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Public Civil Action: Access
to Environmental Justice in Brazil

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GREEN ACCESS PROJECT II

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Public Civil Action: Access to Environmental Justice in Brazil

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Abstract: This paper aims to trace an overview about the role of the State Public Prosecution Office in the protection of the environment, notably through public civil action. Thus, it is important to note that in alignment with the evolution of the International Environmental Law, Brazil experienced, especially from the 80's, a major boost to the environmental legislation. At the same extent, the legislative improvement was followed by both the equipping and independence of the Public Prosecution Office, which became a fundamental entity for environmental protection. In this regard, the 1985 Public Civil Action Law and the 1988 Federal Constitution are key milestones for the preservation of this common heritage of mankind. Accordingly, important instruments for collective environmental protection have been assigned to the *Parquet*, as the public civil action, the civil investigation and the conduct adjustment agreement. In addition, concepts of pollution civil liability were expanded, fixing accountability objective, *propter rem* and integral. These concepts are analyzed in this paper. Finally, several parts of the text expose the path taken by the Brazilian jurisprudence towards the consolidation of these principles for environmental protection.

1. Initial Considerations.

This article aims at presenting a brief analysis of the Brazilian Public Prosecution Office actions in environmental issues, notably through the environmental public civil action.

The legislative and jurisprudential evolution in Brazil granted both autonomy and independence to the Brazilian Public Prosecution Office, which has ceased to act as an arm of the Government to take a prominent role in defense of society-, and in strengthening the environmental legislation - which have gained prominence and *status* of constitutional provision, preventing attempts of retrogression and safeguarding the environment.[1]

From the conjunction of these two scenarios, the attainment of legitimacy by the Public Prosecution Office, allowing the promotion of public civil action on environmental issues, has enhanced environmental protection, in particular if we consider this institution is responsible for the highest number of public civil actions in Brazilian history when compared to other legitimate authors.

2. A brief account on the development of the environmental legislation in Brazil

The end of the 2nd World War, marked by the explosions of atomic weapons dropped on the cities of Hiroshima and Nagasaki, emerged the need to respond efficiently to human rights' attacks, preserving the humanity. In this context, at the end of the 60´s, the international environmental law arises from the concept of "common heritage of humanity".

In emblematic image, ODUM and BARRET describe that the first pictures of Earth from space indicated, for the first time in human history, how lonely and fragile the planet hangs in the universe, fostering a worldwide movement of environmental awareness along the years 1968 to 1970. [2]

Under the aegis of this international movement, the Decree nº 83.540, of June 4th, 1979, foresaw the filing by prosecutors of civil liability action for damage caused by oil pollution. [3]

In 1981, the Law 6.938, complementing the old Forest Code of 1961 (Law 4,771/61), established the National Environmental Policy which "aims at the preservation, enhancement and restoration of environmental quality conducive to life, to ensure, in the country, conditions for developments in socio-economic areas, in national security and in the protection of the dignity of human life" (art. 1).

In its article 14, §1º, Law 6.938/81 ensures legitimacy for the Public Prosecution Office to propose lawsuit for civil liability for environmental damage, in order to oblige the polluter to indemnify or repair the damage done to the environment and to third parties affected by their activity, regardless of the existence of guilt [4]

Therefore, under the pillar of this legal provision, in 1984, it was proposed by prosecutors the first legal action which culminated in the polluter's conviction for environmental damage, and resulted in an agreement between the prosecution office and the convicted party during the execution phase, setting the payment of multiple installments, with statutory interest and monetary correction. [5] This case was

internationally known as "Passarinhada of Embu", when the Mayor of the Embu city, in the São Paulo State, promoted a social event with political purposes, where the invitees were a barbecue prepared with thousands of birds of the local wildlife. [6]

This was the first successful story ever known - even before the Public Civil Action law enacted only in 1985 – as a civil lawsuit filed by the Brazilian Public Prosecution Office for Environmental Protection in favor of a whole collectivity. PASSOS DE FREITAS recalls:

> "The action in question, which was called ‘action of civil liability for damage caused to the environment’ was, in fact, a kind of *public civil action* under the Federal Supplementary Law nº 40, of 14.12.1981, the old Organic Law of the National Prosecution Service, that presented, among institutional functions of the *Parquet*, the promotion of '*public civil action*'". [7]

Shortly after, in 1985, Law 7.347 expressly assigned the Brazilian Public Prosecution Office – which had emerged in the Criminal Procedures Code of 1832 with attributions restricted to criminal actions -, to promote civil inquiry and public civil legal actions, with the purpose of holding accountable the agents of environmental damages, the consumers, the assets and rights of artistic, aesthetic, historical, and scenic value, goals later expanded through legislative modifications.

