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ENVIRONMENTAL CONDUCT ADJUSTMENT AGREEMENTS IN AMAZON

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ABSTRACT

This research evaluated the repairing, preventing and compensating effectiveness of environmental conduct adjustment agreements proposed by states publics prosecutors. Hence, this study focused on verifying whether commitments undertaken by prosecution agencies have been able to reverse or at least minimize damages to the environment. For this, three conduct adjustment agreements were gathered for documentary analysis, being two from Amapá state and one from Pará state; both regions are within the eastern Amazon. These lands lie in the far north of Brazil, wherein the history on timber harvesting and environmental damages have been remarkable for decades. In two of the cases, terms were consistent with constitutional rules and environmental principles, setting deadlines for implementation of obligations and designation of agents who could assist in compliance of targets beyond the public prosecutor, highlighting causes of repairing nature. In the latter case, it was observed prioritization

by different compensation solutions other than the ecological equivalent, featuring a low educational effect of the agreements, besides the lack of plans for environmental damage recovery.

Keywords: Conduct Adjustment Agreement; Environmental Protection; Public Prosecutor.

TERMOS DE AJUSTAMENTO DE CONDUTA AMBIENTAL NA AMAZÔNIA

RESUMO

Este trabalho analisa a efetividade reparatória, preventiva e compensatória dos Termos de Ajustamento de Conduta Ambiental propostos por Ministérios Públicos Estaduais. Objetiva-se verificar se os compromissos ajustados por órgãos ministeriais apresentam potencial para reverter ou minimizar danos ao meio ambiente. Foram selecionados três termos de ajustamento de conduta para análise documental: dois do Estado do Amapá e um do Estado do Pará, ambos localizados na Amazônia Oriental, extremo norte brasileiro, cujo histórico de exploração e danos ambientais caracterizam a região, há décadas. Em dois dos casos as cláusulas foram coerentes com as normas constitucionais e princípios ambientais, com fixação de prazos para o cumprimento das obrigações e indicados agentes que pudessem auxiliar o cumprimento do acordo para além da figura do Ministério Público, destacando-se cláusulas de natureza reparatória. Em outro caso, restou evidenciado a priorização por soluções compensatórias diversas do equivalente ecológico, caracterizando pouco efeito pedagógico dos acordos e reversão dos danos ambientais.

Palavras-chave: *Termo de Ajustamento de Conduta; Proteção Ambiental; Ministério Público.*

INTRODUCTION

In the world scenery the word Amazonia is synonymous of natural wealth and abundance, attracting the greed of large companies eager to explore its biodiversity and economic potential. The occupation of the Amazonian territory since its origins has been remarked by the environment degradation with every consequences from the disrespect against men and nature rights, which support all the ailment arousing from the capital aggressiveness, marking what Loureiro (2009, p. 39) calls "the contrast of the misery of the richest natural region on the planet".

Due to tax privileges bestowed by the federative bodies, great enterprises settle in Amazonia generating considerable liability, arising from the damages caused by their activities. Because of this vision of implemented development by the Brazilian government, the States of Amapa and Para, which are part of the Oriental Amazonia, in the extreme northern part of Brazil, have been stages of implementation of great projects and economic activities from where followed perennial environmental damages (LOUREIRO, 2009).

In disarray with the enterprises advance and the complexity of damages, the public competent organs, which were responsible for the environment protection, are still seeking means to enhance the effectiveness of the environmental protection instruments.

The Brazilian environmental Law has a number of legal instruments capable for the environmental protection, however some do not achieve their finality due to the procedural and burocratic-administrative ties in which they are involved, and, therefore, the environment suffers successive damages, not rarely with irreversible losses due to the time lapse between the lesion occurrence and the moment of the effective legal determination.

Among the legal protection instruments for the environmental goods it is worth mentioning the Term of Adjustment of Environmental Conduct, which can be handled by the environmental organs responsible for the control and fiscalization of activities that can degrade the environment quality, aiming at agreements to repair and recover damages caused by the enterprises.

This way, considering these agreements relevance and purpose, in this article we shall analyze if the Terms of Adjustment of Environmental Conduct, signed by the Public Prosecutor's Office/Ministério Público of

the State of Amapa (MP/AP) and by the Public Ministério Público of the State of Para (MP/PA) are covered with clauses that assure the effective reversion of the environmental damage, upon the aspects of prevention, repair and compensation.

At this point, the issues to be developed in the research arose from the questioning as

follows: Is it possible to declare that the terms of adjustment of environmental conduct proposed by both the Public Prosecutor's Offices of the States of Amapa and Para have effectively contributed for the repair of the environmental damages caused by large enterprises with great economic power?

The study was based on authors as Akaoui (2010), Araújo (2011), Bastos and Brito (2008), Fernandes (2008), Leite and Ayala (2011), Mazzilli (2006) and Rodrigues (2010), which highlight the relevance of the conduct adjustment for repairing damages to the environment, but criticize its proliferation in environmental matters with primacy of compensatory clauses, with no results control, thus justifying the need for analyzing the effectiveness of the reparatory clauses.

