



## SPATIAL PLANNING AND THE FEDERAL ENVIRONMENTAL COMPENSATION: CONCEPTION, OPERATIONALIZATION AND LEGAL CONFLICTS

ORDENAMENTO DO TERRITÓRIO E A COMPENSAÇÃO AMBIENTAL FEDERAL: GÊNESE, OPERACIONALIZAÇÃO E EMBATES JURÍDICOS

L'AMÉNAGEMENT DU TERRITOIRE ET LA COMPENSATION ENVIRONNEMENTALE FÉDÉRALE: CONCEPTION, OPERATIONNALISATION ET CONFLITS JURIDIQUES

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### Abstract

Environmental issues should not be understood as a simple result of the relationships between human beings and nature, but should be seen as part of a component of human relations, as an economic, political and cultural object. One of the instruments of public policy that is directly inserted in the complex and dynamic contemporary issues is the Environmental Compensation. The objective of this paper is to analyze the execution of the Environmental Compensation, in the scale of the administration of the Federal Government of Brazil, with emphasis on its operationalization based on the current legislation, highlighting its genesis and calculation methodology, as well as the elements that involve the constant judicialization of the instrument. Thus, at first moment it is approached its definition and conception, and soon after its operationalization and methodology of calculation are highlighted; it ends with the issues surrounding the constant judicialization of the instrument, highlighting the small but relevant legal updates that have occurred recently. Finally, the conclusions emphasize the main ideas discussed here, as well as presents some possibilities for the future of the EC in Brazil.

Keywords: Environment. Public Policies. Environmental Compensation. Environmental Licensing.

### Resumo

A temática ambiental não deve ser compreendida como resultante do vínculo entre o Homem e a natureza, mas como um componente das relações humanas e um objeto econômico, político e cultural. Um dos instrumentos de política pública diretamente inserido nesta complexa e dinâmica temática contemporânea é a Compensação Ambiental. O objetivo deste trabalho foi analisar a execução da Compensação Ambiental Federal com ênfase para sua operacionalização com base na legislação vigente, destacando sua gênese e metodologia de cálculo, bem como os elementos que envolvem a constante judicialização do instrumento. Logicamente, realçando seu potencial como um instrumento de política pública que influencia o ordenamento do território, particularmente ante o viés ambiental, em um cenário envolto pelos interesses e poderes de vários atores. Assim, no primeiro momento apresenta-se uma abordagem acerca de sua definição e sua gênese, logo após destaca-se a sua operacionalização e metodologia de cálculo; finalizando com as questões que envolvem a constante judicialização do instrumento ressaltando as pequenas, mas relevantes atualizações jurídicas que ocorreram recentemente. Por fim, as considerações finais enfatizam as principais ideias abordadas, bem como apresenta algumas possibilidades para o futuro da Compensação Ambiental Federal no Brasil.

Palavras-chave: Meio Ambiente. Políticas Públicas. Compensação Ambiental. Licenciamento Ambiental.

## Résumé

Les questions environnementales ne doivent pas être comprises comme simplement résultant d'une relation entre l'Homme et la nature, mais comme une composante des relations humaines, comme un objet économique, politique et culturel. Un instrument constitutif de la politique publique nationale qui est directement inséré dans ce sujet complexe et dynamique est la Compensation Environnementale. L'objectif de cet article est d'analyser l'exécution de la Compensation Environnementale, en soulignant son opérationnalisation sur la base de la législation en vigueur, en soulignant également sa genèse, sa méthode de calcul, ainsi que les éléments qui impliquent une judiciarisation constante de l'instrument. Logiquement, il faut également souligner son potentiel en tant qu'instrument de politique publique pour influencer l'aménagement du territoire, en particulier dans la perspective environnementale, dans un scénario entouré des intérêts et des pouvoirs de divers acteurs. Ainsi, dans un premier temps, une approche est présentée concernant sa définition et sa genèse, puis son opérationnalisation et sa méthodologie de calcul sont mises en évidence; les questions relatives à la judiciarisation constante de l'instrument soulignant les mises à jour juridiques brèves mais pertinentes qui ont eu lieu récemment. Enfin, les conclusions mettent l'accent sur les principales idées abordées et présentent certaines possibilités pour l'avenir de la EC au Brésil.

Mots-clés: Environnement. Politiques publiques. Compensation Environnementale. Licences environnementales.

## Introduction

Environmental issue<sup>1</sup> is a significant component of the contemporary society. Consequently, the theme somehow always encompasses the demands, but mainly the interests (similar or distinct) of various actors, placing it in a scenario of turbulent power struggles that permanently surrounds it.