In this context, in 1988, the Brazilian constitutional system incorporates the concept of environment as an asset of common use and essential to healthy quality of life, imposing to the public administration and to the collectivity the obligation to protect and preserve it for the present and future generations (art. 225). In addition, among the institutional functions of the Public Prosecution Office, it highlights the function of promoting civil inquiry and public civil action for the protection of the public and social heritage, the environment and other diffuse and collective interests (art. 129, III). This is the first time that a Constitution is concerned with the environment, dedicating a Chapter for its protection in specific and global ways. [8]

It is because of the modern text of the 1988 Federal Constitution that the Public Prosecution Office is elevated to the status of a permanent and independent institution, essential to the jurisdictional function of the State, with the task of protecting the legal order, the democratic regime and the unavailable social and individual interests (art. 127).

In 1990, the Consumer Protection Code (Law 8.078/90) integrates, with the Law 7.347/85 and the 1973 Civil Procedures Code and subsequent amendments, the protection system of collective rights, forming a true micro-system of *collective protection of collective interests*. Important to note that Law 8.078/90 not only established standards for consumer protection, it also introduced systematic procedures for the collective judicial guardianship of any kind of collective right, which includes the environment.

3. Constitutional bases of environmental protection: some concepts

In an innovative way, the Brazilian Constitutional Law, Chapter VI of the Federal Constitution, details provisions on the protection of the environment in article 225, *in verbis*:

> "Art. 225. Everyone is entitled to an ecologically balanced environment, a good for common use by the people and essential to a healthy quality of life, imposing to the Government and to the collectivity the obligation to defend and preserve it for present and future generations.
>
> §1 - To ensure the effectiveness of this law, it is for the public authorities:
>
> I – preserve and restore essential ecological processes and provide ecological management of species and ecosystems;
>
> II - preserve the diversity and integrity of the genetic patrimony of the country and inspect entities dedicated to research and manipulation of genetic material;
>
> III - set, in all units of the Federation, territorial spaces and its components to be especially protected, being amendment and deletion only allowed by law, prohibited any use that compromises the integrity of the attributes which justify their protection;
>
> IV – demand, in the form of the law, for the installation of facilities and activities potentially causing a significant degradation of the environment, a preliminary study of environmental impact, which will be largely communicated;
>
> V - control production, commercialization and use of techniques, methods and substances entailing risk to life, quality of life and the environment;
>
> VI - promote environmental education at all levels of education and public awareness for the preservation of the environment;
>
> VII - protect the flora and fauna, prohibiting, in the form of the law, practices that endanger their ecological function, causing the extinction of species or subjecting animals to cruelty.
>
> §2 - The one who explores mineral resources is required to recover the degraded environment, according to technical solution required by the competent public entity in the form of law.

§3 - The procedures and activities detrimental to the environment subject the violators, individuals or legal entities, to administrative and criminal penalties, regardless of the obligation to repair the damage done.

§4 - The Brazilian Amazon rainforest, the Atlantic forest, the Serra do Mar, the Pantanal and the Coastal Zone are national patrimonies, and their use shall be in the form of the law, in conditions which ensure the preservation of the environment, including the use of natural resources.

§5 - Are unavailable vacant lands and those collected by the States, for discriminatory actions, necessary for the protection of natural ecosystems.

§6 - Power plants that operate on nuclear reactors must have its location set in federal law, without which they cannot be installed."

As it turns out, the Federal Constitution foresaw from the broad concept of environment, as a common heritage of the people, to minutiae as environmental education, licensing and activities potentially responsible for significant environmental degradation, all assignments of the public authorities.

Besides, supporting and reinforcing the rule carved in the Law of National Environmental Policy (Law 6.938/81, art. 14, § 1), the Federal Constitution reinforced, in paragraph 3 of the aforementioned article, the concept of strict liability of the polluter in repairing the environmental damage.

