

# MUNICIPAL ACTION IN THE MITIGATION OF ENVIRONMENTAL IMPACTS

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## **ABSTRACT**

The present work sought to verify the regulation of the requirement of environmental compensation for projects that, although not similar to those exemplified in art. 2 of Conama Resolution nº 001, of January 23, 1986, produce impacts with consequences sensitive to the quality of the natural environment, being placed in an intermediate position in the scale of activities potentially harmful to the ecological conditions of its area of influence. To do so, through bibliographic research and analysis of legislation and doctrine relevant to the object of research, the concept and legal nature of the environmental compensation institute was analyzed, as well as the position occupied by municipalities in the distribution of material and legislative competences in this area. The conclusion of the feasibility of the municipal environmental compensation institution due to impacts of medium magnitude, as well as the possibility of earmarking the resources collected for the restoration of the ecological functions essential to the conservation of nature and the healthy quality of life of the population, and not exclusively for the creation and maintenance of conservation units.

**Keywords:** Environmental Compensation; Environmental impact; Material Competence.

*ATUAÇÃO MUNICIPAL NA MITIGAÇÃO  
DE IMPACTOS AMBIENTAIS*

**RESUMO**

*O presente trabalho buscou verificar a regulação da exigência de compensação ambiental para empreendimentos que, embora não se equiparem aos exemplificados no art. 2º da Resolução Conama nº 001, de 23 de janeiro de 1986, produzem impactos com consequências sensíveis à qualidade do meio ambiente natural, situando-se em posição intermediária na escala de atividades potencialmente prejudiciais às condições ecológicas da sua área de influência. Para tanto, através de pesquisa bibliográfica e análise da legislação e doutrina pertinentes ao objeto de pesquisa, analisou-se o conceito e a natureza jurídica do instituto da compensação ambiental, bem como a posição ocupada pelos municípios na distribuição de competências material e legislativa nessa seara. Concluiu-se pela viabilidade da instituição de compensação ambiental municipal por impactos de média magnitude, assim como pela possibilidade de se destinar os recursos arrecadados para a restauração das funções ecológicas essenciais à conservação da natureza e à sadia qualidade de vida da população, e não exclusivamente para a criação e manutenção de unidades de conservação.*

**Palavras-chave:** *Compensação Ambiental; Impacto Ambiental; Competência Material.*

## INTRODUCTION

The Federal Constitution of 1988, through its art. 225, gave all people in Brazil the right to an ecologically balanced environment, a common use good essential to the healthy quality of life, imposing on the Public Power and the community the duty to defend and preserve it for present and future generations. Furthermore, in art. 170, it institutes the protection of the environment as a principle of economic order.

As a way of effecting the protection of the environment, it created incumbencies to the Public Power, which has, among other duties, to preserve and restore essential ecological processes; define territorial spaces and their components to be specially protected; require prior study of environmental impact for installation of work or activity that has a potentially cause for significant degradation of the environment; and to protect the fauna and the flora, being prohibited the practices that put in risk their ecological function, provoke the extinction of species or subjects the animals to cruelty.

Given the *status* of the environment in the current constitutional order, the primary objective that informs all environmental legislation is prevention and precaution. When this goal is not realized and environmental damages are caused, our legal and juridical system is oriented to pursue the restoration of the environmental good. Once the impossibility of recovery has been verified, there is still the possibility of carrying out environmental compensation, consisting in the replacement of a damaged environmental good with another equivalent to the provision of ecological services.

In the Brazilian legal system, as environmental compensation species due to damages caused to the environment, are foreseen: (a) compensation for irreversible environmental damage; (b) compensation for suppression of Permanent Preservation Area; (c) Legal Reserve compensation; (d) compensation for suppression of Atlantic Forest; and (e) compensation for the implementation of projects that cause significant environmental impact.

The compensation for the implementation of undertakings that cause significant environmental impact is provided in art. 36 of Law 9.985/2000, and consists of an obligation owed by the entrepreneur in cases of environmental licensing of projects that impact the environment in a significant way, considered by the competent environmental agency, based on an environmental impact study and its report - EIA/RIMA, and whose

resources are intended to support the implementation and maintenance of a conservation unit, preferably of the Integral Protection Group.

The federal legislature's option was to finance the National System of Conservation Units (Snuc), in order to give concrete form to the constitutional provision according to which it is the responsibility of the Public Power "to define, in all units of the Federation, territorial spaces and their components to be specially protected" (CF/1988, art. 225, § 1, III).

However, notwithstanding the important role played by Snuc's compensation in the preservation of large areas, it is understood that by disregarding other ways of pursuing the ecological balance, the federal legislature ended up favoring investments that often do not generate the environmental benefits which best represent the needs of a locality. That is, limiting the application of environmental compensation resources to the creation and maintenance of integral protection conservation units is to ignore the importance of all other measures necessary for the implementation of local environmental policies.

With the help of bibliographical research and analysis of the legislation and doctrine pertinent to the research object, we sought to discuss the concept, species, legal nature and constitutionality of the environmental compensation institute, as well as the position occupied by municipalities in the distribution of material and legislative powers in this area.

As a result, the present study, based on an understanding of the aforementioned environmental compensation of Law 9.985/2000, proposed the establishment by the municipalities of a kind of more restrictive environmental compensation due to irreversible environmental impacts magnitude, thus considered by the environmental agency based on an environmental study, not necessarily EIA-RIMA.

