "directly linked" in the specific banking context. A bank can cause an adverse impact where its activities alone (its actions or omissions) are sufficient to result in the adverse impact.[37]

Contribution, in turn, requires the existence of an element of causality between the bank's activities (actions or omissions) and the adverse impact caused by a third party. In this sense, it is understood that a bank *contributes* to an adverse impact when its actions and decisions influence the client in such a way as to increase the probability of the adverse human rights impact to occur. Financing a client's infrastructure project that entails clear risks of displacement of local communities would therefore be a form of contribution since the bank knew or should have known that such risks were present and yet failed to take steps to prevent them.[38]

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[34] BankTrack. Letter from BankTrack to the OHCHR on the Application of the UNGP in the Banking Sector. Available at: <https://www.banktrack.org/download/letter_from_banktrack_to_ohchr_on_application_of_the_un_guiding_principles_in_the_banking_sector/170306_letter_banktrack_to_un_ohchr.pdf>. Accessed on November 18, 2017.

[35] United Nations High Commissioner for Human Rights. OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. Available at: <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. Accessed on November 18, 2017.

[36] *Id*.

[37] *Id*.

[38] *Id*.

Finally, a bank is considered to be *directly linked* to the adverse impact where it has not caused or contributed to the impact but its client, in the context of the finance provided by the bank, has caused adverse human rights impacts. In other words, the finance provided by the bank was used in such a way as to cause an adverse human rights impact. However, its action alone would not be sufficient to cause the harm and the bank did not know and should not know about the high risk of such harm occurring. OHCHR also points out that there is a continuum between these three categories. Thus, if a bank is made aware of an ongoing human rights issue in the context of finance provided and fails to take steps to mitigate or prevent the impact, its situation may shift from having a "directly link" to "contributing" to the impact.[39]

Concerning remediation (Principle 22),[40] OHCHR reinforces the voluntary character of the Guiding Principles by stating that the bank is required to provide remedy only where the bank itself recognizes that it has caused or contributed to an adverse human rights impact. Otherwise, the bank is not expected to provide remedy, unless it is legally required to do so – for example, by court decision.[41]

In cases of contribution, OHCHR further recognizes that the obligation to provide for remediation should be proportional to the share in the responsibility for the harm. The entity most directly involved with the harm should be the primary responsible for remediation. In addition, where the bank is the only one of the entities involved willing to provide for remediation, OHCHR considers that it would be unreasonable to require it to carry the full share of the remediation. In all cases, however, the bank is expected to exercise its leverage over the client to seek to ensure full remediation of adverse human rights impacts.[42]

In December 2017, the Thun Group released a revised version of the 2013 report in which it admits that, under exceptional circumstances,

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[39] *Id*.

[40] "Principle 22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes".

[41] United Nations High Commissioner for Human Rights. OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. Available at: <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. Accessed on November 18, 2017.

[42] *Id*.

the involvement of banks with adverse human rights impacts may reach the level of *contribution*.[43] It is also acknowledged that banks should play a role in providing for remediation of human rights impacts with which they are involved, regardless of its degree of proximity to the impact. Still, the group reiterated the understanding that, in most cases, banks will only be *directly linked* to adverse human rights impacts, and that insufficient due diligence does not change the bank's degree of proximity to the impact caused. In addition, the new report presents case studies with hypotheses of *direct link* between banks and adverse human rights impacts. Some of these hypotheses, however, have already been recognized as *contribution* in other opportunities. This is the case, for example, of the financing of a highway despite prior identification of potential human rights impacts.

It is therefore seen that the application of the Guiding Principles to the activities of banks and other financial institutions requires attention. While they provide a basis for the establishment of remediation policies and mechanisms based on respect for human rights, the Guiding Principles can also justify significant limitations to a company's responsibility for violations. In the case of the debate provoked by the Thun Group, the almost unanimous reactions were to condemn the restrictive interpretation, which did not prevent the group from subsequently reiterating its position. As pointed out by David Kinley,[44] the attempt of the banking sector – in this case voiced by the Thun Group – to limit its own responsibilities for human rights, in addition to contrasting with the efforts of other sectors, such as retail, to improve their mechanisms for identifying abusive practices in the chains, also raises eyebrows as it ignores the nonlegal aspect that links financial institutions to human rights violations. The effort to restrict responsibility under a contractual exemption strategy would be ineffective insofar as legal shielding does not exempt the financial institution from being linked to the violation in the nonlegal sphere.

In these situations, it is particularly important to include in the debate the concept of *complicity*, which in Ruggie's own view has both a legal and a social component. The consequence for business enterprises

[43] THUN GROUP. Paper on implications of UNGPs 13 & 17 in a corporate and investment banks context. Available at: <https://business-humanrights.org/sites/default/files/documents/2017_12_Thun%20Group%20of%20Banks_Paper_UNGPs%2013b%20and%2017.pdf>. Accessed on January 9, 2018.

[44] KINLEY, 2017. P. 2.

that ignore the risk of complicity beyond their strict legal sense is the loss of the social license to operate, which in turn can have tangible consequences, such as reputational damage and material losses.[45]

Finally, it can be seen that the Guiding Principles are subject to interpretations that distort the very notion that all perpetrators who have either benefited from or contributed to human rights violations through actions and omissions should have the obligation to provide remediation for such violations. In addition, they have a typology which, in some cases, is incompatible with – and less protective than – domestic liability regimes, such as the Brazilian socio-environmental civil liability regime. Thus, the application of the highest protective standard is more in line with the international regulatory framework on the protection of human rights.[46]

3 Socio-environmental responsibility of financial institutions in the Brazilian legal system

As already mentioned, human rights and environmental protection are indissociable. This is because the right to an ecologically balanced environment is a human right enshrined in international treaties and conventions, as well as in the head of Article 225 of the Brazilian Constitution of 1988.[47] However, the discussion about the legal regime of socio-environmental responsibility at the national level reveals that the Brazilian legal system has different provisions for liability for environmental damage and liability for violations of other fundamental rights. The former is subject to clearer laws than the latter.

In fact, according to the head of Article 927 the Brazilian Civil Code,[48] there are three essential requirements for the determination of civil liability: (i) an *unlawful* conduct (voluntary action or omission),

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[45] RUGGIE, John G. Clarifying the Concepts of "Sphere of influence" and "Complicity". Available at: <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-companion-report-15-May-2008.pdf>. Accessed on November 18, 2017.

[46] PIOVESAN, Flavia. Direitos sociais, econômicos e culturais e direitos civis e políticos. SUR – Revista Internacional de Direitos Humanos. Edition V. 1 – N. 1 – June/2004.

[47] "Art. 225. Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations."

[48] "Art. 927. He who, by an unlawful act (arts. 186 e 187), causes damage to another, is obliged to repair it."

that is, contrary to Brazilian law; (ii) the existence of *damage*, which is understood as harm to a legal right; and (iii) the establishment of a causality *between* the conduct and the damage.[49] Civil liability entails the duty to provide for remediation. The general rule is that civil liability should be subjective. In these cases, in addition to the three mentioned elements, it is necessary to demonstrate (iv) that the subject acted with *guilt*, that is, that his conduct does not meet the standard of care to which he was bound[50] – also understood as negligence, unskillfulness, recklessness or excessive exercise of a right.

According to the sole paragraph of Article 927 of the Brazilian Civil Code, civil liability excludes proof of guilt in cases specified by law or when the activity normally carried out by the perpetrator of the damage implies, by its nature, a risk to the rights of others. One of the hypotheses of strict liability recognized by Brazilian law is liability for environmental damage, which is why this paper will address separately the social and environmental responsibility of financial institutions.

3.1 Civil liability of financial institutions for environmental damage

The Brazilian Environmental Policy established the polluter pays principle according to which, regardless of proof of guilt, polluters have the obligation to repair the damage caused to the environment as a result of their activity (Article 14, paragraph 1, of Law No. 6,938/81). For purposes of law enforcement, a polluter is "an individual or a legal entity, whether public or private, directly or indirectly linked to an activity that causes environmental damage" (Article 3, IV). The principle was integrated by the 1988 Constitution in its Article 225, Paragraph 3, which provides that damage to the environment will subject violators to administrative and criminal sanctions, irrespective of the obligation to repair the damage caused.

In addition, in cases of multiple polluters the principle of solidarity applies, pursuant to Article 942, head, of the Civil Code.[51]

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[49] PEREIRA, Caio Mário da Silva. Instituições de Direito Civil. Rio de Janeiro: Editora Forense, 2010. Volume I, reviewed and updated by Maria Celina Bodin de Moraes. P. 566.

[50] *Id*.

[51] "Art. 942. The assets of the party responsible for the offense to or violation of the right of another are subject to reparation of the damage caused; and if more than one person has committed the offense, all shall be jointly liable for reparation."

That is, anyone who has contributed to the environmental damage can be held liable, regardless of proof of guilt, and has the obligation to fully repair the damage caused. It also implies reversing the burden of proof, so that polluters must demonstrate that their action was not intended to cause environmental damage. According to the decisions of the Superior Court of Justice (STJ):

> [A] civil liability for environmental damage, regardless of the legal qualification of the violator, whether public or private, is of a strict, joint and unlimited nature and is governed by the polluter pays, full reparation, priority of in nature reparation and protection of the weaker party (*favor debilis*) principles, the latter legitimizing a series of techniques to facilitate access to justice, including reversing the burden of proof in favor of the environmental victim.[52]

Therefore, with regard to liability for environmental damage, the rules under the Brazilian legal system are more stringent than the guidelines contained in the Guiding Principles. First, because unlike the Guiding Principles, they are binding – and not voluntary – rules. Second because regardless of the degree of involvement, the Brazilian legal system determines that whoever contributes to environmental damage has the obligation to fully repair it.

Because of the principle of solidarity, financial institutions are often required to repair environmental damage even before direct polluters. The discussion, therefore, is about what should be the type of responsibility of these institutions for environmental damage caused by their clients. There is no final decision by higher courts dealing specifically with financial institutions. However, the STJ has already had the opportunity to express its views on the responsibility of financial institutions for environmental damage, having concluded that strict and joint liability should apply:

> (…) The transfer of funds by the State of Paraná to the Municipality of Foz do Iguaçu (action), the lack of inspection regarding the licenses granted and those that should have been made by the state entity (omission), have contributed to the environmental damage. Such circumstances, therefore, are capable of characterizing the causal link of the event, thus legitimizing the strict liability of the appellant.

[52] STJ. Special Appeal 1454281/MG, Justice Herman Benjamin, Rapporteur, Second Panel, published on 09/09/2016.

> Thus, irrespective of the existence of guilt, the polluter, even if indirect (the appellant State) (Article 3 of Law 6.938/81) has the obligation to indemnify and repair the damage caused to the environment (strict liability).[53]

In lower courts, the case law on the matter has not been settled. The Federal Regional Court of the 1st Region (TRF-1), in deciding on the liability of the National Economic and Social Development Bank (BNDES) for environmental damage caused by a project financed by the institution, understood that the mere fact that the BNDES was the financial institution in charge of financing the direct polluter's activity did not justify the inclusion of the bank as a defendant in the lawsuit.[54] The bank's liability would only be justified if, aware of the environmental damage, the bank had not cancelled the loan.

Therefore, the limit of environmental civil liability of financial institutions has not been settled. For those who advocate limiting the liability of these entities to proof of guilt or fraud, while recognizing that full compensation for environmental damage must be ensured, there is concern that unrestricted liability of financial institutions may end up compromising the feasibility of certain types of loans and high-risk products. As mentioned earlier, in these cases the obligation to repair must be proportional to the extent of the institution's liability. The liability limit may also vary according to the product or service provided by financial institutions.

However, it is important to take into account that even in cases of objective and joint liability, the financial institutions should always have recourse against the direct polluters. Therefore, the risk of a financial institution having to fully repair an environmental damage to which it has only contributed indirectly is reduced. It should also be pointed out that the causal link is a fundamental element for the establishment of objective liability for environmental damage.[55] This will exempt indirect polluters, as would be the case of financial institutions, from the obligation to repair damages that do not have a relation of cause and consequence to their action.

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[53] Special Appeal 604.725/PR, Justice Castro Meira, Rapporteur, Second Panel, published on 08/22/2005.

[54] TRF-1. Interlocutory Appeal No. 2002.01.00.036329-1/MG, Judge Fagundes de Deus, Rapporteur, Fifth Panel, published on 12/19/2003.

[55] STJ. Special Appeal 1.346.430/PR, Justice Luis Felipe Salomão, Rapporteur, Fourth Panel, published on 11/21/2012.

If the strict and joint liability of financial institutions is established in the higher courts, the legal system of environmental responsibility in Brazil will offer more legal remedies for environmental protection than those contained in the Guiding Principles. In addition to being binding, thus creating legal obligations and imposing sanctions in cases of violation, Brazilian legislation on environmental liability will overcome the "cause, contribute and directly linked" typology to determine that financial institutions have the obligation to provide remedy for damage to the environment caused by third parties.

This also creates strong incentives for financial institutions to conduct rigorous risk assessment processes for environmental impacts prior to granting a loan. It is therefore an important tool for the prevention, mitigation and remediation of damage to the environment, reinforcing the remedy ensured by Brazilian law on the subject of socio-environmental responsibility of financial institutions.

The positive interaction between the current legal system of environmental civil liability and sectoral regulation and private self-regulation initiatives has motivated civil society organizations to object to a bill proposing to exchange the current system of strict and joint liability for a system of fault-based liability.[56] In mid-2017, the National Congress passed, in Provisional Decree No. 752, a clause restricting the environmental liability of banks in partnership contracts only to cases where there was evidence of fraud or guilt, as well as a causal link between the action of the financial institution and the environmental damage. It also determined that banks would only be secondarily responsible for repairing damage to which they had contributed, and that remediation should be limited to the extent of their participation.

Non-governmental organizations argued that "downgrading" the type of responsibility, in addition to introducing in the law provisions that borne no relation whatsoever to the subject in question – the proverbial "legislative tortoise"[57] – contradicting previous decisions of the Federal Supreme Court, would go against the efforts of the

[56] The technical note was signed by the following entities: Conectas Human Rights, Greenpeace, Socio-environmental Institute and Friends of the Earth – Brazilian Amazon. Available at: <http://www.conectas.org/arquivos/editor/files/Recomenda%C3%A7%C3%A3o%20de%20Veto%20ao%20art_%2035%20da%20MP%20752%20-%20Vers%C3%A3o%20final.pdf>. Accessed on November 23, 2017.

[57] The "Legislative Tortoise" occurs when a deputy or senator includes in legislation a provision of his or her interest that has no relation to the matter in question. (TN)

national financial system to improve socio-environmental responsibility policies and practices in the wake of Resolution No. 4,327/ 2014 of the Central Bank of Brazil (BCB). They also pointed out that it would promote the financing of illegal activities harmful to the environment, encouraging deforestation. This is because the measure would allow financial institutions to assume higher socio-environmental risks without requiring a corresponding improvement in environmental risk management and mitigation instruments. In addition, a change such as that promoted by Provisional Decree 752 could trigger the dismantling of the environmental civil liability system, by introducing a series of exceptions for economic sectors.[58] The measure was vetoed by Brazil's president, but the debate continues within the Judiciary.

3.2 Civil liability of financial institutions for human rights violations

If strict civil liability for environmental damage is expressly provided for in the Brazilian legal system, civil liability for other human rights violations is not as clear. At first, it is part of the logic of the general rule of civil liability.[59] Therefore, establishing civil liability requires identifying the four essential elements, namely: (i) unlawful conduct; (ii) damage; (iii) causal link; and (iv) guilt.

An unlawful action presupposes the existence of objective parameters of action with which the institution has failed to comply.[60] These parameters, in cases of civil liability for human rights violations, correspond to the legal duty to respect such rights. In the Brazilian

[58] Conectas, Socio-environmental Institute, Greenpeace and Friends of the Earth. Recommendation of Veto to Art. 35 PLV No. 3/2017 (MP No. 752/2016) Responsabilidade Socioambiental das Instituições Financeiras: A Inconstitucionalidade Formal e Material do Artigo 35 da MP 752 (PLV N° 3/2017) e a Violação ao Princípio do Não-Retrocesso. Available at: <http://www.conectas.org/arquivos/editor/files/Recomenda%C3%A7%C3%A3o%20de%20Veto%20ao%20art_%2035%20da%20MP%20752%20-%20Vers%C3%A3o%20final.pdf>. Accessed on November 21, 2017.

[59] The exception would be cases where the violation in question arises from an activity which, by its very nature, implies a risk to the rights of others, so that the hypothesis would fall under the general rule of strict civil liability (Art. 927, Single Paragraph, Brazilian Civil Code).

[60] TEPEDINO, Gustavo; BARBOZA, Heloisa Helena; MORAES, Maria Celina Bodin de. Código Civil Interpretado Conforme a Constituição da República. Rio de Janeiro: Renovar, 2004. p. 333.

legal system, both the doctrine[61] and case law[62] recognize the horizontal effectiveness of fundamental rights. This means that respect for fundamental rights does not serve as a standard only for State action, but also for the action of individuals in their private relations.

In terms of international human rights law, the Federal Supreme Court (STF) has consolidated the understanding that international treaties have a supra-legal status and are above regulations in the hierarchy of legal rules.[63] The treaties incorporated into the Brazilian legal system through the procedure described in Article 5, §3 of the Brazilian Constitution, in turn, have the status of constitutional amendement.[64]

Brazil has ratified and incorporated many of the main human rights treaties in force today. This includes treaties under the UN system, the Inter-American System for the Protection of Human Rights and other international organizations, such as the International Labor Organization Convention 169 on Indigenous and Tribal Peoples. The only international treaty that has the status of constitutional law is the International Convention on the Rights of Persons with Disabilities and its Optional Protocol. Nonetheless, the doctrine understands that all international human rights treaties should also be used as an interpretative source of constitutional provisions.[65]

In other words, respect for fundamental rights should be observed as a general standard of conduct when assessing an unlawful act. International human rights treaties, on the other hand, are equal to or serve as an interpretive source of the content of the fundamental rights enshrined in the 1988 Constitution. This logic enables inferring that the provisions of international human rights treaties to which Brazil is a party make up the general pattern of conduct that should

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61 SARMENTO, Daniel. Direitos fundamentais e relações privadas. Rio de Janeiro: Lumen Juris, 2006. p. 209.

62 STF. Special Appeal 201.819, Justice Ellen Gracie, Rapporteur; Justice Gilmar Mendes, Rapporteur of the appellate decision, Second Panel, published on 10/27/2006.

63 STF. Special Appeal 349.703, Justice Carlos Britto, Rapporteur; Justice Gilmar Mendes, Rapporteur of the appellate decision, Second Panel, published on 06/05/2009.

64 "Art. 5. Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms: (…) § 3 international treaties and conventions on human rights approved by both houses of the National Congress, in two different voting sessions, by three-fifths votes of their respective members, shall be equivalent to Constitutional Amendments."

65 NETO, Cláudio Pereira de; SARMENTO, Daniel. Direito constitucional: teoria, história e métodos de trabalho. Belo Horizonte: Fórum, 2014. p. 454.

be observed by individuals. Therefore, a guilty conduct that violates this legal duty and causes harm to another person would be subject to civil liability and entail the obligation to indemnify.

The conclusion is the result of a systematic interpretation of the treatment accorded to fundamental rights in the legal system of civil liability and the role that international human rights law should play in the Brazilian legal system. However, this construction is not expressed in the law and has not been subject to judicial decisions. Even less clear would be its application to the activities of financial institutions.

The BNDES was named as a defendant in a lawsuit that discussed the use of slave labor and international human trafficking in the construction of a sugarcane plant in Angola.[66] The Public Labor Prosecutor's Office (MPT) requested the Bank's inclusion in the lawsuit as a defendant, on the grounds that the construction work conducted by Odebrecht would have been financed by the Bank. However, the Court understood that there was insufficient evidence that the BNDES had financed that specific project and rejected the MPT's request without going into the merits of liability of financial institutions.

Similarly, the Federal Public Prosecutor's Office (MPF) filed a lawsuit against the BNDES seeking to hold it liable for harm caused to the indigenous people Xikrin during the construction of the Belo Monte hydroelectric plant. The ground for including the bank in the lawsuit as a defendant, also in this case was the fact that the Bank had financed the project.[67] The case is currently pending before the STJ. However, on appeal the TRF-1 affirmed that the BNDES had standing to be sued on the grounds that the court had ordered it to stop transferring funds to the project, with effects in its legal area.[68]

In none of the cases, however, mention was made to the civil liability of financial institutions for social impacts caused in the context of projects financed by them. As already stated, there is room and strong legal arguments to support the construction of case law in this regard. However, so far, the role of financial institutions in the obligation to remedy any social damage caused by their clients is not clear.

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[66] Lawsuit No. 0010230-31.2014.5.15.0079, which was pending before the 2nd Civil Labor Court of Araraquara, São Paulo.

[67] Complaint available at: <http://www.prpa.mpf.mp.br/news/2013/arquivos/ACP_Xikrin.pdf>. Accessed on November 20, 2017.

[68] TRF-1. Appeal 0000968-19.2011.4.01.3900/PA, Federal Judge Souza Prudente, Rapporteur, Fifth Panel, published on 01/14/2014.

Given the economic power of these entities and their influence in the activities of their clients, it is essential that case law and regulation on the matter should be developed to strengthen the protection of human rights and the legal regime of corporate social responsibility. As in the case of liability for environmental damage, this protection must be based on the primacy of the protection of human rights while taking into account the different degrees of responsibility of those who contribute to the generation of harm.

The aforementioned discussion on the "legislative tortoise" that would change the regime of civil liability for environmental damage by conditioning the liability of financial institutions on proof of fraud or guilt, provided an opportunity to reflect on the connections between legal protection of the environment and to human rights. In the view of civil society organizations that opposed the issue, changing the environmental liability regime of financial institutions would have a negative impact on Brazil's international human rights commitments. More specifically, non-governmental entities understood that the legislative change would lead to the violation by the Brazilian State of the *principle of non-retrogression* of human rights.

According to the organizations, the principle of non-retrogression provided for in the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR), to which Brazil is a party, requires each State Party to the Covenant to take steps to progressively achieve the social rights recognized therein.[69] This principle prohibits taking legal action or steps that reduce the level of protection of fundamental rights. This obligation binds the ordinary legislators and limits their freedom to revoke or amend rules that annul or reduce the contents of fundamental rights established by the Constitution. In this sense, the measure repealed, although not an explicit revocation, would be a change intended to make the rules of Brazilian environmental law "inoperative".[70]

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[69] "Likewise, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador) contains provisions similar to those of the ICESCR and other international human rights treaties on the obligation of States to ensure the progressive realization of economic, social and cultural rights. The text of the Protocol of San Salvador itself provides, in its Art. 11, that "every person has the right to live in a healthy environment and rely on basic public services" and that "the States Parties shall promote the protection and improvement of the environment" (emphasis added). Conectas et. al, op. cit., p. 7.

[70] *In verbis*: "In addition to measures aimed at extinguishing an environment protection law, the prohibition of environmental retrogression comprises situations in which the

4 Prospects for advancing the human rights agenda in the national financial system

The financial system is complex in terms of both its legal and regulatory architecture and its own operation. Financial intermediaries and all other institutions operating in financial markets form an intricate network of interdependent relationships and interconnections, making this sector unique in relation to other sectors of the economy as regards the way it is regulated in the national and international spheres.[71]

In this context, reforms aimed at changing the modus operandi of the financial system to induce it to operate in full compliance with human rights principles and values would necessarily have to face its inherent complexity, as well as encompass a number of subdomains of high technical expertise such as derivatives markets, capital allocation regulation and the shadow banking system.[72] The challenge is therefore immense. The financial crisis of 2008 showed that there is a huge gap between financial regulation and human rights. Not only financial products and services fail to incorporate a human rights assessment, but the global architecture of the financial system is highly dissociated from the entire international legal system of human rights, operating under its own logic. The negative effects of this rigid separation were

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retrogression is expressed by means of legislative devices or weakening of public policies that, in practice, reduce the level of protection. According to Michel Prieur, "deregulation" of the environment occurs not only by the express derogation of rules of Environmental Law, but also by the reduction or transformation of the rules in force, in order to render them inoperative". Conectas *et al*, *op. cit.*, pp. 5-7.

71 On banking regulation and systemic risk see: Borges, Caio. Banco Central e a Administração de Crises Bancárias. Master's Thesis, FGV Direito SP, 2014. Available at: <https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11815/Dissertacao.Caio.Borges.Bacen.Crises.Bancarias.pdf>. Accessed on November 22, 2017. Lupo Pasini, F. The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law. Translation 1. ed. Cambridge: Cambridge University Press, 2017.

72 Of particular relevance to this debate is the report presented by the UN Special Rapporteur on extreme poverty and human rights, Philip Alston, to the UN General Assembly, in which he criticized the World Bank's historic position to bow to international human rights law. In the words of the Special Rapporteur, "for most purposes, the World Bank is a human rights-free zone. In its operational policies, in particular, the bank treats human rights more as an infectious disease than as universal values and obligations". Available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/274>. Along the same lines, the UN Special Rapporteur on promotion of a democratic and equitable international order, Alfred de Zayas, drew attention to the adverse effects of the insistence of the International Monetary Fund (IMF) and the World Bank to disregard human rights criteria in their emergency financial assistance operations to countries in difficulty and in loans to countries for development projects. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22256&LangID=E>.

felt by those who had their basic rights violated, such as homeowners who were deprived of the right to housing, and all the vulnerable groups that were homeless when the global recession that stemmed from the collapse of financial markets led to the reduction of programs and the weakening of the social protection net in developed and developing countries. This debate, although necessary, is outside the scope of this article.[73]

Without neglecting the systemic and structural aspects raised by authors such as David Kinley and Mary Dowell-Jones, which deserve to be properly addressed by law and public policy, initiatives seeking to integrate a human rights perspective into the operation of financial institutions can already contribute significantly to advancing the issue. To this end, we propose, in this final section, initiatives divided into two fronts: (i) improvement of the binding and voluntary regulatory framework and its respective supervision; and (ii) dissemination of due diligence practices in the financial sector.

