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COMPLIANCE AND SUSTAINABILITY

BRAZILIAN AND PORTUGUESE PERSPECTIVES

ORGANISERS
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2020

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I

GENERAL PART

2.

THE PRINCIPLES OF EQUATOR AS STRENGTHENING MECHANISMS OF SUSTAINABLE INVESTMENTS

THE CONFORMITY OF INVESTMENT

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Abstract: This paper aims to demonstrate, through a textual systematization, the application of the Equator Principles, by financial institutions, integrated to a compliance system capable of generating sustainability in the area of banking investments. In this sector, this practice becomes fundamental, since the objective is to create a long-term sustainability environment, where financing of projects that put the environment in serious danger should be avoided. It sought to clarify how the Principles can be applied based on an efficient governance system, through business ethics and / or national regulatory frameworks. The article presents the theme discussed during the International Seminar, entitled "Compliance and Sustainability: Brazilian and Portuguese Perspective", through a research inserted in the deductive logic method, based on a bibliographical review of the Brazilian literature, concomitantly based on national standards, held on February 7, 2019, at the Faculty of Law, University of Coimbra, Portugal. Thus, it is intended to expose a relational basis of the importance of Compliance Management in the financial area, in order to promote the spirit of sustainable development in the practices of projects with relevant environmental impacts.

Keywords: compliance management; Equator principles; sustainable investments; risk management

1. The application of the Equator Principles in interdependency with the compliance pillars for the sustainable management of investment

The function of an investment bank is currently understood as "funneling personal and institutional savings to productive endeavors, contributing to economic development" (Ladd / Wright 1965, 76). However, for the effective development of this market, it is necessary to understand, from the perspective of sponsoring institutions, that certain risks may occur that lead to negative returns on capital, as "corporations are also subject to unpredicted or even unforeseen situations throughout their history" (Arima / Gil / Nakamura 2013, 136).

As the legal risk is attached as much to the internal adoption of more recent legislation as to an eventual technical and juridical lack of knowledge on how to apply the norm to a specific type of business, the internal application of the pillars of corporate governance is necessary to "enlighten the contingencies through which knowledge sustained by the cause-effect vector can better understand the uncertainties of contingent events" (*Ibid.,* 41), meaning to prevent possible risks that may undermine a specific investment.

The aforementioned application of the compliance pillars is especially important in the banking industry, as "banks are institutions that fundamentally assume and manage risk, be it credit operations, resource management or cash flow management" (*Ibid.,* 133), and because "as a function of the increase in complexity of financial markets […] investment capital is nowadays more exposed and susceptible to speculation" (*Ibid.,* 133).

Based on this idea, "in October of 2002 a small number of banks [...] met in London, together with International Finance Corporation (IFC), the financial arm of the World Bank" (SANTOS 2012, 05) to discuss questions related to project finance, "aiming to develop a common system of environmental and social policies and guidance lines, to be applied globally" (*Ibid.,* 05). Therefore, in 2003, the Equator Principles were defined as "a set of socio environmental demands applied in the approval of finance for large projects, supported by financial clauses that limit its application to a minimum financial amount" (INTERNATIONAL FINANCE CORPORATION 2005 *apud* DIAS / MACHADO 2007, 8). With this public policy, it is expected that such principles "are used as the basis and as a common standard to implement procedures and individual, internal standards in social and environmental issues in financing activities" (*Ibid.*, 8).

In this context, it is understood that both the pillars of compliance and the Equator Principles are intended to safeguard project investment. Therefore, compliance should "be considered as an internal business support area, characterized by three specific lines [...] based on the prevent, detect and react logic" (ASSI 2018, 27). These approaches should be applied internally in financial institutions, together with the Equator Principles, to achieve effective and efficient security in financing contracts.

Therefore, prior to venturing specifically into the systematization of compliance management together with the Equator Principles, it is necessary to explicitly identify the corporate governance pillars included in this study and, in similar fashion, to specify the principles structured in the management system so that they can be dissected later in a theoretical-practical-professional approach.

Compliance programmes are based on 9 (nine) pillars that guide the security of a corporation, namely: *a)* support executive management; *b)* risk assessment; *c)* code of conduct; *d)* internal

controls; *e)* training and communication; *f)* third-party evaluation (due diligence); *g)* complaint channels; h) internal investigation; and *i)* audit and improvement review (*Ibid.,* 34).