Finally, we evaluated the possibility of allocating the financial resources collected in measures that aim at the maintenance of the ecological balance in a broad way, and not exclusively by the implantation and maintenance of conservation units.

## **1 COMPENSATION IN THE BRAZILIAN ENVIRONMENTAL LAW**

As noted by Bechara (2007, p. 158), "the term compensation is used in a number of situations and in each case to designate separate

institutes, although they are often close.” For the said author this proximity is due to the fact that the compensation, in Environmental Law,

[...] has the primary purpose of making a degradation or polluting activity that adversely affects the environmental balance by attacking one of its corporeal or intangible elements, offers a contribution to affect it positively, improving the situation of other physical and intangible elements other than the affected. (2007, p. 158).

Such semantic delimitation is reconciled with that presented by Milaré and Artigas (2006), for whom compensating means “supplying, with a weight or equivalent value, something that has been damaged, taken or subtracted, taking into account the ecosystem, scientific and social significance of the property damaged, and not merely the material, economic or financial value”.

The option of the legislator, evidenced in articles 4, VII, and 14, § 1 of Law 6.938/1981 and art. 225, § 3, of CF/1988, indicates that, in the foreground, the restoration of the environmental good must be attempted and, where this is impracticable, the compensation for substitution or compensation should be initiated (LEITE and AYALA, 2015).

It is, therefore, in a broad sense, the obligation to replace an injured property with another of equivalent value, imposed on the person causing the damage in the event of irreversibility of the injury. That is: compensation (or substitution of the good) can only occur when it is concluded that it is impossible to restore the property damaged.

In the formulation of Leite and Ayala (2015), while the restoration aims at the reintegration, recomposition or *in situ* recovery of damaged environmental assets (return to the *status quo ante*), the objective compensation is the substitution of environmental goods affected by other functionally equivalent.

Thus, by way of conclusion, Mauricio Mota observes that:

the discipline of environmental compensation, even without being precisely delineated theoretically, has appeared to be doctrinally an adequate retribution for the concentrated and particular exercise of a diffuse right to the ecologically balanced environment (article 225 of CF/88) (MOTA, 2015, p. 777).

For Mota, the environmental compensation institute, despite its

stage of theoretical development, is based on the recognition of the socio-environmental function of property, which is in harmony with the notion of “user paying”.

### **1.1. The legal nature of the institute**

There is significant doctrinal divergence about the legal nature of the environmental compensation provided for in art. 36 of Law 9.985/2000, being treated as a tax, public price, early civil liability and economic instrument derived from the polluter pays principle (FARIAS and ATAÍDE, 2016).

The diversity of the legal framework reflects the complexity of the matter covered by the environmental compensation institute. The growing concern with the protection of the natural environment prompts the creation of adequate measures for its conservation and restoration, which can generate legitimate doubts about how to harmonize interests and rights equally protected by the State.

Bechara (2007, p. 194) argues that the “legal nature of an institute reveals to what legal regime - norms and principles - it submits itself.” In this sense, Priscila Santos Artigas (2011) states that the study of the legal nature of environmental compensation seeks to situate the institute in the Brazilian normative framework, in order to enable its implementation and practical application, or, in other words, to allow the validity and effectiveness of the obligation.

This, we go on to discuss the main doctrinal currents that are dedicated to this so important task, which contribute much to the understanding of matter.

#### **1.0.1 *Environmental compensation as a tribute***

A first doctrinal position maintains that environmental compensation has a tax nature, because its structure reflects the concept of tribute posited by the legislator in art. 3 of Law No. 5.172/1966 (National Tax Code - CTN).

That is, the expected exemption of art. 36, § 1, of Law 9.985/2000, is a requirement (i) compulsory; (ii) pecuniary, with value expressed in currency; that (iii) does not constitute sanction of an unlawful act, but, on the contrary, the generating fact is a lawful business activity; (iv) was

established by law; and (v) will be done by related administrative activity (MILARÉ and ARTIGAS, 2006). In closer analysis, William Afonso Ogawa demonstrates that:

The environmental compensation aims to provide financial means to the State to achieve its objectives of preservation and withdraws financial resources of the entrepreneur, therefore, is pecuniary benefit; as the collection of compensation is mandatory, when characterized the impact activity, it is compulsory; the compensation is collected in cash or may be eventually accepted in service units, characterizing “currency or value that can be expressed in it”; the compensation does not come from an unlawful act, as it results from a fully legal environmental licensing act; the compensation is established in art. 36 of Law no. 9.985/200; Finally, it can be verified that the compensation is charged through a fully linked activity, since the SNUC Law establishes who should and how the environmental compensation should be charged, once the need for compensation has been configured, it is not up to IBAMA to appreciate the convenience (discretion act) or the opportunity (arbitrary act) to operate. (OGAWA, 2010, p.29).

Faced with this evidence, José Marcos Domingues (2009, p. 134) states that “the true legal nature of the institute [...] is tributary”. Following this line, Sidney Guerra and Sérgio Guerra (2012, p. 169) consider that, among “the kinds of taxes provided for in the Federal Constitution, it is plausible to infer from the context of the exon in comment as being [...] a contribution.”