Because of this, that analyzes that involve the theme consequently lead us to a complex and dynamic context, considering that its elements act in a conjuncture of several relations of interdependence and/or subordination.

In this scenario, we emphasize that the issue should not be assimilated as a mere result of the association between man and nature, but as a face of human relations, namely as an economic, political and cultural object (Moraes, [1994] 2005). A conception that corroborates the dynamism and complexity traits in an intricate context that comprehend a set of multiscale elements that range from the subtlest local specificities of the territories to the global sphere.

Thus, the question historically has been gradually incorporated into the society that at the beginning of the 21st century seeks, at least in its discourse, a differentiated collective guideline based on a development that is qualified as sustainable<sup>2</sup>. Consequently, the theme is invariably inserted in the current political agenda, considering, as Mello-Théry (2011) points out, the gradual alteration of the discourses and the use of the

Sustainable Development concept by government institutions, even by those who never had the environment as a central work object.

Thereby, although the exploitation of natural resources is essential for human life, the concern for managing their access and usage is old<sup>3</sup>. The environmental issue slowly became more relevant during the twentieth century, especially in the second half post-war (1945), with the broadening of discussions about the planet's ability to sustain the pattern of development<sup>4</sup> that emerged from the Industrial Revolution and the reflexes of expanding urban-industrial at the global level.

Therefore, as Sachs (2004) points out, one of the main challenges of the contemporary society has become the design of a strategy that is environmentally sustainable, economically sustained and socially inclusive.

Thus, the expansion of the environmental debate and its consequent conceptual and paradigmatic evolutions also provided political advances. Especially about the speeches, decision-making and even the agendas of the signatory States of the main international environmental agreements, as in the case of Brazil<sup>5</sup>.

Consequently, the obligations assumed by countries towards the world reflects in the national legislation that, as a set of laws, contribute to the establishment of public policies that influence spatial planning. In the case of Brazil, for example, through the creation and management of protected areas that are integrated into the National System of Conservation Units (known by the abbreviation in Portuguese - *SNUC*), as well as other environmental instruments, such as the Environmental Compensation (EC).

In this conjuncture, our society faces an intense contemporary clash between the incessant capitalist demand for economic expansion and a "recent" claim for environmental protection. This is an arduous conflict, whereas in capitalism the propositions that differ somewhat from the idea of perennial economic growth are rarely considered adequate. Considering that, the potentiality of this system as a path towards the end of world poverty and underdevelopment has been treated as axiomatic for centuries, although this is highly doubtful.

This places the capitalist society at the center of a crossroads in a scenario of countless power relations in which various actors confront and/or support each other to defend their various demands and their respective interests.

Given the above scenario, an instrument that is established as an element of Brazil's territorial and environmental policy and is directly inserted in the complexity of environmental issues, is the Environmental Compensation (EC), the central object of analysis of this article.

Therefore, the objective of this article is to analyze the Federal<sup>6</sup> Environmental Compensation (FEC), with emphasis on its operationalization based on the current Brazilian legislation. In this way, we aim to highlight some points of a research that has been recently performed on this instrument in Brazil (Fonseca, 2017), as well as to make some updates that occurred a few months ago in the legal sphere and that directly impact the execution of FEC.

We intend to emphasize the potential of the FEC as an instrument of public policy to influence spatial planning, particularly from an environmental perspective in a complex and dynamic scenario, surrounded by the interests and powers of various actors. Factors that cause reflexes in its operationalization, especially in an environment of constant judicialization of the process as will be highlighted during this article.

From this perspective, based exclusively on the federal scale of the territory administration, that is, the Federal Government of Brazil, we will approach the FEC focusing primarily on its creation and definition; after that, its operationalization and calculation methodology stand out; concluding with the issues that involve the constant judicialization of the instrument, highlighting the small but relevant legal updates that have occurred recently. Finally, we present some concluding remarks that emphasize the main ideas discussed, as well as some possibilities for the future of the FEC in Brazil.

The contribution of this paper is guided by the perspective of allowing a deepening of the Environmental Compensation instrument in Brazil, going through historical, legislative and operational aspects that lead us to other questions that were partially answered in the recent research mentioned (Fonseca, 2017) and/or as possible directions for future research.

#### **Federal Environmental Compensation: definition, creation and evolution**

Despite Environmental Compensation being an instrument that emerged several decades ago, it is still a frequent object of confusion even

among professionals in the environmental area, especially regarding its definition, function or even operationalization. These instruments have several similar definitions that reinforce a general understanding for some possible aspects, always emphasizing to some aspects, such as the economic, environmental, preventive, social, indemnity ones, among others.<sup>7</sup>

Thus, we consider that the EC in Brazil can be defined as an instrument of territorial and environmental public policy, based on an Environmental Impact Statement and its respective report<sup>8</sup>, which aims to counterbalance the expected impacts of projects with “significant environmental impacts”<sup>9</sup>, burdening entrepreneurs with the objective of strengthening the National System of Conservation Units (*SNUC*) (Fonseca, 2017).