Likewise, the Equator Principles that must be incorporated in a financial organization to allow sustainable investments are 1) review and categorization; 2) environmental and social assessment; 3) applicable environmental and social standards; 4) the environmental and social management system and Equator Principles action plan; 5) stakeholder engagement; 6) a grievance mechanism; 7) independent review; 8) covenants; 9) independent monitoring and reporting; and 10) reporting and transparency (ASSOCIAÇÃO DOS PRINCÍPIOS DO EQUADOR 2013, 6-11).

Regarding the application of the first equator principle — review and categorization — it is important to highlight that the financial institution, upon receiving a request for project financing, should "categorize it based on the magnitude of its potential environmental and social risks and impacts" (*Ibid.,* 06) and order them according to the social and environmental categorization developed by the International Finance Corporation (IFC), thus filtering the project into one of three categories: Category A — projects with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented; Category B — projects with potential limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible and readily addressable through mitigation measures; and Category C — projects with minimal or no adverse environmental and social risks and/or impacts (*Ibid.,* 6).

Principle 2 — environmental and social assessment — is required for the financing of projects that fall into Categories A and B, meaning "the client (is) to conduct an Assessment process to address, to the *Equator Principles Financial Institution*'s (EPFI) satisfaction, the relevant environmental and social risks and impacts" (*Ibid.,* 6) and

should provide "assessment documentation (which) should propose measures to minimize, mitigate, and offset adverse impacts in a manner relevant and appropriate to the nature and scale of the proposed project" (*Ibid.*). The EPFI presents examples of projects that should provide the above-referenced assessment documentation, such as those that use and require the handling of hazardous materials; those that include the efficient production, transmission and consumption of energy; those that involve labour issues (including the four fundamental labour rights); those that involve health issues; and, finally, those that involve human rights, and requires that due diligence be employed to prevent, mitigate and manage adverse impacts to those rights.

It is easily noted that both Principle 1 and Principle 2 can be applied in a financial institution via the second compliance pillar — risk management — since this "should encompass the mapping of risks including key points in the organization, significant interactions with third parties, the specific and general objectives and the threats that may be faced" (AVALOS 2009, 65). Furthermore, after mapping the risks in a joint application of the abovementioned principles and the pillars of compliance, the institution should "move to developing rules to be complied with by every member of the corporation as a way to mitigate such risks" (ASSI 2018, 37).

Next, under Principle 3 — applicable environmental and social standards — "the Assessment process should, in the first instance, address compliance with relevant host country laws, regulations and permits that pertain to environmental and social issues" (ASSOCIAÇÃO DOS PRINCÍPIOS DO EQUADOR 2013, 7). The assessment determines "to the EPFI's satisfaction the Project's overall compliance with, or justified deviation from, the applicable standards." In similar fashion, to meet the ideal of positive compliance, a relationship is established with the application of Principle 8 — covenants — under which "the client will covenant in the financing documentation to comply

with all relevant host country environmental and social laws, regulations and permits in all material respects" (*Ibid.,* 10).

In a more in-depth analysis, it is clear that Principles 3 and 8 are related to the application and fulfilment of internal (corporate culture) and external (government regulation) norms and are fully connected to the implementation of the third pillar of a compliance programme, codes of conduct. In the ideal situation, these documents are necessary to the preservation and security of financing institutions, as they explicitly state "what should be done versus what is forbidden from being done, under penalty of being subject to a determined consequence" (Assi 2018, 38). By instituting such ethics codes and behaviour manuals, financial institutions can explicitly specify the types of investments with which employees may not be associated, including therefore, an ethical-moral analysis of the action.

Regarding Principle 4 — the environmental and social management system and Equator Principles action plan — and Principle 9 — independent monitoring and reporting — it is important to mention they are institutionalized with the following objective: "for all Category A and Category B Projects, the EPFI will require the client to develop or maintain an Environmental and Social Management System (ESMS)" — citing Principle 4 (ASSOCIAÇÃO DOS PRINCÍPIOS DO EQUADOR 2013, 8), which is intended to "outline gaps and commitments to meet EPFI requirements in line with the applicable standard" (*Ibid.,* 8). Principle 9 aims to "ensure ongoing monitoring and reporting after Financial Close and over the life of the loan" (*Ibid.,* 11).

It is notable that such principles may be attached systemically to the pillar of audit and improvement review within compliance systems, as this pillar is intended to "measure efficacy and the application of norms, policies, procedures and other internal controls" (Assi 2018, 42).