4.1 Raising regulatory and CSR standards in the national financial system: human rights as the guide for initiatives among stakeholders

A recent innovation received with relative enthusiasm was Resolution No. 4,327/2014 issued by the by the National Monetary Council (CMN) and published by the Central Bank of Brazil, establishing a new regulatory socio-environmental responsibility regime for financial institutions in the country. The resolution determined that financial institutions authorized to operate in Brazil should (i) develop a Social and Environmental Responsibility Policy ("PRSA") (or, if they already had one, update it); (ii) establish governance systems and administrative routines to integrate the PRSA in internal processes; and (iii) prepare a plan of action with concrete actions for implementation of the PRSA, which should be submitted to the BCB. For the implementation of these obligations, the rule provides that financial institutions should be guided by the principles of relevance and proportionality.

[73] For a detailed analysis of the subject, see: DOWELL-JONES, M. Financial Institutions and Human Rights. Human Rights Law Review, v. 13, n. 3, p. 423-468, 2013; DOWELL-JONES, M.; KINLEY, D. Minding the Gap: Global Finance and Human Rights. Ethics & International Affairs, v. 25, n. 02, pp. 183-210, 2011.

As for the content of the PRSA, Resolution No. 4,327 established that it should include: a) guidelines for socio-environmental actions in businesses and relationship with stakeholders; b) guidelines for the identification, assessment and management of socio-environmental risk; c) governance guidelines to ensure the implementation, monitoring and evaluation of the effectiveness of the actions established.

However, the BCB directive had several gaps. In addition to the requirements listed above, which are clearly generic, the rule does not contain any substantive requirements regarding the content of either the PRSA or the action plans.[74] There are few specific criteria for managing socio-environmental risk (Article 6), but there is neither a systematic treatment between the socio-environmental risk embedded in the supply of different financial products and services nor the necessary steps for assessing and mitigating them. The directive was criticized for its generic and formal nature, which stripped it of merit guidelines on aspects that are indispensable to the very nature of the matter, besides lacking objective and verifiable criteria for assessing the socio-environmental risk of financial operations.[75] For civil society entities, a disturbing aspect was the change promoted in the rule in relation to its first version in 2012, which was submitted to public hearing regarding the external engagement and participation of stakeholders in the preparation of the PRSA. According to the NGOs Conectas and Social-Environmental Institute, Resolution No. 4,327 takes a step backwards by limiting stakeholders to clients, users, the internal community and those that, as assessed by the institution, are impacted by their activities (sic).[76] In the view of the organizations, the complexity of the definition of impacted parties was ignored, and an important opportunity to involve actors such as public institutions, local communities and organized civil society in the process of construction and social control of consistent and efficient PRSA was missed.[77]

The approach focused on processes rather than on substantive rules would aim to gradually introduce the theme of social and environmental responsibility, so as to minimally "equalize" the

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[74] BORGES, Caio; GARZON, Biviany. Resolução dá um passo aquém das necessidades. Valor Econômico, June 9, 2014. Available at: <http://www.valor.com.br/opiniao/3578076/resolucao-da-um-passo-aquem-das-necessidades>. Accessed on November 22, 2017.

[75] *Id.*

[76] *Id.*

[77] *Id.*

practices of different types of entities operating in the national financial system.[78] The Brazilian approach contrasts, however, with the socio-environmental responsibility standard issued by the Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones of Peru in 2015. The rule approved by the Peruvian financial authority contains a discipline that is considerably more detailed than the BCB resolution in relation to basic elements of socio-environmental responsibility. Among them are due diligence requirements, including by requiring financial institutions to ask borrowers to submit action plans to mitigate impacts on the environment and on indigenous peoples;[79] criteria for reporting and disseminating relevant information, which should be made available to affected communities in the local language and in a culturally appropriate manner;[80] parameters for verifying legal compliance, including against international standards;[81] continuous, structured and culturally appropriate processes of consultation with affected communities;[82] and the requirement that the financial institution uses its leverage over the borrower for it to establish a grievance mechanism to receive and handle complaints from parties that feel negatively impacted by its operations.[83] The resolution also establishes requirements for monitoring the activity of borrowers and, in high social risk projects, the hiring of an independent auditor.[84]

Some of the gaps in the BCB resolution were filled by Febraban's self-regulation, issued through standard SARB 14/2014.[85] It specified, inter alia, the implementation of the Resolution on the supply of some products and services and set due diligence guidelines in frequent or sensitive cases of possible occurrence of socio-environmental risk in the financial sector. This is the case of using real estate that could be contaminated by toxic waste as collateral. Self-regulation also included

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[78] BORGES, Caio. Finance and Human Rights: Developments in Brazil and Peru, Oxford Human Rights Hub. Available at: <http://ohrh.law.ox.ac.uk/finance-and-human-rights-developments-in-brazil-and-peru/>. Accessed on November 24, 2017.

[79] Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones do Peru. Resolution 1928-2015. Art 9.c, 13.a and 16.

[80] *Id.* Art 9.e, 18 and 19.

[81] *Id.* Art 9.b, 13 and 17.a.

[82] *Id.* Art 9.e.

[83] *Id.* Art 9.f.

[84] *Id.* Art 11.

[85] Febraban. Standard SARB 014/2014. Available at: <http://cms.autorregulacaobancaria.com.br/Arquivos/documentos/PDF/Normativo%20014%20SITE.pdf>. Accessed on November 24, 2017.

the environmental due diligence to be conducted in the cases of relevant equity stake, so understood as that in which the institution is ensured prevalence in social deliberations, power to elect or dismiss the majority of administrators, effective operational control or controlling interest. In these situations, the rule establishes that the financial institution should evaluate socio-environmental liabilities, compliance with socio-environmental legislation and, "where possible", the company's direct and relevant suppliers.

Despite the lack of substantive criteria to guide the design of socio-environmental policies and action plans of financial institutions, there are opportunities to convert the process of practical implementation of Resolution No. 4,327/2014 into a shared effort to raise the standards of socio-environmental responsibility and respect for human rights in the Brazilian financial sector. To that end, concrete steps can be taken by the regulatory authority, the Central Bank and the financial institutions themselves, either individually or through initiatives at the sectoral level (i.e. through representative entities such as Febraban).

First, it is of the utmost importance that the financial authority and the financial institutions that are the subject of regulation act as transparently as possible on the progress made in implementing the resolution. There is no uniformity in the disclosure of information, either with respect to the action plans or the PRSA itself, which is a clear requirement of the BCB resolution. Some financial institutions refer to Resolution No. 4,327/2014 in their sustainability reports, but without providing further details on concrete steps taken to effectively integrate it to their operational routines and internal policies. With regard to transparency, an example of good practice adopted after civil society actions can be found in the BNDES. The development bank posts on its website the PRSA and the plan of action designed after the adoption of the new policy.[86] In the plan, the BNDES outlines steps taken and planned at different organizational levels and spheres, covering steps to reformulate internal governance (such as the creation of a Sustainability Committee), training of internal departments and design of new methodologies to integrate the socio-environmental issue in the development of financial products and credit supply.

[86] BNDES. Plan for the Implementation of the Social and Environmental Responsibility Policy. Available at: <https://www.bndes.gov.br/wps/portal/site/home/quem-somos/responsabilidade-social-e-ambiental/o-que-nos-orienta/politicas/plano-implementacao-prsa>. Accessed on November 23, 2017.

Despite the advances made, organized civil society has criticized the non-participatory way in which the BNDES updated its PRSA, as well as the reforms that are considered insufficient to re-adjust the practices of evaluation and monitoring of socio-environmental impacts in order to prevent, mitigate and remedy cases of human and socio-environmental rights violations in projects supported by the institution.[87]

As the issue of socio-environmental responsibility has gained importance in the Central Bank's regulatory and supervisory agenda, the institution should be more transparent in communicating its actions in this specific area. In that sense, the authority could address the topic with greater frequency and standardization in its regular reports on the health and soundness of the national financial system. An institutionalized accountability for the financial sector's progress in absorbing best practices of socio-environmental responsibility would lend legitimacy to BCB's actions and reduce the informational asymmetry that exists between actors both "internal" and "external" to the system. In this line, disclosure of the criteria and results of the assessment of advances made in terms of compliance with Resolution No. 4,327/2014 and other socio-environmental regulations are essential for the social and democratic control of the socio-environmental responsibility agenda in the Brazilian financial system.

Complementing the performance of the Central Bank, multi-stakeholder voluntary initiatives can contribute to advancing the financial sector's socio-environmental responsibility system. This model was implemented in the Netherlands, where the Dutch Banking Association, the Ministry of Finance, the Ministry of Foreign Trade, trade union federations, and civil society organizations signed the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights. The agreement uses the UN Guiding Principles on Business and Human Rights as a benchmark and establishes a series of responsibilities for financial institutions. These include the implementation of due diligence procedures (including impact studies, consultation with the impacted parties, reporting requirements regarding clients);[88] the creation and monitoring of plans

[87] Borges, C.; Cardoso, A.; Rodríguez, M. E. (orgs.) Política Socioambiental do BNDES: Presente e Futuro. Brasília. Institute of Socio-Economic Studies, 2015, pp. 121-140.

[88] Sociaal-Economische Raad. Dutch Banking Sector Agreement on international responsible business conduct regarding human rights. 2017. Chapter 4.3.

to address the impacts of projects on human rights;[89] in some cases, the inclusion of human rights clauses in loan contracts, including providing for the possibility of termination of the financing relationship in case of non-compliance with human rights commitments;[90] and the publication of information on the implementation of previous commitments, as well as the development of other measures to increase transparency, such as indicators and geographical data breakdown.[91] The agreement also provides that financial institutions should establish grievance mechanisms;[92] provide remedy or cooperate with the remediation of violations which they have caused or to which they have contributed;[93] and require borrowers to implement grievance mechanisms.[94]

To verify compliance with these commitments, the Dutch Banking Sector Agreement establishes a governance structure composed of a multi-stakeholder Steering Committee.[95] Among other activities, this Committee is responsible for implementing the agreement, as well as for evaluating the information presented annually by participating banks. These evaluations are forwarded to an independent Monitoring Committee, with competence to request additional information and report on the implementation of the agreement.[96] In the event of disputes between the parties to the agreement regarding the fulfillment of the agreed commitments, the agreement provides for a dispute settlement mechanism managed by the Steering Committee, the result of which may consist of a public statement demanding compliance and where this demand fails to be met, exclusion of the infringing party.[97]

4.2 Duty of financial institutions to conduct human rights due diligence

To complement the aforementioned steps, financial institutions should actively integrate human rights in loan processes through

[89] *Id.*
[90] *Id.*
[91] *Id.* Chapter 6.
[92] *Id.* Chapter 1.4 and 1.5.
[93] *Id.* Chapter 7.1.
[94] *Id.* Chapter 7.3.
[95] *Id.* Chapter 13.1.
[96] *Id.* Chapter 13.2.
[97] *Id.* Chapter 13.3.

due diligence during the project cycle. That is, like other actors in the private sector, they need to implement mechanisms to identify, prevent, mitigate and, if necessary, remedy human rights impacts.

As seen, companies can produce adverse human rights impacts through cause, contribution and direct link. Human rights due diligence is intended to act in view of the possibility that the bank, in the specific case, may cause, contribute or be directly linked to human rights violations. In this sense, the due diligence process includes four stages: evaluation (which aims to identify possible impacts), integration (that is, taking steps to prevent and control impacts), monitoring, and accountability.[98] Although these stages follow a sequential logic, they are not independent and do not end in themselves. Rather, they must communicate with one another and continue to occur simultaneously. For example, the monitoring stage may lead to the identification of new impacts that were not anticipated during the evaluation – this finding, in turn, should feed the due diligence process again, giving rise to new studies, prevention measures and possibly remediation. In this sense, the identification and evaluation of impacts should not only initiate due diligence, but also continue to occur continuously.

In order to be complete, the impact identification process should not focus on itself, but permanently seek information from different social actors. Relevant, for example, are press news, civil society complaints, or lawsuits brought against the project. All these sources of information contribute to the identification of impacts and the consequent evaluation of the lender's responsibility. The due diligence mechanism must open up and feed from these sources, lest it will not incorporate all the impacts felt by the community – and therefore will not act in accordance with the obligations of the lender and will give rise to its subsequent accountability. In this sense, the mere absence of formal notification from the financial institution does not exempt it from liability for a violation it was aware of or should have been aware of through other means.

Once the impacts have been identified, the most appropriate measures will depend on the nature of the link between the lender and the possible human rights violation, according to the typology presented in the first section (cause, contribution and direct link), but

[98] FGV. Avaliação de Impacto em Direitos Humanos. Available at <http://direitosp.fgv.br/sites/direitosp.fgv.br/files/arquivos/guia_de_avaliacao_de_impacto_em_direitos_humanos.pdf>. Accessed on November 20, 2017.

focusing also on obligations derived from domestic law. It should be noted that in cases where the donor does not contribute but is directly linked to human rights violations, the Guiding Principles stipulate that the donor should use its leverage over the party implementing the project to prevent, mitigate or stop violations. If the financial institution has no leverage, it should try to increase it. If the financial institution is unable to increase its leverage, it should consider terminating the contract (always taking into account the human rights impact of this decision). For this to be possible, contracts should provide for the possibility of termination or suspension of the business relationship due to human rights violations.[99]

Finally, monitoring the impacts of a project should involve reporting and grievance mechanisms.[100] Financial institutions can establish their own grievance systems, collaborate with other actors to establish sectoral mechanisms, or require that the party implementing the project create an on-site grievance system. In all cases, to be considered effective these non-judicial grievance instruments must be legitimate, accessible, equitable and transparent.[101] Mechanisms at the operational level are important not only to ensure remediation

[99] OHCHR. Response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. Available at <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. Accessed on November 20, 2017.

[100] "Principle 29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted".

[101] "Principle 31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be: A. Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes". B. Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access; C. Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation; D. Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms; E. Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake; F. Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; G. A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be: H. Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances."

of possible violations but also to guide future action by the lender in identifying, preventing and mitigating violations. For this purpose, the financial institution should be concerned about recording, analyzing and reporting complaints and providing possible remediation.

It is essential that the due diligence process is not considered a mere formality in project finance, but that it truly integrates the decision-making processes of financial institutions.[102] That is, environmental, social and governance issues should inform the definition of strategic plans, the choice of priorities, the approval of loan applications, the determination of their conditions, and the relationship with the borrower.

It is worth noting that human rights issues do not need to be incorporated merely from a negative perspective in order not to cause harm. Projects that promote local development, in addition to being aligned with the international community's movement for sustainable development,[103] offer less risk of paralysis and liability for human rights violations and/or environmental damage. In this sense, projects with positive impacts that include a comprehensive vision of sustainability could have access to incentives and/or favorable financing conditions.[104]

5 Conclusions

This article sought to shed light on the obligations of financial institutions to human rights, based on the comparison between international human rights instruments and the Brazilian civil liability regime, as well as obligations arising from the regulatory apparatus (such as BCB Resolution No. 4,327/2014) and from private self-regulation on the socio-environmental responsibility of financial institutions in the country.

Some conclusions are drawn from the comparative and systematic analysis of international corporate standards and human

[102] See, for example: United Nations Principles on Responsible Investment. Available at <https://www.unpri.org/about>. Accessed on November 20, 2017.

[103] See, for example: Sustainable Development Goals. Available at <https://nacoesunidas.org/pos2015/>. Accessed on November 20, 2017.

[104] See: BORGES, Caio; COSTA VASQUEZ, Karin. ROYCHOUDHURY, Supriya. Building Infrastructure for 21st Century Sustainable Development. Available at <http://www.conectas.org/arquivos/editor/files/Building%20Infrastructure%20for%2021st%20Century.pdf>. Accessed on November 20, 2017.

rights, especially the Guiding Principles on Business and Human Rights, and the civil liability regime for environmental damage in Brazil. The first conclusion is that principles of environmental law in the Brazilian legal system, such as the polluter pays and precaution principles, provide a high degree of legal protection to the environment and serve as a hermeneutical anchor for determining that financial institutions can be classified as indirect polluters and, therefore, are subject to joint and strict liability for environmental damage. Nonetheless, as the country's judiciary has not yet issued a final decision on the subject, there are views that advocate fault-based liability, subject to evidence that the financial institution has acted negligently, in disagreement with the standard of conduct required by law. In support of this interpretation is the argument that fault-based and joint liability distorts the financial intermediation activity, increases legal uncertainty and raises the cost of credit. The perspective favoring the strict and joint liability regime understands that "downgrading" the current liability standard would generate a disincentive to the progressive incorporation of socio-environmental responsibility practices by financial institutions, thus increasing the systemic risk due to the lack of effective control mechanisms.

In both cases, a gap still remains in the current Brazilian legal framework as regards the duties and obligations of financial institutions for the prevention and remediation of fundamental rights violations arising from their financing operations. In this sense, the typology of the international benchmark – the Guiding Principles on Business and Human Rights – must be viewed with reservations as it may unduly limit the responsibility of financial institutions, contradicting the basic principle of international human rights law that violations must be fully remedied through various types of remedies available, including non-repetition, restitution, rehabilitation and compensation mechanisms.

Without neglecting the importance of balancing free enterprise with the imperative of sustainable development, it should be borne in mind that determining the degree of environmental responsibility at a level appropriate to the distribution of the risks of business activities is a safeguard for the effective legal protection of fundamental rights, because of the interrelation between environmental rights and human rights. The right to a healthy environment is recognized as a human right of present and future generations. In this sense, the recognition that financial institutions carry specific obligations in relation to human rights is fundamental for the realization of the individual rights and

guarantees as well as of other economic, social and cultural rights enshrined in the Brazilian Constitution of 1988.

In order to enable an advance that is both pragmatic and focused on the primacy of human rights, this article proposes actions for the progressive integration of the human rights agenda in the debate and socio-environmental responsibility frameworks of the national financial system. For the financial institutions themselves, the fundamental step to be taken is the use of tools for conducting human rights due diligence based on the Guiding Principles and other relevant benchmarks such as the OECD Guidelines on Multinational Enterprises and voluntary rules such as ISO 26000. At the core of any effort by the financial sector to enhance its mechanisms for assessing, mitigating and remedying human rights violations, there should be a permanent concern that actions should be taken in the context of participatory and transparent processes. There are clear opportunities for advancing the issue by building upon processes already in progress, such as the implementation of Resolution No. 4,327/2014, especially its action plans, which should be made public by financial institutions.

Finally, the authors propose that the enhancement of human rights standards in the financial sector's regulation and self-regulation should be accompanied by inclusive initiatives for various stakeholders such as government, civil society, trade unions, financial institutions, and the responsible investors' community. The paper also pointed out the key role of the Central Bank as a regulatory and oversight agency in the promotion of transparency in socio-environmental issues, in the monitoring of compliance with established rules and in the incorporation, by the national financial system, of the highest parameters of environmental protection and respect for human rights.

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CHAPTER 7

THE RESPONSIBILITY OF BANKS TO RESPECT HUMAN RIGHTS UNDER THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

RACHEL DAVIS

1 Introduction

The UN Guiding Principles on Business and Human Rights were unanimously endorsed by the UN Human Rights Council in 2011 and have since risen steadily on the agenda of many business enterprises, governments, investors and international and civil society organizations. Leading public and private sector financial institutions are increasingly asking whether their existing approaches to environmental and social risk management are sufficient to meet these new expectations. The UN Guiding Principles expect business enterprises to proactively prevent and address risks to people connected to their operations, including through conducting human rights due diligence. Drawing on Shift's work to put the UN Guiding Principles into practice with a range of those financial institutions, this article explores the responsibility of business to respect human rights in line with the UN Guiding Principles, and outlines some of the most recent international developments in integrating these expectations into financial institutions' policies and processes.

Part A explains the development of the UN Guiding Principles and outlines the three pillars on which they are based: The State Duty to Protect, the Corporate Responsibility to Respect and Access to Remedy.

Part B walks through the core concepts that underpin the expectations on business in the UN Guiding Principles, providing some examples of how they apply specifically to banks. Part C briefly reviews general trends in the global uptake of the UN Guiding Principles before focusing specifically on developments in the space of public and private financial institutions.

2 The Development of the UN Guiding Principles[1]

Business is the major engine of economic growth and job creation globally. But business can also pose risks to human rights, harming people and also business itself. Business enterprises' actions and decisions can affect people's enjoyment of their human rights either positively or negatively. Business enterprises can affect the human rights of their employees and contract workers, workers in their supply chains, communities around their operations and customers and end-users of their products or services. They can have an impact – directly or through their business relationships – on virtually the entire spectrum of human rights.

By the late 1990s, there was growing recognition at the international level of the connection between business operations and human rights harms, but there was also a distinct lack of consensus about what responsibilities businesses had when it came to impacts on people. So, in 2005, the UN Secretary-General tasked Harvard Kennedy School Professor John Ruggie with moving beyond what had become a polarized debate over the human rights responsibilities of business enterprises and identifying practical ways to address business-related risks to human rights. Ruggie's goal was to build consensus among stakeholders on the ways to achieve this objective, by holding consultations around the world and conducting extensive research.[2]

Out of that process came the 'Protect, Respect and Remedy' Framework, which was unanimously welcomed by the UN Human

[1] The following section draws on the publication by Shift, Oxfam and Global Compact Network Netherlands, *Doing Business with Respect for Human Rights: A Guidance Tool for Business enterprises*, 2016, available at https://www.businessrespecthumanrights.org, which Shift was the lead author of. The relevant sections in that guidance document (2.4-2.6) were based on Shift's previous publications.

[2] All the materials from Ruggie's mandate are collected and available online at: https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights.

Rights Council in 2008. The Framework rests on three complementary pillars:

- States have a *duty to protect* people from human rights abuses by third parties, including business.
- Business has a *responsibility to respect* human rights, which means to avoid infringing on the rights of others and to address negative impacts with which a business is involved.
- There is a need for *greater access to effective remedy* for victims of business-related human rights abuse, both judicial and non-judicial.

The UN Human Rights Council extended Ruggie's mandate as Special Representative until 2011 with the task of operationalizing and promoting the UN Framework. In June 2011, the UN Guiding Principles on Business and Human Rights were presented by Ruggie and unanimously endorsed by the Council. In brief, the Guiding Principles elaborate on the three pillars of the Framework as follows.

2.1 The state duty to protect

The Guiding Principles for the first pillar provide recommendations on how states should create an environment that is conducive to business respect for human rights, including by:

- Ensuring greater legal and policy coherence between the state's existing human rights obligations under international law and its actions with respect to business, including by enforcing existing laws, identifying and addressing any policy or regulatory gaps, and providing effective guidance to business on how to meet its responsibilities;
- Fostering business respect for human rights both at home and abroad, including where there is a 'state-business nexus', such as through state ownership or when a state conducts commercial transactions with business (for example, providing export credit or development finance support or procuring goods or services from business);
- Helping ensure that businesses operating in conflict-affected areas do not commit or contribute to human rights abuses; and
- Fulfilling their duty to protect when they participate in multilateral institutions.

2.2 The corporate responsibility to respect

The responsibility to respect is a global standard of expected conduct, affirmed by the UN Human Rights Council and reflected in a growing number of other international standards on responsible business conduct (discussed below). It is the baseline expectation of all businesses in all situations.

The Guiding Principles for the second pillar provide a blueprint for business on how to:

- Prevent and address negative impacts on human rights throughout their operations – meaning in their own activities and through their business relationships – including where they cause or contribute to human rights impacts or where an impact is linked to their operations, products or services through a business relationship (these concepts are explained further in the next section);
- 'Know and show' that they respect human rights, including through effective human rights due diligence processes; and
- Understand how the contexts where they operate may affect the risk of being involved in severe human rights harms.

2.3 Access to effective remedy

Even where states and business operate optimally, negative human rights impacts can still occur, and affected individuals and communities must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. The Guiding Principles for the third pillar set out how such grievance mechanisms can be strengthened by states and businesses:

- As part of their duty to protect, states must take appropriate steps to ensure that when abuses occur, those affected have access to effective judicial and non-judicial remedy;
- Non-state-based mechanisms, including mechanisms at the operational level (such as business enterprises' own grievance mechanisms), industry level (such as grievance mechanisms established as part of multi-stakeholder initiatives), and international level (such as the grievance mechanisms of international financial institutions), should provide an effective complement to state-based mechanisms; and

- Non-judicial grievance mechanisms should meet key effectiveness criteria.

Since the UN Guiding Principles were endorsed, an expert UN Working Group has been created to advance their implementation. In 2015, the Working Group visited Brazil and made a series of recommendations to the government on urgently strengthening efforts to implement the UN Guiding Principles in the country.[3]

There has also been discussion within the UN Human Rights Council about the merits of a binding international treaty on business and human rights, and an intergovernmental working group is exploring the topic further.[4]

3 Core Concepts in the Corporate Responsibility to Respect Human Rights

The Guiding Principles provide the baseline expectations for all business enterprises, everywhere—meaning they apply to business enterprises of every size, industry, country of operation or domicile, and ownership structure. This section describes some of the core concepts as they apply to banks; of course, they also apply directly to banks' business clients across all sectors who have their own responsibility to respect human rights.