The EC origin is associated with the huge Amazonian projects of the Brazilian electricity sector of the 1970s<sup>10</sup>. The instrument arose intending to create areas for the conservation of biodiversity in regions affected by large enterprises, to maintain a “testimonial-area” of the original local environment (Faria, 2008). Therefore, any entrepreneur who changes a significant portion of a natural environment should support the creation of a protected area as compensation for the ecosystems impacted by their respective enterprise.

In this context, it is possible to understand that the EC within the conjuncture of the application of the environmental impact assessment measures, characteristic of that period in Brazil, and its subsequent insertion as an element of the State Environmental Licensing<sup>11</sup> process was a logical consequence.

However, all these ideas and aspirations needed to materialize and strengthen themselves with a legal foundation. Thus, in 1987 for the first time, the EC was included in the Brazilian legislation by Conama<sup>12</sup> through Resolution n° 10/87 (Brasil, 1987), which required all large enterprises to implement an Ecological Stations<sup>13</sup> as a counterpart (Faria, 2008).

At that time, it was defined that the number of resources invested by the entrepreneur in the FEC should be proportional to the damage to be compensated, not less than 0.5% of the project implementation cost (Giasson; Carvalho, 2012).

Subsequently, after almost ten years, the Resolution Conama n° 02/96 (Brasil, 1996) replaces its predecessor, but maintains the percentage

of 0.5% and the concepts of reparation and compensation proportional to the damage caused by projects of significant environmental impact.

It was only in the year 2000 that the instrument exceeded the jurisdiction of Conama's Resolutions and was established in a Federal Act with the legal institution of the National System of Nature Conservation Units<sup>14</sup>. This moment emphasizes the competence of Environmental Compensation as an instrument of territorial and environmental policy, when, at least in the legal sphere, it has considerably strengthened.

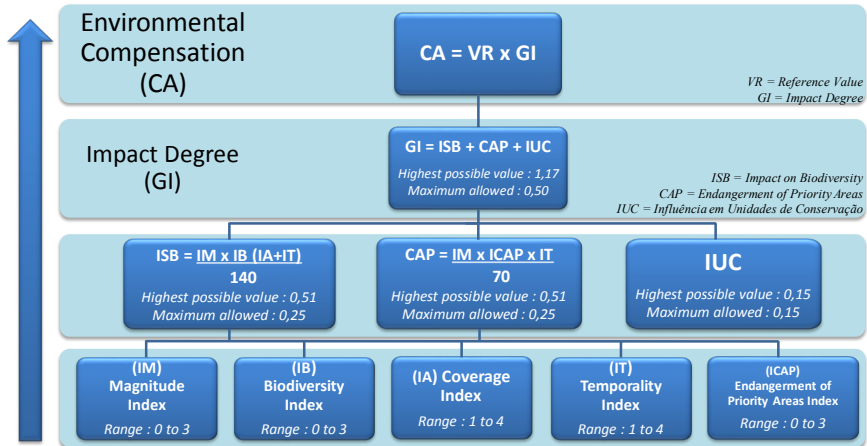
### Federal Environmental Compensation: operationalization and calculation methodology

The operationalization of the Federal Environmental Compensation is based on the attributions of the Brazilian Ministry of the Environment (MMA), Ibama<sup>15</sup> and ICMBio<sup>16</sup>, especially of the last two. Besides, its execution is subsidized by the activities of the Federal Chamber of Environmental Compensation (FCEC)<sup>17</sup> and the Federal Environmental Compensation Committee (FECC)<sup>18</sup>.

The calculation of the financial value destined to *CAF* is the responsibility of Ibama, which executes it based on the *EIA / Rima* information prepared by the respective entrepreneur. This calculation must be performed during the process of obtaining the Installation License<sup>19</sup> so that it constitutes a condition for the issuance of the future Operating License following the deliberations of the FECC. In short, at first, the entrepreneur will only obtain an Operating License, which authorizes the operation of the enterprise, if he fulfills his obligations regarding the Environmental Compensation.

Accordingly, the Environmental Compensation calculation is currently based on the *Environmental Impact Degree Calculation Methodology* defined in 2009 and detailed in the Annex to the Federal Decrees these regulating the FEC (Brasil, 2002, 2009).

Thus, the calculation of the FEC is performed based on six Indexes<sup>20</sup> compulsorily available in the Environmental Impact Statement (*EIA*) and, from them, calculations are made based on some formulas, as shown in Figure 1.