In addition, Principle 4 is connected to aspects of the internal controls of a company, as it highlights "the importance

and need to perform correctly its function, guaranteeing with such the expected results derived from management processes" (*Ibid.,* 38). In other words,

The control environment is related to non-operational controls, which are attached to the personal values of each person in the organization and are likewise important to generate a healthy control environment. Environmental analysis aims to collect information to support the identification of risk events, as well as contributing to choosing the most appropriate actions to achieve the macroprocess objectives (BRASIL 2017, 24).

Furthermore, see Principle 5 — stakeholder engagement — which, by its nomenclature, can be immediately connected with the need to obtain support from executive management (main pillar of compliance), as it is "the basis to building an organizational culture in which employees and third parties effectively cherish an ethical conduct" (MENDES / CARVALHO 2017, 129).

It is important to highlight the importance of such implementation in a sustainability programme since "the function of compliance involves a series of activities of a diverse nature […] that must be articulated in a coherent form so its effectiveness is maximized" (MENDES / CARVALHO 2017, 130). To support the maximization of integrity programmes, it is suggested that applying Principle 5 is also attached to the training and communication actions demanded by Compliance because "there is no use to identifying the inherent risks to the organization's field of activity, followed by the implementation of norms and policies to mitigate them if, at last, nothing gets out of paper" (ASSI 2018, 39).

In the same field, equator principle 6 — a grievance mechanism — is directly connected to the previous principle since "communication channels have two functions: the first is related to resolving doubts […] about how to act; the second is aimed at the communication of potential illicit activities" (MENDES / CARVALHO 2017, 140). This principle

can be attached to the second idea; for example, when there is "identification of fraudulent or damaging practice by a certain manager or collaborator, a denunciation channel must be available to report, investigate and apply the required sanctions" (Assi 2018, 40). Therefore, the grievance mechanism may be implemented along with one of the pillars of compliance — complaint channels — as the EPFI requires the client with projects in Categories A and B "to receive and facilitate resolution of concerns and grievances about the Project's environmental and social performance" (ASSOCIAÇÃO DOS PRINCÍPIOS DO EQUADOR 2013, 9).

In the same way, it is important to mention Principle 7 — independent review — in which the EPFI establishes that, to finance Category A and B projects, "an Independent Environmental and Social Consultant, not directly associated with the client, will carry out an Independent Review of the Assessment Documentation" (*Ibid.,* 09). This Principle aims to guarantee security in high-risk projects by giving that responsibility to third-party management (due diligence), a system that is also used in conformity programmes.

Nevertheless, Principle 10 — reporting and transparency — complements the basic ideals of Principle 5 in aiming to obtain a crystal-clear view of the ethics of the project and its financing. To that end, the EPFI "will report publicly, at least annually, on transactions that have reached Financial Close" (ASSOCIAÇÃO DOS PRINCÍPIOS DO EQUADOR 2013, 12) as well as reporting on "Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations" (*Ibid.,* 12). In addition, the clients of financial institutions shall "ensure that, at a minimum, a summary of the ESIA is accessible and available online" (*Ibid.,* 12) and "will publicly report GHG emission levels […] during the operational phase for Projects emitting over 100,000 tonnes of CO2 equivalent annually" (*Ibid.,* 11).

Finally, regarding corporate security and sustainability, it is possible to understand that the Equator Principles have the advantage of being a common base of orientation for financial agents, which, when analysing investments, can therefore understand whether a project is being developed in a socially responsible way. Therefore, the application of the principles is made possible and easier through their insertion into the pillars of compliance management. In summary, the adoption of each of the ten principles can be related directly to the nine pillars of an integrity programme, thus allowing the expansion of the sustainability of financial organizations.

2. **Analysis of control of Brazilian financial agents: applicable legislation**

As previously stated, the Equator Principles are used primarily as mechanisms of risk prevention for financial agents. In that sense, it is important to highlight that the Brazilian juridical order currently possesses instruments establishing rules and control criteria for those agents, including banking institutions that are part of the association of said principles, as is the case for Banco do Brasil (BB), which "was the first public bank at the global level to adhere to the Equator Principles [...] in 2005" (BANCO DO BRASIL, 2005, 2).