3.1 Which human rights are relevant?

The UN Guiding Principles make clear that businesses need to respect "internationally recognized human rights", meaning the International Bill of Human Rights (comprised of the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), as well as the ILO Declaration on Fundamental Principles and Rights at Work.

These standards provide the basic reference points for businesses in understanding what human rights are, how their own activities and business relationships may affect them, and how to ensure that they

[3] See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20125&LangID=E.

[4] See http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

prevent or mitigate the risk of negative impacts on people.[5] Depending on the circumstances of their operations, business enterprises may need to consider additional human rights standards in order to ensure that they respect the human rights of people who may be disadvantaged, marginalized or excluded from society and, therefore, particularly vulnerable to impacts on their human rights, such as children, women, indigenous peoples, people belonging to national, ethnic, religious or linguistic minorities, or persons with disabilities.[6]

3.2 What policies and processes do business enterprises need to have?[7]

The UN Guiding Principles make clear that business enterprises should have the following elements in place:

- A public policy commitment to respect human rights that is embedded throughout the organization;
- Human rights due diligence processes to:
  - o assess their actual and potential negative impacts on people;
  - o integrate the findings and take action to prevent or mitigate potential impacts;
  - o track their performance; and
  - o communicate about their performance; and
- Processes to provide or enable remedy to those harmed, in the event that the business enterprise causes or contributes to a negative impact.

Human rights due diligence differs from traditional commercial, technical and financial risk management in that it focuses on risks to people, not just risks to the business (although there is increasing evidence that business risks converge with risks to people, especially in the medium to long term).[8] The UN Guiding Principles make clear

[5] For a helpful tool to understand how business may impact these rights see https://www.ungpreporting.org/resources/how-businesses-impact-human-rights/.

[6] For the list of these standards, see OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide', 2012, pp., available at www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

[7] For further guidance on implementing the responsibility to respect, see Shift, Oxfam and Global Compact Network Netherlands.

[8] See, for example, the recent major study by the Inter-American Development Bank on the costs to business and to national economies of community conflict arising from poorly

that negative human rights impacts should be evaluated and prioritized according to the severity of the risk to people. This can help allocate limited resources where business enterprises have large numbers of business relationships, operating contexts or other sources of human rights risks by helping them focus on where the impacts on people may be most acute based on the gravity of the harm, the number of people affected, or the extent to which a harm can be remediated or put right.

To fully understand the risks to people that they may be involved with, business enterprises need to engage with affected stakeholders (also called 'rights holders') or their legitimate representatives. These are individuals or groups who may be impacted by a business enterprise's operations and can include workers (the business enterprise's own staff, including those on temporary contracts, as well as those working for suppliers), customers and end-users of the business enterprise's products or services, and communities located around the business enterprise's own facilities or its suppliers' or clients' facilities, among others. Where such engagement is very challenging (as it can be for many banks), business enterprises will need to find other ways of gaining insight into the perspectives of those who may be at risk of harm to inform their human rights due diligence efforts, for example, through credible proxies for affected stakeholders' views such as local NGOs.

Because human rights due diligence is about risk to people, a business enterprise cannot "offset" human rights harms on the one hand by performing good deeds on the other, for example, by building schools or supporting its employees to engage in volunteering. These activities may indeed be positive in practice but they cannot compensate for a failure to manage risks to people in the business enterprise's core business. This is a fundamental difference between the UN Guiding Principles and traditional understandings of voluntary "Corporate Social Responsibility" or corporate philanthropy.

While it is aimed at preventing and addressing harm to people, human rights due diligence can also help business enterprises too. It can help them to move from being 'named and shamed' by third parties for abusing human rights to 'knowing and showing' that they respect human rights by understanding how they can be connected to human rights impacts, developing strategies to mitigate those risks, and

planned infrastructure projects, particularly where there has been inadequate community consultation. The study explores 200 projects over 40 years in the Latin American region, available at https://publications.iadb.org/handle/11319/8502.

tracking and communicating about their efforts to do so. Examples of leading banks that are stepping up their human rights due diligence efforts are discussed further below.

3.3 How can a business be involved in negative human rights impacts?

The responsibility to respect human rights extends beyond impacts a business enterprise causes or contributes to itself to wherever an impact may be linked to the business enterprise's operations, products or services through a business relationship. This can involve business relationships at any stage or tier of the supply or value chain.

The Guiding Principles describe three ways in which a business can be involved with human rights impacts:

- It may *cause* an impact through its own activities;
- It may *contribute* to an impact through its own activities – either:
  a. In conjunction or in parallel with other entities, or
  b. Through another entity with which it has a business relationship (such as a supplier, government, client or customer);
- It may not do anything to cause or contribute to an impact, but an impact may be *linked* to its operations, products or services through a business relationship (or series of relationships).

While a bank may be involved in causing impacts (for example, if it were to discriminate in its own hiring practices), the concepts that are likely to be most relevant to its core activities – simply put, lending money or providing other financial products and services to clients – are contribution or linkage through a client relationship.

For example, a bank might contribute to an impact by incentivizing a client to take certain actions, such as where a bank provides advisory services to a construction sector client and specifically urges the client to undertake cost-cutting measures that will pose clear risks to workers' health and safety without any proposed measures to mitigate those risks.

Alternatively, a bank might facilitate an impact by adding to the conditions that make it possible for a third party to cause a harm, if it is inclined to do so. These kinds of situations often involve omissions or failures of due diligence – such as where a bank provides asset

financing to a construction business enterprise for a proposed project in an area where it is known that unscrupulous labor brokers are operating without adequate oversight, and yet it does not take any steps in the loan agreement to require the client to mitigate the risk of relying on a supply of temporary or contract workers who may be subject to forced labor. In this kind of example, the primary activity by the business enterprise (providing asset financing) is not in and of itself problematic. Rather, the potential for harm relates to external factors, and mainly to the decisions of a third party.[9]

As these examples suggest, a business enterprise can do a lot by itself to affect where it sits on the continuum between contribution and linkage, primarily by undertaking robust human rights due diligence. First and foremost, human rights due diligence should reduce the risk of harm to people; but if human rights impact nevertheless occurs, the evidence of robust due diligence should also reduce the grounds for viewing the business enterprise as having contributed to that outcome. Equally, the nature of a business enterprise's involvement in a negative impact can change over time if a business enterprise does not change its own behavior in response to evolving circumstances. For example, if a business enterprise does nothing to address a severe human rights risk in its supply chain that is typical and well-known within the industry, any impacts that occur will at some point start to look a lot more like the result of contribution than linkage.

It can be challenging for banks to work through the implications of these concepts for their operations. In a publicly available case study, Nedbank, one of the largest banks in South Africa, describes its efforts to move from looking at the behaviors of its own staff, to working with its immediate suppliers, to starting to grapple with the human rights risks it is connected to through its products and services in an environment that is still burdened with a legacy of racial injustice.[10]

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[9] There is currently an active international debate about how and in what ways a bank can contribute to human rights harms. These conversations are taking place in industry settings, such as among the "Thun Group" of banks, and in multi-stakeholder settings, including the OECD Working Party on Responsible Business Conduct and the Agreement on International Responsible Business Conduct in the Banking Sector in the Netherlands (discussed later in this article). The UN Office of the High Commissioner for Human Rights (OHCHR) offered further clarity on these questions in a June 2017 paper, available at http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf. The detail of this discussion goes beyond the scope of this short article; it is sufficient to note that a bank can be deemed to have contributed to a negative human rights impact through its business relationships under certain circumstances.

[10] See https://www.businessrespecthumanrights.org/en/page/388/responsible-banking-amidst-a-legacy-of-injustice.

While the UN Guiding Principles expand the scope of where business enterprises need to look for impacts, they also put some boundaries on the kind of actions that are expected in response, depending on how a business enterprise is involved with an impact.

3.4 What action does a business need to take in response?

Each type of involvement – cause, contribution, linkage – has different implications for the nature of a business enterprise's responsibility to take certain action, in particular, whether it has a role to play in remedy.

- *Cause*: If a business has caused or may cause an impact, the business should prevent or mitigate the impact from occurring, continuing or recurring, and provide remedy for any human rights harms that have occurred.[11]
- *Contribution*: If a business has contributed or may contribute to an impact, the business should prevent or mitigate its contribution to the impact, contribute to remedy for harm if it has occurred (to the extent of its contribution to the harm), and use or increase its leverage with others to prevent or mitigate the impact if it has not yet occurred.
- *Linkage*: If an impact is linked to a business's operations, products or services through a business relationship, then the business should use or increase its leverage with other parties to seek to prevent or mitigate the impact. The business is not responsible itself for providing remedy to those who have been harmed, although it may still take a role in providing remedy for other reasons.

Where an impact occurs through a business relationship, the concept of leverage is therefore critical. Leverage means the ability to affect change in another's behavior. Leading business enterprises are realizing that engaging in a process of continuous improvement through capacity building, rather than immediately terminating a relationship

[11] The Interpretive Guide to the UNGPs defines remedy as follows: "Remediation and remedy refer to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition." See OHCHR.

when problems are found, can lead to better human rights outcomes overall. For example, if a supplier is found to be using child labor and is immediately terminated, the children that were working in the supplier's factory may be forced to make up for lost income through other even more harmful activities. In cases where systemic human rights impacts are concerned, such as where child labor is a persistent problem throughout an entire tier of a supply chain, then using leverage together with other actors – peers, industry associations, international organizations like the ILO, local trade unions or expert NGOs – may be the only way for a business to achieve sustainable improvements.

Leverage should be established right from the start in the terms of a business enterprise's relationship with a business partner – in the banking context this means in the provisions of the loan agreement or other relevant contract. However, leverage is about much more than words on paper. It includes how a bank engages up front with its client to communicate its seriousness about human rights issues, how the bank assesses the client's capacity and competence to meet its own responsibility to respect human rights (including by implementing human rights due diligence processes), and, if impacts do in fact occur, what kinds of follow up action the bank takes to encourage or insist that the client address the situation.

3.5 What is a business enterprise's role in providing remedy?

The question is a key one for banks since a bank's involvement in a human rights harm will often take the form of linkage. In a linkage situation, a business enterprise is not expected to provide remedy itself; however, it is expected to use its leverage to pressure the third party that is causing the harm to cease or prevent such harm going forwards. Using leverage to encourage or push a client to provide remedy for any harms the client has caused can be an important means of helping to ensure that those harms do not continue or recur. Where a client lacks internal controls and effective accountability mechanisms for impacts it has caused it is more likely that it will pose continued risks to people; where it is accountable for its impacts, those risks are more likely to decrease.[12]

[12] The recent OHCHR response to the NGO BankTrack specifically recognizes the relevance of this in the banking context: see OHCHR.

In sum, remedy is relevant whenever negative impacts have occurred. What changes is the role that a business enterprise is expected to play: whether directly providing, contributing to the provision of, or encouraging or pushing the responsible third parties to provide for effective remedy.

3.6 What is the relationship between the State Duty to Protect and the Corporate Responsibility to Respect?

It is the duty of states to translate their international human rights law obligations into domestic law and provide for their enforcement. The laws of all states include various protections against human rights abuse by business, including in labor, non-discrimination, health and safety, environmental and consumer protection laws. In some states, human rights are explicitly protected in the constitution.

At the same time, national laws may not address all internationally recognized human rights, they may be weak, they may not apply to all people, or they may not be effectively enforced (for example, police may be underequipped or poorly trained). It is clear that, in such situations, respecting human rights is much more difficult for business enterprises.

The UN Guiding Principles do not expect business enterprises to step in for every government failure. But they make clear that where national laws fall below the standard of internationally recognized human rights, business enterprises should respect the higher standard; and where national laws conflict with those standards, business enterprises should seek ways to still honor the principles of those standards within the bounds of national law, as we see business enterprises doing for example through the use of "parallel means" to help enable worker voice and representation where legitimate trade unions are banned. A central contribution of the UN Guiding Principles is this clear articulation of the distinct but inter-dependent duty of the state and responsibility of business in order to drive towards more effective outcomes for people.

4 Uptake of the UN Guiding Principles

Since 2011, there has been a significant amount of action to put the UN Guiding Principles into practice. This section outlines some general trends, and then some specific developments in the context of financial institutions.

4.1 General trends

A growing number of governments are developing National Action Plans on business and human rights. As of late 2017, a diverse group of over 40 states had developed or were in the process of developing National Action Plans on the implementation of the UN Guiding Principles, including within the region Colombia, Chile, Mexico and Argentina.[13] Germany's plan, for example, requires at least 50% of all German business enterprises to be conducting human rights due diligence by 2020.

Developments in national law in countries such as France and the United Kingdom now require the implementation and/or disclosure of human rights due diligence efforts in general, or specifically regarding the risks of slavery and human trafficking in global supply chains. In the US and the EU, disclosure is required in relation to the use of 'conflict minerals' in various consumer products. New laws are currently being debated in other countries as well, such as Switzerland, Australia and the Netherlands, and stock exchanges and regulators in a growing number of jurisdictions, including India, Malaysia and South Africa, are also requiring or encouraging greater disclosure on human rights issues.

Regional organizations, including the Organization of American States, have affirmed the UN Guiding Principles as the authoritative global reference point on the expectations of business regarding human rights. Leading international sustainability standards are now broadly aligned with the UN Guiding Principles, including the OECD Guidelines for Multinational Enterprises, the ISO 26000 Standard on Social Responsibility, and the International Finance Corporation's Sustainability Framework and Performance Standards. In March 2017, the International Labor Organization updated its MNE Declaration to incorporate the UN Guiding Principles,[14] and has begun debating the need for new labor standards on supply chain responsibility, referencing the UN Guiding Principles.

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[13] Information on National Action Plans can be found on the website of the Office of the High Commissioner for Human Rights: http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx and on the Business & Human Rights Resource Centre's website: https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans.

[14] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 5th ed, March 2017, available at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

In addition, socially responsible investors representing over USD 5.3 trillion in assets under management are backing more robust human rights performance and disclosure, as well as benchmarking efforts to assess business enterprises, including banks, against the UN Guiding Principles.[15]

4.2 Uptake by financial institutions

Turning specifically to financial institutions, there has been movement in both the public and private sectors. National export credit agencies (ECAs) and development finance institutions (DFIs) in a growing number of OECD countries are seeking to integrate human rights into their existing environmental and social due diligence. For ECAs, this is being driven by the 2016 revision of the OECD Common Approaches – recommendations that apply to all OECD member states and are intended to guide the environmental and social due diligence their official ECAs conduct on applications for export credits.[16] The Common Approaches were revised to better align with the UN Guiding Principles by including an explicit statement that ECAs should screen all covered applications for severe human rights risks and where a high likelihood of such risks is identified, ECAs should further assess them, including by complementing their existing environmental and social due diligence with human rights due diligence.[17]

Among DFIs, there is a growing awareness that the IFC Performance Standards, even where they are implemented robustly, need to be supplemented by human rights due diligence to effectively manage the most severe risks to people in challenging project contexts.[18] At the multilateral level, several of the regional developments banks have been paying heightened attention to human rights risks,

[15] See, for example, http://www.ungpreporting.org/early-adopters/investor-statement/.

[16] OECD Council, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, adopted 6 April 2016, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282016%293&doclanguage=en. Shift has worked directly with several individual ECAs to adapt their approaches, including with the Norwegian and Dutch ECAs.

[17] See https://www.shiftproject.org/news/oecd-human-rights-due-diligence-export-credit-agencies/.

[18] Shift has worked directly with a number of individual DFIs to integrate human rights due diligence into their approaches. See, for example, CDC, ESG Toolkit for Fund Managers, especially the Briefing Note on Human Rights, available at http://toolkit.cdcgroup.com/e-and-s-briefing-notes/human-rights.

particularly the urgent need for much more robust and meaningful approaches to stakeholder consultation by project operators and their subcontractors to truly identify, understand and mitigate human rights risks.[19] Working with the independent Peruvian Superintendence of Banks, Insurers and Private Pension Funds (the SBS), Shift supported the development of targeted regulation in that country aimed at addressing exactly this gap in the due diligence processes of private banks providing loans or other support to extractive projects in that country where those projects pose heightened risks of social conflict with local communities.[20]

A growing number of commercial banks globally are strengthening their performance and disclosure on human rights risks, including banks headquartered in the US, the UK, France, the Netherlands, Switzerland, Australia, South Africa and Japan. Two examples that Shift has first-hand knowledge of are Citi and ABN AMRO.[21]

Citi's most recent sustainability reporting explains how it is has been building human rights due diligence into its existing approach to environmental and social risk management.[22] ABN AMRO produced a stand-alone report on its human rights efforts in 2016, and has made progress on integrating human rights due diligence into its corporate lending practices across a range of high-risk commodity supply chains.[23] Both banks have also been looking in particular at the issue of human trafficking. ABN AMRO speaks regularly about engaging with the other key private and public sector actors that need to be involved in tackling this complex problem.[24]

The primary way in which banks have typically handled exposure to human trafficking risks, through "Know Your Customer", anti-money laundering and other compliance-based processes, could be significantly strengthened by focusing in addition on the due diligence conducted

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[19] See, for example the Inter-American Development Bank's recent publication by Reidar Kvam, *Meaningful Stakeholder Consultation*, 2017, available at https://publications.iadb.org/handle/11319/8454.

[20] See https://www.shiftproject.org/resources/collaborations/peruvian-financial-regulator-improved-corporate-management-social-conflict/.

[21] Both business enterprises are participants in Shift's Business Learning Program, see https://www.shiftproject.org/what-we-do/business-learning/.

[22] See, especially pp 34-45, http://www.citigroup.com/citi/about/citizenship/download/2016/2016_citi_global_citizenship_report.pdf?ieNocache=526.

[23] See https://www.abnamro.com/en/images/Documents/040_Sustainable_banking/080_Reporting/2016/ABN_AMRO_Human_Rights_Report_2016.pdf.

[24] See, for example, https://www.abnamro.com/en/newsroom/blogs/maria-anne-van-dijk/2016/the-bank-helps-combat-human-trafficking.html.

in their broader corporate lending business. This involves pushing beyond the immediate client and asking questions about the supply or value chains that those clients are relying on, particularly where third-party labor brokers are involved. The UN University, together with banks, regulators, law enforcement agencies, civil society and other stakeholders has developed a set of priority recommendations on how the financial sector can help break the financial bonds of modern slavery reflecting the importance of both of these aspects of banks' activities.[25]

In the Netherlands, the major banks, the banking sector association, the government, and civil society stakeholders recently signed an Agreement on International Responsible Business Conduct in the Banking Sector, which covers the industry's project finance and corporate lending activities.[26] This innovative agreement commits the banks, with the support of all the other parties, to step up human rights due diligence to ensure human rights are respected in their global activities, in line with the UN Guiding Principles. Learning from the implementation of the agreement should feed into the ongoing discussions in the OECD where the responsibility of financial institutions for human rights under the UN Guiding Principles (and the closely aligned OECD Guidelines for Multinational Enterprises) is being actively explored.[27]

In conclusion, the level of debate and action among both public and private sector financial institutions on the topic of human rights risks has increased substantially in the last few years. For any bank seeking to engage on the global stage, the UN Guiding Principles provide the blueprint for the way forward and are a practical means of focusing resources and attention on the most severe risks to people connected to their operations.

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[25] See https://unu.edu/breaking-the-financial-chains.

[26] See https://www.internationalrbc.org/banking?sc_lang=en. Shift has been providing expert advice and support to the Dutch government and to the SER, the body charged with leading the broader process of negotiating sectoral covenants, under the Dutch International Responsible Business Conduct Agreements initiative since 2015.

[27] See http://mneguidelines.oecd.org/rbc-financial-sector.htm.

CHAPTER 8

DECENT WORK, THE ILO AND FINANCIAL INSTITUTIONS: A DIALOGUE FOR SOCIAL JUSTICE

THAÍS DUMÊT FARIA

The International Labor Organization is just one-year shy of its 100th anniversary, which will be celebrated in 2019. Over all these years, the social context from which the organization emerged has unquestionably experienced different realities and new challenges. However, its mission and regulatory instruments, which remain current and deserve to be studied and remembered, have been increasingly used as a foundation for the promotion of social justice policies and strategies worldwide. Therefore, it is still essential to have an organization where tripartite actors work together to create more just and inclusive societies based on decent and productive work. One of the roles of the International Labor Organization is to legislate on issues relevant to the world of work through the adoption of Conventions and Recommendations with basic guidelines that must be respected in all countries, especially in its 187 Member States. Throughout its history, the ILO has published 189 Conventions on various subjects and different sectors of the economy, including the financial sector. The latter has unique specificities and urgent issues, such as the global economic crisis that not only directly affects thousands of workers but also brings about other consequences that will be addressed in this article. Before discussing the key role of financial institutions in this context, one must first and foremost understand the ILO and the mechanisms for carrying out its first mission: promote social justice.

1 Origin and competence to legislate

The Declaration of the aims and purposes of the International Labor Organization and of the principles that should inspire the policy of its Members was unanimously adopted at the 26th session of the International Labor Conference held in Philadelphia, in 1944.[1]

It was the aftermath of World War II, when numerous documents such as the Atlantic Charter were issued, and organizations such as the United Nations and the Bretton Woods institutions were created, establishing a landmark of the post-war international political and economic system. "In this context, the Declaration of Philadelphia reflects the desire of the ILO to adapt to the new world order and, more specifically, to provide itself with a role within the new system of international organizations that was being established".[2]

The period between the two world wars was crucial for the establishment and consolidation of the ILO as an international agency of paramount importance in discussions about the world of work. According to this logic, the First World War marked a fundamental point in time: the beginning of the Peace Conference on January 25, 1919, which created the International Labor Legislation Commission tasked with developing the constitution of a permanent international organization. In April of the same year, the ILO Constitution was adopted, based on the Treaty of Versailles, which was endorsed in its entirety by the Peace Conference on June 28, 1919. In this foundational document, the ILO was created on the basis of tripartism and universality, which still makes it a unique institution that excels at social dialogue. Its original structure comprises a General Tripartite Conference – the International Labor Conference; a tripartite executive body – the Governing Body and; a permanent secretariat – the International Labor Office, with a research, activity and publishing center.

At that time, the Constitution[3] already provided in its section 2, general principles (Article 427) that took into account the peculiarities of each country but established minimum standards that all member states should follow.

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1 ILO: Actas de las sesiones, 26 reunión de la Conferencia Internacional del Trabajo (Montreal, 1944).

2 LEE, Eddy. Orígenes y vigencia de la Declaración de Filadelfia. Revista Internacional del Trabajo, vol 113, 1994, num.4. pg. 532.

3 ILO. Cláusulas de los Tratados de Paz Relativas al Trabajo. Ginebra, 1919.

The High Contracting Parties, recognizing that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance, have framed, in order to further this great end, the permanent machinery provided for in Section I and associated with that of the League of Nations. They recognize that differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labor difficult of immediate attainment. But, holding as they do, that labor should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labor conditions which all industrial communities should endeavor to apply, so far as their special circumstances will permit.

Among these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance:

1. The guiding principle above enunciated that labor should not be regarded merely as a commodity or article of commerce;
2. The right of association for all lawful purposes by the employed as well as by the employers;
3. The payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country;
4. The adoption of an eight-hour day or a forty-eight-hour week as the standard to be aimed at where it has not already been attained;
5. The adoption of a weekly rest of at least twenty-four hours, which should include Sunday wherever practicable;
6. The abolition of child labor and the imposition of such limitations on the labor of young persons as shall permit the continuation of their education and assure their proper physical development;
7. The principle that men and women should receive equal remuneration for work of equal value;
8. The standard set by law in each country with respect to the conditions of labor should have due regard to the equitable economic treatment of all workers lawfully resident therein;
9. Each State should make provision for a system of inspection in which women should take part, in order to ensure the enforcement of the laws and regulations for the protection of the employed.

It should be noted that, considering the historical moment, the ILO Constitution can be deemed advanced in equality of rights, especially in relation to women. This fact has its origin in the participation of working women in the ILO creation process and in the discussions at the first International Labor Conference held in October-November 1919. That meeting led to the first six Conventions: hours of work in industry; unemployment; maternity protection; night work for women and children; and minimum age for work in industry. In some respect, three of the six Conventions contained references to women, whether in their direct work or in the participation of children[4] in work, subjects that were brought for discussion by working women.

The International Labor Office was set up in Geneva in 1920 and the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards – two of ILO's most important bodies to date – were established in 1926. A key piece of information on the interwar period was the definition of four ILO competencies by the Permanent Court of International Justice (1922-1932): regulate the conditions of labor of persons employed in agriculture; examine proposals for the organization and development of methods of agricultural production; regulate, incidentally, the personal work of the employer; interpretation of the Convention of 1919 concerning employment of women during the night. Although such competencies were limiting, the Court recognized Section 1 of the ILO Constitution, thus legitimizing its broader participation in international discussions and in the regulation of issues involving the world of work.

During World War II, the ILO had an active participation through the decisions of the International Labor Conferences. In 1941, the Director-General sent a communication, prior to the Conference, to the governments of the Member States, stating:[5] "(…) Conference will not have normal constitutional powers and adoption of international labor conventions not contemplated but meeting will afford opportunity survey world social developments this critical time and present and future responsibilities of Organization…". That same year the Conference adopted a resolution proclaiming that "the victory of the free peoples in the war against totalitarian aggression

[4] For the UN, the term child refers to persons under the age of 18 years, thereby including adolescents who were fit for work but should do it under special conditions.