Therefore, it is enough the simple confirmation of the harmful event and evidence of the connection to direct or indirect action by the accused to entail repairing obligations, as well as the responsibility to indemnify proved irreparable unlawful acts [9]. As a result, the mentioned responsibility of repairing the environmental degradation caused does not fall upon the subjective element of the agent, being enough the proof of the causal link between the damage and the action or omission of who is being held accountable for the repairs. Likewise, it is irrelevant, for accountability, the legal regularity of the activity or the existence of exclusive causes of guilt, such as unpredictable circumstances, force majeure or third party actions. This is the so-called objective responsibility founded on the theories *of activity risk* and *full risk*.

With regard to causation, in 1984 the scholarly NERY JUNIOR was already writing: "*to fill this requirement, it is sufficient that the damage resulted from the activity of the polluter, regardless of fault or intent to cause prejudice to the environment. It is dispensed, here, the lawfulness of the activity*". [10]

With this focus, well asserted the bright LEME MACHADO, to portray that:

> "the objective environmental responsibility means that the one who damages the environment has the legal duty to fix it, due to the presence of the binomial damage/repair. Ones do not ask the reason of

> degradation so there is duty to indemnify or repair. Responsibility without fault has incidence on damages or in repairing the damage caused to the environment and to the third parties affected by their activity". [11]

Under these perspectives, the author concluded that:

> "(...) the Environmental Law encompasses both roles of objective liability: the preventive function – searching, by effective means, avoid the damage – and the restorative function – trying to rebuild and/or indemnify the losses incurred. It's not social and ecologically suitable to cease the appreciation of the preventive accountability, since there is irreversible environmental damage ". [12]

As a result, still, of the strict liability, the Environmental Law recognizes the responsibility *propter rem* of the owner or possessor of the property, that, simply as a result of this condition, shall be responsible for repairing the environmental damage on their property, regardless of causing directly the degradation.

In fact, the owner or possessor of an immovable property appropriates part of the wealth of the State, involving the territory and natural resources and, therefore, pursuant to article 225 of the Federal Constitution, takes the responsibility of preserving this area before the society – present and future generations. [13]

According to LEMOS, the owner or possessor of a property must exercise his right of obedience to the social function of property and to the principle contained in the constitutional text, which reflects the need for maintenance of healthy and ecologically balanced environment for this and future generations. We must therefore respect the social and environmental functions of the property. If the owner has privileges arising from the individual content of the right to property, he/she also has duties arising from the social content of the holders of diffuse interest concerning the environmental preservation, this interest cannot be individually appropriated and disposed by the owner or possessor of the property. [14]

Individual ownership of social and environmental assets generates therefore the obligation to preserve it for present and future generations. It is due to the owner or possessor the adoption of active and negative behaviors for the preservation of the social and environmental assets, which transcends the individual right to use and enjoy private property. [15] In this way, it does not matter the individual ownership of the property; in the case of environmental resources, with diffuse ownership, the legal

regime of protection affects those who are in possession/ownership of the property, applying the rule of article 225 of the Federal Constitution.

In this respect, the case law of the Superior Court of Justice:

> "ENVIRONMENTAL. CIVIL PROCEDURE. OMISSION DOES NOT EXIST. INSTITUTION OF LEGAL RESERVE AREA. OBLIGATION *PROPTER REM* AND *EX LEGE*. SCORESHEET 83/STJ. (...)
>
> 2. The jurisprudence of this Court has established that the duties associated with the Permanent Preservation Areas (APPs) and the Legal Reserve have compelling nature *propter rem*, i.e. join the domain title or possession, regardless of whether or not the owner is the author of environmental degradation. Cases in which there are no discussion of guilt or causal relationship as determinants of the obligation to recover the permanent preservation area.
>
> 3. This Court has understood that the obligation to demarcate, register and restore legal reserve areas in rural properties configures legal duty (duty *ex lege*) which automatically transfers with the change of the domain, and can therefore be immediately payable by the current owner". [16]

In that decision, the Minister ELIANA CALMON presented the following vote:

> "It is possible to impose on the owner or possessor the obligation to recompose the forest cover in the area of legal reserve of their property regardless of having been the author of the environmental degradation. That is because the obligations associated with the areas of Permanent Preservation and Legal Reserves have character *propter rem* and, although cannot be attributed to the fundamental right of environment the characteristic of absolute right, it falls between the vested rights, and accentuate the un-prescribe of repair and its inalienability, since it comes from right of common use of the people. Thus, there is no acquired right vis-à-vis the obligation to recompose the degradation of the environment, being not possible to the current owner continue to practice acts prohibited or use the property in discordance with the law ".