With this parameter, as the States of Amapa and Para belong to the Amazonia territorial space characterized by the presence of large enterprises of economic exploitation with negative environmental reflexes, it was sought to analyze with their respective Public Prosecutors' Offices, organs with competence, among others, of protecting the environment recognized as a fundamental human right, working with the clauses of environmental protection in the signed terms of adjustment.

In order to establish a time-cut to support the arguments put forward, and considering the data accessibility, the terms that had most institutional repercussion in the period from 2007 to 2012, were analyzed - at the end remaining the analyzes of three agreements, one from each State which had large economic groups as compromisers. These documents were accessed, with the due authorization, in the databases of the Attorney General's Offices and the Operational Support Center of the Public Ministries of Amapa and Para.

Thus, the aim is to analyze the clauses of the Terms of Adjustment of Environmental Conduct signed between the Public Ministry of the Environment, Agrarian Conflicts, Housing and Town Planning of the Comarca of Macapa and the Commissary Faculty of Macapa and the Term of Conduct Adjustment signed between the Public Ministry of the State of

Para, Attorney General's office of Barcarena and the compromisers Imerys Rio Capim Caulim S/A, and, by means of qualitative analyzes, evaluate its reparatory effectiveness to the environmental protection.

1 STATE DUTY FOR ENVIRONMENT PROTECTION

In the post-World War II period, the International Law old concepts, which prioritized the protection of the State while sovereign, gave way to the recognition within the international ambit of the human being as subject of fundamental rights, which can invoke for their protection a range of international legal instruments (ALEXY, 2008).

In this scenery, as an important instrument of defense of the fundamental rights, gain strength the growing dialogue between two great topics of the globality, the human rights international protection and the environment international law, a joint study that enable to understand the globalization reflexes on the defense of fundamental rights.

In the Brazilian legal system, the 1988 Federal Constitution (CF/88), in its article 225, attributes to the public power and to the society the duty of protection to the environment ecologically balanced, linking them to the stabilization and prevention of the framework of risk and ecological degradation, thus contemplating the modern Constitutional Theory that advances towards the sedimentation of a Socio-environmental State of Law, from which the segregation of the fundamental rights into categories is no longer conceived, as they are correlated and complement each other, so as to legitimate the right to the healthy and quality environment as fundamental right necessary to enable health, life, housing, etc.

Indeed, the constitutional norm recognized that the framework of environmental destruction puts at risk the very human existence, as well as the assumptions for a decent life depends on the environmental balance to safeguard a healthy quality of life, which must be protected by the public power and the society.

Thus, the duty of environmental protection transcends the man as subject of rights and contributes for the totality of the ecosystem lives, in the search for the much desired environmental balance, requiring the public power and the community to act attentive, proactive and vigilant to assure that the current and the future generations enjoy an ecologically balanced environment.

Therefore, the recognition of the duty to protect the environment

as fundamental right, introduced as value in the CF/88, makes its implementation to become a goal and a state task, by means of administrative and legislative measures concerning the ecological protection, both in its objective dimension and in the adoption of public policies, and it is not limited to the exemplificative duties within the constitutional mark.

Thus, in its action, in the light of the precautionary principle, the State must act so as to avoid the risks considering that the environmental protection is a duty. In this sense, if actions are not implemented to assure a balanced and healthy environment, the State-Judge can be activated to correct the detected violences. Furthermore, all the constituted state organs should observe the constitutional matrix rule and seek, quickly and efficiently, fast and practical solutions to prevent and repair environmental damages, in order to assure effectively the protection to the fundamental right to the ecologically balanced environment as posed ion the article 225 of the 1900 Federal Constitution.

1.1 The Public Ministry and the duty of environment protection

The Public Ministry (MP), according to the Brazilian constitutional disposition (art. 127, *caput*), has the mission to act in defense of the democratic order and the community rights. Currently, its recognition is indisputable in the defense of the fundamental rights, such as the ecologically balanced environment and the healthy quality of life, noting that its action is not restricted to monitoring the laws accomplishment, but the duty to make it effective in the Socio-environmental State of Law.

Moreira (2004), dealing with the MP legitimacy to act in the environmental area, recognizes the difficulties in face of complexity of the ministerial assignments and assures that

> The function, of the prosecutor of the Law and defender of society is extensive, complex and relevant, only comparable to the extension of the responsibilities on the shoulders of the Public Prosecutor, in charge of promoting and carrying out – which does not dispense vocation and sacrifice - a vast mission that simply written, with few words, in the cold legal instruments [....] Such a mission requires not only the obligation of the representative of the Public Prosecution Offices in the judicial proceedings, as well as outside of these, in administrative matters. This is why its representatives must be always dynamic, ready to intervene wherever there is violation (MOREIRA, 2004, p. 46).

Focusing its action in the environmental field it is imperative to recognize that the characteristic interdisciplinary of the Environmental Law (RUBES, 1999), in face of the convergence of diverse areas of knowledge, requires the search for a constant improvement and the recognition that the lack or rejection of the due technical or normative support can lead to the inefficacy of the action instruments management.

It is clear that the MP has a relevant role in the protection of the fundamental right to the ecologically balanced environment, and should take the defense of this important case with the adoption of every regulatory, technical, administrative and procedural cautions to assure the effectiveness of its instruments of action in environmental matters. According to Teixeira (2000, p. 15) "(...) the environmental degradation puts to risk people's right to life and health, whether individual and collectively considered, as well as the very perpetuation of human species".