[5] Conferencia de la OIT, 1941, New York y Washington D.C.

is an indispensable condition of the attainment of the ideals of the International Labor Organization".[6]

Positions that may be considered more advanced in the sense of promoting social justice were a landmark in the most relevant historical moments and represented a preview of global decisions. The year 1944 was undoubtedly one of the most relevant in the history of the ILO. It was the year when the Declaration concerning the aims and purposes of the International Labor Organization, known as the Declaration of Philadelphia was adopted. The Declaration was incorporated into the revised ILO Constitution of 1946.

The Declaration of Philadelphia can be construed as a preview of the Charter of the United Nations and of the Universal Declaration of Human Rights, since it focuses not only on the world of work but on the human being in general and is addressed to all persons, regardless of race, creed and sex.

Precisely because it was advanced for the historical period and had a general scope, this document continues to be a benchmark in terms of general principles, considering that the world of work is part of the social and human structure and for that reason must be considered in its full extent. This logic is the same that applies to the interpretation of any International Convention or Recommendation. It should be noted that the discussion papers of the International Rules are an essential basis for interpreting them, since they contain not only the elements that formed it but also the intended objectives.

Thus, the principles governing the ILO, its rules and regulations are aimed at all areas and sectors of the economy. However, it is understood that each sector has specificities and different ways of producing social impacts. For that reason, the ILO created a Sectoral Policies Department (SECTOR) that promotes decent work by addressing social and labor issues in specific economic sectors at both the international and national levels. In coping with the challenges and development issues of great importance to particular sectors, the International Labor Organization provides assistance to governments, employers and workers in designing policies and programs to improve economic opportunities and working conditions in each sector. Over the years, SECTOR has implemented numerous national activities in different sectors. Although social dialogue remains the focus of sectoral

[6] Revista Internacional del Trabajo, vol. 45, n. 1, 1942, p. 15.

work, the other pillars of the Decent Work Agenda such as job creation, labor rights and social protection are also addressed thanks to the cross-cutting nature of the Department. The financial sector is of paramount importance for its diversity in terms of institutions and workers reached.

2 The role of financial institutions: concept and importance

Financial institutions as well as services and products that make up the financial services sector vary from country to country. However, in general there is always a central bank; depository institutions like banks, construction credit societies or mortgage companies; credit cooperatives; insurance and pension funds; general financial services; treasury management companies; and other institutions engaged in financial mediation or asset management. Financial intermediaries may include securitization institutions, investment firms and personal credit institutions. A strict perspective of the sector is not always capable of understanding reality and its impacts. Thus, it is important to have a broader view of the financial services sector that encompasses not only the financial sector itself but also the business services that support its financing.

Regardless of the country, the financial services sector understood in its broader sense is comprised of three overlapping elements: financial institutions (such as banks) and regulatory authorities; financial markets (e.g. bond, securities and foreign exchange markets) and participants therein (issuers and investors); and the payment system (cash, check or electronic payments) and participants therein (e.g. banks). The interaction of these parties allows for the provision of investment funds or the consumption of existing economies in other parts of the national economy – or, as has been increasingly the case – of the international economy. Financial institutions are primarily concerned with mediation and the provision of financial services, i.e. accept deposits, request and grant loans, provide insurance with all types of coverage and leases, and invest in financial assets.

Banks in most countries are the largest depository institutions and providers of financial services, but other organizations such as insurance companies and savings banks are steadily gaining market space and power. In the last ten years there has been a clear demand for a financial infrastructure whose entities and practices together are

what can be called a shadow financial system. This system includes, for example, hedge funds, investment funds, money market funds and special investment instruments. Many observers believe that this shadow financial system, which is outside the national control framework but closely linked to regulated financial systems, may have contributed significantly to the global financial and economic crisis that began in late 2008.

In the sub-sector of professional services there are individuals, associations, companies and contractors or consultants providing services in areas such as accounting, public relations, translation and interpretation, system analysis and design, real estate, etc.,

At employment level, ILO's latest activities related to financial services and professional services are focusing on the effects of mergers and acquisitions on banking and financial services as well as on the impact of the financial crisis on workers in the sector. Cooperatives, in this sense, have played a unique role in guaranteeing employment and in actions to cope with the global economic crisis. It should be pointed out that cooperatives are, in many cases, the only production and livelihood means for more excluded groups, either because of prejudice, geographic isolation or other social and economic issues.

3 Importance of cooperatives vis-à-vis the crisis

The ILO believes that cooperatives are important for improving the living and working conditions of women and men worldwide, besides contributing to the chain of essential infrastructures and services, including in areas neglected by governments and investment firms. In addition, the existence and contribution of cooperatives are essential to the creation of decent work. Cooperatives favor a democratic, people-centered economy that cares for the environment while promoting economic growth, social justice and a fair globalization. They play an increasingly important role in balancing economic, social and environmental concerns, as well as in preventing and reducing poverty. In general, for many communities or social groups the path towards attaining decent work and/or preserving their spaces and cultures is through cooperatives. On the other hand, although they not often represent a high amount of resources, they seem to be more resilient to the oscillations caused by crises or other social and economic factors.

At the peak of the global crisis, for example, cooperative banks faced increasing demands for association and had difficulty responding

to this sudden rise in demand. So far, cooperative banks have not announced any major losses as a result of the crisis. However, the losses recorded by the German Central Cooperative Bank (DZ), a general corporation, show how cooperative banks could put themselves at risk in an economic crisis. However, what has been seen is that the specific control mechanisms of the cooperatives either have not been used at all or have failed. Nonetheless, most cooperative banks have reduced their vulnerability and increased their transparency, especially by investing in nearby locations and in the real economy. Ethiopian coffee growers, for example, seem to be less affected by global market fluctuations than coffee producers who are not part of cooperative-specific value-added chains.

Does this mean that cooperative banks are more resilient to a financial crisis? So far, according to the information received, no cooperative bank has requested government assistance. But there are no concrete data to support this assertion. As the German example shows, this cannot be interpreted as if these financial institutions had not been affected by the crisis. The very design of the cooperative provides and allows for some self-help mechanisms, such as members' responsibility, intercooperative bank guarantees, or the use of liability reserves, before requesting outside assistance.

4 Workers in the financial sector

As explained above, the financial sector in the broad sense encompasses many production and labor groups, including workers who are responsible for operating the system. These professionals are often affected especially by market conditions or financial crisis. Not by chance, in 2009 the ILO promoted a debate on the subject as part of the initiatives of the Sectoral Activities Department, which produced a report with the main risks for this category.

The purpose of the debate was to conduct a brief review of the background, causes, characteristics and trajectory of the financial and economic crisis started in 2008; define the financial services sector, its occupations and training requirements, as well as important trends in the period; provide a preliminary assessment of the impact of the crisis on employment in the financial sector; and make suggestions on possible policies to tackle the effects of the crisis on financial sector workers. First and foremost, it is important to recall the definition

used at the time. The financial services sector included the following subsectors: banking industry; insurance industry and financial and insurance intermediaries.

In this sense, many professionals may have their employment or job quality affected by crises, and it is essential to identify these profiles and roles for the adoption of prevention actions and strategies in the medium and long term. This sector employs a large number of highly and average skilled professional and technical staff specialized in trade and finance as well as IT experts and technicians. However, given that occupational classifications vary according to traditions and different education systems and structures, national comparisons can be ineffective. For example, because of their education and learning systems, financial services in Germany employ a large number of administrative staff, while French financial services employ a large number of executive and management staff. Nonetheless, generally in all countries the sector has a significantly larger share of highly and average skilled professionals and people and of information technology jobs than the workforce average as a whole.

In addition, the knowledge base of the financial services sector has improved since the 2000s, as a result of the emergence of new jobs that require more specific and higher-level education. Many new positions and occupations were also more customer-orientated and required higher levels of formal education. The distinction between administrative jobs and management and commerce jobs has been reduced by increased specialization requirements.

Profound changes are expected in the traditional organization of work in financial services in positions such as management, sales, accounting, analysis and information technology and administrative activities. The proportion of average qualified and highly qualified workers is also expected to shift towards the latter, thus reflecting new personnel requirements aimed to ensure greater financial and IT knowledge. Financial institutions are expected to be required to strengthen their middle office, where key activities include financial accounting, reporting, account control, process control, risk management, and managerial or management accounting. Employment in this area requires high qualification in information technology and thorough knowledge of financial processes, expertise in international commercial law, and language skills, given the increasingly global nature of the operations of most institutions.

A possible vulnerability that may arise from this specialization of positions is that more and more telecom operators and receptionists are hired as temporary workers and with a high degree of turnover leading to job instability for thousands of workers. On the other hand, in the sector of less technically qualified services, workers are hired on a temporary basis and also outsourced. Both employment practices are considered by the ILO as atypical forms of employment,[7] which require more care so as not to become poor working conditions or entail rights violations. For this and other reasons, contrary to popular belief many jobs in the financial services sector are underpaid. The average annual salary of bank tellers in May 2006 in the United States was around US$ 22,000.00, according to the BLS. These and other supporting positions are likely to experience extensive cuts through restructurings and staff reduction in response to crises. Highly paid jobs are mainly related to the investment and corporate sectors and trading companies and stock brokers. Between January and October 2008, for example, the average spending on wages adjusted for workforce size at Goldman Sachs fell by 38%.[8]

The financial sector is experiencing a deep and exhaustive restructuring, and the fact that the crisis affected the sector unevenly could result in labor movements between financial subsectors. This will strengthen the momentum for structural changes similar to those experienced until 2009. This restructuring of the financial sector cannot be carried out without substantial consequences for both the employment and entry of current employees in this industry. As a result, the sector experienced, after 2008 and at least until 2010, a drop in total activity after years of expansion, which led to significant job losses. Likewise, there was a paralysis or slowdown in terms of new entrants.

Initiatives that support workers in coping with crises in the sector would be useful for achieving economic and social goals. The latter include adequate and well-designed unemployment benefits and social protection, economic activation policies and effective public employment services. These initiatives would not only support the entry of affected workers but would also facilitate the transition to new jobs and reduce the risks of unemployment and long-term inactivity. There are powerful reasons to launch training programs for workers in the

[7] For atypical forms of employment see:http://www.ilo.org/global/publications/books/WCMS_534518/lang--es/index.htm

[8] http://news.efinancialcareers.com/Blogs_ITEM/newsItemId-15608.

financial sector, given the increase in the number of specialized positions and changes in occupations. Social dialogue between employers and trade unions in the sector can be very supportive in taking effective action and essential to ensure the correct design of specific policies for the sector. Strengthening the sector means guaranteeing space for the economic growth of several other sectors, including those responsible for the employment of people from areas of greater exclusion, such as rural areas.

5 Development of rural economy through financial inclusion

Despite the great need for financing, rural communities are still the largest market in need of financial services. Ensuring the financial inclusion of rural areas allows them to release their considerable economic potential and benefit the poorest living in these areas by increasing household income and ensuring decent work. Access to financing can be a powerful tool for the development of rural economy. It is especially important in the case of the most excluded workers, among them migrants, domestic workers and small farmers, to protect them against risks, increase their income and invest in their businesses. About 70% of adults living in developing countries have no access to financial services and this percentage is significantly higher in rural areas.

Considering the important effect of the financial market on the level and quality of employment, the ILO has the mandate to support financial inclusion. In particular, it should "consider (…) programs or measures of an economic and financial character from the point of view of social justice",[9] including those related to rural areas. The ILO also works towards financial inclusion in rural areas by:

1. Capacity-building off constituents (governments and workers' and employers' organizations) and ILO staff;
2. Functioning as a help desk for requests from constituents and ILO staff and for monitoring the quality of ILO interventions;
3. Promoting innovation through action-oriented research and knowledge management.

[9] ILO. Declaración de Filadelfia, 1944 (artículo 2) y Declaración sobre la justicia social para una globalización equitativa (Ginebra: 2008)

Despite the progress achieved in some countries, the global employment crisis and the deep structural weakness of labor markets are prevailing issues in the main debates on global development, such as preparation of the post-2015 development agenda. In many regions of the world, millions of people who aspire to join the workforce face difficult employment prospects.

In developing countries, a large proportion of the workforce is engaged in low-productivity activities such as the informal rural economy. Despite a higher rate of growth of the formal economy, the problems of underemployment and poverty cannot be solved without a change in the overall investment agenda and the employment intensity of economic growth. Moreover, these trends may be exacerbated as a result of political instability, localized armed conflicts and the economic and financial crisis.

When speaking of the rural economy, it is impossible not to refer to the importance of its structuring in guaranteeing the rights of women, who are essential to this economy, but whose situation is usually more precarious than that of men. Women play important roles in the rural economy as farmers, wage earners and entrepreneurs. They also care for the well-being of family members by acting inter alia as food providers and caregivers of children and the elderly. The unpaid work of women in rural areas, particularly in poorer locations, often includes carrying firewood or water. Women in indigenous and local communities are also repositories of traditional knowledge that is critical to guarantee the livelihoods, resilience and culture of their communities. However, rural women face constraints to engage in economic activities because of gender-based discrimination and social conventions, excessive participation in unpaid work and lack of access to education, besides having little or no access to financial services. Strengthening this sector can represent the empowerment of women and, consequently, the reduction of poverty and social inequalities.

6 Conclusion

The financial sector, its responsibility and impacts on the economy and the guarantee of decent work is a broad topic, subject to discussions according to historical times and social organizations. However, it is possible to affirm its great importance to the economy and especially for overcoming poverty, including in times of economic crisis.

Special attention can be given to the topic of cooperatives, which as people-centered entities based on the solidarity and ownership of their members, have the right conditions to promote the development of all-inclusive societies and economies. Work, and more specifically decent work, is a key mechanism for inclusion and social justice. Achieving decent work as a reality for all is an integral part of the United Nations Sustainable Development Goals: this means paying special attention to the situation of working women and men at risk of exclusion and poverty, particularly persons with disabilities, indigenous peoples, migrants and refugees.

Given the specificities, but also the potentials of the financial sector in the broadest sense, it is clear that it is one of the sectors that can contribute most to decent work. The common challenge of the ILO is to find policy alternatives that can offer decent work opportunities. In this regard, the stability and prosperity of societies are essential elements. Solutions are needed to reduce conflict and lead societies to recovery, economic growth and social progress as well to facilitate the construction of institutions based on labor standards that guarantee labor rights. In an interconnected world, this is both a global agenda and a global responsibility.

The founding mandate of the ILO originates in the principle *Si vis pacem, cole justitiam* – "If you desire peace, cultivate justice". These words are as imperative today as when they were written nearly a hundred years ago, when the world was experiencing the aftermath of the war. Strengthening decent work is to ensure that social justice can evolve from being a utopia and a goal to becoming a global reality.

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THE SOCIAL RESPONSIBILITY OF BANKS AND SLAVE LABOR

JOSÉ CLAUDIO MONTEIRO DE BRITO FILHO

1 Opening remarks

Labor analogous to slavery is still a very current problem in Brazil, despite more than two decades of a fierce struggle against this illegal practice.

Indeed, although several measures have already been taken since the Brazilian government officially recognized this practice more than two decades ago in the administrative and judicial spheres, including through a number of regulatory changes in both infraconstitutional legislation and the Federal Constitution, this serious problem still persists.

In fact, this shows that much still needs to be done, and not only at the repression level, as the involvement of all public and private stakeholders is required to eliminate (or at least reduce) slave labor.

In this context, this text will address a particular aspect: the action of banks in the quest to eliminate labor in conditions analogous to slavery, based on the social responsibility of financial institutions.

The main purpose of the text is to discuss what financial institutions can do to fight slave labor and how this is regulated.

Although corroborated by a theoretical analysis, this study will use the regulatory sources necessary for understanding the problem, in addition to documents produced by the Public Labor Prosecutor's Office and the Judiciary.

It starts by providing a brief overview of slave labor and actions taken in Brazil in the last two decades towards its elimination.

The paper then discusses steps that can be taken in the private sphere against those who subject workers to labor analogous to slavery, including the specific situation of banks, due of their particular relevance in providing credit for productive activity and development.

2 Slave labor in Brazil: basic notions and brief trajectory of the struggle towards its elimination[1]

I believe that the first steps to be taken in this section are to indicate a basic definition of labor analogous slavery and the terminology used throughout the article.

2.1 Basic notions: definition and terminology

Starting from the first question and considering the legal framework, in the case of article 149 of the Brazilian Code of Criminal Procedure, labor analogous to slavery can be defined as the illegal practice of the service recipient who, in their employment relationship with the individual providing the service violates the dignity and personal freedom of the latter.

This definition emphasizes the main legal interests protected by Article 149: the dignity of the human person and freedom as autonomy, preventing the instrumentalization of the worker as well as the violation of his or her right to act freely.[2] It also has, I believe, the advantage of showing the relationship between all the elements that characterize slave labor as described in Article 149, which are summarized in the idea of non-instrumentalization of the human being, besides ensuring to the person the power to decide freely what is the right thing to do.

With regard to the terminology, I should start by noting that under the law – in this case Article 149 of the Brazilian Code of Criminal

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[1] The ideas presented in this article reproduce, in part, to the extent deemed necessary, the contents mainly of the first and second chapters of my book *Trabalho escravo*: caracterização jurídica (2. Ed. São Paulo: LTr, 2017).

[2] The theoretical notion, here, is the one used by Immanuel Kant in Grounds of Metaphysics of Costumes. In this regard, see especially the issue of freedom as autonomy in SANDEL, Michael (*Justice* – What is the Right Thing to Do).

Procedure, as indicated above – the proper name for the unlawful act is *labor analogous to slavery*. It is the most appropriate, as in fact what happens in this case is the use of workers in conditions analogous to slavery rather than slavery itself, which is legally prohibited.

Such is the teaching of Nelson Hungary, who said: "The law refers to '*condition analogous to slavery*', making it clear that slavery is not about subjection to slavery, which is a legal concept, that is, presupposing the legal possibility of *domination* of one man over another".[3]

However, there is nothing against using this phrase – as I often do – in a reduced form, that is, *slave labor*. But one must have in mind that this is only a reduced form of the broader phrase used by the law. Since slavery, as already said, is not allowed by the legal system, it is unacceptable that the human person, even on account of the unlawful conduct of another, could become a slave; at most, that person will be in a condition analogous to slavery.

The phrase slave labor, I point out, has strong connotations, and it is almost impossible not to use it; we just should remember its actual meaning, which reveals, ultimately, its improper use in the amendment to Article 243 of the Brazilian Constitution, which, although incorrectly, equalized the two phrases.

These are the two designations that I use in the study with the same meaning. The latter (slave labor), I repeat, should be considered merely a reduced form of the first (labor analogous to slavery) and not as having a different meaning.

2.2 Recent trajectory of the fight against slave labor in Brazil

Having made these opening remarks, I will provide a brief description of the fight against slave labor, which is necessary for the discussion that will follow.

I believe that the starting point in this report are the rural inspections to detect and combat slave labor, especially in the south and southeast of the state of Pará, where these inspections gained strength in the first half of the 1990s.

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[3] *Comments on the Brazilian Code of Criminal Procedure (Decree-Law No. 2848 of December 7, 1940)*. 4th. ed. Rio de Janeiro: Forense, 1958. v. VI, arts. 137-154. p. 199.

What was seen especially at that time in the rural businesses inspected, in some cases was the same situation that is characterized today, after the amendment to Article 149 of the Brazilian Code of Criminal Procedure, as labor analogous to slavery due to degrading working conditions.[4] It is highly probable that the situation in the businesses inspected, or in some of them, was even more serious. Neither prosecutors nor the then called labor inspectors, currently labor inspection auditors, had all the information necessary to know exactly what to investigate. What they did, with some adaptations, was to conduct an investigation and an inspection more or less in the same way that alleged cases of violations of labor protection laws were inspected and investigated.

Time went by and since the second half of the 1990s the situation has changed dramatically. Brazil recognized that although illegal, slave labor still existed in the country. A group that operated nationwide known as Special Mobile Inspection Group – or in short "Mobile Group"[5] – was created within the Ministry of Labor, currently Ministry of Labor and Social Security (MTPS). Inspections began to be carried out in a different way and the Public Labor Prosecutor's Office (MPT) also changed its M.O.[6]

The following years were dedicated to improving the action. Not only inspection was being carried out more properly, with a new set

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[4] The original version of article 149 of the Brazilian Code of Criminal Procedure was still in force and, therefore, slave labor was characterized basically by the presence of forced labor.

[5] The Special Mobile Inspection Group was created with the aim of curbing the use of slave labor, forced labor and child labor, through Administrative Rule No. 549 of 6.14.1995 of the Ministry of Labor. In fact, there was more than one group formed by labor inspection agents brought in for this purpose by the then Labor Inspection Secretariat (SEFIT), in consultation with the Occupational Safety and Health Secretariat (SSST), with none of the agents acting as coordinator. Currently, the activity of the Mobile Groups in the fight against slave labor, as well as of local teams, both formed by labor inspection auditors, is regulated by Normative Instruction No. 91 of October 5, 2011, issued by the Labor Inspection Secretariat and published in the Official Gazette of October 6, 2011, Section I, p. 102.

[6] In the scope of the Public Labor Prosecutor's Office, although the fight against slave labor is part of the activities of all the members working as agents, the coordination of activities is under the responsibility of the National Coordinating Office for the Eradication of Slave Labor (CONAETE), created on September 12, 2002 through Administrative Rule No. 231 of 2002 of the General Labor Prosecutor's Office, which replaced a committee established on 6.5.2001 charged with preparing studies on strategies to combat slave labor and regularize indigenous labor. Among other activities, CONAETE organizes the schedule of the Prosecutors that monitor the activities of the Mobile Group of the Ministry of Labor, where this is not done directly by members of the units of the Public Labor Prosecutor's Office to which the slave labor was reported.

of theoretical instruments more compatible with reality, but the Public Labor Prosecutor's Office also participated in the inspections together with the Mobile Group.

It was a period with significant results, especially because mainly in terms of labor the Judiciary understood the importance of recognizing and curbing a practice that although illegal supported the activities of a significant part of an entire economic segment.

After this first moment, with the recognition by the Supreme Federal Court (STF) of the Federal Court's jurisdiction to try cases involving slave labor, the repression against this offense gained ground and the issue was no longer discussed mainly from a labor perspective. The trial of cases filed by the Federal Public Prosecutor's Office[7] for subjecting a person to labor analogous to slavery also gained speed.

All that, however, has not yet had the power to turn this illegal practice into something sporadic.

There are innumerable difficulties to – if not eradicate[8] – at least reduce the incidence of slave labor in the country. These difficulties range from an elitist and conservative view of service recipients – who believe they can offer work without the minimum necessary conditions and in an extreme situation of overexploitation – to the lack of government capacity to combat illegal activities, up to the starting point for any confrontation: the correct understanding of the act (in this case, unlawful) committed, on which there is already a reasonably uniform doctrine and case law, especially by the Federal Supreme Court,

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[7] In the Federal Public Prosecutor's Office, the responsibility for repressing slave labor lies with the Federal Prosecutors. In the MPF, according to information, and considering all of Brazil, in 2014 there were "2,232 ongoing investigations concerning crimes related to the use of slave labor, provided for in Arts. 149, 203 and 207 of the Brazilian Code of Criminal Procedure (data from December 2013)", and "the states with the highest rate of the crime provided in Article 149 of the Brazilian Code of Criminal Procedure (subjecting a person to a condition analogous to slavery) are: Pará, with 295 investigations underway; Minas Gerais, with 174; Mato Grosso, with 135 cases; and São Paulo, with 125 cases. Available at: <http://www.trabalhoescravo.mpf.mp.br/trabalho-escravo/atuacao_mpf.html> Accessed on 6.11.2014.

[8] Although the eradication of slave labor should exist as a goal, in real terms it is not possible. Because the modus operandi varies and the limits between what is normal in the demands of service recipients and the unlawfulness arising from those same demands have no contours that cannot be extrapolated, there will always be cases in which the service recipient, usually because of greed and the pursuit of easy profit, will be tempted to deviate from the path of normalcy to that of unlawfulness. What is important, then, is to have well-defined contours of what is lawful and what is unnlawfu, as well as a system capable of avoiding, or at least suppressing, harmful conduct.

despite occasional attempts – somewhat unsuccessful – to change this understanding, usually with the aim of establishing that slave labor could only be characterized by restriction on the freedom of movement.

It should be noted that in both the criminal and labor aspects, in fighting slave labor the State has not limited its action to the administrative sphere – or to the judicial sphere in the case of repression. It went further by creating a mechanism to name and shame individuals and legal entities engaged in this practice.

Thus, notifying the service recipient for the characterization of having subjected workers to conditions analogous to slavery also means, if the notification is not reversed in the administrative sphere, including the service recipient in the Register of Employers that have subjected workers to conditions analogous to slavery, also called "dirty list."

This register was initially created by Ordinance No. 540 of October 15, 2004 of the Ministry of Labor and Employment, which created the "Register of Employers that have subjected workers to conditions analogous to slavery".[9] Later on, it was regulated by Interministerial Ordinance No. 2 of May 12, 2011 of the Ministry of Labor and Employment and the Secretariat of Human Rights of the Presidency of the Republic, published in the Official Gazette of May 13, 2001, Section I, p. 9.[10]

The inclusion of the employer's name in the Register, where it remains for a period of two years, could lead to restrictions on credits in official development agencies, as well as restrictions of a commercial nature in general, since neither legal entities nor individuals would be willing to establish relations with those who have committed such an offense. After this deadline, and with confirmation that all fines and labor and social security debts have been paid and no recurrence has taken place, the employer's name will be excluded from the register.[11]

The legality of the Register was questioned in court through a writ of mandamus (MS No. 14,017 / DF), but the case was dismissed by

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[9] Available at http://trabalho.gov.br/images/Documentos/trabalhoescravo/BRA77204.pdf. Accessed on October 25, 2017.