**Figure 1 - Scheme of Environmental Compensation Calculation Methodology**

Fonte: Created by the author (2017) based on Federal Decree No. 6.848 / 2009 (Brasil, 2009). The abbreviations were kept in Portuguese according to the mentioned legislation.

Then, we observe that the whole calculation is based on the six predetermined indexes to define the Degree of Impact (*GI*) of the enterprise. Therefore, multiplying the *GI* by the Reference Value (*VR*) of the respective project (the value must be provided by the entrepreneur) we obtain the monetary value of the Environmental Compensation<sup>21</sup>.

In short, analyzing the Calculation Methodology (Figure 1), we observe that it is the Degree of Impact (*GI*) that defines the percentage of the project cost that will be directed to the Federal Environmental Compensation.

However, it is important to emphasize that the Federal Decree that implemented the current Calculation Methodology (Figure 1) (Brasil, 2009), defines that, for the Impact Degree (*GI*) calculation, the variation must be between 0 and 0.5%. Also, it defines other limitations for the calculation of *ISB*, *CAP*, and *IUC*, which must vary to a maximum of 0,25 (see Figure 1).

Fonseca (2017) analyzes a hypothetical situation of extreme impact, in which all five Indexes in an EIA would be considered at their maximum values. The Impact Degree (which directly influences the *CA* value) would easily exceed the maximum limit of 0,5 imposed by the current Calculation Methodology, reaching 1,17 (see Figure 1). This demonstrates,

to some extent, a mismatch in the calculations that benefits high impact enterprises and consequently leading them to be considered as enterprises of medium impacts, at most. Although this aspect is not the scope of this article, this limitation may be explained by the demand that arose after the Direct Action of Unconstitutionality (DAU)<sup>22</sup> filed by the Brazilian National Confederation of Industries (*CNI - Confederação Nacional das Indústrias*) in 2004, with the purpose of impugn the Environmental Compensation in Brazil, as we will cover in the following item.

However, it should be emphasized that the SNUC Act states that the amount spent by the entrepreneur at the CAF cannot be less than 0.5% of the total enterprise implementation costs<sup>23</sup>. So, the SNUC Act defines a minimum of 0,5 while, at the same time, the current Calculation Methodology limits the maximum to 0,5 (Figure 1). Therefore, the definition of the minimum or maximum limits of the CAF is among the most controversial points of the instrument, contributing to a judicialization scenario.

#### Federal Environmental Compensation: the judicialization of its operationalization

Define monetary values to environmental assets is an extremely complex debate, but sometimes necessary. For Ortiz (2003), all environmental resource has an intrinsic value, and from the economic point of view, the value of this feature would be its contribution to social welfare.

It is within this complex scenario that the definition of the *FEC* percentage falls in constant debates and disputes, which results in a legal imbroglio that began more than a decade ago and is still pending in Brazil.

As mentioned earlier, although being there since the 1970s, the *FEC* was established as a Law only in the year 2000, from *SNUC* (Brasil, 2000). At that time, it was set a minimum of 0.5% in the cost of implementation of the enterprise, without defining a maximum value, the minimum percentage used as a reference since its inception. Therefore, this was the minimum percentage used as a reference since the beginning.

Later, in 2002, the Federal Decree No. 4.340 (Brasil, 2002), that regulates the *SNUC* Act, designating the environmental licensing agency the task definition of the Degree of Impact for the purpose of defining the monetary value of a *FEC*, keeping the same minimum percentage of 0,5 again, without provision for a maximum value.



Within this context, in late 2004, the Brazilian National Confederation of Industries (*CNI*) filed a Direct Action of Unconstitutionality (DAU)<sup>24</sup>, to challenge the article of the *SNUC* Act that deals specifically with the FEC (Article 36). The claim was that this instrument hurts the principles of legality, separation of powers, the reasonableness and proportionality (Domingues; Carneiro, 2010), constituting a prior indemnity without previous measurement and evidence of damage, thus constituting unjust enrichment by the State (Almeida; Pinheiro, 2011; Macedo, 2012).

Thus, the fact of the *SNUC* Act does not set a maximum percentage for the definition of FEC by the environmental agency licensor, undoubtedly, was one of the key elements that motivated the DAU., also aggravated by the fact that the monetary value defined for the FEC is linked to the total cost of the project.

In addition to other legal proceedings that took place in the following years, as analyzed by Fonseca (2017), the Supreme Federal Court (*STF*) analyzed the DAU only in 2008, judging it partially valid by the majority of votes. In short, the *STF* has declared the FEC as a valid instrument. However, it considered its definition unconstitutional based only on a minimum value. It was understood that this percentage should be fixed proportionally to the environmental impact based on the EIA / Rima, but without any link to the total cost of the project.