Grau (2003) tells that it takes much more to accomplish Justice than the cold analysis of the Law. According the author

> to apply the Law is to make it effective. Saying that the Law is immediately applicable is to assume that the precept in which it is registered is self-sufficient, that such precept does not claim – because does not depend on it – any legislative or administrative act that precedes the decision in which its effectiveness is consumed [...]. Precept immediately applicable links, in the last instance, to the Judicial Power. Denied by the Public Administration, the Legislative Power or by private citizens its application, it is up to the Judiciary to decide by imposing its prompt effectiveness (GRAU, 2003, p. 313).

Piovesan (1997) asserts that the rule of art. 5º, §1º, of the CF imposes

> [...] to the Public Powers to give maximum and immediate effectiveness to any and all precept defining fundamental rights and guarantee. This principle intents to assure the guiding and linking force of the fundamental rights and guarantees, that is, turn rights into prerogatives directly applicable by the Legislative, Executive and Judiciary Powers (PIOVESAN, 1997, p. 64).

More than a state agent from the legal area, restricted to to the disciplinary academic, contents, the environmental dynamics requires from a member of the Public Prosecutor's Office(MP) the incessant search of

the respect to the interdisciplinary normative and technical aspects with the social justice, since many solutions for environmental issues are not explicitly found in the juridical handbooks or in the current law, and end by emerging from unprecedent concrete cases, requiring attention to adopt the action instrument, most efficient to the aims of the fundamental rights.

Therefore, it became imperative to take the reflection of the ministerial action from the

Socioenvironmental State of Law, which demands and action increasingly integrated, not only upon the institutional view, but also of the pursuit of social participation, as the failure to this view would bring structural changes in the ways the legal action instruments are conceived, defined and implemented by the State, with the awareness of dealing with a fundamental right whose protection serves the survival of the current and the future generations.

Leite and Ayala (2011, p.35-38) declare that

> Strengthening the material *status of* the fundamental right to the ecologically balanced environment in the infra-constitutional laws, the increasing environmental disasters created by a risk society, and the Law ecologization require an emergency change of the State role.

Hence the need for laying foundations that shall sustain the conception of the Socioenvironmental State of Law, whose highest objective is to seek the harmonization between the legal, social and political elements in order to achieve the satisfaction of the human dignity at the same time that also guarantee a balance in the environmental condition.

To Canotilho (2004) three are the essential assumptions for the building the Environmental State of Law: 1) adoption of an integrated conception of environment; 2) the institutionalization of the fundamental environmental rights; 3) the administration integrative action.

Thus, it is noted that, without relinquishing its functional independence, the member of the Public Prosecution Office must adjust its action in the search for the effective environmental reparation. In this context relevant consideration is registered by Rodrigues (2010), when asserts that

> [...] it must be recognized that it is hard to walk the balanced path of the serious and consistent action without succumbing to the media spotlights, to the exacerbate

> personalism, to the puerile messianism. Therefore we must overcome, as much as t possible, the personal references and construct an institution with routines and rules that may provide the effective exercise of the most relevant constitutional attributions, always within the principles and observing constant dialogue, when possible, with the other political actors. (RODRIGUES, 2010, p. 62).

It is not a matter of questioning the constitutional principle of the functional independence of the member of the MP, which assures to its components to act according their own convictions before the concrete case, but to seek to conciliate with the principle of the unit, to design systematized institutional actions seeking to strengthening this unit and, in case of conflict between these principles, to ponder before the concrete case in order to define which one shall prevail (ALEXY, 2008), so as the instruments of action are perfected from the point of view of the institutional unit.

The homogenization of the ministerial actions, as well noted by Akaoui (2010), do not imply mitigation of the principle of functional independence of the MP members, and the author highlights that the action should be "responsible, so as not to allow the degradation agent or the one who allows the existence of the risk of damage be exempt of accomplishing its legal obligations, now stamped in the commitment of conduct adjustment." (AKAOUI, 2010, p. 124). And the author completes that

> The action of the Public Prosecutor in disagreement with the legal determination generates true discomfort to the class, as it can be questioned by the community, mainly through nongovernmental organizations due to a misconduct, leaving Arguments for the degradation agents, in the sense that they might have been treated with inequality, by one and another organ of the institution (AKAOUI, 2010, p. 124).

There fore, as a contribution, with no pretension of finishing the reflections on the matter, the duty of environmental protection, now focused on the MP/PP, requires the recognition by its members that they must set their actions in the environmental field based on the three construction elements of the Socioenvironmental State of Law mentioned by Canotilho (2004), as a corollary tom strengthen its instruments of action.

2 THE TERM OF ENVIRONMENTAL CONDUCT AJDUSTMENT

The term of environmental conduct adjustment appeared in the historical period of redemocratization in Brazil, as an instrument to face the demands of mass society, in which the new rights gained relevance in the legal social scenery, claiming for quick solutions for the conflicts emerging as a challenge to the power of the state for protection of the trans individual rights.