[10] Available at http://trabalho.gov.br/images/Documentos/trabalhoescravo/p_20110512_2.pdf. Accessed on October 25, 2017.

[11] The list was updated every six months, according to Art. 3 of the aforementioned Interministerial Ordinance No. 2/2011. According to the International Labor Organization, in the update of 8. 26.2009 the "dirty list" had 170 names, excluding those that had been removed by court order.
(*Profile of Decent Work in Brazil*. Brasília and Geneva: ILO, 2009).

the Superior Court of Justice (STJ). The decision was issued by Justice Herman Benjamin from the 1st Section of the STJ by.[12]

However, the issue was re-submitted to judicial discussion. Through Provisional Remedy in Direct Action for the Declaration of Unconstitutionality (ADI) 5,209, of which Justice Cármen Lúcia was the Rapporteur, the then Chief Justice Ricardo Lewandowski, on December 23, 2014 granted a preliminary injunction "to suspend the effectiveness of Interministerial Ordinance MTE/SDH No. 2 of May 12, 2011 and Ordinance No. 540 of October 19, 2004, pending final trial".[13]

Subsequently, Interministerial Order MTE and SDH No. 02 was issued on March 31, 2015 (Official Gazette of 4/1/2015)[14] repealing the previous ordinance. However, due to the preliminary injunction, this ordinance had no effect. Just over a year later, a new regulation was issued, namely Interministerial Ordinance MPTS and SDH No. 04 of May 11, 2016 (Official Gazette of May 13, 2016).[15]

Next, on May 16, 2016, Justice Cármen Lúcia, Rapporteur of ADI 5,209 ruled the case moot due to the repeal of Interministerial Ordinance 2/2011 replaced by Ordinances No. 2/2015 and No. 4/2016 and cancelled the injunction. The case was dismissed on June 17, 2016.[16]

The employers' register imbroglio is still dragging on unresolved and now, while this paper in being drafted, a new ordinance (No. 1,129) issued by the Ministry of Labor on October 13, 2017 and published in the Official Gazette of October 16, 2017) has come into play. Under the guise of regulating the role of the Ministry of Labor in relation to slave labor, the new ordinance aims to change the Ministry's understanding of labor analogous to slavery by reducing all its characterizing elements to violation of the right to freedom of movement, which is contrary to the opinions and position prevailing in the Federal Supreme Court on the matter, in addition to seeking to impose additional difficulties for the inclusion in the register of the names of employers that commit

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[12] Trial on May 27, de 2009 and publication in the Judicial Gazette on July 1st, 2009.

[13] Available at http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4693021. Accessed on October 25, 2017.

[14] Available at http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=01/04/2015&jornal=1&pagina=116&totalArquivos=140. Accessed on October 25, 2017.

[15] Available at http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=13/05/2016&jornal=1&pagina=178&totalArquivos=304. Accessed on October 25, 2017

[16] Both the Justice's ruling and the process of ADI 5209 are available at http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4693021. Accessed on October 25, 2017.

the offense described in Article 149 of the Brazilian Code of Criminal Procedure.[17]

It is a good thing that the ordinance has had its effects suspended by a preliminary decision of Supreme Court Justice Rosa Weber, contained in the records of the action against the violation of a constitutional fundamental right (ADPF) 489 of October 23, 2017.[18]

But it is not that simple. It is true there are no longer obstacles to the publication of the list which, as ruled by Justice Rosa Weber, no longer needs to be submitted to an analysis that distorts the prevailing doctrine and case law, which is the case of the aforementioned Ordinance No. 1,129/2017. However, the Ministry of Labor resisted as much as possible to publishing the Register, in a judicial battle in which several injunctions were granted, sometimes in favor of the Union others in favor of the Public Labor Prosecutor's Office,[19] (the plaintiff) – noting that no list had been published from 2014 to October 26, 2017, when the new list was presented, with 130 names of both individuals and legal entities caught during an inspection subjecting workers to conditions analogous to slavery. The list also included a legal entity that had signed a term of adjustment of conduct or a settlement agreement in a lawsuit.[20]

The discussion of this specific issue, I emphasize, will be resumed in the next item, since it is an important element for banks to allow their social responsibility to emerge.

In any case, still on the steps taken against labor analogous to slavery, it is worth noting that another possibility was offered by Constitutional Amendment (EC) No. 81 of June 5, 2014, which provides:

> Art. 1. Article 243 of the Federal Constitution shall be in force with the following wording:
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> "Art. 243. Rural and urban properties in any region of Brazil on which illegal cultivation of psychotropic plants or the exploitation of slave labor, as provided by law, are found shall be expropriated and destined for agrarian reform and programs of popular housing, without any

[17] Available at https://www.legisweb.com.br/legislacao/?id=351466. Accessed on October 25, 2017.

[18] Available at http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=5293382. Accessed on October 25, 2017.

[19] See, for example http://www.correio24horas.com.br/noticia/nid/agu-recorre-para-adiar-publicacao-de-lista-suja-do-trabalho-escravo/ and http://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2017-03/tst-derruba-liminar-que-suspendia-publicacao-da-lista-suja-do. Both accessed on November 1, 2017.

[20] The list is available at http://trabalho.gov.br/images/Documentos/cadastro_empregadores_2017.pdf. Accessed on November 1, 2017.

> compensation to the owner and without prejudice to other sanctions provided by law, observing, to the extent applicable, the provisions of Article 5.
>
> Sole paragraph. Any and all goods of economic value seized as a result of traffic in narcotics and similar drugs and the exploitation of slave labor shall be confiscated and shall revert to a special fund with a specific destination, as provided by law".

However, the amendment to Article 243 of the Brazilian Constitution, which was more than twelve years in the making, derived from both an impropriety and a threat.

The impropriety was to include the phrase slave labor in the constitutional provision, since in a legal regime that does not recognize slavery there is no slave labor, but rather work analogous to slavery, as already explained above.

There is also a threat. The reference to "exploitation of slave labor, as provided by law" which, from a logical perspective, could only be Article 149 of the Brazilian Code of Criminal Procedure, actually reflects the attempt to implement different regulations restricting the situations that characterize labor analogous to slavery. The aim is to remove two situations that characterize slave labor but that displeases the representatives of the sectors in which this violation is more common: exhausting working hours and work in degrading conditions, that is, limiting slave labor to situations in which there is a direct violation of the right to freedom of movement, as already mentioned in this item. This is clearly also what is behind the aforementioned Ordinance No. 1,129/2017 of the Ministry of Labor.

An initiative in this regard can be identified in Senate Bill (PLS) No. 432 of 2013 which, for the purposes of Article 243 of the Federal Constitution seeks to characterize slave labor only in the presence of the following situations: forced labor, restricting freedom of movement by reason of debt, keeping workers under overt surveillance in order to retain them in the workplace, prohibiting workers from using any means of transport, and seizing the worker's documents and personal belongings, that is, situations already provided for in criminal legislation, with the exception, as already said, of exhausting working hours and work in degrading conditions. The bill, which was submitted initially to be approved together with EC No. 81, is still pending.[21]

[21] Available at http://www25.senado.leg.br/web/atividade/materias/-/materia/114895. Accessed on October 25, 2017.

And it did not end there. With the same objective, that is, restrict the definition of slave labor, but now trying to amend Article 149 of the Brazilian Code of Criminal Procedure, there is also Bill (PL) 3842 of 2012, of the Chamber of Deputies, which intends to provide for the concept of labor analogous to slavery. The author of the bill is Deputy Moreira Mendes of the Social Democracy Party from the State of Rondônia (PSD/RO). The bill, which was passed by the Committee on Agriculture, Livestock, Food Supply and Rural Development on April 15, 2015, is also awaiting Congress approval. Its main objective is to amend Article 149 of the Brazilian Code of Criminal Procedure by eliminating the following situations that characterize slave labor: exhausting working hours, degrading working conditions and retention of workers by seizing their belongings or documents.[22]

Supposing that these restrictive regulations occur in any of the cases, that is, for the purposes of Article 243 of the Brazilian Constitution or to amend Article 149 of the Brazilian Code of Criminal Procedure. Supposing also that any of these new rules prevail in the legal world and is considered valid, there will be a setback incompatible with all theoretical support that justifies the fact that labor analogous to slavery can occur without direct restriction on freedom of movement, but rather from a violation of the principle of the dignity of the human person and the personal freedom of workers.[23]

It is important to note that this attempt to react through the Legislative Branch is a reflection of the greater effectiveness in the fight against slave labor, despite the many difficulties that still exist. An important and timely step was taken from the decisions of the Federal Supreme Court on the matter in 2006 and 2012, first by ruling that the federal court has jurisdiction to hear and prosecute criminal cases related to slave labor (RE 398.041-6) and then for recognizing work in degrading conditions as a situation that characterizes slave labor and a violation of the personal dignity and freedom of workers, as stated in the previous paragraph (Investigations 2,131 Federal District and 3,412 Alagoas).[24]

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[22] The bill is currently pending in the Chamber of Deputies. Available at www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=544185. Accessed on October 25, 2017.

[23] Specifically for legal interests protected by Article 149 of the Brazilian Code of Criminal Procedure, see pages 68 to 75 of my book *Trabalho escravo*: caracterização jurídica, already mentioned in a footnote (2nd ed. São Paulo: LTr, 2017).

[24] Available on the website of the Federal Supreme Court: www.stf.jus.br.

It should also be noted that the fight against slave labor in Brazil has surpassed the domestic sphere, as cases of slave labor in Brazil have already been discussed in international organizations. Two important cases show that.

The first is the case known as "José Pereira",[25] which ended in a friendly settlement. As mentioned in the committee's Report already mentioned in a preceding footnote,

> On December 16, 1994, the non-governmental organizations Americas/ Human Rights Watch and Center for Justice and International Law (CEJIL) petitioned the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") against the Federative Republic of Brazil (hereinafter "the State", "Brazil", or "the Brazilian State"), in which they alleged facts related to a situation of "slave" labor and violation of the right to life and to justice in the southern part of the State of Pará.

The case involved José Pereira and another worker, known by the nickname "Paraná", possibly killed when both attempted to escape the Espírito Santo estate, and ended in a friendly settlement agreement between the petitioners and the Brazilian State which, in addition to recognizing its responsibility at the international level, committed to ensuring prosecution of those responsible, as well as, mainly, to taking a series of preventive, remedial (José Pereira received a compensation in the amount of R$52,000.00 as determined by Law 10706/2003) and inspection measures, including regulatory changes.

The other case, in which a conviction was entered, was tried at the Inter-American Court of Human Rights known as Fazenda Brasil Verde workers *vs*. Brazil,[26] is currently waiting Brazil's compliance with the determinations of the court order.

None of these measures, however, exhaust the possibilities of fighting slave labor in the public and private spheres. The following item will discuss how a specific segment of the economy, the financial sector, can contribute in this regard, and how this is justified.

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[25] Report No. 95/03. Case 11,289. October 24, 2003. Available at https://cidh.oas.org/annualrep/2003port/Brasil.11289.htm. Accessed on October 25, 2017.

[26] The judgment is available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_318_por.pdf. Accessed on October 25, 2017.

3 Slave labor and the banking sector

Resuming what was said in sub-item 2.2, the Register of Employers is an important tool in the fight against slave labor since, not only those caught using slave labor are named and shamed, but evidence of these facts implies "credit restrictions by official development agencies, as well as restrictions of a commercial nature in general".

And in this respect, firm action by official development agencies as well as by non-public banks would be important. The fact is that developing productive activities, as a rule requires financing and, thus, restricting credit is a way to prevent the continuity of an activity that is being developed, to a large extent, against the law and in flagrant violation of workers' dignity. As stated by Rafael de Araújo Gomes, in large projects "it is simply impossible for operations of such magnitude, which also involve considerable operating costs, to be implemented without sufficient and ongoing financing".[27] Moreover, few activities within the productive sector can survive credit restrictions, and in this case this is more than justifiable, for it is not appropriate that individuals and legal entities that use slave labor can continue to do business at the expense of the violation of the fundamental rights of workers.

For that there is a sufficient set of rules and regulations. For example, in the case of the National Bank for Economic and Social Development (BNDES) there is Law No. 11,948 of June 16, 2009, whose Article 4 reads as follows:

> Article 4. Granting or renewing any loans or financing by the BNDES to private companies whose directors are convicted for moral or sexual harassment, racism, child labor, slave labor or crime against the environment is hereby prohibited.

And in this case, not granting credit in the form of either loan or financing is not a possibility but rather a duty, starting from the conviction of the company for the commitment of various unlawful acts, including slave labor. And this applies to any sphere – judicial or non-judicial – and whether the conviction is of a criminal, labor or administrative nature, in this case based on the notifications issued by labor inspection auditors.

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[27] Trabalho escravo e o sistema financeiro. *In* PAIXÃO, Cristiano and CAVALCANTI, Tiago Muniz (Org.). *Combate ao trabalho escravo*: conquistas, estratégias e desafios. São Paulo: LTr, 2017. p. 337.

It should be noted, however, that conviction should be understood as the irrefutable conclusion that the use of slave labor has occurred. Thus, in the extra-judicial sphere, the provision should be applied as soon as the notification becomes final, with the inclusion of the company in the Register of Employers. In the judicial sphere, in principle, there must be a final and unappealable decision unless, due to the gravity of the offense, a preliminary decision is indispensable – which is not difficult to occur – and the court must inform the BNDES of this fact, ex officio or at the request of the party.

In this regard, it should be noted that the last dirty list, already mentioned in a previous footnote, includes large companies that have a relationship with the BNDES, and this can now no longer happen, either through new loans or the renewal of existing ones.

In general, there is Resolution No. 3,876 of June 22, 2010, issued by the National Monetary Committee of the Central Bank of Brazil which, in Article 1, provides as follows in relation to rural credit:

> Article 1. The financial institutions enrolled in the National Rural Credit System (SNCR) are prohibited from contracting or renewing, with funds from any source, rural credit operations, including the provision of guarantees, as well as from conducting commercial leasing operations in the rural segment, with individuals and legal entities included in the Register of Employers that have used workers in conditions analogous to slavery established by the Ministry of Labor and Employment, due to a final administrative decision regarding the notice of violation.

Nevertheless, when asked to submit the documentation related to noncompliance with the Resolution, the Central Bank provided incomplete information. With its answer, the Central Bank made it clear that it was failing to inform one of the institutions with jurisdiction to investigate issues involving slave labor – in this case, the Public Labor Prosecutor's Office (MPT) – which acts on the issue in the labor sphere.[28] This even led the MPT to file a public civil action against the Central Bank (BACEN) in 2013. According to information posted on the website of the Regional Labor Court (TRT) of the 15th Region, in response to the MPT action, BACEN pursued an interlocutory appeal on November 5, 2015 and the remittance of the records to the 1st Labor Court of Araraquara on March 1, 2016, thus showing that the MPT had

[28] See GOMES, Rafael de Araújo (Trabalho escravo e o sistema financeiro. *In* PAIXÃO, Cristiano e CAVALCANTI, Tiago Muniz [Org.]. *Combate ao trabalho escravo*: conquistas, estratégias e desafios. São Paulo: LTr, 2017. p. 341-342.)

won the case, although it could not clarify if in whole or in part, since the case is closed to the public.[29]

It could even be argued that such rules might even be unnecessary. Apparently, coercive measures would either fail to produce greater effects in a sector that would spontaneously be committed to the eradication of slave labor or merely reinforce what probably was already being done.

The Brazilian Federation of Banks (FEBRABAN), for example, as reported by the Federal Public Prosecutor's Office for Citizen's Rights of the Federal Public Prosecutor's Office reported that "on December 13, 2005, it signed the Declaration of Intent of the Brazilian Federation of Banks for the Eradication of Slave Labor in Brazil", and that the banks it represents have taken steps that would lead to the achievement of the objectives of the Declaration of Intent.[30]

The existence of rules as well as of internal regulations on social responsibility[31] which aim, inter alia, to prevent financing to individuals or legal entities that exploit slave labor, however, have not had great impacts.

As is clear from the investigations of the Public Labor Prosecutor's Office, conducted by the Labor Attorney Rafael de Araújo Gomes, who coordinates the Working Group on Economic Instruments and Corporate Governance within the scope of CONAETE at the Public Labor Prosecutor's Office, the largest banking institutions in the country do not have a real and effective policy that involves credit restrictions on employers that subject workers to a condition analogous to slavery. What they do have are regulations on social responsibility, and, in theory, restrictions on those who use slave labor. In practice, however, this is not observed with the necessary strictness.[32] This, by

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[29] Available at http://portal.trt15.jus.br/numeracao-unica, from examination of the file in case No. 0000024-17.2013.5.15.0006. Accessed on November 3, 2017.

[30] Available at http://pfdc.pgr.mpf.mp.br/informativos/edicoes-2009/junho/instituicoes-bancarias-signatarias-do-pacto-nacional-pela-erradicacao-do-trabalho-escravo-informam-procedimentos-para-restringir-credito-a-exploradores-de-mao-de-obra-escrava/. Accessed on November 3, 2017. Available at http://pfdc.pgr.mpf.mp.br/informativos/edicoes-2009/junho/instituicoes-bancarias-signatarias-do-pacto-nacional-pela-erradicacao-do-travel-scravo-informam-procedimentos- to-restrict-credit-to-labor-slave-explorers. Accessed on November 1, 2017.

[31] According to the website responsabilidadocial.com, there is social responsibility "when business enterprises voluntarily adopt positions, behaviors and actions that promote the well-being of their internal and external audiences" Available at http://www.responsabilidadesocial.com/oque-e-responsabilidade-social/. Accessed on November 2, 2017.

[32] Information provided by Prosecutor Rafael de Araújo Gomes on September 14, 2017.

the way, became evident in the investigation involving BACEN, which was briefly reported above.

Regarding this issue involving BACEN, a report by Leandro Prazeres from the UOL website in Brasilia shows that there were at least 24 operations in which credit could have been granted to natural or legal persons that exploited slave labor, of which fourteen were considered illegal, and without the Central Bank doing anything other than disqualify these operations, which may even mean additional charges for borrowers but does not invalidate them, thus maintaining the loan to those that have exploited slave labor, which is unacceptable.[33]

And this obviously means that employers that commit this criminal and labor offense end up having access to credit to finance their activities, even where they resort to unlawful practices that violate the dignity of the human person.

It is a hard blow for the efforts of the State and the community to put an end to this practice. It is this financing, along with the criminal exploitation of cheap labor, that sustains this type of business, in which financing has a significant weight as it is decisive for the activity to be developed. It also conveys the idea that all it takes for getting a loan is to provide guarantees for the operation. In this case, a behavior that is compatible with the fulfilment of constitutional and labor laws that enjoin respect for the fundamental rights of workers does not seem to matter.

4 Final remarks

The fight against slave labor has made significant strides in the last 20 years. The country has an adequate regulatory framework to repress slave labor from the criminal, labor and administrative points of view. Brazilian case law has followed the rules, especially after the decisions issued by the Federal Supreme Court on the matter.

In the same line, the necessary knowledge to understand the problem has been constructed. This is also an important step for reducing the incidence of slave labor, given the impossibility of its complete elimination, as this would depend on the action of all people, which is virtually impossible because the instrumentalization of labor to the extent of violating its dignity is used by some as a way to increase profits and reduce the cost of their activity.

[33] Available at https://www.uol/noticias/especiais/bancos-e-trabalho-escravo.htm#bc-identifica-irregularidades-mas-nao-pune-bancos. Accessed on November 2, 2017.

In this respect, some measures of simple implementation have been designed to, if not prevent, at least hamper activities that use slave labor. One of them is the Register of Employers that have submitted workers to conditions analogous to slavery, published by the Ministry of Labor and aimed to name and shame those that have engaged in this practice, thus preventing them inter alia from obtaining financing for the continuity of their activities, from both public and private banks.

This has not happened. First because of the resistance of the Ministry of Labor to publish the list, and second because banks still lack the strictness required to stop lending to offenders. And this happens despite regulation on the matter and the commitment of banks to adopt a standard compatible with what is called social responsibility.

This conduct, in addition to being socially and legally reproachable, clearly represents a way of contributing to this criminal and labor offense, thus going against the very foundation of the most basic rights of the human being: the dignity of the human person.

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SOCIAL SUSTAINABILITY WITHIN NORWAY'S SOVEREIGN WEALTH FUND

LORENA VASCONCELOS PORTO

1 Introduction

This article aims to study social sustainability within the framework of Norway's Sovereign Wealth Fund. Part one presents considerations on the concepts of sustainable development and the social function of property and companies, with a view to demonstrating that employment in decent conditions is essential for achieving sustainable development.

Next, the paper presents the characteristics of the welfare state model in the Nordic countries, including Norway. This model is marked by low social and economic inequality, greater gender equality and comprehensive welfare systems, with very satisfactory economic growth characterized by dynamism and innovation. The existence of a strong welfare state model in Norway is intrinsically related to the reasons for the creation and operation of Norway's Sovereign Wealth Fund.

Following these considerations, the paper dives deeper into the study of Norway's Wealth Sovereign Fund, that is, its establishment, characteristics, policies, principles, actions, and operation. It is currently the world's largest sovereign wealth fund, with the explicit objective to integrate long-term investments with a two-sided ethical commitment: to corporate engagement according to accepted global principles of best practice corporate governance and to ensuring global environmental and social justice.

2 Social sustainability

The idea of social sustainability is closely related to two concepts: balance and permanence. The whole world, from the highest spheres of the scientific community to the ordinary citizen has turned its attention to the issue of sustainable development. According to the concept presented by the Brundtland Commission Report, sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

This report defined four key concepts to ensure sustainability: the needs of the future must not be sacrificed for the demands of the present; humanity's economic future is linked to the integrity of natural systems; the needs of many, especially the poor; and protecting the environment is impossible unless we improve the economic prospects of the Earth's poorest peoples.[1]

It is clear, therefore, that reducing exclusion, inequality and poor income distribution requires establishing effective policies. In this sense, decent employment is the most effective instrument to guarantee the achievement of these objectives. Employment, its promotion and mechanisms that ensure balance and permanence should be at the heart of any discussion about sustainable development. Decent employment, in turn, is employment that meets the assumptions of sustainability: balance and permanence. It must deliver a fair income to meet all the basic needs of workers, in addition to enabling their personal and professional growth and ensuring that they will be maintained within the normalcy of the business activity.[2]

Intrinsically related to the issue of social sustainability is the concept of the social function of property and companies enshrined in the legal systems of democratic countries, which imposes on the holder of the power arising from property, positive behaviors (obligation to do) and not merely negative behaviors (obligation not to do). In the labor sphere, this imposition of positive behavior on the owner of the company corresponds to actions in favor of employees, represented by greater appreciation of workers through a healthy environment, fair

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1 HASSON, Roland; VILLATORE, Marco Antonio Cesar. Sustentabilidade: o vetor social. *LTr: Suplemento Trabalhista*, São Paulo, LTr, year 44, n. 006/08, p. 23-27, 2008. p. 23 e 26-27.

2 HASSON, Roland; VILLATORE, Marco Antonio Cesar. Sustentabilidade: o vetor social. *LTr: Suplemento Trabalhista*, São Paulo, LTr, year 44, No. 006/08, p. 23-27, 2008. p. 24.

wages and, above all, a treatment that ensures their dignity as human beings.[3]

These concepts and ideas should be the basis for analyzing the issue of social sustainability within the framework of Norway's Sovereign Wealth Fund.

3 The Welfare State in the Nordic countries

In the early 20th century, the Nordic countries[4] were among the poorest in Europe. But in the course of that century the situation changed, thanks to a combination – which proved to be very successful – of market economy, democracy, nongovernmental organizations, and interventionist State policies. All European countries can be broadly classified as Welfare States. But the Nordic model differs from all others because of the dominant role of the State in the design of social policy and in the development of an extensive public sector for implementing such policy.[5]

Compared with the rest of Europe, the Nordic Welfare States boast twelve peculiar characteristics that together can be seen as a specific Nordic "model".[6] These are:

1. A greater degree of state intervention in relation to other countries. As an example, the State guarantees free or highly subsidized basic pensions and health services for all citizens, although the provision of these services is usually managed by provincial or local governments.

2. Considering international standards, these countries have the highest proportion of the workforce employed in the social, health and education sectors, i.e. around 30%.

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[3] DALLEGRAVE NETO, José Afonso. Compromisso social da empresa e sustentabilidade: aspectos jurídicos. *Revista LTr*, São Paulo, LTr, vol. 71, No. 03, p. 346-350, March 2007. p. 346.

[4] The phrase "Nordic countries", according to Norwegian professor Stein Kuhnle, covers Norway, Sweden, Denmark, Finland and Iceland. They have in common certain characteristics that enable including them in the same group, such as: geography; Lutheran religion; close ties between the Church and the State; language; a long democratic tradition; basic concepts of justice; mixed economy; advanced level of equality between men and women; Welfare State; institutional cooperativism.

[5] See KUHNLE, Stein. O Estado de Bem-Estar Social nos países nórdicos. *O Estado de Bem-Estar Social no Século XXI*. org. Mauricio Godinho Delgado and Lorena Vasconcelos Porto. São Paulo: LTr, 2007.