About this decision, there are requests in process to modify the effects of the result of the judgment of both litigants, being *CNI*, the plaintiff, and the Presidency of the Republic of Brazil, the defendant (Domingues; Carneiro, 2010). Thus, the decision of the *STF* did not become final and, therefore, is now suspended.

However, in 2009 it was published the Federal Decree No. 6.848 (Brasil, 2009) which amended the regulation of FEC, which innovated by defining in its Annex the Calculation Methodology addressed in the previous item (Figure 1). The Methodology, which defines the Degree of Impact (GI) between 0% and 0.5%<sup>25</sup>, in other words, the minimum percentage became the maximum percentage without the revocation of Article 36 of the *SNUC* Act (Brasil, 2000).

For Domingues and Carneiro (2010), the 2009 Federal Decree only disassemble the criteria previously considered unconstitutional. However, by creating a clearer Calculation Methodology, the legal insecurities of the environmental instrument were reduced. Therefore, the demands

of the actors involved were at least partially satisfied, making the FEC operational for now despite the scenario of legal instability and the usual difficulties in this unstable political conjecture.

At the point to the minimum or maximum percentages, there is a scenario of legal inertia now. The current operation is based on the latest Federal Decree, while the DAU can be re-examined by the Supreme Court at any time, so it is not a consolidated scenario.

Besides the question about the percentage, another element that for many years led to legal clashes around the FEC refers to its modality of execution.

The Environmental Compensation Commitment Term (*TCCA*) is the legal document established between the environmental agency and the entrepreneur, in which the conditions for the execution of the FEC are formalized and established. This execution can occur in two ways: by the entrepreneur's means (a modality called direct execution) or by depositing in a bank account that is managed by the environmental agency (called indirect execution).

Between 2000 and 2007, the FEC was exclusively performed only in the direct mode, a fact that the points of view of environmental agencies, and especially entrepreneurs, contributed decisively to the ineffectiveness of the instrument, mainly due to the lack of expertise of several entrepreneurs in the environmental area, the increased of costs and its slowness (TCU, 2013).

However, the main advantage of the direct modality refers to the exemption of the "administrative machinery" in the enforcement activities of the FEC, as well as increased legal certainty, since the legal understanding is that the obligation imposed by *SNUC* Act only contemplate the direct form (TCU, 2013). A fact that always bothered entrepreneurs, as can be observed through the action of the Brazilian National Confederation of Industries (*CNI*).

In this regard, aiming the possibility of implementing a form of indirect application in an attempt to maximize the results of the instrument, in 2006, Ibama<sup>26</sup>, in partnership with the *Caixa Econômica Federal* bank, created the Investment Fund for Environmental Compensation so that the entrepreneurs could opt for an indirect modality, a fact that took place from mid-2007.

However, the performance in the indirect mode became the object of several determinations of the Federal Court of Accounts (*Tribunal de Contas da União – TCU*) that, as a supervisory branch of the State, assesses the management of resources of the FEC, especially from a budgetary perspective.

Due the fact the law did not foresee this indirect mode, the Fund was terminated in 2009. Then, aiming to not paralyze the execution of FEC in Brazil, the ICMBio started to operationalize this modality through book accounts opened at the *Caixa Econômica Federal* bank on behalf of the respective enterprises (TCU, 2013), with the insecurity that the Federal Court of Accounts might not approve this practice.

All this conjuncture of legal insecurity, allied to the context of the creation of the ICMBio<sup>27</sup>, disrupted the execution of the FEC, which went through several months without a routine operation. This stoppage brought as its main effect the accumulation of liabilities of processes already licensed or in environmental licensing, in an unknown quantity.

The latest “clashes” between the Federal Court of Accounts (*TCU*) and the FEC implementation modalities started from a request in 2012, from a Senate request (The Environment Committee, Consumer Protection and, Inspection and Control - *CMA*) to conduct an operational assessment on the implementation and monitoring of the resources of Environmental Compensation in the past decade, considering the efficiency and effectiveness of the government programs assisted by them.

This audit determined, among other things, that the ICMBio does not authorize the entrepreneurs to execute the FEC through bank deposits (indirect mode), considering that there was no legal basis to authorize this environmental agency to assume the execution of material actions by the entrepreneur, requiring only the amount due from the FEC, consequently managing resources and applying them for public purposes outside the regular budgetary and financial process, without incorporation into the Union General Budget (TCU, 2013).

It can be said that the decision of the Federal Court of Accounts (*TCU*) displeased the environmental agencies and most entrepreneurs too, that within this context there would have no other alternative but to execute the FEC in the direct mode, which generates operating and human resources costs for the company management applying the FEC resources from start to finish, while in the indirect mode the entrepreneur

transfers the full responsibility of this management to ICMBio, only by depositing in a bank account (Torres, 2016)<sup>28</sup>.

