

Environmental Compliance: Search for Effectiveness in the Application of Environmental Standards

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Abstract— Since the advent of the Lava Jato operation, the term compliance has acquired a hitherto unknown popularity. Although it has been related to criminal guardianship, it takes care of a perfectly possible strategic management in the most diverse branches of law. In this study, the compliance is approached within the environmental sphere, as an instrument of feasibility and effectiveness of legal norms and practices in favor of environmental protection. Much is questioned whether the practice of compliance is mandatory or to what extent would be of great value for the development and business performance. In the environmental aspect, the research demonstrates that the preventive nature of this governance technique can bring current and future benefits. In addition, there is, implicitly, the approach to the concept of sustainability within the objectives described by the United Nations. To carry on this study, a bibliographic research was developed, based on selected scientific articles, as well as Brazilian doctrine and legislation pertinent to the theme. The achieved results of the research demonstrated that applicability of compliance practice in the environmental matters can be adopted in view of its preventive nature.

Keywords— effectiveness of legal norms and practices, environmental compliance, sustainability.

I. INTRODUCTION

When addressing the compliance theme, it is necessary to bring a concept to enter its applicability. Compliance is an expression of the English language that comes from the to comply, that is, to conform. This definition draws on the need to adapt to the current legal norms and legislation¹. In the year 2019, the concern with the environment reached the most diverse spheres. This is a world issue

where respect for environmental standards, principles and treaties have begun to take precedence over the debates. This demand for preservation and environmental recovery solutions has brought real challenges to governmental and private sectors, mainly on accountability. In this sense, we seek ways to achieve development without the occurrence of environmental damage: The objective is sustainable development as a way to drive both government and private sectors.

Considered compliance as part of strategic management, the technique was brought to the environmental area as a

¹ BREUS, Thiago Lima; GUIMARÃES, Fernando Vernalha; PETIAN, Ângela; MARCHESI, Bruna. Soluções Jurídicas em Compliance e Anticorrupção. Available in: <https://www.vgpilaw.com.br/compliance>. Access: 02 July 2019.

way to make better adequacy and effectiveness of the then prevailing norms.²

It is also noteworthy that this is a multidisciplinary technique. It is imperative that the most diverse areas work together so that the program achieves a good result. Through the so-called "anticorruption Law" – Law No. 12.846/2013 – The compliance Institute is brought to the legal Brazilian planning for application in business management. It seeks to prevent corruption in public and private businesses. It is important to emphasize that corruption is a broad term that encompasses any situation capable of generating an imbalance capable of damaging both the public and private sector.³

The principled and normative application became the basis of compliance to achieve the best result. Constitutional principles – implicit and expressed – and those brought by international treaties are used at all times.

Also, regarding the implementation of the Institute of Compliance, those inherent to the public administration described in article 37, *caput*, of the Constitution of the Brazilian Republic of 1988, are fully applicable: legality, Impersonality, morality, publicity and efficiency. In addition to these, those laid down in article 225 of the constitutional text – which deals with environmental protection – are also applicable here. The principles of prevention, polluter pays, precaution and sustainable development stand out.

Based on these principles described and in the main norms related to environmental protection, this study was developed. The methodology used was the bibliography,

through consultation with current Brazilian legislation, doctrine and scientific papers.

II. EFFECTIVENESS OF THE APPLICATION OF ENVIRONMENTAL STANDARDS

Since the National Environment Policy (1981), there has been not only an awakening in the environmental awareness of the Brazilian population but also a significant increase, perceptible over the years. After the promulgation of the Republic Constitution in 1988 and other legislations indispensable to environmental protection, an active participation of Brazil begins as a signatory of international treaties on the environment, in addition to hosting events of great repercussion.

The applicability of norms regarding protection and environmental preservation is seen as a priority, since it is directly related to the principle of the dignity of the human person, one of the pillars of the Brazilian constitutional order (art. 1. III of 1988 CRFB). The great concern involves the effective application of the norms and the way of exercising control in economic activities with potential polluter.

According to Attanasio *et al.*⁴, when present the results of environmental damage such as the effects of soil degradation, water pollution, among others, implicitly affect the increase of consciousness in the population about dependence on the environment. The relationship between man and natural resources is related to quality of life, which has caused, in recent decades, the revision, creation and expansion of specific legislation on the use of the environment.