[6] *In* KUHNLE, Stein. O Estado de Bem-Estar Social nos países nórdicos. *O Estado de Bem-Estar Social no Século XXI*. org. Mauricio Godinho Delgado and Lorena Vasconcelos Porto. São Paulo: LTr, 2007.

3. High reliance on the public sector to provide educational and social services; about 90% of the staff in these sectors is composed of civil servants. In other European countries this percentage ranges from 40 to 80%; in the United States it is 45%.

4. Social Security is organized through coordinated national systems, which have full responsibility for the payment of benefits related to sick leaves, expenses for children, pensions and health services.

5. A comparatively high level of trust between citizens and governments. Societies in the Nordic countries are more "allied to the State" than in other European countries.

6. Social Security systems are comprehensive or universal, covering entire populations or subgroups. For example, all resident citizens are entitled to a basic old-age pension upon reaching the age provided by law for this purpose, even in the absence of any previous paid work; the benefits of expenses with their children are paid to all families, regardless of income level; all residents are entitled to the best available medical services irrespective of their income, social status or other personal characteristics. This contrasts with most European countries where the enjoyment of these rights is conditional upon effective participation in the labor market.

7. An advanced level of equality between men and women, resulting mainly from laws passed since the 1970s; all benefits are essentially "gender neutral", which means that women are treated as individuals with their own needs and rights and not just as widows and mothers. Nordic labor markets are characterized by high levels of female employment, virtually equal pay for men and women doing equal work, and a well-structured support system for working mothers.

8. Social Security systems are dissociated from occupational or social class aspects. Thus, those who receive high salaries are included in the same system as those with low or even no salary.

9. Generalized taxation is the State's main finance mechanism and has the effect of redistributing income. As a result of the universal and redistributive social security systems of the Nordic countries, their poverty rates are among the lowest in the world. The minimum benefits although not high are generous compared to those in most other countries.

10. There is a greater emphasis on the provision of services – rather than direct income transfer – in comparison with other European

countries. These services include an extensive network of day-care centers, nursing homes and home care for the elderly and critically ill.

11. The traditional and strong emphasis on full employment is a goal in itself and a necessary condition to generate the economic resources needed to fund the Welfare State.

12. Strong popular support. Issues such as children's welfare, public health and protection of the elderly, among others, are highlighted as a priority in opinion polls and during election periods. No political party that wants broad popular support can afford to ignore them.

The main characteristics of the Nordic Welfare State model can be summarized in three central ideas: statehood, universalism and equality. Such a model combines low social and economic inequality, greater gender equality and comprehensive welfare systems with very satisfactory economic growth, seen in a long-term perspective characterized by dynamism and innovation.[7]

The fact that the Nordic countries can be described through the characteristics listed above does not mean that they have become "welfare havens". As with any nation, they are faced with a host of old and new challenges. But compared to other developed countries, they face much lower levels of crime, drug and alcohol abuse, poverty, and related issues. In addition, problems associated with mono-parenting and unemployment become less serious because of the support given by the Nordic societies to the people affected by these problems.

This comparatively favorable situation is a consequence of strong social institutions and policies in the regions and central governments. Furthermore, the comparatively egalitarian spirit of the Nordic countries – expressed, for example, in their income redistribution policies – certainly contributes to greater stability and social cohesion.[8]

The existence of a strong welfare state model in Norway is intrinsically related to the creation, characteristics, policies, principles and operation of Norway's Sovereign Welfare Fund, as we shall see.

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[7] See KUHNLE, Stein; HORT, Sven; ALESTALO, Matti. Lições do modelo nórdico do Estado de Bem-Estar Social e governança consensual. *Revista Direito das Relações Sociais e Trabalhistas*, Brasília, UDF, vol. 3, n. 1, 2017, p. 37-52, Jan.-June 2017.

[8] See also on the theme: KUHNLE, Stein. A globalização e o desenvolvimento das políticas sociais. *O Estado de Bem-Estar Social no Século XXI.* org. Mauricio Godinho Delgado and Lorena Vasconcelos Porto. São Paulo: LTr, 2007.

4 Norway's Sovereign Wealth Fund

Norway's Sovereign Wealth Fund (SWF) is the largest in the world and one of the most transparent institutions of its kind.[9] Its explicit objective is to integrate long-term investments with a two-sided ethical commitment: to governance principles and to work towards global environmental and social justice. As such, the SWF has an ethical mandate –something remarkable when compared to other sovereign wealth funds.

Norway's Sovereign Wealth Fund consists of a deposit account with the Norwegian Central Bank ("Norges Bank"). Its assets are managed by Norges Bank Investment Management, which reports at the first level to the Bank's Governor and Board of Directors and at the highest level to the Minister of Finance. The people who work in Norges Bank Investment Management are Bank employees and therefore subject to its employment policies and practices. Norges Bank Investment Management is subject to the policies of the Minister of Finance, including quantitative rules on asset allocation and ethical investment guidelines set by the Norwegian Parliament. As the Fund is required to invest its resources outside Norway, its ethical investment policies aim to give global effect to national values and commitments.[10]

Considering the large size of the Fund (more than USD1 trillion in September 2017) and its ethical policy that leads it to exclude certain companies from its investment portfolio, as will be seen later in this article, the naming and shaming process, that is, the creation of a kind of "dirty list" of companies makes headlines around the world. The Fund represents both a long-term national welfare instrument and an expression of Norway's commitment to global justice. Unlike other similar funds, the SWF is involved in the public administration's mechanisms and is subject to the democratic debate about investments

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[9] According to news published in September 2017, Norway's Sovereign Wealth Fund is the largest in the world and has now hit a milestone value of more than $1 trillion, according to the Norwegian Central Bank, which is responsible for managing the Fund. This level of appreciation represents approximately $189,000 for each of Norway's 5.3 million people. This record is mainly due to the appreciation of the main world currencies against the US dollar and to the good health of the Stock Exchange. Available at <http://dc.clicrbs.com.br/sc/noticias/noticia/2017/09/fundo-soberano-da-noruega-supera-pela-primera-vez-us-1-trilhao-9905733.html> Accessed on October 11, 2017. See also <http://www.investopedia.com/news/5-largest-sovereign-wealth-funds/> Accessed on October 11, 2017.

[10] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at <http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

in companies around the world that are deemed to violate widely shared national standards. Thus, unlike other similar funds, the SWF is not "protected" from Parliament and public opinion by means of statutory powers attributed to its administrators.[11]

Norway's Sovereign Wealth Fund is inspired by the premise that governments may have a legitimate interest in determining the nature and purpose of public asset investment, with a view to ensuring the values of their citizens through investment policies and responsible instruments and agencies. As we shall see, the governance of the Fund reflects a public commitment to procedural democracy.

The Norwegian economy was considerably boosted by the discovery of oil and gas reserves in the North Sea in the late 1960s. In order to prevent this wealth from negatively affecting the country's economy and society, the Norwegian Government decided to capitalize the proceeds from oil and gas production by creating the Government Petroleum Fund, later renamed Norway's Sovereign Wealth Fund. The aim was to regulate budget planning in a manner consistent with intergenerational equity.

Thus, the Norwegian Government Petroleum Fund was created in 1990 through an act of the National Parliament, for several reasons. The first reason refers to the potential long-term costs of wealth derived from a natural resource for the configuration of any economy that has to absorb this type of wealth. This could create distortions in the economy, decreasing the value of agriculture and industry as well as the benefits of education for individual human capital and long-term social development. The second reason were the potential short-term costs of floating revenues for macroeconomic stability. In a small nation, the volume and volatility of such revenues posed a threat to the stability of the domestic economy.

In the case of Norway, the issue of macroeconomic stability was particularly serious as a result of the significant and sustainable increase in public spending based on the income earned in the late 1970s and throughout the 1980s. As seen, Norway's spending was considerably high as a result of a strong social welfare state with universal and comprehensive public policies.

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[11] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at <http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

When the Norwegian Government Petroleum Fund was set up, two political rules were used to manage both the public budget and the flow of revenues to the fund. First, to limit the future reliance of government spending on oil and gas revenues, a long-term theoretical "sharing" of the wealth from these resources was established. Second, to regulate the budget process, the flow of revenue to the fund became dependent on the annual budget surplus. That is, only in case of budget surplus the financial resources would be allocated to the fund. The purpose of these two rules and of the Fund itself can be seen as a tax administration tool to ensure transparency in the use of oil revenues. Fiscal discipline in the face of the wealth derived from this resource was sustained through a comprehensive financial management process.[12]

Due to the worldwide recession late in 1989 and in the first years of the 1990s, the Norwegian government budget saw no surplus until 1995, when the first allocation to the Norwegian Government Petroleum Fund was made. Since then, the Fund's revenues have grown considerably from 48 billion in 1996 to more than 1,000 billion Norwegian kroner in 2004. As seen, in September 2017 the Fund was worth over USD1 trillion. Initially, the funds were invested in the monetary reserves of the Central Bank of Norway. In 1998 the Government authorized investment in foreign companies, with an initial allocation of 30% to 50% of the funds.

In 2006, the Norwegian Government Petroleum Fund was renamed Norway's Sovereign Wealth Fund. The name change reflected strategic issues related to the country's long-term economic and financial prospects. In 2005, the oil sector accounted for 25% of Norway's Gross Domestic Product, and the cash flow from oil and gas revenues corresponded to 33% of government revenue. Forecasts by the Minister of Petroleum and Energy suggest that by 2030 oil and gas production will likely fall by some 66% and 25% respectively. Revenues will inevitably follow the production and overall prices of these resources, so that the growth rate of wealth accumulation in Norway is likely to decline as well.[13]

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[12] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at <http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

[13] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

Mention should also be made of the demographic situation faced by developed countries, including Norway, related to declining birth rates and increasing life expectancy. Thus, in the context of a decrease (in relative terms) in revenues from natural resources and the increase in public spending on retirement benefits, the Norwegian Government, like other countries, is seeking to invest for the future. In this sense, an important objective of the SWF is to guarantee the payment of these long-term public expenses and, consequently, ensure the well-being of future generations of Norwegian citizens. In other words, one of the primary objectives of Norway's Sovereign Wealth Fund is to ensure the existence, in the future, of a strong welfare state with comprehensive and universal public policies.

Norway's Sovereign Wealth Fund has two distinct policies under the banner of global socially and ethically responsible investment. One is related to corporate governance, which seeks to influence the market performance of companies whose management is inconsistent with long-term value. The second is directed to the list of foreign companies that act inconsistently with the expectations of proper behavior widely shared by Norwegians. The Minister of Finance is responsible for monitoring these policies through a sui generis investment management model, as we shall see.

The costs of this governance system are welcomed by Norwegian society because of the importance attached to accountability and the search for shared values in the global arena. Indeed, modern States base their legitimacy on public participation in the decision-making process, in relation to either economic, financial or social aspects. Democratic societies like Norway value participation or at least public representation in institutions responsible for financial management. In addition, financial markets in particular have been demanding public decision-making environments because of the risks and uncertainties that characterize the domestic and global markets. Public representation presents great advantages for the funds to be effective institutions in the context of financial market uncertainty.[14]

Transparency and accountability are very important in the process through which ethical issues are assessed. Thus, if the non-exclusion of a company from the investment portfolio of Norway's Sovereign Wealth Fund is recommended as a result of the consultation

[14] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

and evaluation process, the integrity of the process should be such that even those who oppose the decision end up endorsing it. The process therefore is a constituent element of legitimacy itself. SFW's claims to be heard in the rest of the world on issues related to ethical standards are largely based on the legitimacy of the process used to assess the ethical behavior of certain companies that are subject to other jurisdictions. Transparency and accountability in the governance process is such that the SWF scores high on independent governance quality tests.

Parliament established the status and powers of Norway's Sovereign Wealth Fund. In this sense, a distinction is made between SWF-Global, which receives the flow of net revenues from Norwegian oil and gas reserves, and SWF-Norway, which receives the assets and liabilities of the Government's National Insurance Institute. Both are aimed at securing funds for the Government to finance the National Insurance Institute's pension expenses and long-term considerations on the spending of government revenues from oil. The Ministry of Finance is responsible for managing the Fund, including its investment strategy, investment regulation and ethical guidelines. Operationally, the Fund is managed by the Norwegian Central Bank through Norges Bank Investment Management and reports to the Ministry of Finance through the Bank's Governor and Board of Directors.

The Minister of Finance has a Secretariat dedicated to the management and regulation of the Fund staffed by permanent civil servants. There are advisors to the Minister on matters pertaining to the management of the fund, including the Council on Ethics. The members of the latter are appointed by the Minister for fixed terms, with mandates to advise the government on important policy issues, as we shall see. The Council on Ethics is comprised of five appointed members, plus eight government employees. Appointees to the Council must be independent experts, with appropriate knowledge of ethics in theory and practice and Norway's international commitments embodied in treaties and conventions as well as in the agreements and directives of the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD). The Council on Ethics provides evaluation to the Ministry of Finance of whether potential investments in specific financial instruments are inconsistent with the ethical guidelines.[15]

[15] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

Unlike some sovereign wealth funds in which the government delegates the framing and execution of investment strategy to the designated responsible board, in Norway the Minister of Finance has a detailed "rulebook" that effectively governs the management and operation of the Fund. The Minister, in short, determines asset allocation by class as authorized. In addition, it regulates the performance standards of the investment portfolio, the rebalancing of the Fund, the limitation of standard deviations, and the evaluation, measurement and control of investment risk. The Minister also sets expectations as regards proper investment behavior.

Section 5 of the "Guidelines for the Management" of the Fund provides instructions regarding "ethics". In section 5.1, the Minister of Finance sets out two statements of principle: first, "the Fund is an instrument for ensuring that a reasonable portion of the country's petroleum wealth benefits future generations and be managed with a vision to generating a sound return in the long term, which is contingent on sustainable development in the economic, environmental and social sense"; and second "the Fund shall not make investments that entail an unacceptable risk that the Fund is contributing to unethical acts or omissions including violations of humanitarian principles, human rights, gross corruption, and severe environmental damage". In the following Section, the Minister identifies three ways in which ethical considerations were to be given effect: through the exercise of ownership rights based on international conventions, negative screening of companies that produce weapons whose use violates fundamental humanitarian principles, and the exclusion of companies from the fund's portfolio that are deemed to constitute a "considerable risk" of corruption, environmental degradation, and the violation of human rights. The Minister's Council on Ethics advises on the first two matters (negative screening and exclusion) while exercise of ownership is managed exclusively by the Norge Bank Investment Management. In any case, final authority for any related decision rests with the Minister. When a decision to exclude a company from the Fund's portfolio is made, it is transmitted to the Bank and implemented by Norges Bank Investment Management.[16]

[16] Since 01.01.205, the decisions to exclude companies from the Fund's investment portfolio have been made by the Executive Board of the Norwegian Central Bank, and prior to that date the decisions were made by the Minister of Finance. The decisions are based on the recommendations of the Council on Ethics appointed by the Minister. With regard

Currently the world's largest sovereign wealth fund, Norway's Sovereign Wealth Fund is widely recognized as a remarkably transparent and well-governed financial institution. By Truman's assessment,[17] based on publicly available information, Norway's Sovereign Wealth Fund scored 92 points out of a total of 100 in terms of its adherence to best practice. International conventions loom large for the SWF, with shared principles and practices referenced time and again in official statements that justify investment decision-making with an explicit ethical component.

To a large extent, the Norwegian Government established the Council on Ethics to deal with a controversial issue at the time: investment in Total, the French energy company with significant investments in Myanmar (Burma), and the ensuing claims that it was complicit in the military regime's suppression of human rights. The Government hardly rejects out of hand the Council's recommendations. This is recognized by the major political parties and has been acknowledged as government has changed hands between parties.

From the Total issue, the Council on Ethics developed a multistage process of review and assessment to identify the crucial issues and apply a series of decision rules that provide for robust and defensible recommendations. The Minister of Finance may ask the Council to consider a specific case, and the Council may also identify an issue and a company that it considers significant, despite the limits of time, expertise and institutional capacity.

The Council maintains a regular 'scanning' process conceived to keep members abreast of the issues on a worldwide basis. Given the various issues and companies identified by the "scanning" process, the Council undertakes research to better understand the significance of the identified issues, drawing upon the enormous flow of information available on the web and from NGOs. As "targets" for assessment and evaluation are identified, the Council limits disclosure of their

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to the exclusion of companies using the criterion related to the coal production or coal energy, the decisions are based on the recommendations of Norges Bank of Investment Management. The exclusions are regulated by the Guidelines for the observance and exclusion of companies from Norway's Sovereign Wealth Fund, issued by the Minister of Finance on 12.18.2014. Available at: <https://www.nbim.no/en/responsibility/exclusion-of-business enterprises/> Accessed on 11 out. 2017.

[17] TRUMAN, E. *Sovereign Wealth Funds: The Need for Greater Transparency and Accountability*. Policy Brief P807-6. Washington DC: Peterson Institute *apud* CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on 11 out. 2017.

interest so as to dampen speculation and political maneuvering. Having decided there is a case to be considered, given the terms of the Council's mandate, a factual case is developed focused, in part, on the extent to which the company is directly involved in the ethical violation. The last stage in the process normally involves contacting the target company with a view to eliciting a response. Thereafter, the case is formally presented at the Council, and the members make their determination as to whether a recommendation for exclusion should go forward to the Minister of Finance.

Over the period 2005 to 2009, the Council recommended that a number of companies be excluded. In almost all cases, the Minister accepted the Council's recommendation. The companies excluded come from a variety of countries, although the largest group are US corporations, perhaps reflecting the importance of US corporations in the weapons industry and respective capital markets.[18]

It should be mentioned that on November 30, 2001 the Norwegian Government appointed a Special Advisory Commission on International Law for the Government Petroleum Fund. The Commission should, at the request of the Minister of Finance, provide an evaluation of whether specific investments were in conflict with Norway's commitments under

[18] The complete list of excluded companies, as well as the reasons for such exclusions and respective dates are available at <https://www.nbim.no/en/responsibility/exclusion-of-business enterprises/> Accessed on October 11, 2017. The following companies have been excluded from the SWF investment portfolio by the Minister of Finance on the recommendation of the Council on Ethics, with the reasons for and dates of exclusion: anti-personnel landmines (Singapore Technologies Engineering Ltd, Singapore, excluded 04.26.2002); companies supplying weapons or military equipment to Burma (Dongfeng Motor Group Co. Ltd, China, excluded on 02.22.2009); cluster bombs (Alliant Techsystems Inc., General Dynamics Corporation, L-3 Communications Holdings Inc., Lockheed Martin Corporation, Raytheon Business enterprise, all from the US, and Thales AS from France, excluded on 08.31.2005; Poongsan Corporation from South Korea, on 11.30.2006; Hanwha Corporation from South Korea, on 12.30.2007; Textron Inc. from US, on 12.31.2008); nuclear weapons (BAE Systems plc from the UK, Boeing Business enterprise from the US, Finmeccanica SpA from Italy, Honeywell International Inc from the US, Northrop Grumman Corp from the US, Safran AS from France, United Technologies Corp from the US, all excluded on 12 31.2005; EADS Co from the Netherlands, on 05.10.2006; GenCorp Inc from the US and Serco Group plc from the UK, excluded on 12. 31.2007); human rights violations (Wal-Mart Stores Inc, US and Wal-Mart de Mexico AS, from Mexico, excluded on 05.31.2006); environmental damage (Freeport McMoRan Copper and Gold Inc from the US, on 05.31.2006; DRDGOLD Ltd from South Africa, on 03.31.2007; Rio Tinto plc UK and Rio Tinto Ltd Australia, on 06.30.2008; Barrick Gold Corporation from Canada, on 11.30.2008); human rights violations and environmental damage (Vedanta Resources plc from the UK, Sterlite Industries Ltd from India and Madras Aluminum Business enterprise from India, all excluded on 10.31.2007). *In* CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

international law. When the Minister issued ethical guidelines for the Government Petroleum Fund in 2004, the exclusionary mechanism was extended, and the Advisory Commission on International Law was replaced by the new Council on Ethics.

Three aspects of the Council on Ethics' activity deserve to be highlighted. The Council has limited time, expertise and institutional capacity. Inevitably, it has to choose among a large number of issues and possible cases. Large companies with recognized names are attractive targets because of their public visibility. The Council is also concerned to distinguish between "association" and "causality": that is, their case is strengthened when it can be shown that the target company has a direct connection with the circumstances giving rise to the ethical assessment. Most importantly, the Council sees its recommendations as an expression of the public interest in "proper" behavior, according to the criteria set out in the ethical guidelines. As such, the Council is not concerned to affect corporate behavior except in the sense that the publication of the "naming and shaming" may prompt companies to reconsider their alliances and management performance.

On the other hand, Norges Bank Investment Management's commitment to global standards of corporate governance seeks to affect the structure and performance of the companies that are targets of actions and campaigns. This can be justified on efficiency grounds, as well as ethics. It is widely accepted that well-governed firms are more likely to enhance shareholder value. Equally, it is widely accepted that some governance regimes are more likely to protect the interests of minority shareholders than others, such that reform of the regulation of corporate governance in favor of global best-practice is consistent with the long-term efficiency of global capital markets and the interests of large institutional investors. In this context, the actions of Norges Bank Investment Management seek to promote the financial interests of Norway's Sovereign Wealth Fund as well as to act consistently with respect to collective welfare.[19]

Given limited time, expertise, and institutional capacity Norges Bank Investment Management tends to focus its voting activities upon the world's 500 largest companies, representing approximately 80% of the market value of the total equity portfolio of Norway's Sovereign

[19] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

Wealth Fund. Recently, the Investment Management's strategy for active ownership has been revised by the Executive Board and broadened. Most specifically, Norges Bank Investment Management focuses on six areas: the first set of three relate to capital market performance and the second set of three relate to three substantive issues, which represent for the fund areas of significant risk as regards safeguarding the long-term value of the portfolio. The first three are: equal treatment of shareholders, shareholder influence and Board accountability, and well-functioning, legitimate and efficient markets. The second three issues are: children's rights, climate change, and water management. So, for example, protecting children's rights could involve major corporations that have extensive supply networks through to the developing world. Based upon International Labor Organization (ILO) conventions, Norges Bank Investment management seeks information on sectors' child labor practices, the extent of company monitoring of this issue, and disclosure on existing practices and intended policies. These issues can have significant implications for sectors of the economy where 'value' is a product of corporate reputation and consumer tastes. In this respect, reputation can be a significant albeit intangible asset.

The main objective of Norges Bank Investment Management is to protect and create long-term values. The Council on Ethics and Norges Bank Investment Management are the two arms of the Ministry of Finance's policy. Public support for the Fund's existence depends on the process through which public interest in decision-making is managed. Public accountability, represented by the Minister of Finance and the accountability of the Minister to government and ultimately Parliament. The institutional legitimacy of the Fund is therefore successful, with an emphasis on its commitment to intergenerational equity and global justice. In this sense, the Minister of Finance is at the center of a web of governmental entities, all of which have a role to play in either implementing and overseeing the activities of Norway's Sovereign Wealth Fund. It should be noted that the means of legitimizing institutions is the value of the processes used to represent the public interest rather than the functionality of those institutions against performance measurement criteria.

It is clear that the procedures developed to give effect to the public interest in ethics and global justice have been very important in representing shared commitments to Norway's international obligations. The recommendations of the Council on Ethics on Norway's Sovereign Wealth Fund investment are taken very seriously by the

Ministry of Finance and serve as a vital element in screening and excluding companies from the Fund's investment portfolio. "Naming and shaming" is an essential ingredient in this process-model of institutional legitimacy: The Council's recommendations represent public values. The transparent nature of the Sovereign Wealth Fund's decision-making and its accountability to the democratic process are widely cited and score highly in comparative studies of sovereign wealth funds' governance.[20]

Norges Bank Investment Management (NBIM) emphasizes that the UN Guiding Principles on Business and Human Rights are a standard that should be the starting point for corporate human rights strategies. These Guiding Principles also provides a reference point for businesses in understanding what human rights are, how their own activities and business relationships can affect them, and how to ensure that businesses prevent or mitigate the risk of adverse human rights impacts. In line with the aforementioned UN Guiding Principles, Norges Bank Investment Management encourages companies to identify human rights that may be at risk of the most severe negative impact through a company's business operations, including in supply chains and other business relationships, as well as products and services.[21]

Norges Bank Investment Management supports the development of good practices. Appropriate and timely reporting as well as measurable data are important in this regard. NBIM uses such information to identify how the human rights issue may affect corporate performance and prospects, and to assess whether companies are taking adequate steps to develop a long-term business strategy addressing these challenges.

In this sense, companies should undertake a public commitment of respect for human rights, including with regard to supply chains and other business relationships. Companies should regularly consider whether their remuneration, incentive systems, and wider company culture appropriately integrate sustainable business practices. Employees and other contractors must be made aware of their policies and strategies. Company policies should include measures to address

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[20] See CLARK, Gordon L.; MONK, Ashby H. B. *The legitimacy and governance of Norway's sovereign wealth fund: the ethics of global investment*. Available at<http://ssrn.com/abstract=1473973> Accessed on October 11, 2017.

[21] NORGES BANK INVESTMENT MANAGEMENT. *Human rights: expectations towards business enterprises*. Available at<https://www.nbim.no/contentassets/3258fe10181544cc8e02566c7237fa5f/human-rights-expectations-document2.pdf> Accessed on October 11, 2017.

human rights risks, including through cessation, prevention and reduction of potential human rights abuses. Companies should have an adequate supply chain management system in place, including policies for detecting and preventing human rights abuses in these supply chains by monitoring systems, contractual clauses, incentives and corrective instruments such as formal or non-formal education and training.