Within this context, the CNI (Brazilian National Confederation of Industries) and the CNT (Brazilian National Confederation of Transport) became part of the process as *amicus curiae*<sup>29</sup>, defending the possibility of indirect modality of the FEC, considering that the interpretation of *SNUC* Act does not rule out the possibility of their implementation mode (TCU, 2016).

Thus, in April 2016, the Federal Court of Accounts (*TCU*) rejected a review request. The Court held that the modality of direct execution of the resources of FEFCF meets the provisions of the *SNUC* Act, because the expectations of generating useful results for society are infinitely greater than the mere transfer of financial resources to environmental agencies (TCU, 2016).

It was reinforced that the indirect modality alters the obligation of the entrepreneur with the FEC, merely by giving private resources to ICMBio via bank transfer, on an extra budget basis, so that the environmental agency promotes the obligation of the entrepreneur, emphasizing that no administrative act can innovate the legal system, creating elements without legal provision to meet whatever interests, whether public or private (TCU, 2016). In this particular case, the public rapporteur stated that ICMBio would be favored. In short, it is understood that the indirect modality can only be considered legal if a Law or a Decree regulates it.

Moreover, although this was not the understanding of the public rapporteur, it is clear that entrepreneurs are also greatly favored by the indirect modality, as it transfers to the ICMBio the responsibility for the execution and management of Federal Environmental Compensation resources.

Given the above, we observe again the complexity of issues involving the FEC and its respective actors in a scenario of high instability, which contributed to negatively influencing its potential as an environmental instrument and its effects on spatial planning in Brazil.

Therefore, in recent years, the difficulties encountered by the involved public environmental agencies, in current legal insecurities and the scenarios that surround them in the context of the State bureaucracy, have caused the shutdown of the Environmental Compensation for several

months on more than one occasion. Given the decisions of the Federal Court of Accounts (*TCU*) since July 2016, the only option for entrepreneurs who had not yet signed TCCAs (Environmental Compensation Commitment Term) with the ICMBio was the direct mode.

However, in May 2018 it was published the Federal Law No. 13.668 (Brasil, 2018) which amended various elements related to the implementation of the FEC. Regarding the indirect execution mode of the FEC, ICMBio is authorized to select an official financial institution to create and manage a fund formed by resources raised with the Environmental Compensation, so that the full deposit of the amount fixed for the entrepreneur releases him from the obligations related to the direct execution of the instrument (MMA, 2018).

This change will eliminate, or at least decrease, the legal barriers involving the Federal Court of Accounts (*TCU*) and its understood that and indirect execution of FEC would not be allowed. With the new Law, it is expected to overcome a significant obstacle, as the fund will allow the use of about R\$ 1,2 billion<sup>30</sup>, currently dammed (MMA, 2018).

With this new law, the management of the Federal Conservation Units is at a new level, as they can be better structured to meet their objectives since the legal gap that prevented the use of the FEC resources is resolved. We hope that finally, almost 50 years after its adoption, the Federal Environmental Compensation can indeed be applied by exploiting its full potential for the SNUC consolidation and spatial planning.

## Conclusions

If we present an analysis of such complex subject with a significant request for synthesis due to the pattern of this academic work, we run the risk of not presenting some basic notions and aspects for the idea that we intend to expose in this article, demanding the reductionism of important elements considered in the broad research that served as the basis (Fonseca, 2017) for the formulation of this article. On the other hand, this does not prevent some pertinent final considerations being made based on what has been discussed so far.

We note that the State, through its territorial policies, plays a fundamental role in the face of contemporary, and sometimes contradictory, demands of society associated with the perennial economic

growth, as well as environmental protection. In Brazil, this conjecture is no different.

This is why territorial planning is fundamentally a political issue that requires a plurality of negotiations, because it is essential to promote a more democratic process of access to the territory (Mello-Théry, 2011).

In this complex scenario, the social and environmental vector acquires an increasingly relevant role in the organization of territories, especially when public actions slowly become polycentric and the concept of public incorporates the State, but also the civil society, the private sector (Little, 2003) and their many interests and demands.

Therefore, we have the Environmental Compensation incorporated into this eventually contradictory scenario, inserted in a field of powers, forces and interests of different actors, established in a relationship that promotes direct and/or indirect reflexes in the territorial and environmental policies in Brazil and consequently in its spatial planning since its creation in the 1970s.