It is thus important to state that the strict liability for compensating environmental damage is also solidary, so that the public civil action can be filed against the direct, indirect or both agent of the damage. [17]

These are the principles that, applied through the important tool of public civil action, allow the Prosecution Office to act in the protection of the environment, safeguarding the interests of the whole collectivity.

4. The Civil Inquiry

Law 7.347/85, reaffirmed in the Federal Constitution of 1988, not only instituted the public civil action for the collective protection of collective interests, but also guaranteed the Prosecutors a powerful tool, pre-trial and with investigative character, named "civil inquiry". [18]

This is a tool available to the members of the Public Prosecution Office, which allows administrative investigation prior to the occurrence – similar to the police investigation in the criminal sphere. In this regard, it aims at gathering conviction elements to enable the proposition of a public civil action, through the observation of diligences, interviews with the agent or witnesses, documents, expert examinations or inspections etc. Alternatively, also serves to: a) subsidize the signing of conduct adjustment agreements to fully compensate the environment damage; b) substantiate the expression of recommendations; c) hold public hearings for the protection of the safeguarded collective rights. In case it is proven the absence of environmental damage after several demarches, it serves to justify its own archiving.

It is important to state that, although it is a fundamental document for data collection, the civil investigation is not mandatory for filing the public civil action. That is, if the Prosecutor has sufficient evidence for filing the demand, they can do so regardless the institution of pre-trial discovery procedure.

Noting also that, in the case of investigative administrative procedure, the absence of an adversarial part in the civil inquiry will not invalidate the public civil action subsequently initiated.

MAZZILLI is emphatic: "in principle, nullities or vices of the civilian inquiry will have no reflection in the lawsuit. Such irregularities do not go beyond overshadow the inquiry's own value: that is the principle of *indemnity of separable*". But caveat:

“However, the acts that effectively are dependent on illicit evidence, even judicial acts, will be contaminated by those (this is the theory of the *fruits of the poisonous tree*)”. [19]

In any case, closed the investigation and without the basis for filing the public civil action, the hypothesis is archiving the civil inquiry, which necessarily will be the subject of review by the Council of the Public Prosecution Office [20] in the case of States (subnational level); in the Federal Public Prosecution Office this mentioned review is an attribution of the Board of Coordination and Review[21].

Highlighting the content of the Summary nº12 of the Superior Council of the Public Prosecution Office of the State of São Paulo:

> "Summary No. 12. Subjected to the approval of the Board of Governors any promotion to archive a civil inquiry or pieces of information, as well as the refusal of representation which contains pieces of information alluding to the defense of diffuse interests, collective or individual homogeneous.
>
> Background: the federal law No. 7,347/85 stablishes that the Board of Governors of the Public Prosecution Office - CSMP[22] - will review any archiving procedure of civil proceedings or of information pieces, to prevent the filing of public civil action by the organ of the prosecution service (art. 9 and § 1 of law No. 7,347/85).

If the respective collegial body decides not to be the case of archiving, it may determine a new diligence, or when considered to have sufficient evidence, designate another Member of the *Parquet* for filing the public civil action. [23]

It is important to note that the archiving of the civil investigation will not compromise the criminal investigations, since the principles of criminal and civil liabilities are different. [24] Eventually, however, the civil investigation might serve as an element of conviction for offering criminal complaint, since the police investigation is dispensable for the filing of criminal action. [25]

In summary, the civil investigation established to determine the occurrence of environmental damage may result in three possible solutions: a) the filing of a public civil action for holding the polluter accountable; b) the signature of a conduct adjustment agreement for full environmental damage compensation; c) archiving the procedure due to the absence of environmental degradation to be repaired.

5. Some peculiarities of Public Environmental Civil Action and the role of the Public Prosecution Office in Brazil

The Public Prosecution Office, along the Public Defender's Office, the federate entities, local authorities, public corporations, foundations and institutions of mixed economy, and civil associations[26], is the legitimized institution for filing of public civil actions related to environmental issues (*legitimatio ad cause*). In addition, if it is not the author of the demand, the *Parquet* must obligatorily intervene in the process as *custos legis* (law nº 7,347/85, art. 5, § 1).