In addition, companies should publicly disclose their human rights strategies, policies and processes and report on their implementation of the UN Guiding Principles on Business and Human Rights and other relevant international standards. In this sense, companies should ensure that information is communicated in a relevant and accessible manner and report such information regarding supply chains and other business relationships. Companies should, as appropriate to their size and the nature and context of their operations, consult and engage with their workers and their representatives, occupational health and safety representatives, potentially affected groups, and other relevant stakeholders, on human rights issues.[22]

It should be noted that the as regards companies in developing countries, the Norwegian Government has been seeking to apply to them the same level of ethical oversight applied to companies from the central countries included in the investment portfolio of Norway's Sovereign Wealth Fund.[23] This reflects the Fund's growing concern with labor standards, corruption and environmental damage in emerging markets. Illustratively, the analysis companies SourceAsia and CSR China located in Oxford, England, were contracted to report on the ethical performances of 2,300 companies in Asia, in which Norway's Sovereign Wealth Fund has investments. This is due to the fact that it is always more difficult to get information on companies in fast-growing Asian economies than on companies in the United States and Europe that are governed by stricter transparency rules. It should be noted that about 10% of the Fund's resources are invested in emerging markets.[24]

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[22] NORGES BANK INVESTMENT MANAGEMENT. *Human rights: expectations towards business enterprises*. Available at<https://www.nbim.no/contentassets/3258fe10181544cc8e02566c7237fa5f/human-rights-expectations-document2.pdf> Accessed on October 11, 2017.

[23] Norway's Sovereign Wealth Fund invests in nearly 9,000 companies in 77 países, and of the total investment 36% are in Europe, 42% in North America, 18% in Asia and Oceania, and 4% in the rest of the world. Available at: <https://www.nbim.no/> Accessed on October 11, 2017.

[24] VALOR ECONÔMICO. *Fundo da Noruega adota padrão ético para investir*. Published on 09.29.2009. Available at<http://www.responsabilidadesocial.com/noticias/o-que-deu-na-midia-edicao-82/> Accessed on October 11, 2017.

Norway's Sovereign Wealth Fund currently invests in about 128 Brazilian companies. It is very important that entities like the Labor Prosecutor's Office, the Ministry of Labor, the ILO, the Labor Court, NGOs (e.g., Reporter Brazil), among others (such as the Pastoral Land Commission) provide information to the Fund on these companies' compliance with fundamental labor rights.[25]

For illustration purposes, mention should be made of the "dirty list" prepared by the Ministry of Labor containing data on employers that are found using labor analogous to slavery,[26] and of the Digital Observatory of Slave Labor in Brazil, developed by the Public Labor Prosecution Service in partnership with the ILO.[27] Information on

[25] Norway's Sovereign Wealth Fund invests in in the following Brazilian companies among others: AES Tiete Energia S.A., Ambev SA., Arezzo Industria e Comercio S.A., Banco ABC Brasil S.A, Banco Bradesco S.A., Banco do Brasil S.A., Banco Santander Brasil S.A., BM&FBovespa S.A. – Bolsa de Valores Mercadorias e Futuros, Braskem S.A., BRF S.A., CCR S.A., Centrais Elétricas Brasileiras S.A., Cia Brasileira de Distribuição, Cia de Gás de São Paulo – COMGAS, Cia de Saneamento Básico do Estado de São Paulo, Cia de Transmissão de Energia Elétrica Paulista, Cia Energética de São Paulo, Cielo S.A., Cosan SA. Indústria e Comércio, CPFL Energias Renováveis S.A., CPFL Energia S.A., Direcional Engenharia S.A., Energias do Brasil S.A., Eletropaulo Metropolitana Eletricidade de São Paulo S.A., Embraer S.A., Gol Linhas Aéreas Inteligentes S.A., Grendene S.A., Guararapes Confecções SA., Itaú Unibanco Holding S.A., JBS S.A., Light S.A., Lojas Americanas S.A., Mahle-Metal Leve S.A., Marfrig Global Foods S.A., Marisa Lojas S.A., MRV Engenharia e Participações S.A., Natura Cosméticos S.A., Paranapanema S.A., Petróleo Brasileiro S.A., Raia Drogasil S.A., Renova Energia S.A., Rumo Logística Operadora Multimodal S.A., Suzano Papel e Celulose S.A., Telefonica Brasil S.A., TIM Participações S.A., Usinas Siderúrgicas de Minas Gerais S.A., Vale S.A., Via Varejo S.A. The complete list of Brazilian companies in which Norway's Sovereign Wealth Fund has investments is available at: <https://www.nbim.no/en/the-fund/holdings/?fullsize=true> Accessed on October 11, 2017.

[26] The Public Labor Prosecutor's Office filed a public civil action against the Union and the Ministry of Labor (case No. 0001704-55.2016.5.10.0011), requesting, inter alia, that they be ordered to publish the Register of Employers, with the inclusion of all administrators against whom there is a final administrative decision regarding the notification issued by labor inspectors for use of labor analogous to slavery since 07.01.2014, considering that the latest update of the register occurred in June 2014. The Judge of the 11th Labor Court of Brasília granted the preliminary injunction and confirmed it at the time of sentencing. The defendants lodged an ordinary appeal, pending judgment by the TRT, 10th Region, which was the procedural situation at the time of finalization of this article.

[27] The Digital Slave Labor Observatory in Brazil, established through a partnership between the Public Prosecutor's Office and the ILO, was launched on 05.31.2017 (https://observatorioescravo.mpt.mp.br). The Observatory consolidates the contents of several databases and government reports on the subject. Based on an intuitive interface and cross-referencing of socioeconomic information, the platform contextualizes contemporary slavery in order to contribute to the action of public managers, civil society, researchers and journalists, especially in the development of public policies that strengthen the fight against contemporary slave labor. The observatory was created by the Decent Work SmartLab, a partnership between the MPT and the ILO. Between 1995 and 2017, more than 50,000 people were rescued from labor in conditions analogous to slavery in Brazil. *In* PUBLIC LABOR PROSECUTOR'S OFFICE. *MPT e*

Brazilian companies using labor analogous to slavery could be provided to Norway's Sovereign Wealth Fund, to prevent these companies from being included in the Fund's investment portfolio or, where they are part of it, to be excluded, with their consequent inclusion in the Fund's "naming and shaming" list.

5 Conclusion

The strengthening, expansion and effectiveness of fundamental labor rights, especially employment under decent conditions, are essential for achieving sustainable development and the social function of property and companies as enshrined in the legal systems of democratic countries.

The welfare state model found in the Nordic countries, including Norway, is marked by low social and economic inequality, greater gender equality and comprehensive welfare systems, with very satisfactory economic growth seem from a long-term perspective, characterized by dynamism and innovation. The existence of a strong welfare state model in Norway is intrinsically related to the reasons for the creation, characteristics, policies, principles and operation of Norway's Sovereign Wealth Fund.

Indeed, the Fund was created for a number of reasons: to prevent the wealth from oil and gas reserves from negatively affecting the country's economy and society; to avoid the potential short-term costs of floating revenues for macroeconomic stability; to ensure that future generations can also benefit from the wealth derived from natural resources; and to defray the costs of maintaining a Social Welfare State with universal and comprehensive public policies, in view of declining birth rates and increasing life expectancy, in addition to future forecasts

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of reduced oil and gas reserves. The objective, therefore, is to protect the welfare of future generations of Norwegian citizens.

Norway's Sovereign Wealth Fund, currently the largest in the world has the explicit objective of integrating long-term investments with a two-sided ethical commitment: to corporate engagement according to accepted global principles of best practice corporate governance and to ensuring global environmental and social justice.

In this sense, mention should be made of the Fund's ethical policy, which leads it to exclude certain companies from its investment portfolio trough a "naming and shaming" process. These are companies that do not respect the ethical standards established by the Fund in line with the values shared by Norwegian society and Norway's commitments under international law, including ILO Conventions.

The Norwegian Government has been seeking to apply to companies from developing countries the same level of ethical oversight applied to companies from the central countries included in the Fund's investment portfolio, thus reflecting its growing concern with labor standards, corruption and environmental damage in emerging markets.

Norway's Sovereign Wealth Fund currently invests in about 128 Brazilian companies. In this sense, the provision of information to the Fund by the Labor Prosecutor's Office, the Ministry of Labor, the ILO, the Labor Court, NGOs (e.g. Reporter Brazil), among others (such as the Land Pastoral Commission) about these companies' compliance with fundamental labor rights is of the utmost importance.

Also noteworthy is the "dirty list" prepared by the Ministry of Labor containing data on employers that are found using labor analogous to slavery and the Digital Observatory of Slave Labor in Brazil, developed by the Public Labor Prosecutor's Office in partnership with the ILO. Information on Brazilian companies using labor analogous to slavery could be provided to Norway's Sovereign Wealth Fund, to prevent these companies from being included in the Fund's investment portfolio or, where they are part of it, to be excluded, with their consequent inclusion in the Fund's "naming and shaming" list.

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CHAPTER 11

SOCIAL AND ENVIRONMENTAL RESPONSIBILITY OF THE BNDES

ALESSANDRA CARDOSO

1 Introduction

This article is structured in three parts. Part 1 is dedicated to an overarching reflection on the recent trajectory of the incorporation by the BNDES of policies to address the social and environmental impacts of its financing activities. This trajectory is critically positioned as part of a broader context where the BNDES operates as a government bank; where its strategic action is neither explicit nor conclusive, according to autonomously defined criteria based on whatever the economic, regional, social and socio-environmental parameters might be.

Part 2 presents a general though not exhaustive view of how Socio-environmental and Social and Environmental Responsibility Policies (PRSA) are structured in the BNDES, highlighting its main elements and features and showing, from the bank's perspective, some of its commitments and progress in implementing the PRSA. Part 2 also provides a critical and proactive interpretation of these policies, considering some of their central problems and challenges.

By way of final considerations, Part 3 proposes a brief reflection on the importance to avoid "dodging the issue" in the search for effective solutions shared by part of the Brazilian State so as to prevent public, private or public-private construction works and projects from seriously violating rights, as is currently the case, under the guise of generating development.

Much of the information and reflections presented here are the result of collective accumulations by a group of organizations dedicated to understanding, criticizing and advancing BNDES social and environmental practices and policies.

2 The role of the BNDES as a government bank and the limits of its socio-environmental policy: yesterday and today

Throughout its history, since its creation in 1952 by the Vargas government, the role and relevance of the BNDES are closely associated with the economic projects for undertaken by successive governments.[1]

This issue, although not directly associated with the current Socio-environmental Policy and Social and Environmental Responsibility Policy (PRSA) of the BNDES, is important insofar as the real challenges and limits of these policies cannot be dissociated from the fact that the bank has historically acted in tune and as a financial instrument for leveraging government projects of incentive and encouragement to sectors deemed strategic by the institution. In other words, the Bank's strategic action is neither explicit nor conclusive, according to autonomously defined criteria based on whatever the economic, regional, social and socio-environmental parameters might be.

Here it is worth pointing out that the BNDES is "the main enforcement instrument for implementing the Federal Government's investment policy and its main objective is to support programs, projects, construction works and services that are related to the economic and social development of the country within a long-term vision".

Within the frameworks of this statutory vision, however, there are practices and projects of diverse political natures, with different implications also from the perspective of both the social and environmental impacts generated by projects supported by the Bank

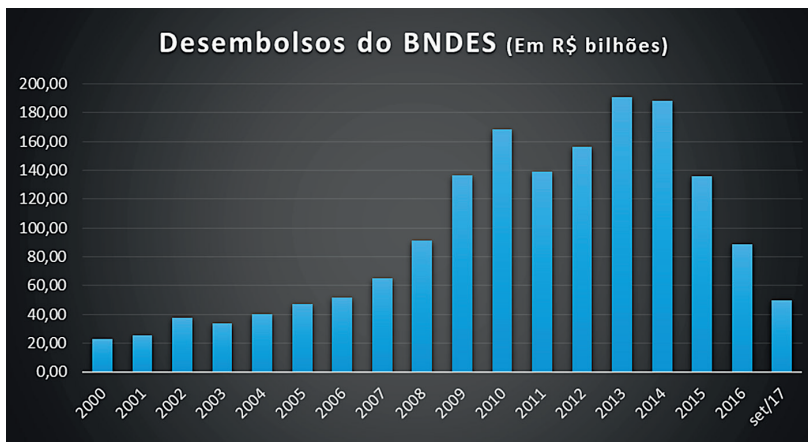
[1] In the late 1950s and early 1960s, the BNDES role was central to both the preparation and implementation of Juscelino Kubitschek's so-called Targets Program, by financing projects in the areas of energy, highways, transmission lines, steel, and paper and cellulose. In the 1970s, under the leadership of the military regime, the BNDES was central to the consolidation of the capital goods industry, especially by financing the petrochemical, steel and aluminum metallurgy, mechanical and electrical industries. The Bank also had a distinctive but strategic role in the 1980s by rescuing several companies in the 1980s crisis through BNDESPAR, created in 1982; and then, in the 1990s, by financing privatization processes in sectors such as mining and public banks.

and its capacity and "willingness" to publicly discuss its "choices" and practices. In this regard, it is worth stating, briefly, two political visions and projects emanated from different governments.

The first vision was consolidated in the mid-2000s, during the Workers' Party administrations, when the Bank once again moved from implementing privatization processes throughout the 1990s to increasing its financing of the infrastructure and energy sectors, especially through financial incentive via subsidized loans to the so-called "national champions", under the auspices of the Growth Acceleration Plans (PACs).

Particularly since the financial crisis of 2008, the bank has played a strong countercyclical role by offering significant and increasing amounts of credit, especially to finance large business enterprises in the infrastructure, energy and agriculture sectors. A large part of the Bank's new credit contributions, as is well known, derived from capitalizations made by the National Treasury, which reached R$452 billion and accounted for over 50% of its funds annually disbursed by the Bank over these years.

Disbursements by the BNDES (In R$ billion)



Source: BNDES, prepared by the author.

Protected by its statutory mandate and with record amounts of funds to disburse, the BNDES began to guarantee the financial feasibility of projects with high social and environmental impact, against the social

resistance not only of the communities affected but also of national and international segments committed to the defense of rights. The national and international action against the construction of the Belo Monte hydroelectric plant and its financing by the BNDES was a milestone in the growing association of the BNDES with the viability of works politically and legally challenged for their socio-environmental impacts.

It was in this context that the Socio-Environmental Policy of the BNDES became increasingly central and the subject of reflection, questioning and propositions by social movements and organizations, ethnic groups and communities that legitimately express their opposition to development projects that entail irreversible environmental, social and territorial impacts on the places where they are implemented.

The experience of the BNDES in financing large projects such as Belo Monte showed how much this mandate of the Bank as a financial arm at the service of government projects has imposed a structural limitation on internal procedures to conduct a rigorous assessment and management of environmental risks, in addition to jeopardizing transparency. In other words, the choices of projects and financing priorities, while anchored in the Bank's technical and institutional strength, have always been strongly aligned with government visions and strategies.

The example of large hydroelectric plants in the Amazon is useful to illustrate this point. The construction of the technical, economic and financial viability of the projects starts well before the financing, with central and sectoral government agencies playing the leading role (President's Chief of Staff, Planning and Ministry of Mines and Energy) – usually unbeknownst to the Ministry of the Environment and of environmental agencies responsible for indigenous and environmental issues – with the strong participation of the public energy company (Eletrobrás) and large construction companies. This – it should be said – in the context of the governments that preceded President Dilma Rousseff's impeachment.

This process also entails, before sending the request for letter of interest for the project to the BNDES, spending millions of reais on inventory, feasibility and environmental impact studies, in addition to the auction itself, which also occurs prior to financing and formalizes a contract between the State and the business enterprise for the generation and delivery of energy under pre-determined conditions and timelines.

In summary, the decision to finance these projects does not rest with the BNDES alone, but with the government as a whole. The BNDES

joins the process immediately before the auctions to publicly present the financing conditions. This information is absolutely strategic to enable the auction itself and set the parameters for bids among competitors. In addition, the deadlines established in the auctions guide the projects and their physical and financial schedules. Thus, even without giving up internal procedures to classify and evaluate projects and even environmental risk, the responsibility for making the auctioned project viable also rests with the BNDES.

This explains, in part, the Bank's defensive posture toward strict and formal compliance with environmental legislation or, in other words, its difficulty in implementing a more autonomous and effective socio-environmental policy.

From this point of view, it would be naïve to believe that the Bank will design for itself (and that the government will validate) a sufficiently robust and rigorous socio-environmental policy to preclude projects such as those for large hydroelectric plants in the Amazon from receiving funding. These projects have high social and environmental impacts, in spite of their questionable economic return, as has now become evident, as well as of problems associated with corruption.

In addition, this helps to understand why the Bank uses the formal practice of checking environmental licenses, repeating like a mantra the discourse that "it is not the role of the Bank to act as environmental agencies" and that it "strictly follows the country's environmental laws", a discourse also repeated for financing projects outside the country.

Thus, a plausible hypothesis is that the fragility of the BNDES socio-environmental policy is not only a reflection of the lack of sensitivity of its highly technified bureaucracy, which would assign marginal importance to the impacts of the investments financed by the Bank. It is possibly also the result of a strategic political vision of government leaders that their policy cannot be strong enough to generate procedures that make financing unfeasible or that, during execution of the projects generate evidence of impacts and additional requirements that jeopardize the schedule of works and disbursements, increasing the project's costs, the risk of legal disputes based on evidence generated by the financing process and, as a result, credit risks as well. The Bank's lack of transparency in its internal procedures for assessing environmental risk and monitoring the environmental requirements established by licensing authorities (and, in a few cases, established autonomously by the Bank and included in contracts) is another strong

indication of its attempt to not generate evidence against the companies responsible for the projects it finances and, ultimately, against itself.

In summary, in our opinion despite relevant regulatory and institutional changes – with emphasis on the development of socio-environmental guidelines[2] for some sectors, of sectoral policies started with the mining policy and of other more recent incremental changes that will be detailed in the next section – the BNDES Socio-Environmental Policy and PRSA are, in practice, essentially focused on the requirement of formal compliance with environmental and labor legislation.

In the current government's scenario, the issues raised are even more concerning as important changes – which have strong potential implications in the Policies discussed here – are under way as regards the role and mandate of the BNDES in "development financing" and in the vision of what "development" actually is.

If in previous governments the "developmentalist" vision was accompanied by a package of projects under the Growth Acceleration Program (PAC), many of which, like Belo Monte, were of questionable economic viability and neglected systemic impacts, in the current government the situation is even more critical. The new large projects that the current government seeks to implement are now contained in the package of the Partnership and Investment Program (PPI). In this program, along with the hastily resumption of privatization processes, the government seeks to stimulate new investments, essentially under the responsibility of the private sector, promising to that end to both speed up and reduce the costs of licensing processes, whether sectoral or environmental. The intention is clear in Law No. 16,680/17 creating the PPI, according to which projects validated by the Program have the guarantee of "national priority" and agility in the granting of licenses:

> Art. 17. Public bodies, entities and authorities, including autonomous and independent ones, of the Union, States, the Federal District and Municipalities with powers the exercise of which depends on the feasibility of a project under the PPI, have the duty to act jointly and effectively so that all administrative processes and acts required for structuring, authorizing and implementing such project are concluded

[2] Socio-environmental guidelines developed by the Bank: Soybeans, Sugarcane, Water and Sewage, Beef Cattle.

> in a uniform and economic manner and within a deadline compatible with the national priority assigned to the project.
> Paragraph 1. Granting shall be understood as obtaining any licenses, authorizations, registrations, permits, rights of use or exploitation, special regimes, and equivalent titles of a regulatory, environmental, indigenous, urbanistic, traffic, public assets, hydro, cultural heritage protection, customs, mining, tax, and any other nature necessary for the project's implementation and operation.
> Paragraph 2. Central government agencies, entities and authorities with sectoral jurisdiction over PPI projects shall call on all agencies, entities and authorities of the federal, state, Federal District or municipal governments with granting powers, to participate in the structuring and implementation of the project and achievement of the objectives of the PPI, including for the joint definition of the terms of reference for environmental licensing.

In this new scenario, the BNDES undergoes structural transformations. In previous governments it had the role of facilitating the financing of large projects carried out mostly by major Brazilian construction companies, which have been considerably affected by investigations of corruption scandals. In the current government, the BNDES has been progressively deconstructed in its role as a long-term lender, both through legal changes that have changed the interest rate (Long-Term Interest Rate) that guaranteed its ability to finance at a cost below high market interest rates and through the decapitalization process, with successive returns of funds to the Treasury, which guaranteed the bank a high level of disbursement.[3] In addition, the BNDES starts to play another role linked to the PPI: that of structuring projects. This new mandate is already more clearly identified in the privatization processes of public federal and state companies, but also in new and renewed concessions. In summary, under the aegis of the PPI, the BNDES would play the role of "structuring projects aimed at attracting private partnership, identifying opportunities and leading

[3] Between 2016 and 2017 the BNDES returned R$150 billion to the Treasury (R$100 billion in 2016 and R$50 billion in 2017). An additional amount of R$130 billion is expected to be returned in 2018. According to sources of Bank employees, this reuturn would practically prevent the disbursements of operations already contracted from continuing.

the process from the study and modeling phase to the signing of the concession contract between state governments and concessionaires".

Although it can be read between the lines that projects, especially new projects, will follow the normal flow of socio-environmental analysis based on the Bank's current PRSA, it becomes evident in the discourse, in the drafting of the PPI Law and also in the articulation of forces in the government and the National Congress that the attempt to deconstruct the socio-environmental legislation is underway, with a view to streamlining and "reducing the cost" of licensing processes as a way to attract new investments, especially in the area of infrastructure.

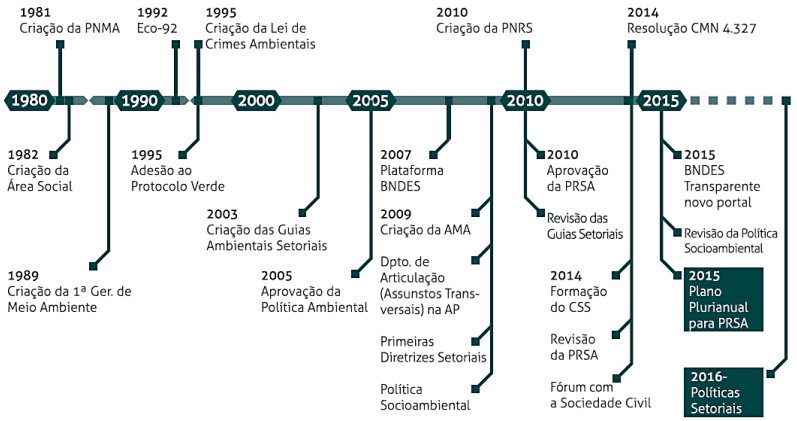
One of the legislative measures pending in Congress is the creation of a General Licensing Law. Under the guise of releasing investments, the intention is to remove criteria and parameters to guide the action of state environmental agencies and brutally reduce the mandate and capacity of the government to evaluate, mitigate and compensate for environmental impacts that are always inherent in large projects.

These issues, although beyond the scope of both the BNDES Socio-Environmental Policy and PRSA, need to be taken into account in a current reflection on its limits and potentialities.

3 BNDES Social and Environmental Policies and PRSA: between norm and practice

Formally established in 2010, the PRSA is part of a process of accumulation by the Bank, as well as accumulation by other financial institutions, especially multilateral ones, which resulted in the creation of socio-environmental assessment and risk management mechanisms associated with the impacts generated by financed projects. Not less relevant in this Policy's design process were the criticisms and pressures from social organizations and movements, in relation to both the political choices that enabled large projects to be financed by the Bank and the policies and practices used by the Bank in assessing and monitoring the socio-environmental impacts generated by its financing decisions.

The timeline produced by Teixeira and Pimentel (2016) and reproduced below illustrates some of the milestones of the Bank's trajectory in the design of its PRSA, which defines and formalizes principles, guidelines, governance and instruments of socio-environmental management applied to operations financed directly by the BNDES.



1980
1981 – Establishment of the PNMA
1982 – Establishment of the Social Area
1989 – Establishment of the first Environmental Management Unit

1990
1992 – Eco-92
1995 – Adhesion to the Green Protocol
1995 – Creation of the Law on Environmental Crimes

2000
2003 – Creation of Sectoral Environmental Guidelines
2005 – Approval of the Environmental Policy
2007 – BNDES Platform
2009 – Creation of AMA
Coordination Dept. (Cross-cutting Subjects) in the AP
First Sectoral Guidelines
Socio-environmental Policy

2010
2010 – Approval of the PRSA
Review of Sectoral Guidelines
2014 – Establishment of the CSS
Forum with Civil Society

2015
2015 – BNDES Transparent – new portal
Review of the Socio-environmental Policy
2015 – Multi-year Plan for the PRSA
2016 – Sectoral Policies

It is not within the scope of this article to detail this design process,[4] but only to highlight two aspects. The first relates to the recognition that this trajectory reflects advances and attempts to respond both to the permanent and successive criticisms of the Bank's socio-environmental behavior and to institutional and policy changes emanating from a broader set of Development Finance Institutions (DFIs). In this last point, it is worth mentioning that these changes have been driven mainly by multilateral financial institutions (in particular the World Bank), which for decades have been scrutinized by groups committed to denouncing socio-environmental impacts and to the proposal of socio-environmental safeguard policies. As stated by Borges (2016):

> At least since the 1980s, the formula widely adopted by DFIs, especially MDBs for the incorporation of socio-environmental and human rights variables into their mission and activities has been to make the granting of loans conditional upon compliance with socio-environmental standards. These criteria have gradually evolved to the point where they are, today, at least in the MDBs, a sophisticated and overlapping set of requirements for borrowers, so that impact assessments, action plans and compensatory measures can be implemented in advance of, concurrently with and even after disbursements. These requirements, usually instilled in operational policies, are known in the world of development finance as "safeguards" (Borges, 2016: 28).