Still in the evaluation of Sidney Guerra and Sérgio Guerra (2012), the development of economic activity in disagreement with the constitutional principles to which it is subjected causes the intervention of the Union, which in the case of ventures of significant environmental impact can be given by the institution of a contribution, designated by the doctrine as an environmental CIDE.

They share the same view, Milaré and Artigas (2006, [sp]), arguing that the tax component to which environmental compensation is best subsumed is the contribution of intervention in the economic domain (CIDE), which is based on art. 149 of CF/1988, whose function is to create “a stimulus to the development of sectors of the economy in which state intervention is necessary, which fits the question of defense to the environment, envisaged as a principle of the constitutional economic

order.”.

However, while influential thinkers argue for the tax nature of compensation, a consensus prevails that there are difficulties in subsuming environmental compensation to a kind of tribute. In Artigas’s strong analysis (2011, p. 62), these difficulties “seem to be, at a time, a failure of the law that instituted it or a *deficit* of legislative quality, at another, the transgression of several principles and norms that govern the normative order.”

This reality opens space for criticism on the part of the doctrine that discards the tax nature of compensation. This is the position of Costa and Mota (2010, [sp]), which disregard even the possibility of being a hidden or occult tax, understood as the “pecuniary benefit that, despite all the essential elements of the concept of tribute in the General Theory of Law, is required by the State without obeying the rules and principles that make up the legal regime of the tribute. They argue that the tax nature succumbs to the following criteria of analysis:

- when the entrepreneur requires the licensing of an enterprise with the environmental body/entity, the Public Administration is exercising police power, since the administrative act bound - licensing - needs to have its legal requirements fulfilled, ie, competence, purpose, form, motive and object in accordance with the principles inscribed in art. 37 of the CF/1988 (LGL\1988\3);
- environmental compensation is not confused with effective consideration of public service, aiming to refer to a previous indemnity by means of which compensation is sought for damage caused by an undertaking that causes significant environmental impact, having as parameter EIA/RIMA;
- there is no violation of inc. II of art. 145 of CF/1988 (LGL\1988\3), whereas the legal nature of environmental compensation is not characterized as a charge, and there should be no actual recovery and no consideration of a regular public service;
- from the concept of tribute, it should be clarified that in environmental compensation it is not necessary to take the wrongful act, since the service is not compulsory and it will only be required under art. 36 of Law 9.985/2000. Therefore, if we compare the definition with the assumptions of the environmental compensation, it is verified that this has a reparatory nature, being due before the damage is verified, by obtaining only the environmental license;
- the amount collected in the compensation is a technically feasible value that does not include indivisibility and specificity, because the State, in this case, is not offering a consideration, but the entrepreneur is reimbursing it for the use of the finite natural



resources belonging to the community, due to extrapolation in the use of these (COSTA and MOTA, 2010, [s.p]).

Finally, while acknowledging the viability of environmental taxation through the establishment of a CIDE, Ana Alice Moreira de Melo (2011) believes that the Union did not intend to intervene in the economic domain when regulating a given activity.

The aim of the legislator would have been to apply the user-pays principle as a way of forcing entrepreneurs to compensate for the non-mitigating negative impacts on the environment, and thereby promote sustainable development. “Therefore, there is no way to attribute a tax nature to the compensation, nor to confuse it with the so-called CIDE” (MELO, 2011, p. 78).

### *1.1.2 Environmental compensation as a public price*

José Marcos Domingues (2006), quoted by Bechara (2007, p. 220), defines public prices as original recipes that:

are destined to reward the acquisition of proprietary right or effective use of public goods - State property (tangible assets), as well as public services (intangible assets) effectively rendered without compulsory character (DOMINGUES, 2006, apud BECHARA, 2007, p. 220)

In other words, it is the name given to the remuneration paid to the Public Power “for the exploitation of the public patrimony, or for the provision of a public service, not especially related to the state, that is to say, an activity of a commercial or industrial nature” (GUERRA, Sidney and GUERRA, Sérgio, 2012, p. 166). However, the authors continue:

a public price does not appear to be called environmental compensation, since, in truth, what is sought by the aforementioned compensation is not a charge for the use of a public good, but rather the imposition of an obligation to recover a damage that has not yet occurred (GUERRA, Sidney and GUERRA, Sérgio, 2012, p. 167).

Same is Bechara’s view (2007, p. 220), since “for environmental compensation to have the legal nature of public service, it should correspond to a remuneration paid by the entrepreneur for the use of environmental

resources.” Indeed, “the assumption of environmental compensation is the non-mitigating negative environmental impact, not the use of environmental goods” (PULSEN, 2007, p. 35, *apud* MACIEL, 2012, p. 102).

### *1.1.3 Environmental compensation as early civil liability*

There is an important doctrinal current that deals with the environmental compensation in the scope of civil responsibility, consisting in anticipating the duty to repair the presumed damage. They adopt this position, among others: Erika Bechara; Marcelo Abelha Rodrigues; Solange Teles da Silva and Willian Afonso Ogawa (Maciel, 2012).