Among the instruments of legal protection of the environmental goods stands out the Term of Environmental Conduct Adjustment that can be managed by the environmental organs in charge of the control and monitoring of the activities susceptible of degrading the environmental quality, aiming at agreements to repairing and recovering damages caused by the great enterprises. Thus, in face of a threatening or violating activitiy for the environmental goods, agreements can be made to avoid or remove the breach conduct. According the CF/88, in the art.225, §3rd, repairing must be integral, and the clauses in the conduct adjustment aim at the readjustment of the conduct harmful to the current legal system, designing all the viable measures for the effective and integral protection to the environmental good under protection. As it deals of the protection of an unavailable right, the policy-making organ cannot compromise on the extent of the duty to prevent or repair the threatened or violated good, and it is prohibited the total or partial waiver of the legal duties by the person causing the loss.

So, the adjustment must correspond to the satisfactory prevention or integral repair of the environmental good, restrict the clauses to the form, time and local conditions of the accomplishment, abstaining the taker organ from resigning legal duties contemplated in the legal order to the detriment of the interests of the collectivity, containing clauses of do, not do, give or indemnify, necessary to prevent or repair the damage.

The term of adjustment of conduct cannot be imposed to the compromiser, as it depends on its previous manifestation of Will. There must be two distinct but coincident, reciprocal and concordant assumptions about the conclusion of the adjustment term, that is: that from the public organ, that manifests its will not only at the time of celebration of the agreement but also at the fixation of the obligations accomplishment; that from the compromiser, who manifests its agreement to undertake to adjust its conduct to the requirements of the law.

2.1 The Term of Adjustment of Environmental Conduct and the Public Prosecution Office (Ministério Público)

The environmental dynamics requires an extrajudicial action from the member of the MP (Public Prosecution's Office) in a new institutional profile, as in face of the primacy of the fundamental right and the imminence of the violation of the right, the solution must be current and effective to solve the growing environmental degradation.

The MP/Public Prosecutor Office immediate action can prevent the outbreak of future lawsuits. Therefore, the Prosecutor must be always attentive for the environmental issues. Rodrigues (2010, p. 73.) calls the attention to a "silent revolution", which occurred in the role of the ministerial action concerning the functions carried outside the judicial scope, highlighting that the extrajudicial action often can culminate not with the writing of court papers, but crystallize into intense work in the search for the best solution to correct violation of rights, such as: collection of statement terms, carried inspections, documents request and other inquiries.

In face of threatening or occurrence of environmental damage, priority should be given to prevention or repairing. It occurs that under the impetus of obtaining a rapid response, one notices the multiplication of terms of adjustment of conduct with no control of qualitative outcome concerning the effective damage repairing in the environment.

Upon this perspective shall be analyzed the terms of adjustment signed in the Prosecutor's Office of the States of Amapa and Para, in which the compromisers are from great enterprises that practiced acts of environmental degradations, with clauses that assure the effective damage repair.

2.2 Normative Dispositions on Terms of Commitment of Conduct in the Public Ministries of the States of Amapa and Para

First, it is noteworthy that the Public Ministry of Amapa and Para, through administrative acts, in case, Resolutions from the respective Colleges of Prosecutors, have sought to discipline and delineate the use of the terms of adjustment of conduct, both in the procedural aspect and in its contents. It deals of setting parameters for their adoption, requiring

obligatory clauses that assure their efficacy, as the excessive use of this instrument, with no institutional discipline at all, could generate its banalization as a way to avoid the judicial process, with no qualitative return to its management.

The § 6º of art. 5º of the Law n.º 7.347/1985, disposes: "The legitimate public organs can take from the interested persons the commitment of adjustment of their conduct to the legal requirements, through commitments, which shall have the efficacy of extrajudicial executive titles" (BRAZIL, 1985). From the matrix rule, the Resolutions in the MP/AP and MP/PA were edited, to the discipline and uniformity of heir members actions.

Resolution 001/2012 from the College of Prosecutors of the MP/AP, from 21 May, 2012, disciplined the extrajudicial procedures within this institution, providing in the Chapter IV about the Commitment of Adjustment of Conduct. In the State of Pará, the Resolution 0010/2011 from the College of Prosecutors of the MP/PA, from 30 June, 2011, disciplined the procedures about the Commitment of Adjustment of Conduct, in the Section V.

3 THE TERMS OF ADJUSTMENT OF CONDUCT EFFECTIVENESS CELEBRATED IN THE PUBLIC MINISTRY OF AMAPA AND PARÁ

Terms of adjustment of conduct of cases with social repercussion were collected in both States, reason of their emphases in the current study, such as: a) the environmental impact from the construction of the União de Faculdades do Amapá (FAMA), in the vicinity of the Lagoa dos Índios, in Macapá-AP, with analysis of two terms, by joint liability, and b) the leak of liquid rejects dammed in the Tailing Ponds of the Imerys Rio Capim Caulim S/A, which caused environmental pollution in the water of the igarapes Curuperê e Dendê and Praia de Vila do Conde, environmental preservation areas in the municipality of Barcarena, in Pará.

From the documental delimitation, the analysis of the clauses of the respective terms of adjustment will be carried out, with the scope of subsidize the analysis concerning the reparative scope coming from the adoption of the institute, so as finally to confirm whether the analyzed adjustments have contributed or not for the reparation of the environmental

damage caused.