For Attanasio *et al.*⁵, there was a concern of the legislator in seeking mechanisms for the State to meet the aspirations of the population, highlighting the rational, sustainable and permanent use of the environment in the most diverse sectors: rural, agricultural, trade, industry, services, Public administration and the common citizen himself.

Regarding the practice of compliance, it is important to highlight the relevance of the adoption of integrity programs⁶. In these programs, the following requirements

² In the USA, for example, the creation of effective compliance programs has been intensified since the decade of 1990, due to the strengthening of the penal application of American environmental statutes and the consequences of violations Potentially more serious. SILECCHIA, Lucia Ann. Ounces of Prevention and Pounds of Cure: Developing Sound Policies for Environmental Compliance Programs. *Fordham Environmental Law Journal*, v. 7, n. 3, 1996, p. 583-590. Also mention the importance of the Clean Air Act Amendments of 1990 ("CAAA") that established criteria and rules for compliance certification. MAJUMDAR, Somendu B. Voluntary Environmental Compliance Auditing: A Primer. *Fordham Environmental Law Journal*, v. 7, n. 3, 1996, p. 817.

³ As we affirm in another opportunity, the expression "corruption" is a phenomenon whereby a state agent acts outside the normative standards of the system, favoring particular interests in exchange for reward. Corruption is the enemy of the Republic, since it means the private use of the public thing, when the basic characteristic of Republicanism is the search for the "common good", with the distinction between public and private spaces. NEVES, Daniel Amorim Assumpção; OLIVEIRA, Rafael Carvalho Rezende. *Manual de Improbidade administrativa*, 7. ed. São Paulo: Método, 2019, p. 3-4.

⁴ATTANASIO, C.; RODRIGUES, R.; GANDOLFI, S.; NAVE, A. Environmental adequacy of rural properties recovery of degraded areas restoration of ciliary forests. USP. Higher School of Agriculture "Luiz de Queiroz"-Department of Biological Sciences-Laboratory of Ecology and forest restoration. 2006. Available in <<http://www.esalq.usp.br/gerd/Recuperacao/ApostilaTecnicoLE RFFinal1.pdf>> Access on 20 Jul 2019.

⁵Id. 6

⁶ We have already had the opportunity to affirm that the creation of a corporate compliance policy goes beyond, however, the mere compliance with legal norms, notably involving the

must be observed: control environment, risk mapping, procedure policy, communication or information and monitoring. This governance technique aims to ensure that measures implemented in the company and in the control system are not part of a new department, but, rather, be integrated into the company⁷.

The role of compliance, as corporate governance, is in its preventive nature. For Credidido, respect for ethics, integrity, administrative accountability and corporate morality are achieved through the effective application of the technique.⁸

It is important to emphasize that the regulatory laws of the corporate management programs – Law n ° 12.846/2013 (Anti-Corruption law) and Law No. 13.303/2016 (state law) – have sanctioning norms and encouragement to Institution of compliance programs. The objective is to curb or discourage the practices of corruption not only in the public sector, but also in the private one. There is also an incentive for the implementation of an instrument of business integrity and the imposition of management practices. That's why it's a corporate governance practice.

The search for effectiveness in applying standards and preventing abusive practices has caused the new legislation to impose sanctions on companies. According to the Law No. 12.846/2013, a parameter for the application of the penalties typified in that legal diploma, with the attenuation of the amount of the fine eventually applied, is the existence of internal mechanisms and procedures for integrity, auditing and encouraging the denounce of irregularities and the effective application of codes of ethics and conduct within the scope of the legal entity (article 7, PARAGRAPH VIII, of Law No.

12.846/2013 and articles 18, item V, 41 and 42 of Decree no. 8.420/2015).

Law No. 13.303/2016, in turn, required the implementation of codes of conduct and integrity within the scope of the state companies and their Subsidiaries, providers of economic activities or public services (articles 9, 12, item II, 14, item I, 18, item II, 24, item IV, 32, paragraph V, of Law no. 13.303/2016) Law no. 13.303/2016, in turn, required the implementation of codes of conduct and integrity within the scope of the state companies and their subsidiaries, providers of economic activities or public services (articles 9, 12, item II, 14, item I, 18, item II, 24, item IV, 32, paragraph V, of Law no. 13.303/2016)⁹.