MIRRA summarizes, with accuracy, the role of the Public Prosecution Office in environmental public civil actions:

> "The representativeness of the Public Prosecution Office, as 'guardian' of the collective interests in the legal defense of the environment, stems from the Federal Constitution (art. 127) and the organic laws of the Public Prosecution Offices of the Union and States, that erected it as permanent institution essential to the jurisdictional function of the State, and to which was attributed the defense of the legal order and of the democratic regime, and of the vested rights of the individuals and of the collectivity, ensured the independence of its members in the performance of their duties. Aside that, by its performance over the years in defense of collective and diffuse interests overall, the Public Prosecution Office has been noticed as a true defender of the people, as per the line maintained with social demands in this respect, legitimized in practice too, in political terms, as a representative institution of society". [27]

Pursuant to article nº3 of Law 7347/85, the public civil action may set the conviction to financial payment or to the fulfillment of obligation, and do or not do. Those are cumulative or alternative applications, not exclusive. In the event of conviction in money, "compensation for the damage caused will revert to a fund managed by a Federal Council or by State Councils in which will participate necessarily prosecutors and representatives of the community, being the resources used for the reconstruction of damaged assets" (art. 13, law No. 7,347/85).

LEITE classifies the environmental damage, as to its extent, in *equity* (property injured) and *environmental morality* (sensation of pain or injury not supported by collective heritage due to the injury to the environmental property). [28]

The concept of environmental damage includes injury to natural, artificial and cultural elements, defined as properties of common use by legally protected people, as well as the violation of the right of the whole collectivity to an ecologically balanced environment, fundamental human right, of diffuse nature.[29]

Defined such premises, it is clear that, in accordance with the Federal Constitution of 1988 (art. 225, § 1), repairing the environmental damage must be aimed at repairing the injury itself and all other damages associated with it, such as current, emerging, intercurrent, and moral damages as well. That is, the repair of the damage to the environment must be integral.

It is the recognition by the national order, of the principle of *integral environmental damage reparability*, which, according to Minister Antonio Herman de Vasconcelos e Benjamin, prevents all the "forms and formulas, statutory or constitutional, of exclusion, modification or limitation of environmental repair, which must always be integral, ensuring effective protection to the ecologically balanced environment".[30]

According to MIRRA, "one do not admit any limitation to the complete reparability of the damage, the characteristics of the medium or the environmental property. In view of the unavailability of the protected right, no law, no agreement between litigants and no court decision tending to limit the extent of the repair of environmental damage can be considered legitimate. "[31]

The jurisprudence of the Superior Court of Justice walks in direction of the consolidation of the *principle of integral environmental damage reparability* and, within the framework of lawsuit, the consolidation of the possibility of overlapping, in the midst of the public environmental civil proceedings, the demands for repairing *in natura* and compensation payment. The admission of this possibility of accumulating demands aims at the effective application of that principle. See, by the way:

> "ADMINISTRATIVE. ENVIRONMENTAL. PUBLIC CIVIL ACTION. DEFORESTATION OF NATIVE VEGETATION (CERRADO) WITHOUT THE PERMISSION OF THE ENVIRONMENTAL AUTHORITY. DAMAGE TO BIOTA. INTERPRETATION OF ARTS. 4, VII, and 14, §1, of law 6,938/1981, and of ART. 3 of law 7,347/85. PRINCIPLES OF FULL COMPENSATION, POLLUTER-PAYS AND USER-PAYS PRINCIPLE. POSSIBILITY OF CUMULATION OF OBLIGATION

TO DO (REPAIR THE DEGRADED AREA) AND TO PAY A CERTAIN SUM (COMPENSATION). *REDUCTION AD PRISTINUM STATUM*. DAMAGE

INTERMEDIATE ENVIRONMENTAL, AND RESIDUAL COLLECTIVE MORALITY. ART.5 of the CIVIL CODE INTRODUCTORY LAW. INTERPRETATION *IN DUBIO PRO NATURA* ENVIRONMENTAL STANDARD. (...)

3. By declaring civil responsible the environment offender, one must not confuse environmental priority of recovery *in natura* degraded properties, with impossibility of simultaneous accumulation of duties of reverting to natural (obligation to do), environmental compensation and indemnity in money (obligation to give), and abstention from use and new lesion (obligation not to do). (...)

5. The environmental demands, by virtue of the principles *polluter-pays* and *compensation in integrum*, admit the conviction of the defendant, simultaneously and in aggregate, in obligation to do, do not and indemnify. That is the typical cumulative or conjunctive obligation. Thus, in the interpretation of arts. 4, VII, and 14, §1, of the law of National Environmental Policy (Law 6,938/81), and art. 3 of law 7,347/85, the conjunction ' or ' has additive value, does not introduce alternative exclusionary. This judicial position takes into account that the environmental damage is spacious (ethical, temporal, ecological and patrimonially speaking, still sensitive to the diversity of the vast universe of victims, ranging from isolated individuals to collectivity, future generations and the ecological processes in themselves considered).