The terms of commitment to be analyzed are three, as follows: a) Term of Adjustment of Environmental Conduct signed between the Environment Public Ministry, Agrarian Conflicts, Habitation and Urbanism of Comarca de Macapá-AP and the Compromiser FAMA; b) Term of Adjustment of Environmental Conduct signed between the Environment Public Ministry, Agrarian Conflicts, Habitation and Urbanism of Comarca de Macapá-AP and the Compromiser Luk Comércio e Representações Ltda. and c) Term of Adjustment of Environmental Conduct signed between the Public Ministry of the State of Pará, the Public Prosecution Office (Promotoria de Justiça) of Barcarena-PA and the Compromiser Imerys Rio Capim Caulim S/A.

3.1. Case study 1: degradation of the Lagoa dos Índios, in Macapá-AP

In the current study, the term of adjustment of conduct signed due to the environmental degradation of the Lagoa dos Índios was highlighted, as this is a "ressaca" area of the hydrographic basin of the igarapé Fortaleza, limits with the municipalities of Santana and Macapa, in the State of Amapa.

The "ressaca" areas, according to the Master Plan of the Municipality of Macapa (Plano Diretor do Município de Macapá), Complementary Law n. 026-2004/ PMM (TOSTES, 2006), are understood as the natural water reservoir areas, with a rich and unique ecosystem that suffer the temporary influence of the tides and the rain. They are considered areas of permanent environmental preservation, according to the Law n. 835, de 27 May, 2004, of the State of Amapá, which disposes about the territorial reordering, economic use and Environmental management of the "ressaca" areas (AMAPÁ, 2004).

In addition of being an area of permanent preservation, Lagoa dos Índios is considered a natural patrimony as it houses in its territory a remaining quilombola community in Macapá-AP, so as the use of the natural resources has changed the meaning. It ceased to be only for the survival of the community, to become property of private economic usufruct suffering much influence from entrepreneurial ventures and housing development after the construction of the Rodovia Duque de Caxias, such as the building and installation of a private college.

Lagoa dos Índios is the stage of a negative reflection of the capitalism advance in Amazônia under the justification of the economic development, in which the human action, marked by a messy urban occupation, caused irreparable environmental damages, according Tostes (2006).

It is noted that environmental impacts caused by the urban expansion in the area affect the Lagoa dos Indios ecosystem and the human being itself, as in the description of Bastos and Brito (2008, p. 22-23):

> To measure the negative impacts in the area of the Ressaca Lagoa dos Índios, SEMA and IEPA, prepared a diagnosis, where is shown that the intense
> occupation around the Lake and from the emission of debris is occurring a significant increase of organic matters that facilitate the formation of poisonous gases, as methane and sulfur, that kill fish and make the water prohibited for human consumption (process of artificial eutrophication of the Lake). It was noted
> immense sedimentation in the Lake caused by the atrophic action, landfill and the presence of macrophyte vegetation, which make difficult the sun rays penetration into the water. Due to this process, there is a break of the ecosystem stabilization, causing imbalance between production of organic matters, the consumption and the disposal of all types of waste.

Initially, the MP/AP, finding the existence of environmental damage, based on the Technical Police Expert Report 1.212/2006, filed a criminal action against the legal entities Luk Comércio e Representações Ltda., União de Faculdades do Amapá and Y. Yamada S.A. Comércio e Indústria, due to the repeated non-compliance with the adjustment of conduct signed in 2004 with the Secretaria de Estado do Meio Ambiente do Estado do Amapá.

The Report. n. 1.212/2006 described the damages found as: "the physical, chemical and biological degradation in the western part of Lagoa dos Índios" (NEVES, 2014, p. 84); an installation of open dump; the landfill of areas along the Lake margins; the suppression of the native vegetation and the swage discharge directly in the swamp region – responsible by the bacterial proliferation and reduction of the habitat of fish and other species of fauna and flora.

For legal reasons, the company Y. Yamada S.A. Comércio e Indústria left the area of liability, and the action continued in face of the other defendants, who signed, each one, the term of adjustment of conduct

that are the object of analysis in the current study.

3.1.1 Term of adjustment of environmental conduct signed between the Environment Public Ministry, Agrarian Conflicts, Housing and Urbanism of the Comarca de Macapá-AP and the compromiser FAMA

The Term of Adjustment of Conduct signed between the MP/AP and the União das Faculdades do Amapá contained ten clauses. It was prepared containing provisions about general norms, object delimitations, nature of the obligations, inspection, deadlines for compliances, sanctions and fines for non-compliances, and concluding with final provisions. Among the clauses, the second, the third, the fourth, the fifth, seventh, eighth and ninth will be analyzed.

The second clause delimited the object, that is: negotiation about the adoption of procedures that aim at the environment conservation and preservation, specially the area of the ressaca Lagoa dos Índios. This provision links the construction to the other clauses with focus on the conservation and preservation of the environment, considering that the Report n.º 1.212/2006 found damages which had as cause the compromiser's commercial activities..

It was expected that, according the constitutional guidelines on integral reparation, the clauses would focus on the recovery of the degraded area, which did not occur. As the third and fourth clauses contain to do and not to do obligations with compensatory purposes with no links with the ecological equivalents.