It is important to demonstrate that there are three basic principles to the practice of *compliance*. First of all, the principle of morality, enshrined in article 37 of the 1988 CRFB, requires ethical, loyal and serious administrative action. It is not for another reason that article 2, paragraph one, IV, of Law no. 9.784/1999 imposes on the public administrator "Acting according to ethical standards of probity, decorum and good faith". As a consequence, the concern with the internal control of public management is natural, especially through the establishment of programs of compliance.

Secondly, the principle of publicity, also enshrined in article 37 of the CRFB of 1988, is fundamental for the *compliance* system. The said principle imposes the dissemination and externalization of acts of the public power.

Otherwise, the visibility (transparency) of the state Acts is closely related to the democratic principle (article 1 of the CRFB of 1988), enabling the exercise of social control on public acts. The obscure and secretive state action is typical of the authoritarian states. In the democratic State of law, the rule is the publicity of State acts; secrecy is the exception.¹⁰

Public transparency depends on the implementation of the fundamental right to the information provided for in art. 5, xxxiii, OF 1988 CRFB, in law n ° 12.527/2011 (Access to Information Law – LAI) and Law No. 13.709/2018 (General Law on personal data protection – LGPD).

implementation of an organizational culture that it emphasizes ethics and commitment to the norms, whether legal or the internal policies of a company, based on established standards of conduct. OLIVEIRA, Rafael Carvalho; ACOCELLA, Jéassic. The requirement of compliance and integrity programs in public hiring: the pioneering of the state of Rio de Janeiro and the Distrito Federal. *Revista Brasileira de Direito Público*, v. 17, n. 64, jan./mar., p. 9-30, 2019.

⁷ VASCONCELOS, Priscila E.A., LOPES, Ingrid F., FERNANDES, Sanny B.O. Analysis of compliance in the public administration under the aegis of the Constitutional principles (cap.). Democracy and fundamental rights. Studies in tribute to Professor Leonardo Rabelo. Rio de Janeiro: ed. Processo. 2019.

⁸ CREDIDIO, Guilherme S. Business Compliance as a tool for reducing corruption. *Revista CEJ*, Brasília, Ano XXII, N. 74, p. 85-90, Jan./abr. 2018. Available in < http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/Rev-CEJ_n.74.09.pdf> Access on 25 Jul 2019.

⁹ OLIVEIRA, Rafael Carvalho Rezende. *Organização administrativa*, 4. ed. São Paulo: Método, 2018. p. 159 e segs.; GABARDO, Emerson; CASTELLA, Gabriel Morettini e. A nova lei anticorrupção e a importância do *compliance* para as empresas que se relacionam com a administração pública. *Belo Horizonte: Revista de Direito Administrativo & Constitucional*, ano 15, n. 60, p. 129-147, abr./jun., 2015.

¹⁰ OLIVEIRA, Rafael Carvalho Rezende. *Curso de Direito Administrativo*, 7. ed. São Paulo: Método, 2019. p. 41-43.

It is no difficult to understand that the advertising principle allows access to information and values spent in each public body. Transparency, therefore, is used to check for possible indications of corruption, since it allows for visibility of data and information related to the integrity of Public administration.

Finally, the principle of efficiency, inserted in the art. 37 of the CRFB of 1988, by the constitutional Amendment No. 19/1998, also plays a fundamental role in the institutionalization of *compliance* programs. The insertion of the principle of efficiency in the constitutional text aimed, in the normative field, to replace the "bureaucratic public administration" by the "Public Administration Management" (or "Results Management").¹¹

In the context of "results management", the interpretation and application of the law cannot depart from the consequences (legal and extra-legal) generated by the choices effected by the State authorities. Without leaving aside the importance of certain formalities, strictly necessary for the legitimate formation of the state will, the law starts to worry in a preponderant manner with the effectiveness of fundamental rights (final legality).

The achievement of the results, as far as possible, should be accomplished through a political-participatory process¹²: a) Planning: action plans, budget and priorities, highlighting the participation of the population through hearings and public consultations; b) Implementation: concrete measures to satisfy the previously delimited results; and c) Control: the controlling organs should not be restricted to formal legality in the analysis of the legality of administrative action, and should take into account the other principles and the achievement of the expected results.