6. If the damaged property is completely and immediately restored to the *status quo ante* (*reductio ad pristinum statum*, i.e. restoration to original condition), there is no discussion, ordinarily, in compensation. However, the technical possibility, in the future (= provision by prospective Court), of restoration *in natura* is not always enough to revert or recover fully, in the field of civil liability, the various dimensions of the environmental damage caused; that is the reason it

does not invalidate the duties associated with the principles of *polluter-pays* and *compensation in integrum*.

7. Refusal of application or partial application of the principles of *polluter-pays* and *repair in integrum* overhang the harmful impression that, moral and socially, the environment delict does really compensate. Hence the administrative and judicial responses be just acceptable and manageable - risk or cost of business - , leading to the weakening of the dissuasive character of legal protection, real stimulus for others, inspired by the example of impunity as a matter of fact, even if not supported in law, of the offender rewarded, imitate or repeat their deleterious behavior.

8. Environmental liability must be understood as widely as possible, so that the condemnation of restoring the damaged area does not exclude the obligation to indemnify – retrospective and prospective judgments.

9. the *bis in idem* accumulation of obligation to-do, don´t-do and pay is not configured, since the compensation, instead of considering the specific injury already ecologically restored or to be restored, focus on the portion of the damage that, although caused by the same agent, still represents deleterious effects hereafter, irreparable or intangible.

10. This transitional degradation, remnant or reflex of the environment encompasses: a) the ecological damage that mediates, temporally, the instant of action or harmful omission and the complete restoration or recovery of the biota, that is to say, the hiatus of total or partial deterioration, in the empowerment of the right to use by the common people (= interim damage or intermediate), something always present in the hypothesis, e.g. in which the judicial command, restrictively, is satisfied with the single natural regeneration and lost sighting of the flora illegally suppressed, b) the environmental ruin still exists or lasts, despite all the efforts of restoration (= residual or permanent damage), and c) the collective moral damage. Must also be reimbursed to the public heritage and the collectivity the economic advantage of the agent with the activity or degrader venture, the ecological added-value which was received illegally (e.g., timber or ore removed irregularly

from the degraded area, or the benefits resulting from its spurious use in activities like agriculture, kettle rising, tourism , commercial). (...)

14. Special recourse partially provided to recognize the possibility, in theory, of overlapping pecuniary indemnity with obligations to-do and don'ts related to recomposing *in natura* the aggrieved property, returning the case back to the Court of origin to verify if, in the hypothesis, there is damage compensation and to secure possible *quantum debeatur*". [32]

6. The Conduct Adjustment Agreement

In those terms, the §6º of article 113 of the Consumer Protection Code – whose procedural discipline applies to collective protection of any collectivity rights - provides that "the legitimate public agencies may take commitment from stakeholder of conduct adjustment to the legal requirements, upon agreement with the defaulter, with efficacy of extrajudicial enforcement order".

Therefore, closed the investigations of civil investigation and with evidence of the environmental damage, it is possible for the Prosecutor to seek out-of-court composition of the dispute by signing with the polluter aconduct adjustment agreement[33], extrajudicial enforcement in favor of the victim group. [34]

This agreement will have as object the full compensation of the environmental degradation, and may foresee, alternative or cumulatively, obligations to-do, don'ts, compensate or indemnify the environmental damage. In the case of convictions in money of public civil actions, the compensation for the damage caused will revert to a fund managed by a Federal Council or by State Councils, and its resources used for restauration of damaged assets (art. 13, law No. 7,347/85).

It is extremely important to estimate, in the agreement, that the breach of obligations will subject the infringer to the payment of daily fines until the effective fulfillment of their obligations. The mentioned fine (*astreinte*) will have comminatory character, and not compensatory, since for the environmental protection what matters most is the commitment to comply with to-do or not-to-do by the polluter, rather than the corresponding funds. Possible payment value, corresponding to the daily fine, will compose as wellthe Diffuse Rights Protection Fund and will revert to the reconstitution of damaged assets.

Important to point out that, given the diffuse nature of the interests involved in environmental protection – right that belongs to the entire community, current and future generations - the member of the State Public Prosecution Office is not allowed to deploy on its content when signing the adjustment with the degrader. Therefore, the negotiation intrinsic to the agreement can't ever discuss about the substantive law tutored; any provisions may occur only with respect to the deadline for compliance.