In the third clause, a not to do generic obligation was determined with a prevention connotation in the terms where the compromiser assumed the obligation of abstaining from exercising any harmful activities or which could cause any kind of environmental degradation to the environmental preservation area Lagoa dos Índios. Based on the Report n.º 1.212/2006, there would already be subsides to indicate the major abstentions that the compromiser should accomplish to mitigate the environmental impacts, which was not seen in the mentioned Term.

In the fourth clause, with the purpose of extinguishing criminal penalties, that required the effective environmental recovery, obligations of to do were established as follows: a) the production, edition and distribution of 20.000 (twenty thousand) booklets on environmental education, for the

preservation and conservation of the area Lagoa dos Índios, b) production and edition of an educational film, in DVD, with 200 (two hundred) copies, to be used during environmental education campaigns by the city hall Prefeitura Municipal de Macapá, c) make available two teachers, for a period of 4 (four) years, to develop projects for the environmental management and preservation of Lagoa dos Índios, and d) make available five full scholarships for poor people from the Quilombola Community located around the Lagoa dos Índios, for the existing graduation courses at FAMA, for all the course duration, independently of the signed Term period of validity.

As provided in the fourth clause, the conditions for the conditional suspension of the judicial proceedings required effective evidence of the environmental damage recovery, which was not made feasible in the provided obligations that were limited to indicate compensatory obligations, diverse from the ecological equivalents, that do not meet the constitutional requirements of preservation and restoration of the environmental *status quo*, what in this specific case would be possible with the removal of the irregular buildings.

In the fifth clause, it was established that the supervision of the compliance with the adjustment of conduct, was in charge of the MP/AM, that would carry out the inspection and execution of the agreement, with personal inspections to be reported in recorded memoranda, with the adoption of the applicable legal measures (AMAPÁ, 2007a). For the purpose of effectiveness, it is understood that this would be a timely opportunity to insert intervenient agents, who could assist in supervising the compliance with the term of adjustment, with inclusion of representatives from the governmental and non-governmental organs.

In the Term under analyzes, there was no stipulation of deadlines for the fulfillment of each obligation, only the seventh clause set a general term for the accomplishment of the obligations, that would be 2 (two) years, "with possibility of extension for equal period, since duly agreed and justified, according to the provisions in the article 28 of the Law n.º 9.605, of 12 February 1998, combined with the article 89 of the Law n.º 9.099, of 26 September 1995" (AMAPÁ, 2007a, p. 4). Probably the previously setting deadlines would render the liability of the obligations more transparent, and the estimate social and environmental impact would have greater effect.

The clauses eighth and ninth provided respectively about the

sanctions and penalties in case of non-compliance, related to the revocation of the benefit of the conditional suspension of judicial proceedings with immediate continuation of the Criminal Public n.º 4.089/2007 and filling the competent enforcement action, in addition to the daily fine of R$ 5.000,00 (five thousand reais), which could be exigible jointly with the other obligations, until the full accomplishment, and with no prejudice to the specific enforcement by third parties, except for duly justified reasons. Here it is worthy to highlight that the fine seems not to be in line with the compromiser economic capacity, which can minimize the expected pedagogic effect.

Thus, regarding the adjustment of conduct under analysis, one can perceive that:

1 – The clauses are not coherent with the constitutional norms and environmental principles, under the perspective of safeguard of the right to the ecologically balanced

environment;

2 – The absence of fixed deadlines for the compliance with the obligations contrasts with the need for a quick response to the proven damage, given that this leaves to the

Compromiser's discretion the time for the compliance along a two-year period.

3 – The primacy of the obligation to do with compensatory connotation diverse from the ecological equivalent does not meet the legal reparatory purposes, as the choice of actions turned exclusively to environmental education, reaching a reduced number of people, does not have the power to enhance the protection of the ecologically balanced environment for the current and the future generations.

4 – There was no relation of the agents that could assist in the supervision of the compliance with the Term of Adjustment of Conduct, being this function restricted to the MP/AP.

Thus, there is no effectiveness of the Term signed between the MP/AP and the FAMA compromiser, considering the deficit of reparatory clauses and the primacy of the compensatory ones.

Therefore, it is worthy to analyze, trying to speed up the ministerial organ, whether the Terms effectiveness is not impaired to the effect of preventing the conscious practice of the environmental degradation in Brazil. The agreement respects the constitution environmental principles, not simply by compensation, but by effectively repairing.

3.1.2 Term of Adjustment of Conduct signed between the Environmernt Public Ministry, Agrarian, Conflicts, Housing and Urbanism of the Comarca de Macapá and the compromisers Luk Comércio e Representações Ltda.

The Term of Adjustment of Conduct signed by the MP/AP and Luk Comércio e Representações Ltda., contained ten clauses. Among its issues, the Term recognizes that the compromiser is the owner of several buildings in the region, indicating that the company is the owner of an area located around the Lagoa dos Índios, where he has built several improvements and has developed varied economic activities, included real state rentals located there. In this aspect, the Term highlighted that the compromiser's activities coming from the work carried out in the location caused environmental damages to the Lagoa dos Índios, and hence the Term imposes obligations to the compromiser.