On the legal basis of the doctrine that contends for the environmental compensation framework as a form of early liability for damages, Milaré and Artigas argue that:

[...] the Federal Constitution, in the chapter about the environment, imposed on the natural resource operator the obligation to recover the degraded environment (art. 225 § 2), as well as, to anyone who adopts conduct that is harmful to the environment, the obligation to repair damages (art. 225 § 3). It was also mentioned that, even earlier, Law No. 6.938/81 imposed on the polluter an obligation to indemnify or repair the damages caused by his activity, regardless of the existence of fault (art.14 § 1), thus introducing objective liability into the Brazilian legal system (now also provided for in the Civil Code of 2002). Based on these propositions, it is argued that the legal nature of environmental compensation falls within the scope of the civil reparation institute, and is a form of reparation for damages caused to the environment (MILARÉ and ARTIGAS, 2006, [sp]).

This is not the case, however, of uncontroversial classification. Sildaléia Silva Costa (2007, p. 62) indicates one of the sources of the disturbance, which resides, above all, at the time of the obligation to repair. Given that:

The main legal basis for causing the environmental damage to be repaired comes from the possibility of its liability, whether criminal, administrative and/or civil, provided by law, but it is necessary, however, the actual occurrence of the damage to enable it. In the case of the environmental compensation provided for in art. 36 of SNUC, however, is facing a potential damage, not yet occurred, through which there arises the obligation to pay an amount of resources still in the phase of environmental

licensing of the enterprise, as a way to compensate for the negative non-mitigable impacts identified in the respective EIA/RIMA, according to the Law. Therefore, the State's right to demand that the entrepreneur comply with this provision derives from a legal obligation and not from legal responsibility, which is one of the main characteristics of the institute. (COSTA, 2007, p. 62).

Mauricio Mota dismisses the legal nature identified with the idea of civil liability in the form of compensation for anticipated damages. The author refutes this thesis by arguing that:

The future environmental damage, from the perspective of civil liability, is the expectation of individual or transindividual damage to the environment. Because it is a risk, there is no current damage or absolute scientific certainty of its future occurrence, but only the probability of harm to future generations.[...] The assignment of objective civil liability is based on the theory of concrete risk, which requires the realization of actual and concrete damages.[...] To think of civil liability in this hypothesis would mean to think of a responsibility based on the formation of a new theory of risk, abstract risk, in which legal decisions viewed as a problem the production of risks, and whose only valuable element consisted of probabilities or improbabilities of its harmful potential. Evidently, the subject, although it has contacts with the notion of civil liability, is different: precaution and prevention of environmental damage that has not yet occurred (MOTA, 2015, p. 793-794).

Bechara (2007, p. 233) acknowledges that there is no reparation without damage, and that, in view of that, “prior reparation, before the occurrence of the damage, is unusual for the civil liability system”.

However, the author contends that civil liability derives from the damage and there is no need to speak of risk-based civil liability (to which the precautionary principle applies). According to Bechara (2007, p. 234), “the civil liability system entails the repair of future damages, not yet caused, but of certain occurrence, duly anticipated.”

In accordance to Bechara, Marcelo Abelha Rodrigues (2007), affirms that the discussion about the duty to reimburse future damages has already been overcome, as fully reveals the discipline of lost profits. The triggering event of the obligation to repair is the certainty of the damage, which may be current or future. This is:

Certain damage is the damage that has occurred or what is certain and evident to

occur. The certainty of the damage allows for damages that have not yet occurred, but which have the expected occurrence with a reasonable degree of probability, to also be repaired. It should also be noted that the certainty of the damage comes from a complete study based on technical data provided by a multidisciplinary team and contrasted with the environmental agency's analysis in the EIA-RIMA procedure. Therefore, there is a solid technical basis for affirming that environmental damage will occur with that work or activity (RODRIGUES, 2007, [sp]).

The author concludes his reasoning by claiming that, in accordance with the principles of prevention and precaution, it is not permissible to negotiate risks to the environment, so it is up to the entrepreneur rather than society to bear the risk of injury in advance activity. To think the opposite puts in doubt the very function of the EIA-RIMA.

#### *1.1.4 Environmental compensation as an economic instrument deriving from the polluter pays principle*

Another position that can be sustained as to the legal nature of environmental compensation is the one that considers its fundamental characteristic as being the “preponderance of the economic aspect, characterizing it as an economic instrument based on the polluter-pays principle” (MACIEL, 2012, p. 110). In this regard, Vinicius Freitas Lott explains that:

The Federal Constitution, in the sole paragraph of its art. 170, ensures that everyone has the free exercise of any economic activity, independent of the authorization of public agencies, except for cases provided by law. However, the same article 170 of the Constitution affirms that the economic order will observe the principles of the defense of the environment. When costs of ecological degradation are not paid by those who generate them, these costs are externalities to the economic system, affecting third parties without due compensation (LOTT, 2009, p. 2937).

For Ronaldo Seroa da Motta, when projects are planned without considering the environmental externalities:

[...] people's consumption patterns are forged without any internalisation of environmental costs. The result is a pattern of natural capital appropriation where the benefits are provided to some users of environmental resources without them

compensating the costs incurred by excluded users. In addition, future generations will be left with a stock of natural capital resulting from the decisions of the current generations, bearing the costs that these decisions may entail (MOTTA, 1997, p. 3).