For this reason, the institutionalization of compliance mechanisms, with the establishment of codes of ethics and internal control systems, functions as an important tool in the effectiveness of the principle of efficiency.

As highlighted by Breus *et al*¹³ the compliance Programs entail several benefits, such as: a) it is possible to recognize the agents that this is a company that seeks to

be in accordance with the predefined dictates; b) There is a valuation on the part of the government when the participation of these companies in hiring processes along to the public bodies, leaving clear that it is a company with solid and healthy business values; c) There is a professionalization of business risk management; d) the preservation and optimization of the company's values also appear as positive factors; e) Facilitating access to financial resources of Credit institutions or even if necessary to the opening of capital; f) The management of conflicts of interest in a more effective way; and g) the permission in the constant evaluation of the company's purposes in order to better adapt them to the directions that the market comes to develop.

Furthermore, it is possible to verify that compliance rules for companies make better adequacy to existing standards, besides respecting the principles inherent in environmental management and business management.

III. ENVIRONMENTAL RESPONSIBILITY

It is essential to analyze compliance, from the perspective of compliance with environmental standards.

At this point, the history of the Brazilian legislation on environmental protection allows a better understanding of the civil, penal and administrative aspects of environmental responsibility.

The environmental awareness of Brazilian society is based on the years 80, with the publication of the National Environment Policy (Law no . 6830/1981), followed by the promulgation of the Constitution of the Republic in 1988. A greater concern about environmental preservation is initiated at this time.

Vasconcelos and Vasconcelos¹⁴ explain that, in the constitutional text, the environment acquires a *status* of diffuse law and goes on to have a chapter of its own: the Chapter VI of title VIII. This means that, by the new Brazilian constitutional order, environmental issues become a concern of the whole society and not just the public sector.

Art. 225 of the CRFB consecrates the right to the ecological balanced environment, well of common use of the people, which must be defended by the public authorities and the collectivity. All the members of the Federation (Union, States, Federal District and municipalities) must adopt the necessary measures to

¹¹ PEREIRA, Luiz Carlos Bresser. Gestão do setor público: estratégia e estrutura para um novo Estado. *Reforma do Estado e Administração Pública gerencial*. 7. Ed. Rio de Janeiro: FGV, 2008. p. 29. On the principle of efficiency, see for example: MODESTO, Paulo. Notas para um debate sobre o princípio constitucional da eficiência. *Revista do Serviço Público*, v. 51, n. 2, p. 105-119, abr./jun., 2000.

¹² OLIVEIRA, Rafael Carvalho Rezende. *Curso de Direito Administrativo*, 7. ed. São Paulo: Method, 2019. P. 45.

¹³ BREUS, Thiago Lima; GUIMARÃES, Fernando Vernalha; , Angelica; MARCHESI, Bruna. Soluções jurídicas em Compliance e Anticorrupção. Available at: <https://www.vgpilaw.com.br/compliance>. Access on 20 Jul 2019.

¹⁴ VASCONCELOS, Priscila E.A. and VASCONCELOS, Paulo S. Environmental responsibility and sustainability of bioenergy plants. In: X CBPE Brazilian Congress of Energy Planning, 2016, Gramado, RS. Energy supply and demand: the role of information technology in resource integration, 2016.

protect the environment (art. 23, VI and VII, of the CRFB).

The conducts, commissive or omissive, and activities harmful to the environment subject the offenders, individuals or corporations, to civil, criminal and administrative sanctions, in the form of art. 225, § 3, of the CRFB. Similarly, art. 14, § 1, of the Law 6.938/1981, which provides on the national environment policy, establishes that the polluter is "obliged, regardless of the existence of guilt, to indemnify or repair the damage caused to the environment and to third parties, affected by its activity".

The growing concern about preserving and complying with environmental standards has been growing over the years. For Vasconcelos and Vasconcelos¹⁵, Brazil, as well as other developing countries, is influenced by the great global concern. There are many international treaties that Brazil is a signatory, including some large events, such as Rio-92 and Rio + 20, both occurring in the city of Rio de Janeiro, in 1992 and 2012, respectively.

As regards environmental accountability, it is necessary to point out that the principle of sustainable development, brought by the Brundtland report¹⁶ (1987), it is clear to demonstrate that only the concept of sustainability is attained when there is respect for economic, environmental and social orders.