The Term was prepared containing provisions on general norms, setting the object, obligations, supervision, deadlines for compliance, sanctions and fines for non-compliance and concluded with final provisions. From these clauses, we will analyze the fourth, as the others are reproduction of those in the previous term of adjustment.

In the fourth clause the Term established mandatorily the compromiser to avoid promoting new landfills or new buildings, constructions or any other enterprises in the Permanent preservation strip of land of the Lagoa dos Índios. In this provision it is clear the effective protection of the constitution environmental principles, standing out the prevention, considering that it prohibits actions contrary to the environmental preservation of the local.

Also in the fourth clause, there was the obligation of doing compensatory diverse from the ecologic equivalent, providing that within 180 (one hundred and eighty) days the compromiser should promote the installation of a Health Care Office in the Community Quilombola of Lagoa dos Índios, provided with a dental office and medical professional with minimum working hours of 4h/day, for 12 (twelve) months after the Office installation. According to the Term, the building should be transferred to the Government of the State of Amapa patrimony. This clause intended compensation to the traditional quilombola community that occupied the

area, as a way of minimizing the social impact from the diseases caused by the alteration in the local ecosystem.

The other items in clause fourth, of obligations to do, have a connotation of Reparation in accordance with the constitutional text that prioritizes the reparation of the environmental damage, setting deadlines and legal instruments necessary for complying with the obligations, within an integrated view of the duty of environmental protection, and safeguard for the current and future generations.

Thus, regarding the analyzed adjustment of conduct, one can conclude:

1 – Its clauses are coherent with the constitutional norms and environmental

principles, upon the perspective of safeguard the right to the ecologically balanced environment for the current and future generations. The compensatory clauses of make or indemnify were established exceptionally.

2 – Deadlines for the compliance with the obligations of reparatory nature were established, which enable to follow up their impact on the society.

3 – The only clause with compensatory nature sought protection for the health of the members of the local community directly affected by the environmental damage.

4 – There was no relation of the agents that could assist in the supervision of the compliance with the Term of Adjustment of Conduct, being this function restricted to the MP/AP.

In view of this fact, we can see the effectiveness, partly, of the Term signed between the MP/AP and the compromiser Luk Comércio e Representações Ltda., considering the primacy of the clauses of reparatory nature. Therefore, it is seen that having agreements that impose prohibitions of practices that may change the ecosystem *status*, the Term of Adjustment of Conduct becomes the legal instrument environmentally effective.

3.2 Case study 2: kaolin leak in Barcarena-PA

The Municipality of Barcarena is in the State of Pará, a territorial area of 1.310 km^2; with a population of 99.800 inhabitants, of which 36,43% in the urban zone and 63.57% in the rural zone (IBGE, 2010). Its geography is marked by rivers and islands, with riparian and plain forests

in stretches under the influence of floods, also occurring the mangrove and the Siriuba, bordering the great rivers and the islands of the Municipality, with a warm humid equatorial climate, entering the Amazon region.

During the Military Regime, under the label of development and modernization of Amazônia, enterprises were implemented with industrial projects of ore processing plants in

Barcarena, changing significantly the local economy based on pineapple and flour production and sale. Currently, Barcarena is considered an industrial polo standing out in the sector of aluminum, kaolin and the steel mills.

In this context, stands out the Grupo Imerys, operating in the Municipality of Barcarena, since 1996, through the company Imerys Rio Capim Caulim S/A, with kaolin processing plants in the region and already having caused some environmental accidents.

Among the environmental accidents in Barcarena, we will analyze the one caused by the company Imerys Rio Capim Caulim S/A, which communicated to the public organs of environment al management, on 12 June 2007, a leak in the rejects number 3 (three), located 50 meter from the Industrial Section, where at the time lived about 500 families. The leak has continued for about one day, launching in the environment 300 thousand cubic meters of rejects used in the kaolin production. Part of this material reached the Road that separating the company from the Industrial Section, the igarapés Curuperê e Dendê and the respective permanent preservation areas, as well as the beaches Caripi, Conde and Itupanema, dyeing their waters in white for a whole week, causing damages to the aquatic ecosystems and risks to the health of the local population that used the rivers waters for consumption, hygiene and homework (LIMA et al, 2011).

Due to this accident a Civil Inquiry was installed under number 01/2007 in the 1st Prosecutor's Office, having as preliminary diligences a request for experts report carried out by the Instituto Evandro Chagas and by Centro de Perícias Científicas Renato Chaves. The Instituto Evandro Chagas report, concluded that there were damages for the aquatic life in the affected Rivers, and serious social-environmental impacts for the riverside communities as well as compromising the groundwater of the home wells in the area of the Industrial Section, located in Barcarena-PA. The expert report by the Centro de Perícias Científicas Renato Chaves found that the leak occurred due to the lack of systematic monitoring of the Tailing Ponds

n.º 3.

After the analyzes were carried out in the mentioned Civil Inquiry, to evaluate the extension of the social-environmental damages, finally the term of adjustment of conduct was signed, designing a set o actions to be implemented to verify and compensate the occurred damages, also providing instruments for discussion with the society.

3.2.1 Term of Adjustment of Environmental Conduct signed between the Ministério Público do Estado Pará, Promotoria de Justiça de Barcarena and the compromiser Imerys Rio Capim Caulim S/A

The Term of Adjustment of Conduct between the MP/PA, through the Public Prosecution Office of Barcarena, and the Imerys Rio Capim Caulim S/A, was signed containing seven clauses (PARÁ, 2007).