After signing the Conduct Adjustment Agreement, this must be submitted to the internal control by the Council of the Public Prosecution Office, in case of States, or by one of the Chambers of Coordination and Review, of the Federal Public Prosecution Office in case of the Union. These internal organs may disagree and determine new arrangements or the filing of a public civil action, in case of misconceptions in the agreements. On the other hand, when agreed, it shall be determined the monitoring of the agreement by the respective institution.

It is, in short, an important tool placed at the disposal of the public prosecutor for the effective environmental protection.

7. Conclusions

In consensus with the developments of the International Environmental Law, Brazil experienced, especially from the early 80´s, a major boost to its environmental legislation. Indeed, the 1985 Public Civil Action Law and the 1988 Federal Constitution gave to the Public Prosecution Office, raised to the status of independent body, important instruments for environmental protection. In the exercise of this, the public civil action, the civil investigation and the conduct adjustment agreement consolidate the work of the *Parquet*, active representative of society in Brazilian domestic law, aiming not only to maintain but also to improve the healthy and ecologically balanced environment for present and future generations.

[1] The principle of reverse environmental seal, insert in article 225, the Brazilian Federal Constitution, often is ignored by the Brazilian Legislature, following the example of the current Law 12.651/12, which amended the old forest code, reducing their environmental protection and is the subject of three direct action of Unconstitutionality by the Supreme Court of the country.

[2] ODUM, Eugene p.; BARRET, Gary w. *Fundamentals of Ecology*. 5th ed. Translation: Pegasus systems and solutions. São Paulo: Cengage Learning, 2013, p. 3.

[3] MAZZILLI, Hugo Nigro. *The diffuse interests in mind. Environment, consumer, cultural heritage, public assets and other interests*. 24th ed. Rev., ampl. and current. São Paulo: Saraiva, 2011, p. 155.
[4] Law No. 6.938/61, art. 14, §1-Without prevent the application of the penalties foreseen in this article, is the polluter thanks, regardless of the existence of fault, to compensate or repair the damage done to the environment and to third parties affected by their activities. The Public Ministry of the Union and the States will have legitimacy to propose action for civil and criminal liability for damages caused to the environment.
[5] FREITAS, Vladimir steps (Coord.). *Historical Judgments of environmental law*. Campinas: ed. Millennium, 2010, p. 44.
[6] Menu of the judgment: "compensation. Third-party liability – damage caused to the environment by reason of the extermination of small birds used in barbecue promoted in the municipality of Embu – effective ecological damage Proof – joint and several liability of the Mayor and of the codefendant recognized – Indemnification due-provided Resource ". (Court of Justice of São Paulo, civil appeal 70,393-1, Itapecerica da Serra, Rapporteur Márcio Bonilha j. 25.6.1986. In Revista de jurisprudence of the Court of Justice of São Paulo (RJTJESP), São Paulo: LEX, 21 year, March and April 1987, volume 105, pp. 134-137).
[7] Idem.
[8] BRAZIL, 1988 Federal Constitution, chapter VI, "the environment". DF, 2015. Available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm . Access to 1/18/2015.
[9] FINK, Daniel Roberto. *Environmental liability.* In practical handbook of the District Attorney's Office of the environment. São Paulo: Press Officer of the State of São Paulo, Ministério Público do Estado de São Paulo, 2005, v. 1, p. 206/207.
[10] NERY JR, Nelson. *Civil liability for ecological damage and public civil action.*In Justittia, Sao Paulo, 40 year, vol. 126, Jul.-set. 1984, p. 174.
[11] MACHADO, Paulo Affonso Helm. *Brazilian Environmental Law*. São Paulo: Editora Malheiros, 19th ed., 2011, p. 369.
[12] Ibid., p. 374.
[13] LEMOS, Patricia Faga Iglecias. *Environment and civil liability of the owner. Analysis of the causal relationship.* São Paulo: Revista dos tribunals, 1st ed., 2008, p. 99.
[14] Ibid., p. 100.
[15] Ibid., p. 100.
[16] Superior Court of Justice (STJ),AgRg in REsp 1367968/SP,2nd Class, Rapporteur Minister Humberto Martins, v.u., DJe: 3/12/2014. Available at https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201200049293&dt_publicacao=12/03/2014 . Access to 1/26/2015.
[17] In this sense: Superior Court of Justice (STJ), 2nd Class, Special Feature (REsp) 37,354 -9/SP, Rapporteur Minister Antonio de Padua Ribeiro, v.u., Journal of environmental law, v. 15, p. 246.
[18] MAZZILLI, Hugo Nigro. The diffuse interests in mind. Environment, consumer, cultural heritage, public assets and other *interests*. 24th ed. Rev., ampl. and current. São Paulo: Saraiva, 2011, p. 156.
[19] Ibidem, p. 476.
[20] The Board of Governors of the Public Ministry is the implementing body and the upper management of the Public Ministry which has, among its duties, approvals of promotions of civil investigations archive. See Law No. 7,347/85, art. 9, §§ 1st and 3rd: "Art. 9. If the governing body of the Public Ministry, exhausted all the steps, you can tell yourself that there is no basis for the filing of civil action, promote the archiving of records of the civil investigation or informative parts, causing it to inform. §1 The autos