Despite the difficulty in its comprehension, its potential to influence territorial and spatial planning cannot be neglected, especially in the context of environmental protection. Therefore, enabling and improving the use of operationalization is fundamental to minimize the impacts of anthropic actions in the territory.

That is why, despite the questions, the establishment of the Environmental Compensation Calculation Methodology surpassed, or at least minimized, part of the existing legal insecurities up to that moment, favoring the operationalization of this instrument in some ways.

However, it is crucial to emphasize the potential of the EC as an instrument of territorial policy, but at the same time, as highlighted by Torresan and Lorandi (2008), it is crucial to emphasize that not everything can simply be compensated, so the Environmental Compensation cannot be basically used to approve any activity or enterprise.

In short, the Environmental Compensation aims to protect the environment, but also needs to ensure the economic efficiency of the country's major infrastructure projects. Therefore, territorial policies need to be conceived and implemented as constitutive elements and delineators of development, as fundamental instruments of spatial planning.

The Federal Law published in May 2018 (Brasil, 2018) undoubtedly diminishes the main legal obstacles that have practically disrupted the

operation of the FEC in recent years, being an important step towards the actual consolidation of this instrument, although it was created almost 50 years ago. However, its insertion in a field full of actors with diverse interests does not guarantee that this favorable scenario is perennial.

It is clear that the Federal Environmental Compensation is a mechanism with a relevant potential to influence territorial planning and that involves a significant sum of resources that needs to be effectively operationalized and spent. Real compensations need to occur not only at the administrative and/or legal levels.

However, we emphasize that economic growth should not take place at all costs. We must ensure a development consistent with contemporary demands and especially be able to build long-term prospects.

Finally, we understand that the continuation and expansion of discussions on the Environmental Compensation in Brazil are indispensable. Its purpose seems clear (Fonseca, 2017), but that does not mean that, as an instrument of territorial policy, it must not be debated and refined.

## Notes

1 We conceive that the environment includes elements of the natural world, but also the relationships between people and the environment in which they are inserted (Bursztyn; Bursztyn, 2012). In this article, when we mention the “environmental issue” or “environmental theme” or even other correlated references, we will be referring to the issues that have the environment as a whole as their central perspective.

2 The concept of sustainable development was popularized by the Brundtland Report in 1987 as that the development “[...] that meets the needs of the present without compromising the ability of future generations to meet their own needs” (CMMAD, [1987] 1991, p. 46).

3 Ricupero (1993) points out that, although the classical economics is autonomous and utilitarian in relation to nature, some economists and/or intellectuals of the past centuries were already manifesting themselves in relation to the environment, such as Adam Smith, John S. Mill, David Ricardo, Thomas R. Malthus, and even Karl Marx. In general, not precisely because they are concerned with aspects related to the preservation of the environment, but because they consider in their analysis the “limits of growth” of humanity and a probable depletion of natural resources.

4 One of the most celebrated debates was promoted by the Club of Rome from its report on “the limits of growth.” Since then, there have been some global environmental conferences (the first one was held in Stockholm, Sweden in 1972) and the expansion of other discussion venues (meetings, forums, research, etc.) that together have been central to conceptual and paradigmatic advances on environmental issues, undoubtedly influencing its current conjuncture.

5 Focusing on the Brazilian case, the relevance of environmental issues is unquestionable due to the country's leading role in the environmental and socioeconomic spheres, considering that the country has the biggest part of the Amazon in its territory, a rich biological diversity among its ecosystems and a large number of water resources and minerals. In addition, Brazil ranks eighth in world GDP (World Bank 2019), has the fifth largest global population with 208 million inhabitants (UN, 2017), is a major player in international trade in agricultural and mineral commodities, concentrates one of the world's largest livestock areas, placing it among the world's largest meat traders, among other social and economic factors that result in harmful and degrading environmental consequences, especially if not managed satisfactorily.

6 The political-administrative organization of Brazil comprises the Union, the States, the Federal District, and the Municipalities, all autonomous, under the terms of this Constitution (Brasil, 1988). All elements of the administration of the Union, in general, are called Federal as, for example, in the case of the Federal Environmental Compensation (FEC).

7 Definitions for Environmental Compensation of Brazil are found in Born and Talocchi (2002), Faria (2008), Giasson and Carvalho (2012), ICMBio (2018), Macedo (2012), Sánchez (2008), among others.

8 In Brazil, these two technical documents are known by the abbreviations EIA / Rima, which means Estudo de Impacto Ambiental (Environmental Impact Statement) and Relatório de Impacto Ambiental (Environmental Impact Report).

9 Due to a high level of subjectivity, defining the concept of "significant environmental impact" contributes to misunderstanding and doubts about the applicability and enforcement of the Environmental Compensation in Brazil.