Thus, Farias and Ataíde (2016) argue that environmental compensation is a fundamental duty, with legal nature as an economic instrument derived from the polluter-pays principle, to the extent that there is the internalisation of costs by the entrepreneur. Therefore, effectively, art. 36 of Law 9.985/2000,

when establishing that the entrepreneur will allocate part of the resources of the execution of the work or activity for the implementation and maintenance of UCs, ends up promoting the internalization of costs related to negative environmental impacts not mitigable to natural resources, in the cost of the enterprise (MACIE, 2012, p. 110).

After all, environmental compensation is not intended to repair damages, not even the simple compensation of impacts, as it encourages their reduction. “Its scope is therefore preventive, future-oriented, not reparatory, aimed at the past” (MACIEL, 2012, p.111).

Among the exposed currents, the present work inclines to the adoption of what it considers environmental compensation to be an economic instrument derived from the user/polluter pays principle, whose main characteristic is to integrate the economic planning of activities that cause significant environmental impacts, in order to favor the internalization of environmental costs and, bearing this in mind, to seek the compatibility between the economic development and the maintenance of the quality of the environment and the ecological balance.

In any case, it is clear that attempts to frame the legal nature of environmental compensation to existing institutes are not successful. This is because it is a relatively new Brazilian invention (FARIAS and ATAÍDE, 2016, [sp]). However, the key, in the observation of Sílvia Capelli, is that:

the damage is repaired in its entirety. The debate on the legal nature of compensation of the SNUC Law does not matter here, because regardless of the option adopted, there will always be a constitutional obligation to fully repair the damage to the environment. Thus, there is no obstacle to the cumulation of the compensation provided for in the SNUC, with environmental compensation for ecological

equivalent (*in natura ex situ*), or with reparation, in the event of total or partially irreversible damage. Such cumulation is due to the principle of full reparation of the damage and constitutional order (CAPELLI, 2011, p. 367).

In addition, it joins the aforementioned currents, which was inaugurated by the Federal Supreme Court (STF) on the occasion of the Direct Unconstitutionality Action (ADI 3.378/DF), according to which environmental compensation is a form of sharing expenses with official measures of specific prevention in the face of projects with significant environmental impacts.

However, the fact that the so-called “sharing of expenses does not refer exactly to a legal nature, but to the very objective [...] of the obligation” (Artigas, 2011, p. 70), as is presented next.

## **2 LEGAL POSSIBILITY OF THE INSTITUTION OF MUNICIPAL ENVIRONMENTAL COMPENSATION FOR NON-MITIGABLE MEDIUM MAGNITUDE IMPACTS**

At the outset, it is reiterated that the main objective of this work is to propose an extension, at the municipal level, of the protection regime currently applied to the environment when licensing activities that are potentially polluting and using natural resources.

Such a claim would be made, it is believed, by the institution of a kind of prior environmental compensation, expressed in pecuniary amounts, legally required in cases of activities subject to licensing, and that provoke negative impacts of medium magnitude, considered by the environmental agency based on environmental studies and specific regulations.

Among the species of environmental compensation foreseen in the Brazilian legislation, already reviewed in the previous chapter, the one that most approximates the municipal environmental compensation proposed in this study, thus functioning as a paradigm, is enforced in art. 36 of Law 9.985/2000, for the financing of the National System of Conservation Units (SNUC).

The parallel can be traced on the basis of common characteristics, such as: (a) if they are compensation required “at the stage of viability judgment of the activity or enterprise” (MILARÉ, 2016, p. 241), and, therefore, prior to the environmental damage, regardless of unlawful conduct; (b) be expressed in pecuniary values; (c) instituted by law; and

(d) *it is* based on the principle of user pays, whose purpose is to create mechanisms for internalization of the non-mitigable negative impacts resulting from activity subject to environmental licensing.

On the other hand, there are differences in the incidence hypothesis, depending on the magnitude of the negative impact defined as a requirement for the obligation to compensate, the type of environmental study required, and the territorial scope of the standard.

More detailed, we have that federal environmental compensation requires, among other requirements, the existence of a significant environmental impact, considered by the competent environmental agency based on EIA/RIMA, while municipal environmental compensation would act at a more restrictive level, being imposed in case of negative impact of medium magnitude, as determined by the local environmental agency, duly subsidized by environmental study and own regulation.

It should be noted that the term “environmental study” has broad meaning, and in the proposal there is no limitation on the type of study that will subsidize the imposition of the tax. On the other hand, SNUC compensation only allows for the characterization of EIA/RIMA environmental compensation, an environmental impact assessment instrument established in CF/1988 (Article 225, § 1, item IV), “specific for works or activities potentially causing significant environmental degradation” (MOTTA, 2013, p. 41), such as those related in art. 2 of Conama Resolution No. 001 of January 23, 1986.

In this sense, the present work is aligned with the position of Erika Bechara, who considers that:

if the idea of compensation is to “offer something in return” for irreparable damages verified prior to the implementation of the enterprise, whether or not the enterprise is subject to the EPIA/RIMA - it is important that the environmental agency detect the irreversibility of some damage to the environmental licensing of work or activity. (BECHARA, 2007, p. 314).

As can be deduced from the cited quotation, the author understands due to environmental compensation whenever there is irreversible environmental damage. Although this possibility is admitted, the proposal discussed in this study is limited to compensation for damages of medium magnitude. This position has a pragmatic bias, considering that any proposal for the institution of environmental compensation for low

magnitude impacts will possibly be interpreted as excessively restrictive by the political class and by productive sectors of the municipalities that in a given moment initiate a debate on the subject.