It should be noted that the compromiser's economic activities originated socio-environmental damages in the local, the preservation areas of the city of Barcarena and, from there, the clauses that define the object, obligations, intervention for supervision, sanctions for non-compliance, compromiser's liability, the necessary communication for publicize and the final provisions were outlined. For the current study the clauses to be analyzed were the first, the second, the third and the fourth.

The first adjustment clause emphasizes that its object/objective is the integral reparation of the environmental damage resulting from the accident. The object definition was in tune with the constitutional text, recognizing reparatory measures, preventive and precautionary, which should be adopted as rule to safeguard the environmental protection.

The second clause described how to achieve the objectives set in the first clause and introduces obligations to do, not to do, compensatory measures and indemnities to correct the damages. These include: a) avoid launching in the rivers, the soil or in the air, substances that can harm the environmental balance, b) prepare an Area Recovery to the Secretaria Estadual do Meio Ambiente to be carried by the compromiser, and c) present plan of deactivation of tailing ponds for at least 03 (three) of the 05 (five) ponds.

Monetary values were required, as compensatory measures and indemnities due to the damages caused, for the creation of benefits that would enable quality of life for the population affected by the accidental leak of kaolin, in a total over R$ 5.202.847,00 (Five million, two hundred

two thousands and eight hundred and forty seven reais).

The third clause provides supervision for the compliance with the obligations as set in the adjustment, attributed to the MP/PA, which regardless of the environmental organs responsibilities, could delegate powers to any official organs at its discretion, and at the compromiser's expenses, provided previous agreement between the parties, with express inclusion of intervenient parties that would aid in the supervision for the compliance with the Term.

The fourth clause provides the sanctions in case of non-compliance with the adjustment, which would be applied regardless of the criminal, civil and administrative sanctions. It is worth to note that the fine in case of non-compliance with the Term, in the value of R$ 100.000,00 (one hundred thousand reais), seems to be in line with the compromiser's economic capacity, what then refers to a pedagogical effect with the sense of accomplishing the commitment in reason of a value that is assumed to have an impact on the company finances, in case of enforcement. Thus, with regard to the adjustment of conduct under analysis, one can conclude that:

1 – The clauses are coherent with the constitutional norms and environmental principles, under the view of the safeguard of the right to the ecologically balanced environment for the current and future generations. It stands out that the compensatory clauses of to do or indemnify were exceptionally established and, even so, they have direct relation regarding the reparation of the socio-environmental impacts.

2 – The deadlines were set for the accomplishment of the obligations to do with reparatory nature, so as to enable the follow up of their impact on the society.

3 – Intervenient agents were included to assist in supervising the compliance with the Term, the function not being restricted to the MP/PA.

Before these facts, the effectiveness of the Term signed between the MP/PA and the compromiser Imerys Rio Capim Caulim S/A is confirmed, considering the primacy of the reparatory clauses. It is worth to emphasize that effectiveness is performed by the obligation of avoiding reincidence of the degrading practices, actually producing environmental balance effects.

CONCLUSIONS

The reflections about the cases that prompted the behavioral adjustments in the current study allowed to confirm that the State omission in preventing activities harmful to the environment still requires more control.

From the point of view of the effectiveness, one can conclude that the analyzed behavioral adjustments fit, only partially, to the constitutional principle of the ecologically balanced environment, as the compensatory clauses are still accepted in cases where the reparatory clauses would rather have been determined.

In two cases the clauses were coherent with the constitutional norms and environmental principles concerning protection and restoration of the ecological processes; there were set deadlines for the obligations fulfillment; besides the MP, agents were included to assist in supervising. However, one of the cases had no clauses of reparatory nature regarding the restoration of the environmental damages with documentary evidence. On the contrary, the adjustment brought compensatory solutions with no effective results linked to the environmental issues

If the Term of Adjustment of Environmental Conduct is one of the instruments of control and supervision of activities susceptible of degrading the environmental quality, aiming at agreements turned to remedying and recovering the damages caused by the Enterprises, it is up to the state legal representative – the member of the Public Prosecutions Office, to make every effort to insert clauses with focus on the environment protection, highlighting its recovery, or in face of the irreversibility, clauses of prevention and compensation environmentally linked.

Thus, it is not enough to recognize the existence of the damage to evoke the environmental protection. It is necessary an integration of the social actors, as in the preamble of the article 225 of the Brazilian Constitution, when it states that it is everyone's duty the environmental protection, in order to extract the maximum effectiveness of the instruments of protection, especially when originating from commitments of adjustment of environmental conduct.

It is still important to emphasize, under a practical point of view, in order to mitigate de damages found by the experts' report, the need for then institutions to promote a qualitative control of their instruments, assuring periodical periods for compliance supervision on behalf of their own actions visibility and transparence.

Therefore, the structure of the Socioenvironmental State of

Law, which recognizes the fundamental duty of environmental protection, inspired in the constitutional principles of prevention and precaution, should be the focus for those who defend the environment as a vital good, using the terms of adjustment of conduct as instrument that not only compensates but effectively repairs.

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