10 Its origin is associated with the inspirations of Professor Paulo Nogueira Neto, who was one of the pioneers of environmental causes in Brazil. For example, he was responsible for the creation and structuring of the first Special Secretariat of Environment of Brazil (Sema) in 1973, commanding it from 1974 to 1986, when he created more than three million hectares of protected areas as Conservation Units (Faria, 2008).

11 According to Ibama (2002) (Brazilian Institute of Environment and Renewable Natural Resources – the federal environmental agency), the Environmental Licensing is an instrument capable of formalizing the anticipatory role of the entrepreneur, guaranteeing the license holders the public recognition that their activities will be carried out with the perspective of promoting environmental quality and its sustainability. In Brazil, the Environmental Licensing of projects with significant environmental impact is based on three stages: Preliminary License, Installation License and Operation License, issued sequentially and with an expiration date.

12 National Environmental Council. This Council is made up of representatives of governments, representatives of entrepreneurs, and representatives of NGOs and other members of organized civil society.

13 In Brazil, Ecological Station is a type of protected area also known as Conservation Units.

14 Federal Law No. 9985 of 2000. Art. 36. In the case of Environmental Licensing of projects with significant environmental impact, thus considered by the competent



environmental agency, based on environmental impact study and respective report (EIA / Rima), the entrepreneur is required to support the implementation and maintenance of a Conservation Unit [...] (Brasil, 2000).

15 Brazilian Institute of Environment and Renewable Natural Resources.

16 Chico Mendes Institute for Biodiversity Conservation

17 The FCEC (Câmara Federal de Compensação Ambiental - CFCA) has a supervisory character and aims to guide compliance with Environmental Compensation legislation. It is a collegiate body linked to the Ministry of Environment and composed by members of the public and private sectors, the scientific community, and civil society. (MMA, 2010).

18 The FECC (Comitê de Compensação Ambiental Federal - CCAF) is composed only by representatives of the federal environmental agencies - Ibama, Ministry of the Environment and ICMBio - being chaired by the first one, and its main competence is to decide on the division and purpose of the resources from the Federal Environmental Compensation. (MMA, 2011).

19 As mentioned earlier, the State exercising its competency of control issues three types of licenses sequentially in Brazil, namely: Preliminary License, Installation License and Operating License, all of which have an expiration date (Brasil, 1997).

20 With the abbreviations in Portuguese as in the Decree, the six Indexes are IUC (Influence on Conservation Unit), IM (Magnitude Index), IB (Biodiversity Index), IA (Coverage Index), IT (Temporality Index) and ICAP (Endangerment of Priority Areas Index) (Brasil, 2009).

21 As an example, Fonseca (2017) analyzed the execution of the Environmental Compensation of the Santo Antônio do Jari Hydroelectric Plant in Brazil, emphasizing how the respective calculations occurred to reach the amount of approximately R\$ 3,7 million (the equivalent of US\$ 1.8 million at that time), based on an Impact Degree of 0,5, in other words, the maximum.

22 DAU - Direct Action of Unconstitutionality (ADI – Ação Direta de Inconstitucionalidade). According to the Supreme Federal Court (STF, 2018) is an instrument to declare the unconstitutionality of a law or federal norms, concerning the current Constitution.

23 According. Art. 36, § 1º, SNUC Federal Law (nº 9.985/2000) (Brasil, 2000).

24 Direct Action of Unconstitutionality No. 3378. According to the Supreme Federal Court (2018), one ADI aims to declare that a law is unconstitutional or part of it, that is, contrary to the Federal Constitution.

25 According to Article 31-A, Federal Decree No. 6.848 / 2009 (Brasil, 2009).

26 At that moment, the ICMBio did not exist yet, therefore Ibama was responsible for the overall operation of the FEC.

27 The ICMBio was created in 2007 when it absorbed part of Ibama's attributions. This environmental agency is responsible for propose, implement, manage, protect, supervise and monitor Federal Conservation Units, in addition to promoting and executing biodiversity research, protection, preservation, and conservation programs and to exercise environmental police power to protect the biodiversity throughout Brazil. We emphasize its responsibility for the execution and supervision of the FEC in Federal Conservation Units.

28 It is estimated that in the direct mode the extra expenses add up from 35% to 50% more expended volume with the EC in addition to the fact that not all entrepreneurs have knowledge about the implementation of such processes, which can decrease the effectiveness, make it more costly and slow the FEC enforcement procedures (Torres, 2016).

29 *Amicus Curiae* is a Latin expression meaning "friend of the Court." Refers to assistance intervention in the judicial process through adequate representation to manifest in the case file. Although not part of the proceedings, it acts only as a third party to the case. (STF, 2018).

30 The equivalent of US\$ 320 million at that time.

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