In turn, territorial scope is nothing more than a consequence of the nature of the political entity from which the norm emanates. While the Union edits a law valid throughout the national territory, the legislating activity of the municipality does not produce direct effects beyond its geographical limits. That is, while SNUC's environmental compensation is a common norm throughout Brazil, municipal compensation only links local activities with respect to autonomy and harmony among federated entities.

In view of the above, at the same time that the municipal environmental compensation shares the essence of SNUC compensation, which is the maintenance of the ecological balance by the internalisation of environmental costs, it is distinguished from the same one, since the elements characterizing the exaction, although close, are not coincident.

In addition, "the enterprises and activities are licensed or authorized, environmentally, by a single federative entity", according to the prediction of art. 13 of Complementary Law no. 140/2011, a fact that, together with the distinctions already discussed, dispels the possibility that the institution of the alleged municipal environmental compensation represents a violation of the National System of Conservation Units.

What happens, moreover, is an extension of the regime of protection to the natural environment. That is because, whenever cumulative environmental licensing occurs; Environmental Impact Study and respective Environmental Impact Report - EIA/RIMA; besides the identification by the environmental agency of significant non-mitigable negative impacts, the compensation provided for in art. 36 of Law 9.985/2000 will come into play.

In fact, as noted by Ana Alice Moreira de Melo (2011, p. 49), art. 36 of Law 9.985/2000 "characterizes a true general rule on liability for environmental damage, nature conservation, protection of the environment and pollution control", so that any non-implementation by the Member States "constitutes [...] clearly disobedience to the constitutional principle of the supremacy of the general federal norm in environmental matters provided for in Article 24 of the Constitution" (2011, p. 51), which regulates matters within its jurisdiction, supplementing federal legislation in order to best fit its needs.



It should be noted that, although the author has focused her analysis on the legislative competence of the States, municipalities are also reserved the possibility of regulating art. 36 of the SNUC law. As already discussed, notwithstanding the silence of art. 24 of the Federal Constitution in relation to the legislative competence of competing municipalities, these have it in function of its competence to legislate on matters of local interest (art.30, I) (FIGUEIREDO, 2011).

According to Sinara Soares (2013, [s.p]), Law 9.985/2000 and Decree 4.340/2002):

established that the competence for fixing Snuc's compensation would be the "environmental body" responsible for environmental licensing, ie there was no express distinction in the legal text of which the licensing body would be competent to collect compensation (SOARES, 2013 , [s.p]).

However, according to the author, since the issuance of Decree No. 6.848, there has been a clear "natural limitation of the scope of application of Snuc compensation to enterprises subject to licensing by Ibama". In addition, the proceeds from the application of Law 9.985/2000 presuppose a federal public revenue, so that,

a particular State or Municipality could not claim to apply local Snuc compensation, based on federal law. In order to establish the obligation to pay environmental compensation at the state level, it would be necessary to provide for a state law, under penalty of violation of the principle of local financial autonomy (Articles 24 and 30 of the CF (LGL\1988\3)) (SOARES, 2013, [s.p]).

Therefore, it is understood that the application of federal compensation by a local environmental agency must be preceded by its regulation by municipal law. This does not mean, however, that no municipal law can be enacted that deals exclusively with compensation for non-mitigable medium-magnitude impacts in the way proposed in this paper.

As seen, an eventual institution by the municipality of environmental compensation of this nature is not intended to suppress the application of federal compensation, a general rule of mandatory application whenever the hypotheses of incidence described in art. 36 of Law 9.985/2000. Municipal compensation is nothing more than an extension of the protection regime

offered by the general rule, and would operate independently of this, since they share the same foundation, but not of the same generating fact of the obligation.

That said, municipal environmental compensation would only be due when the municipal environmental agency, in the course of environmental licensing process of activities that “cause or may cause local environmental impact” (Article 9, XIV, *a*, Complementary Law No. 140/2011), to verify the existence of a non-mitigable environmental impact of medium magnitude.

The definition of what is meant by “average magnitude” represents a similar challenge to that faced by the federal legislature, when, in editing Law 9.985/2000, it linked the obligation set forth in art. 36 to the existence of “significant environmental impact”, a concept that also has some degree of discretion.

This characteristic is inherent to the discipline of environmental impact assessment, which deals with a large number of variables that cross multiple areas of knowledge, which in no way justifies discarding initiatives with potential to improve the management of environmental resources. What should be sought is the reduction of discretion by means of regulation and constant improvement of the norms destined to environmental protection, which in the case of SNUC compensation occurred with the edition of Decree No. 4.340, dated August 22, 2002, later amended by Decree No. 6.848, of May 14, 2009.

Well, the verification of the legality of municipal environmental compensation under the terms proposed, necessarily requires an analysis of the legislative and administrative competence in environmental matters attributed to these federated entities.

As previously discussed, “the principle of municipal autonomy finds its legal basis in arts. 29 and 30 of the CF/1988 (LGL\1988\3), which determine to the Municipality, among other things, to be governed by organic law, and to legislate on matters of local interest” (SILVEIRA, 2005, [s.p]). The administrative and legislative powers are respectively agreed in arts. 23 and 24 of the CF/1988.