The Ministry of the Environment¹⁷ -MMA- indicates that the actions that respect the environment and policies that have as one of the main objectives the sustainability, will also have socio-environmental responsibility. All are responsible for environmental preservation: governments, companies and each citizen.

In addition to environmental accountability, it is necessary to produce and sustainable consumption on the part of society. According to MMA¹⁸, sustainable production is an incorporation that occurs throughout the entire life cycle of goods and services, aiming at the use of better alternatives to minimize environmental and social costs.

The definition brought by the United Nations Environment Program¹⁹ (PNUMA) on sustainable consumption. It is the use of goods and services that meet basic needs, providing a better quality of life. There is a direct relationship with the minimization of the use of natural resources and toxic materials, the generation of waste and the emission of pollutants throughout the life cycle of the product or service, so that it does not jeopardize the needs of future generations.

IV. SUSTAINABILITY CERTIFICATIONS: "GREEN" CERTIFICATES

It is important to emphasize the objective of corporate governance mainly in the environmental aspect. Sustainability certifications are the fruit of internal and external policies undertaken by legal entities, including the impact on negotiations with public authorities and other institutions in the market that act.

Based on the Brazilian energy sector, where there is a concern with the production of clean and renewable energies as a way to reduce environmental liabilities, it is possible to verify the existence of certifications at national and international level.

Sugar-energy mills – capable of cogenerating energy through sugarcane biomass – to be considered as self-sustainable plants, need to possess certain "green" certifications. For Vasconcelos²⁰, the *Usina Verde* certificate (MCT, 2006) comes to those mills that have managed to transform an activity previously regarded as pollutant by the emission of GHG (greenhouse gases) in sustainable, mainly because it promotes the reduction in the production of residues like sugarcane bagasse.

The sustainability certifications of the sugar-alcohol or sugar-energy sector are not new. The Green Energy Seal²¹ was created in the year 2015. The Sugar Cane Industry Association (UNICA) and the Electric Energy Commercialization Chamber (CCEE) created this seal with the objective of certifying those companies that were not only producers but also consumers of clean and renewable energy. That is, it was a certification of energy self-sustainability.

The Green Energy Seal is granted on those companies that acquire and consume at least 20% of the total energy produced by the sugar-energy plants. However, there is

¹⁵Id. 5

¹⁶Brundtland report. Our common future. Available in <<https://www.un.org/documents/ga/res/42/ares42-187.htm>> Access on 20 Jul 2019.

¹⁷Ministry of the Environment. Responsabilidade Socioambiental. Available in <<https://www.mma.gov.br/responsabilidade-socioambiental.html>> Accessed on 20 jul 2019.

¹⁸Ministry of the Environment. Produção e consumo sustentável. Available in <<https://www.mma.gov.br/responsabilidade-socioambiental/producao-e-consumo-sustentavel.html>> Access on 20 Jul 2019.

¹⁹United Nations Environment Program. 1972. Disponível em <<https://nacoesunidas.org/agencia/pnuma/>>. Access 20 July 2019.

²⁰Valdes, Patricia; The legal-environmental responsibility of sugarcane mills and the recovery of degraded areas. Rio de Janeiro: ed. process. 2019.

²¹Sugar cane Industry Union. Only. Green energy seal. Available in <<http://unica.com.br/selo-energia-verde>>.Access on 20 jul 2019.

still a requirement that plants using sugarcane biomass as raw material for cogeneration must meet pre-defined sustainability criteria in addition to energy efficiency requirements²².

In addition to the UsinaVerde certificate and the Green Energy seal at the national level, there is the Better Sugarcane Initiative international certification. Called by the acronym BONSUCRO²³, it is a sustainability protocol in the sugar cane production sector.

The role of mills in the pursuit of sustainability is so relevant that it was a Brazilian mill, located in the interior of São Paulo, the first in the world to receive the BONSUCRO Certification²⁴.

Other economic sectors also have sustainability certifications. Brazil also presents a prominent position in the other countries. There are Brazilian companies among the ranking of the most sustainable 100 in the world. According to the data published in January 2019 by the Corporate Knights²⁵, there are four Brazilian companies with outstanding sustainable practices: Banco do Brasil S.A. (8th place), Natura Cosméticos S.A. (15th place), CEMIG (19th place) and ENGIE Brasil Energia S.A. (72th place).