As for the second aspect, we propose to offer a more detailed description regarding the operation, from the BNDES perspective, of the implementation of its Socio-environmental Policy formalized in 2009 and incorporated as part of its so-called Social and Environmental Responsibility Policy (PRSA) in 2010. Then, in the second part of this topic, a summary will be provided of the limits and challenges of these

[4] A good summary is provided in the aforementioned study by Teixeira and Pimentel (2016).

Policies from the accumulations of a group of organizations that have been monitoring these policies in recent years.

The Bank's *Socio-Environmental Policy* establishes guidelines, standards and part of the operational procedures to be implemented in financing operations. In short, it defines procedures for classifying, analyzing, approving, contracting, and monitoring the projects supported. Some synthetic information is useful for understanding this policy from the Bank's perspective.

The *classification* phase, involves information provided by the company and organized in two questionnaires, one on the company's practices and policies in socio-environmental issues (QASE) and another on the project (QASP).[5] In the first questionnaire the Bank requests information, for example, on the formalization of the company's socio-environmental responsibility commitments and policies such as Human Rights Policy, Occupational Health and Safety Policy, participation in sectoral or global initiatives, or agreements related to the issue of sustainability. The second questionnaire requests information on the project's site, for example, inside Conservation Units, around Indigenous Lands, whether the project provides for a contingency/emergency plan in relation to socio-environmental risks and impacts, among others.

In this phase the Bank also collects information on the company based on surveys of public lists and other official means regarding labor analogous to slavery, environmental crimes and areas embargoed by IBAMA. In the case of some sectors – such as mining, infrastructure, cattle farming and solid waste – additional information and statements are requested in the classification and analysis phases. We will return to this point.

The information thus collected provides inputs for the classification of projects according to their environmental risk, which is defined, in a manner similar to other Development Banks and Financial Institutions,[6] in categories of risk of adverse impacts:[7]

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[5] The information is organized into two questionnaires that are part of the electronic pre-consultation roadmap available on the bank's website since June 2016.

[6] Especially those signatories of the Equator Principles, to which as of this date the BNDES is not a party.

[7] It is worth mentioning that in 2015, 48% of projects (in terms of amount) in the Bank's portfolio were classified in category A, 41% in category B and 11% in category C.

Category A: The activity is intrinsically related to risk of significant environmental impacts or of regional scope. Licensing requires impact studies, preventive measures and mitigating actions;

Category B: The activity involves lighter or local environmental impacts and requires specific assessment and measures;

Category C: The activity does not present, in principle, a significant environmental risk.

Still in this phase, the Bank prepares any social and environmental recommendations for the phases of analysis and monitoring of the operation as may be necessary. According to the Bank, in the case of projects of greater environmental risk (category A), additional assessments are carried out on impacts and maturity of the company's socio-environmental management, which may entail taking mitigation action.

In practice, for these projects the Bank adopts a standard procedure for inclusion in the loan contract of a "social sub-loan" granted under the so-called "Corporate Social Investments (CSI)"[8] line which, in theory, is intended for investments in addition to those required in the licensing process and aimed to mitigate negative impacts and maximize positive impacts related to the environment affected by the projects.

The Bank's *Social and Environmental Responsibility Policy* (*PRSA*), in turn, has a broader scope and includes the Socio-environmental Policy, the socio-environmental guidelines, the operational policy of Corporate Social Investments (CSI Line) and, more recently, the Socio-environmental Sectoral policies started with the Socio-Environmental Policy for the Mining Sector formalized in 2016.

Although the PRSA was formalized in 2010, it was formulated more clearly by the Bank, with the description of its components and the structuring of its implementation Plan in 2014, with the publication of the Resolution of the National Monetary Council (Resolution CMN

[8] This CSI line has existed since 2006 and in its current form it supports actions: 1) within the company; in this case to "implement or improve environmental, social, health and/or occupational safety management systems for both Beneficiaries and companies in their supply and distribution chain; or facilitate social investments complementary to legal obligations, aimed at employees of Beneficiaries (including dependents and family members), as well as employees of companies in their supply and distribution chain or clients"; 2) within the community, the focus of the line is "to assist populations exposed to some type of social risk, located both in the economic project environment or in areas of geographical influence of the companies and distributed nationwide, not necessarily associated with business initiatives or areas of influence of the company".

4,327 of April 2014)[9] requiring financial institutions to develop a PRSA and Plans for its implementation. It is worth mentioning that this process produced internal changes with the establishment of a governance structure aimed to meet requirement of said Resolution. Thus, a Socio-Environmental Sustainability Committee (CSS) was created in June 2014, *with the aim to promote the integration of the social and environmental dimensions into the policies, processes, practices and procedures of the institution, in line with the PRSA*".[10] In 2015, the Board of Directors and the Corporate Board of Directors of the BNDES approved the so-called "Multi-year Plan for Implementation and Monitoring of the PRSA" for the period 2015-2017.

This plan establishes five areas of action[11] for the three-year period and 45 short, medium and long-term deliverables.

Changes in the Bank's management since June 2016 have been accompanied by organizational changes with effects on the governance of the PRSA as well, with emphasis on the reorganization of areas and boards through the creation of a Public and Socio-Environmental Management Area (AGS) from the merger of the Social and Environment Areas.[12]

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[9] This Resolution provides for the socio-environmental responsibility of financial institutions authorized to operate by the Central Bank of Brazil and establishes as an obligation the development of a Social and Environmental Responsibility Policy (PRSA) and a plan of action for its implementation. The Resolution also requires adopting a governance structure compatible with the size of the institution, the nature of its business and the complexity of the products offered, to ensure compliance with PRSA guidelines and to enable carrying out and monitoring the actions contained in the action plan. Supervision is the responsibility of the Central Bank.

[10] Further details on the scope of the PRSA and the Plan can be found on the official BNDES website at: https://www.bndes.gov.br/wps/portal/site/home/quem-somos/responsabilidade-social-e-ambiental/o-que-nos-orienta/politicas/plano-implementacao-prsa.

[11] These are: 1) PRSA Strategic Alignment and Implementation Management, focused on strengthening BNDES governance for the theme of sustainability; 2) Dialogue and Accountability, focusing on the implementation of improvements and innovations in dialogue and accountability processes and activities; 3) Final Action, which includes actions related to the practices, procedures, methodologies and internal controls adopted in the flow of financial support, as well as those related to the process of development, monitoring, review and evaluation of BNDES financial products related to social and environmental development; 4) Leadership, culture and learning focused on the dissemination of knowledge, systematization of training actions and development of employees and leaders of the institution in the theme; 5) Organizational Management, which provides for the incorporation, in BNDES administrative activities, of concepts related to sustainability, such as certification of facilities, carbon inventory and performance in its environment.

[12] A good synthesis of the accumulations, criticisms and suggestions built in this dialogue process is systematized in the book "Política Socioambiental do BNDES: presente e

In December 2016, the Bank published a first review of the Plan.

For the purposes of this article, it is worth raising three points that seem to be particularly relevant in the review, as they dialogue with issues that have been repeatedly criticized by social organizations that during 2014 and 2015 established channels of dialogue with the Bank on its Socio-Environmental Policy.

The first point concerns the commitment to formalize the "concept of socio- environmental risk for the BNDES" and its integration as part of corporate risk management. Regarding this aspect, it is worth mentioning that although the review presented by the BNDES asserts that progress has been made in this area, the concept is not presented in the document and no mention to socio-environmental risk is found on the Bank's website or located in the latest Risk Management Reports (the most recent version dates to June 2017).

The second point concerns the implementation and monitoring of the aforementioned CSI line. In this aspect, the evaluation conducted by the Bank mentions as progress the review of this line's governance with the creation of the Subcommittee on Corporate Social Investment Line (CSI) linked to the CSS, and also in the implementation of the line with the creation of a "Basic Roadmap for Presentation of Corporate Social Investment Projects" and possible efficacy and effectiveness indicators.

The third point concerns the integration into the Socio-Environmental Policy of a specific chapter for export-supporting projects, with the inclusion of the classification of socio-environmental risk of the projects and provisions for contracting a consulting firm to assess the socio-environmental impacts of projects.

Finally, in May 2017 the BNDES Board of Directors approved the updated version of the PRSA Pluriannual Plan, resetting deadlines and adjusting the Plan to the new organizational structure.[13]

3.1 Between norm and practice

A general and non-exhaustive overview of how the Socio-Environmental and Social and Environmental Responsibility Policies

futuro", available at: http://www.inesc.org.br/biblioteca/publicacoes/livros/2015/politica-socioambiental-do-bndes-presente-e-futuro/view.

[13] For a more in-depth view of the recent changes in the PRSA's management see Teixeira and Pimentel (2017).

are structured in the BNDES was presented above, highlighting what we consider to be its main elements and features, as well as showing, from the Bank's perspective, some of its commitments and advances in implementing the PRSA.

This more general and institutional view makes it clear that there is in fact an ongoing process to improve the Bank's practices and policies in addressing the social and environmental issues underlying the projects it finances. Also noteworthy is the role of the Central Bank, through the aforementioned Resolution, in incentivizing the regulation and governance of these issues by financial institutions, including the BNDES.

However, a more critical and proactive interpretation of these issues is necessary and we will rely on the accumulation of debates among social organizations concerned with the issue, on the experience of dialogues between these organizations and the Bank, and on evaluation studies of these Policies.

The *first* aspect is about the structural limits of these Policies with respect to their actual ability to preclude projects of high and irreversible socio-environmental impacts from receiving financing.

The BNDES publicly states on its website that in the phases of a more detailed analysis of the project it can choose to not finance a project due to possible negative aspects that may affect the Bank's image or reputation. However, the recent experience in the financing of large projects with high and cumulative impacts, many of them poorly assessed and mitigated by licensing processes and subject to numerous legal disputes, shows that the decision to finance rests with other government areas above the BNDES. In other words, along the line already defended in the first part of this article, the BNDES operates as a financial arm at the service of strategies and priorities defined by the government and is part of arrangements and plans which in large part precede the financing structuring under the responsibility of the BNDES. This means in practice that the role of screening projects based on higher criteria of socio-environmental responsibility and reputational risk is not within the Bank's reach and choice.

As already mentioned, significant changes in the BNDES are currently in progress. The Bank's financing capacity has been hollowed out due not only to the progressive elimination of the interest rate advantage that used to be guaranteed by the Long-Term Interest Rate (LTIR) but also to the end of capitalizations by the Treasury and successive returns of funds to the Treasury. However, despite

the apparently low expected capacity to finance new projects, as far as we can see the Bank continues to play a strategic role in the viability structure of large projects with high impact potential such as infrastructure, energy and mining in environmentally and socially sensitive areas. As already discussed in the first part of this article, in the present context the BNDES will likely play a project structuring role, whether in privatization or new greenfield projects. Therefore, in any context a robust socio-environmental policy should mean structural and institutional capacity – which in the present case is highly unfeasible due to the Bank's character and its role and place in the investment strategies prioritized by governments – to reject projects because of their socio-environmental impacts and reputational risk to the Bank.

The *second* aspect refers to the numerous weaknesses of these policies from the implementation perspective. In this regard, many aspects need to be highlighted. We point out here those aspects which are, in our view, if not the main or priority ones at least useful to explain the size of the challenge towards more robust and effective Policies, despite their more structural limits.

In the *classification phase*, we have the weaknesses already identified a few years ago and that remain in the review stage of the PRSA. The information gathering phase carried out by the BNDES, in spite of specific changes to the environmental questionnaires, shows important flaws. One of them is its declaratory character, which means that the client interested in the loan is the main source of the information collected, which is essential to assess the socio-environmental conditions of clients and projects. In this regard, in compliance with the due diligence obligation and as the sponsor of potentially impacting projects, the Bank must seek to get information on the same facts from other sources, in order to conduct a consistent socio-environmental risk assessment. In addition, part of the requested information is insufficient for a real assessment of land and social conflict in project areas.

The weakness of the procedures used by the Bank has thus facilitated the approval of financing for projects located inside or adjacent to indigenous lands, without considering their socio-environmental impacts and generating, besides rights violations, strong legal uncertainty and reputational risk:

> This is the case of sugarcane mills involved in the illegal exploitation of indigenous Guarani lands in the state of Mato Grosso do Sul, whose regularization has been claimed for a long time. A portion of the lands of

> the Guarani people was irregularly occupied by sugarcane plantations. The largest and most well-known of these lands is Guyraroká, in the municipality of Caarapó (MS), where farmers rent lands to Raizen/Nova América, a plant belonging to the Cosan/Shell group. The other case involves the Jatayvary indigenous land, in the municipality of Ponta Porã (MS), occupied by five farms that lease a total of 712.2 hectares to the Monte Verde plant. Until mid-2011, the plants financed by the BNDES used the sugarcane illegally produced in these indigenous lands. This situation of illegality was corrected only because of the action taken by the Federal Public Prosecutor's Office. Of course, this type of project marked by illegalities should be rejected by the BNDES early in the screening phase of project proposals. A better qualification of the request for letter of interest, with the verification of information provided by the stakeholder on the land situation and the existence of disputes over rights of access to natural resources, including in consultation with FUNAI should suffice (Garzon et al: 2015).

In the *contracting phase*, the weaknesses are clearly expressed in usually standardized social and environmental provisions. These weaknesses are explicit including in doubly verified project contracts based on the Socio-environmental Policy and on sectoral guidelines, as is the case of beef cattle farming. In this case, the sectoral guideline establishes the need to check for additional information in the project classification and analysis phase, seeking to establish procedures and check information on the project's direct suppliers, in order to exclude suppliers involved with labor analogous to slavery, race or gender discrimination, child labor, invasion of Indigenous Lands, illegal deforestation, land conflicts, and land grabbing.

However, in all cases the Bank only requires the company to *declare* that it maintains the register of its suppliers. In addition, it is explicit in its requirement that the monitoring of direct suppliers should consider such practices for the purpose of suspending suppliers only in case of *final and unappealable judgment*. This requirement pattern, in turn, is repeated in loan contracts.

Sectoral Requests: Cattle Farming (version 09/15/2016)

For projects related to cattle farming, a Bidder's Statement will be requested in the Analysis Phase signed by its legal representatives, stating that:

1. (…)

2. all industrial units have a system in place with procedures for the purchase of livestock, which includes as direct suppliers only those that once evaluated have demonstrated fulfillment of the following conditions:

2.1. are not included in the Register of Employers that have used labor analogous to slavery, established by Interministerial Ordinance No. 2 of 5.12.2011 of the Ministry of Labor and Employment (MTE) and the Secretariat of Human Rights of the Presidency of the Republic;

2.2. their direct suppliers or managers have not been convicted in final judgment or administrative act issued by an official entity, as a result of their legal attributions, for acts that violate race or gender discrimination, child labor and slave labor legislation;

2.3. are not included in the list of embargoed areas maintained by the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA), pursuant to Decree 6,321 of December 21, 2007 and Decree 6,514, of 7.22.2008;

2.4. their direct suppliers and managers have not been convicted in final judgment for invasion of indigenous lands owned by the Union, pursuant to Art. 20 of Law 4,947 of 4.6.1966, according to information provided by the competent official authorities;

2.5. their direct suppliers or managers have not been convicted in final judgment for acts involving land conflicts, according to information provided by the competent official authorities;

2.6. their direct suppliers or managers have not been convicted in final judgment for any acts that characterize falsity or violence in obtaining land deeds or ownership rights ("land grabbing"), whether for public or private land, according to information provided by the competent official authorities;

2.7. their direct suppliers or managers have not been convicted in final judgment of criminal offenses related to deforestation under Law 9,605 of 2.12.1998, according to information provided by the competent official authorities;

(…)

Legally, while the BNDES takes note of the socio-environmental obligations of companies, it only acts objectively to suspend financing in cases of final court judgments. This pattern of relationship between the Bank and the companies to which it provides financing shows a defensive posture (evasive and tangential) and not, as its discourse indicates, a proactive initiative of social and environmental responsibility.

Against this background and with a high reputational risk, the BNDES can easily be identified as a bank that finances projects involved in labor analogous to slavery. A survey conducted by the website Investments and Rights in the Amazon of the Institute of Socioeconomic Studies (INESC) compared the corporate taxpayer identification numbers included in the slave labor "dirty list" with those posted on the BNDES's website as beneficiaries of loans. The data showed that between 2000 and 2016 almost R$90 million in loans went to companies and individuals included in the "Dirty List" of Slave Labor in Legal Amazon states.[14]

In the *monitoring phase*, a recurring theme that has been critically evaluated by social organizations is the chronic lack of information about the progress of the projects financed and the impacts caused by them, which ends up generating financial and legal risks for the Bank itself. The Bank's virtually exclusive reliance on entrepreneurs as sources of information on impact monitoring makes the BNDES extremely vulnerable in terms of its joint liability for environmental damage caused by the projects, as established by Law No. 6.938/81. Thus, although there are no official statements by the Bank recognizing the difficulties generated by the weakness of the project monitoring process, the BNDES has been taking steps that show, despite many problems, some willingness to solve these problems, such as the implementation of independent socio-environmental due diligence. The most well-known case is the financing of Belo Monte hydroelectric dam, whose loan contract already provided for independent socio-environmental due diligence.

[14] According to the survey, the state of Pará ranked first, with 27 loans granted by the BNDES in the analyzed period, totaling R$45.8 million. Tocantins came in second, with 10 cases and R$32.4 million. Acre (R$ 2.2 million), Mato Grosso (R$7 millions), Maranhão (R$921,000), Rondônia (R$638,000) complete the dirty list. Available at: http://amazonia.inesc.org.br/bndes-emprestou-milhoes-para-empresas-que-exploram-trabalho-escravo-na-amazonia-legal/.

However, this initiative was jeopardized by the lack of both clarity and transparency about the parameters that guided due diligence and the transparency of its results. It is noteworthy that access by society to Belo Monte's due diligence reports was the subject of a long judicial dispute started in 2014, involving the Socio-Environmental Institute (ISA). Only three years later, in September 2016, a non-judicial agreement was reached between the BNDES, the Federal Public Prosecutor's Office and Norte Energia, the company responsible for the construction of Belo Monte hydroelectric plant. Under the agreement, the company had the obligation to post the reports produced by the independent due diligence on its website.

A *third* and last point to be highlighted, among others that cannot be addressed given the scope of this article, concerns the weakness of the BNDES solution for a more active action of social and environmental responsibility that goes beyond social and environmental legal requirements.

As already mentioned, the main instrument used today by the Bank as an active action of social and environmental responsibility is the so-called CSI line, which has existed since 2006 but has been progressively reclassified and discursively elaborated as the Bank's specific and differentiated contribution to mitigate impacts on the target areas of Bank-funded projects. Thus, since 2009 and 2010, the ISE line has been linked to the so-called "Action Policy in areas surrounding projects", which is being announced as its specific contribution to "mitigate the negative effects that major projects tend to have on the territories".

Starting from the idea of existence of a "surrounding area", defined as the area of direct and indirect influence of the environmental impact studies of the project, the BNDES plans as the central strategy of this Policy the formulation of a "territorial planning" to be spearheaded by actors deemed relevant.

In this ideal arrangement, the company responsible for the construction of the large project, already licensed by the environmental agency and financed by the BNDES, would be the "strategic interlocutor" or "anchor company". It would be responsible for facilitating the dialogue with other actors deemed relevant by the BNDES in the design of a "Development Agenda for the Territory". These actors would be, in turn, governmental and non-governmental organizations such as research institutions, the 'S' System and civil society organizations.

Thus, the Bank argues that in addition to financing the project and its environmental conditions, it is promoting "something else" that would be, in summary, an additional financing to the corporation (strategic interlocutor), based on a new interpretation of socio-environmental responsibility of the corporation (anchor company). And, secondarily, financial support for government actors.[15]

In order to comply with this policy, the CSI line is now linked to a bank/company negotiation, which takes the form of a social sub-loan as part of the global financing for projects classified in risk category A. Financial conditions are differentiated and more subsidized (basically LTIR without additional fees) and the execution of the sub-loan depends on the presentation by the anchor company of actions and projects aimed at benefiting the community. As a practice already in force at the Bank, this line has a pre-established value standard, corresponding to 0.5% of the investment value.

Very little is known today about the effectiveness of this policy. The daily life of the areas surrounding projects is marked by systematic reports of lack of public policies and high social impacts caused by the works.

A study still under development by INESC has monitored projects financed through social sub-loans in various projects and identified several problems, including: i) lack of verification by the Bank with validation by the licensing agency of the effective additionality of the works and projects in relation to those supported by the conditions and components of environmental licensing; ii) lack of information to the local population about the scope and role of additional works and projects; the vast majority of people identify the projects as the exclusive initiative of the mayor or as an action aimed at building "social legitimacy" for the presence and action of the company in the territory, in this case mistaking it for "institutional marketing", which

[15] This formulation is clear in the recently released book *"Um Olhar Territorial para o Desenvolvimento: Amazônia"*. In it, the Bank argues that its contribution to reduce the impacts of the projects it finances in the Amazon are investments in the areas surrounding the projects. Examples of financing for Amazon hydroelectric dams are the most noteworthy: "In addition to creating jobs and boosting the regional economy, social and environmental investments in areas surrounding the hydroelectric dams are contributing to significantly improve the quality of life of the region's population and the preservation of the environment, through actions to improve education, health and sanitation services, land regularization, and protection of Conservation Units and indigenous lands" (p. 120).

would be prohibited by the CSI line;[16] iii) low effectiveness of the line in view of the objectives it proposes to achieve.

Thus, the CSI line seems to work, in practice, to enable contracting and subcontracting a group of other companies to "manage" a list of actions and projects that are mistaken for those required by the licensing authority and often carried out with weaknesses and delays. In addition, they are also mistaken for actions that are typical and under the responsibility of the government and are therefore often implemented through negotiation and transfer of funds to the government through protocols and agreements and without transparency.

It is worth mentioning that recently the BNDES has sought to respond to part of the criticism of its CSI line, which continues to be an important part of its PRSA. The third area of the PRSA Implementation Plan (2015/2017) established as one of the deliverables "enhancing the process of corporate social responsibility incentive by improving the management of the CSI Line and related initiatives". As part of this effort, the Bank defines in its Plan implementation assessment as advances: i) publication of a roadmap to inform the presentation of social projects by companies interested in the CSI Line; ii) improvements in the management and implementation of the CSI Line with the creation of the Corporate Social Investment Subcommittee (SISE), linked to the CSS.

It is too early to assess the effects of these improvement measures. However, it seems clear that they do not change what seems essential to us: the BNDES Policy for Surrounding Areas and the CSI line are anchored in a defensive and fragile posture of socio-environmental responsibility, which invests a few million subsidized reais to legitimize the presence of both the company and the Bank in the region.

In short, in our view these social sub-loans are not the solution to mitigate the impacts generated by the projects, which are not mitigated or compensated by licensing and are maximized by the lack of public policies.

[16] According to the BNDES's Operational Policies, the following actions are not eligible for financing under the CSI Line: actions imposed by law, administrative act or judicial decision, including obligations arising from environmental licensing and Terms of Adjustment of Conduct (TAC); actions exclusively focused on the commercial and competitive performance or direct development of the consumer market; actions that have been subject to tax benefits in any governmental sphere; and actions related to institutional marketing.

4 From dodging the issue to searching for effective solutions

The socio-environmental policy of the BNDES should meet the complex challenge of contributing to reducing environmental licensing weaknesses (permanently under attack and risk of downgrading), as well as the weaknesses of the process to monitor compliance with environmental, labor and human rights legislation.

This does not imply, as often alleged by Bank officials, playing the role of the licensing authority or other government authorities. As already pointed out by numerous social organizations, processes of dialogue but also of criticism and evaluation of the Bank's policies and practices, much needs to be done for a Public Development Bank to operate proactively in the Brazilian context of enormous social and environmental weaknesses and vulnerabilities.

It is important to say that just like the Bank responds to criticism by avoiding to play a more relevant role in environmental risk assessment and impact monitoring, IBAMA also eschews criticism and responsibility, arguing that it is responsible just for coordinating the licensing process, which is essentially environmental. Its technicians have repeated incessantly the defensive discourse that environmental legislation, including administrative regulations, has limits in the assessment, mitigation and compensation of social or socio-environmental impacts and that the licensing authority cannot be held accountable for these gaps.

Without validating the defensive character of these discourses, it is important to recognize that licensing, as it exists today – despite its advances and in the more recent context of severe setbacks – has formal and institutional limits. It is essential to move forward and, above all, not to retreat. All government actors – the BNDES, the licensing authority and other authorities involved in processes of evaluation and mitigation of large project impacts – such as FUNAI, INCRA, ICMBio, Palmares Cultural Foundation, Ministry of Labor – should work jointly to overcome the gaps that ultimately fall on the shoulders and lives of workers, the populations and their territories impacted by the projects. In addition to incorporating socio-environmental aspects with greater stringency, the impact evaluation, monitoring and mitigation process should be understood as a responsibility of the government, involving different institutions, including the financing entity.

What we see today, however, is the opposite path, a setback. There is no denying the accelerated process of deconstruction of the socio-environmental rights enshrined in the Federal Constitution of 1988, as well as in infraconstitutional legislation, administrative acts and the establishment of institutions with a mission to enforce them.

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