It occurs that, although it is reserved to the municipality a prominent position within the federation, enjoying great autonomy, “perhaps due to mistaken exegesis, or due to authoritarian inheritances and, consequently, a mitigated federalism, municipal autonomy still does not come being respected and fully applied as foreseen in the current Constitution”

(SILVEIRA, 2005, [s.p]).

In the same vein is the criticism of Toshio Mukai, who considers it to be “poor, if not nil, the existence of municipal legislation regarding environmental protection. What is the reason for this phenomenon, when it is known that the Municipality in Brazil is autonomous, politically and administratively?”(MUKAI, 2011, [s.p]).

Responding to their own inquiries, the author assumes that, apparently, “municipal administrators and legislators themselves feel they have no legal competence in the field of environmental protection, because they see especially in recent years, the Union and the states with the seeming monopoly of this activity” (MUKAI, 2011, [s.p])

In order to aggravate this situation, this legislative inertia is often broken for the defense of “local interest for unsupported or immediacy economic development, in opposition to the local interest, for the conservation of the environment” (MACHADO, 2013, p. 443).

It is not, however, what is proposed with the present work. It is understood that the local interest to legislate on the protection of the environment, with a clear beneficial effect to the ecological balance, provided by a more restrictive norm than the general one of the congener, without, however, exclude the application of the latter.

For all of the above, it is defended the legality of the environmental compensation object of this work, considering that:

the Municipality, within its constitutional autonomy to legislate in administrative matters, and to act accordingly, in the exercise of its police power, may restrict freedoms, activities and even property, to the benefit of the local collectivity, in order to protect the health, the environment and even the life of the citizens. It can and must, since it is the development of the principle of the power-of-duty of the public administrator (MUKAI, 2011, [s.p]).

Not surprisingly, the Federal Supreme Court, in ADI 3.378/DF, recognized the constitutionality of the environmental compensation of Law 9.985/2000, since it “densifies the user-pay principle, this means a mechanism of assumption shared by social responsibility for the environmental costs derived from economic activity”(BRASIL, 2008, p. 242).

Finally, as can be seen, besides the unequivocal competence of the municipality to institute the obligation, strictly observing the local interest

and in consonance with the provisions of arts. 23 and 24 of CF/1988, the grounds justifying the validation of the federal standard are the same that inform the proposal of municipal environmental compensation for medium-magnitude non-mitigable impacts, which reveals their compatibility with the current constitutional order.

## **2.1 Alternative forms of resource allocation**

In addition to the possibility of establishing municipal environmental compensation, the present work contends for a wide discretion in the application of the collected resources, which would serve the public manager to sponsor projects and actions of environmental recovery, with the condition of contributing to the maintenance of the ecological balance, in line with the constitutional provisions that surround the matter.

Law 9.985/2000, through its art. 36, determines that the resources derived from environmental compensation should be allocated to the implementation and maintenance of conservation units of the Integral Protection Group, composed of the categories listed in art. 8, subsections I to V.

Exceptionally it authorizes that part of the resources benefit conservation units of the Group of Sustainable Use, described in art. 14, items I to VII, with the condition that they are affected by the licensed enterprise (article 36, §3), as can be verified as follows:

Art. 36. In cases of environmental licensing of enterprises of significant environmental impact, as considered by the competent environmental agency, based on an environmental impact study and its report - EIA/RIMA, the entrepreneur is obliged to support the implementation and maintenance of the Group's conservation unit of Integral Protection, in accordance with the provisions of this article and the regulation of this Law. [...]

§3º. When the enterprise affects a specific conservation unit or its buffer zone, the permit referred to in the caput of this article may only be granted upon authorization of the agency responsible for its administration, and the affected unit, even if not belonging to the Integral Protection Group, you must be one of the beneficiaries of the compensation defined in this article.

Briefly, it can be affirmed that “the law completely binds the

environmental compensation to the units of conservation. And, preferably, to the protected areas of integral protection” (BECHARA, 2007, p. 295).

As a result of this limitation, what is observed is that the public administration is obliged to apply the whole financial amount disbursed by the entrepreneurs in actions that, possibly, may not produce, among the possible scenarios, the ecological services able to provide the greater environmental quality observed in a given locality. Therefore, because it does not observe the criterion of the preponderance of the local interest, it is questioned:

[...] if environmental compensation should be limited to the creation and implementation of conservation units, considering the possibility of providing environmental gains to the community affected by the damages, by many other mechanisms, such as reforestation of degraded areas and remediation of contaminated areas (of course, when it is not possible to identify the polluter since, in this case, reforestation or remediation will have to be promoted exclusively at their expense and not at the expense of the compensation resources) (BECHARA, 2007, p. 296).

In another perspective, Paulo Affonso Leme Machado (2013, p. 978) also criticizes the exclusive application of resources in conservation units, noting that “the payment or the monetary contribution created does not reach all the fields under the effects of the activity”, since “pollution of water and air, noise pollution, soil pollution through waste and agrochemicals are not covered by the compensation to be paid”.

Of course, the environmental quality of a given ecosystem or region is not limited to the creation and maintenance of protected areas. Without overlooking the great importance that the Federal Constitution gave to protected areas, these do not summarize all the ways to seek ecological balance. However:

from the legal point of view [...] an option was made. In other words, starting from the observation that investment in protected areas would be an adequate (although not unique) way of compensating for the evils generated by a degrading work or activity, the legislator decided to channel the compensation for this purpose (BECHARA, 2007, p. 296-297).