Among the 20 companies with the most sustainable practices in the world, there are three Brazilians, as can be seen in Table 1.

For the purpose of better clarification, the Bank of Brazil is in the 4th. position and has several sustainability certificates, including an eco-efficient company²⁶.

It is important to emphasize that companies that adhere to compliance have a higher probability of achieving these certifications. This occurs by the very nature of the corporate governance technique, which seeks respect for laws and norms, in addition to the preventive and advisory character internally.

²² Id. 14.

²³ BONSUCRO. Better Sugarcane Initiative. Available in <<http://bonsucro.com/site/certification-process/certification-system/?lang=pt>>. Accessed on 27 July 2019.

²⁴ eCycle. Usina de cana de açúcar brasileira é a 1ª a receber certificação ambiental. Disponível em <<https://www.ecycle.com.br/component/content/article/8-tecnologia-a-favor/530-usina-de-cana-de-acucar-brasileira-e-a-1o-a-receber-certificacao-ambiental.html>> Acesso em 27 July 2019.

²⁵ Corporate Knights. 2019 Global 100 results. Available in <<https://www.corporateknights.com/reports/2019-global-100/2019-global-100-results-15481153/>> Access on 27 July 2019.

²⁶ Banco do Brasil. Reconhecimento das ações em responsabilidade socioambiental. Disponível em <https://www.bb.com.br/pbb/sustentabilidade/reconhecimento-das-acoes-em-responsabilidade-socioambiental#> Acesso em 20 July 2019.

Table 1 Corporate Sustainability Ranking. Companies with sustainable practices. Global analysis.

Source: Corporate Knights. 2019 Global 100 results. 2019.

	Company	Country	Industry	Participation
1	Chr. Hansen Holding A/S	Denmark	Food or other chemical agents	82.99%
2	Kering SA	France	Clothing and Accessories	81.55%
3	Neste Corporation	Finland	Oil refinery	80.92%
4	Ørsted	Denmark	Wholesale business	80.13%
5	GlaxoSmithKline plc	UK	Biofarmaceutical	79.41%
6	Prologis, Inc.	USA	Real estate Investment Funds	79.12%
7	Umicore	Belgium	Primary Metals Products	79.05%
8	Banco do Brasil S.A.	Brazil	Banks	78.15%
9	Shinhan Financial Group Co.	South Korea	Banks	77.75%
10	Taiwan Semiconductor	Thailand	Semiconductor equipment	77.71%
11	Pearson PLC	UK	Professional Personnel Services	76.91%
12	Outotec Oyj	Finland	Machinery manufacturing	76.53%
13	McCormick & Company	USA	Beverage and food production	76.20%
14	Cisco Systems, Inc.	USA	Communications equipment	76.12%
15	Natura Cosméticos S.A.	Brazil	Cleaning and personal Care	75.55%
16	ERG S.p.A.	Italia	Wholesaling	75.39%
17	Analog Devices, Inc.	USA	Semiconductor manufacturing	75.31%
18	Novartis AG	Switzerland	Biopharmaceuticals	75.19%
19	CEMIG	Brazil	Electric power Companies	75.18%
20	Sanofi	France	Biopharmaceuticals	75.16%

V. CONCLUSION

After addressing the facts and legal foundations covered in the research, it is possible to verify that *compliance* is not restricted to a particular area of activity. Because it is a multidisciplinary corporate governance practice, it is perfectly applicable in several areas of activity, including when it concerns environmental protection by organizations.

The beginner and normative approach demonstrated that *compliance* has a preventive nature. Effective application of codes of ethics and integrity programs within the public administration and private companies is able to avoid abusive practices and bring benefits in the medium and long term. Since all legal sustainability dictates are respected, it is possible to obtain certificates that will positively impact the market.

In addition, the implementation of compliance programs is encouraged by economic incentives, including the removal or mitigation of corporate accountability, given that environmental performance will be within the limits of the constitutional order and the laws and treaties in force.

However, it is stressed that the implementation of the compliance program in Brazilian organizations goes far beyond the sanctioning aspect, serving as an instrument for preventing environmental violations by companies.

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