of the civil investigation or parts of archived information will be sent, under penalty of incurring serious misconduct, within 3 (three) days, the Board of Governors of the Public Ministry.(...) § 3 the promotion of archiving will be subject to examination and deliberation of the Board of Governors of the Public Ministry, as has his regiment ".

[21] complementary law No. 75/93, arts. 62, IV, and 171, IV.

[22] the Superior Council of the Public Ministry.

[23] law No. 7,347/85, Art. 9, paragraph 4: "Leaving the Board of Governors to approve the promotion of archiving, shall appoint, from the outset, another organ of the prosecution service for the filing of the action".

[24] about it, check out the Summary paragraph 5 of the High Council of the Public Ministry of the State of São Paulo: "DOCKET No. 5. Environmental damage repaired and there is no basis for the proposition of public civil action, the civil investigation should be filed, without prejudice to any criminal proceedings that the case now. Bedding: If the environmental damage has been repaired and, simultaneously, there is no basis for the proposition of any public civil action, the case is filing a civil inquiry or parts, except information required any criminal aspects ".

[25] MAZZILLI, Hugo Nigro. OB. cit., p. 480.

[26] Law nº 7,347/85, Art. #5: Have legitimacy to propose the main action and the precautionary action: (...) V-the Association that, concomitantly: a) is constituted at least 1 (one) year under the civil law; b) includes, among its institutional purposes, protection (...) to the environment (...) or the artistic heritage, aesthetic, historical, tourist and scenic ".

[27] MYRRH, Álvaro Luiz Valery. *Public civil action and the repair of damage to the environment*. São Paulo: Juarez de Oliveira, 2nd ed. current., 2004, p. 197.

[28] milk, José Rubens Morato. *Environmental damage: the individual to the collective off-balance sheet item*. 2nd ed. São Paulo: Revista dos Tribunals 2003, p. 97.

[29] MYRRH, Álvaro Luiz Valery. Op. cit., p. 85.

[30] BENJAMIN, Antonio Herman de Vasconcelos e. *civil liability for environmental damage*, environmental law Magazine, São Paulo, year 3, no. 9, Jan./mar. 1998, p. 5-52.

[31] MYRRH, Álvaro Luiz Valery. *Civil liability for environmental damage and the principle of full compensation of the damage.*In Journal of environmental law. São Paulo: Revista dos tribunals, nº 32, Oct./dez. 2003, p. 81-82.

[32] Superior Court of Justice (STJ),REsp 1198727/MG,2nd Class, Rapporteur Minister Benjamin Herman, v.u., DJe: 5/9/2013,RIP vol. 79 p. 279. Available at https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201001113499&dt_publicacao=09/05/2013. Access to 1/26/2015.

[33] Organic law of the Public Ministry of the State of São Paulo, complementary law No. 734, of November 26, 1993, "Article 112.The organ of the prosecution, civil investigations that have introduced and since the fact is properly clarified, you can formalize upon term in autos, commitment of responsible as to the fulfilment of the obligations necessary for full compensation for the damage. Sole paragraph. The effectiveness of the undertaking will be subject to the approval of the promotion of archiving a civil inquiry by the Board of Governors of the public prosecution service ". Available at http://www.al.sp.gov.br/repositorio/legislacao/lei.complementar/1993/compilacao-lei.complementar-734-26.11.1993.html . Access to 1/15/2015.

[34] MAZZILLI, Hugo Nigro. OB. cit., p. 432.