Marília Passos Torres de Almeida, quoted by Erika Bechara, disagrees with this model, “who prefers the formation and maintenance of

‘isolated islands of conservation’ rather than promoting the restoration of a diverse good but with ecological functions equivalent to the damaged one” (TORRES, 2005, p. 324; BECHARA, 2007, p. 297).

Thus, while recognizing the unique importance of environmental compensation established by Law 9.985/2000, which plays an important role in the preservation of large territorial extensions, it is advocated to improve it by increasing the incidence hypotheses and resources. As well remembered by Mauricio Mota:

the complexity of the concept of environmental good, its holistic character, will give rise to new solutions of Law. Having overcome the understanding of the environment as *res nullius* and revealed the insufficiency of the simple public patrimonialization without control of the management on uses of the environmental good, it is now necessary to rethink it from its scope, its function, protecting it in view of its purposes (MOTA, 2015, p. 801).

In view of all of the foregoing, it is understood that the envisaged improvement could be brought about by the exercise of the powers attributed to the municipalities by the Federal Constitution of 1988.

That is, municipal environmental compensation, when it is instituted, besides representing an extension of the protection offered by Law 9.985/2000, should allow the municipality, in the exercise of its administrative competence, to define the most efficient way of allocating financial resources, always with a view in producing the environmental benefits that best represent the local interest.

## CONCLUSION

Environmental compensation can be understood, in the broad sense, such as the replacement of an injured environmental good with another of equivalent ecological value. It is an institute applied in a subsidiary form, whenever the preventive measures prove insufficient to avoid harmful action and prove the impossibility of restoring the ecological services previously provided by the damaged environmental good.

It also represents an important mechanism for internalizing the environmental costs of ventures that cause negative impacts that can not be mitigated. That is, some activities, although tolerated because of the social benefits they generate, should, in accordance with the polluter/user

pays principle, apply part of their budget to the benefit of the environment.

This measure aims to prevent the unrestricted appropriation of environmental capital by private individuals, with the environmental externalities borne exclusively by society. In this way, economic development is allowed, while at the same time the maintenance of the ecological balance is pursued, as recommended by the Federal Constitution of 1988.

Law 9.985/2000, through its art. 36, inserted environmental costs into economic planning activities that negatively and significantly affect the natural environment. It chose the federal standard to use the irreversible negative environmental impacts identified in the environmental impact assessment phase, which should be in the form of EIA-RIMA, as a criterion for quantifying the financial resources to be allocated for the creation and maintenance of units of conservation.

The option of the legislator was clear when allocating the resources collected exclusively to the National System of Conservation Units. Therefore, it sought to give concreteness to the constitutional provision that fits to the Public Authorities “set in all of the Federation, territorial areas and its components to be specially protected” (CF/1988, art. 225, § 1, III).

Law 9.985/2000 is a general rule of observation obligatory by the states and municipalities, but it lacks regulation within the scope of their respective competences, which must adapt it to their regional or local needs, being forbidden the edition of a less restrictive norm. It has the legal nature of an economic instrument deriving from the user/polluter pays principle, and has its constitutionality recognized by the Federal Supreme Court, by densifying the user-pays principle, functioning as a shared assumption mechanism of social responsibility for the environmental costs derived from economic development activity.

Therefore, as a federative body competent to legislate and act administratively in environmental matters, the municipality must, in order to demand the exemption set forth in art. 36 of Law 9.985/2000, regulate it internally. However, in the defense of local interest, it may supplement the federal standard, and expand the hypotheses of compliance of the obligation. This increase can be due to the requirement of ecological compensation for non-mitigable impacts of any magnitude, as well as the admission of several methods of environmental impact assessment, and not exclusively EIA-RIMA.

In spite of the possibility of compensating for irreversible impacts of any magnitude, the option contested by the present work is regulation of the requirement for those projects that, although they do not match those exemplified in art. 2 of Conama Resolution No. 001, of January 23, 1986, produce impacts with consequences sensitive to the quality of the natural environment, being placed in an intermediate position in the scale of ventures potentially harmful to the ecological conditions of its area of influence. This is what we have come to call non-mitigable impacts of medium magnitude, whose conceptualization must be subject to regulation, with a view to reducing subjectivities when classified by the environmental body.

In addition, the option to extend the requirement to the impacts of low and medium magnitude passes through the manager's evaluation about the several variables that influence the legislating activity of the municipality. Possibly, from a more pragmatic point of view, a possible proposal for the institution of environmental compensation for low-magnitude impacts will be interpreted as excessively restrictive by the political class and productive sectors of the municipalities.

What is not to be forgotten, however, is that, although it is desirable that any irreversible environmental impact be duly compensated, the edition of municipal law intended to create mechanisms to compensate damages of medium magnitude represents a great advance in the management and conservation of local natural resources.

Finally, it is concluded that resources from municipal environmental compensation for medium-magnitude impacts are destined to restore the ecological functions essential to nature conservation and the healthy quality of life of the population, and not exclusively for the creation and maintenance of conservation units.

Just as the federal legislature opted to privilege the National System of Conservation Units, it is for the municipality, in the exercises of its constitutionally mandated legislative competence, to define the possibilities of applying the resources, as long as they directly benefit the natural environment.

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