As this bank reports, "Social and environmental responsibility and capacity to generate employment and returns from the enterprise must be considered in the decision about operations with credit risk" (*Ibid.,* 2). In addition, adhesion to the principles is clear, as the Bank states that it does not assume "credit risk with a client liable for malicious damage to the environment, which submits workers to degrading work conditions or keeps them in conditions analogous to slave work" (*Ibid.,* 2), in accordance with Principle 2 — environmental and social assessment.

A thorough national analysis shows that in addition to Banco do Brasil, only 4 (four) other banks adhere to the aforementioned principles, namely, Banco Bradesco S.A., Banco Votorantim S.A, Caixa Econômica Federal and Itaú Unibanco S.A, Furthermore, in international terms, the European continent is represented by the largest number of banks in the instituted Equator Principles system, with forty subscribing banks, followed by the Asian continent and North America, each with fourteen banks, and finally Africa and Latin America, with ten each.

Turning the focus to Brazil, it is observable that the application of the Equator Principles by financial institutions provides safeguards and avoids ill-advised investments in projects with social and environmental impacts. In the same fashion, the Central Bank of Brazil issued Resolution nº 4.327 of 25/04/14, which states directives for the "implementation of Social and Environmental Responsibility Policies by financial institutions and other institutions authorized to operate by Central Bank of Brazil" (BANCO CENTRAL DO BRASIL 2014, 1). Such an example is article six of the aforementioned resolution, which establishes that the management of social and environmental risk of the referred institutions should consider a) systems, routines and procedures that allow the identification, classification, evaluation, monitoring, mitigation and control of social and environmental risks presented in the activity and operations of the institution; b) a registry of data referred to effective losses due to social and environmental damage for a minimum period of five years, including the value, type, location and economic sector object of the operation; c) prior evaluation of potential negative social and environmental impacts of new modes of products and services, including risks to reputation; and d) procedures to adjust social and environmental risk management to legal, regulatory and market changes.

In a similar fashion, another national regulation by the Central Bank in accordance with the objectives of the

Equator Principles is Resolution nº 3.545/2008, which "establishes a demand of probatory documentation of environmental compliance and other conditions, to permit agricultural financing in the Amazonian Biome" (*Ibid.* 2008, 1). Furthermore, in another policy for the application of sustainable financing, the Banco Nacional de Desenvolvimento (BNDES), promotes the idea of sustainable development with the "main objective of a Social and Environmental Policy [...] with a focus on an integrated conception of economic, social, environmental, and regional dimensions" (BNDES, 2018) in addition to establishing "operational procedures for an efficient social and environmental analysis of projects postulating to financing" (BNDES, 2018).

Consequently, these examples of national standards demonstrate their importance given that "following what is happening with other enterprises, the role of banks is being redefined, answering to significant pressure from society to intensify their actions in reducing social inequality" (Vinha / Hacon / Marques 2005, 6). In addition, the standards incentivize financial organizations to focus on "economic growth and democratizing banking services and products and financing socially and environmentally sustainable development projects" (*Ibid.* 2005, 6).

3. **Conclusion**

This work seeks to conceptually present the Equator Principles, which originated in 2003 in response to the need to create mechanisms for social and environmental policies and guidelines in a financial-corporate setting for a group of specific banks. Furthermore, this study aims to identify a systematization of the possible application of the abovementioned principles through a structured system of compliance. Finally, the study briefly investigates national legislation related to the theme, meaning, and risk management and intended to enact sustainable investments in Brazil.

In regard to the ten Equator Principles, it is important to understand that their mission is to aid and direct the actions of financial agents, specifically banks, by implementing positive practices against possible investments that negate sustainable investments, whether such investments cause damage to the environment, have high-risk impacts or affect human rights. The execution of the principles can be organized by inserting them into the nine pillars of compliance management, thereby facilitating, their institutional adoption.

Not least important, this paper presents a brief national and international overview through which it is possible to understand the strict and low number of 4 (four) Brazilian banks involved in the principles association. Meanwhile, even with such low representation, the country has achieved a high level of legal positivity that facilitates the development of risk management policies in sustainable investments, with the examples of Resolution nº 4.327 of 25/04/14 and Resolution nº 3.545 of 2008, both from the Central Bank.

Finally, considering all of the factors described above, it is possible to conclude that the Equator Principles may and should be applied by financial institutions as internal-cultural parameters that aim to create financial enterprise value. Furthermore, the integration of the principles may occur in an accessible way by fitting them into the compliance programme pillars in an ordered, wholesome, effective and efficient way, enabling institutions to create a successful extension of their corporate activities through the promotion of sustainable investments.

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