

Governance of Brazilian Public Environmental Funds: illegal allocation of resources collected to the Fund for Defense of Collective Rights

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Abstract: The paper aims to describe models adopted in Brazil and Australia to structure and operate funds developed to invest on protection and management of the environment. It also seeks to evaluate the effectiveness of Brazilian Fund for Defense of Collective Rights respecting the amount used on supporting environmental projects and resources collected. Both jurisdictions face the challenge of reducing their alarming biodiversity loss rates and have very different environmental governance systems. The creation of protected areas, the extension of the existing protected areas and integration among these are major strategies for biodiversity recovery and environment protection in general. All these conservation initiatives demand financial support to be accomplished. Both public and private funds are organizational structures created by legal instruments and idealized as part of a major governmental strategy to finance the environment protect. A way of thinking their effectiveness is to evaluate how much has been invested compared to the total amount collected. Brazilian Fund for Defense of Collective Rights and Brazil National Fund for the Environment are two relevant public funds that should invest all their collection on protection and management of the environment, but that's not happening. Both funds have been compelled to form surplus amounts that will be classified as contingency reserve and latter transferred to the Federal Union's account. Resources that should be invested on environmental and other public interests projects end up on the Treasury account. Nevertheless, rulings from the Federal Supreme Court regarding public funds are starting to change that and determining the correct appropriation of public funds resources..

Keywords: Environmental Protection, Governance, Illegal allocation, Public Funds.

Introduction

This paper targets to catch a glimpse on models adopted in Brazil and Australia to structure and operate funds developed to invest on protection and management of the environment. It also aims to evaluate the effectiveness of Brazilian Fund for Defense of Collective Rights¹ respecting the amount used on supporting environmental projects and resources collected. Both jurisdictions face the challenge of reducing their alarming biodiversity loss rates and have very different environmental governance systems². The creation of protected areas, the extension of the existing protected areas and integration among them are major strategies for biodiversity

1 Fundo de Defesa de Direitos Difusos (FDD).

2 MARTIN, Paul; LEUZINGER, Márcia Dieguez; SILVA, Solange Teles da. *Improving the effectiveness of legal arrangements to protect biodiversity: Australia and Brazil*. Revista de Direito Internacional, Brasília, v. 13, n. 2, 2016 p. 27-28. In this paper the authors “take an institutional perspective, defining governance as rules, strategies and organizational structures that together control or guide how natural resources are used or conserved. Legal institutions and legal instruments are part of the governance system, alongside economic and social interventions”.

recovery and environment protection in general³. All these conservation initiatives demand financial support to be accomplished.

At this point, both public and private funds are organizational structures created by legal instruments and idealized as part of a major governmental strategy to finance the environment protection. A few different models of management and constitution of environmental funds were identified in Brazil and Australia: one is the creation of public funds that can be administered solely either by the government (Australian National Biodiversity Fund) or by non-governmental organizations, and, eventually, by government nominations along with members from non-governmental organizations (Brazil National Fund for the Environment⁴ and Brazil Fund for Defense of Collective Rights); and another model that requires the constitution of private funds, mostly a non-profit organization administered by a management council formed of delegates from governmental institutions altogether with non-governmental organizations deputies (Brazilian Biodiversity Fund⁵).

First some details over the private fund institutionalized to protect Brazilian biodiversity and the Australian public fund designed with the same purpose will be presented. After that the discussion will focus on two other Brazilian public funds created to support environmental projects, that suffer from contingency of reserves, and about their legal regimes. It's determined by Federal Act n. 7.347, from 24 July 1985, that all judicial condemnations on collective and public damages actions should be deposited in either a Federal Fund – the FDD – or State funds and used exclusively to restore the damages⁶. As identified during the research, even though FDD has its own and specific fund provision and has collected R\$ 2.1 billion from 2012 until October 2017, it only has executed R\$ 21.7 million in funding, meaning a little over 1% percent of the resources were allocated legally.

Finally a precedent from the Federal Supreme Court will be analyzed in which the judges decided that the amount made available to a public fund that bear a legal specific destination can't be used to satisfy other financial needs of the Government, different from what has been done at FDD and FNMA.

The Brazilian Biodiversity Fund

FUNBIO is a non-profit organization created in 1996. According to its statute FUNBIO is an innovative financial mechanism generated to facilitate the destination of strategic resources and support initiatives regarding the implementation of the United Nations Convention on Biological Diversity (CBD) in Brazil⁷. FUNBIO started its operations after receiving a donation of US\$ 10 million from the Global Environmental Facility (GEF)⁸.

On its first call for projects it offered a total amount of US\$ 2.4 million for funding 10 initiatives related to: natural forest management, conservation of natural ecosystems in private properties, sustainable management of fisheries resources, agriculture and biodiversity, management of protected areas⁹. Throughout 20 years of existence FUNBIO has established tactical partnerships with private and public sectors and has managed a total of US\$ 600 million in assets, providing funds for 310 protected areas (67 million hectares of protected areas) and also 270 projects from 232 different organizations¹⁰. The last seven years data is condensed at the table¹¹:

3 For more information on this subject: BENSUSAN, Nurit. *Conservação da biodiversidade em áreas protegidas*. Rio de Janeiro: FGV, 2006.

4 Fundo Nacional do Meio Ambiente (FNMA).

5 Fundo Brasileiro para a Biodiversidade (FUNBIO).

6 BRASIL. Presidência da República. *Artigo 13 da Lei n. 7.347, de 24 de julho de 1985*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7347orig.htm>. Access on: 20 jul 2017.

7 FUNBIO. Fundo Brasileiro para a Biodiversidade. *Estatuto social do FUNBIO*. Available at: <http://www.funbio.org.br/wp-content/uploads/2012/10/Bylaws_Portuguese.pdf>. Access on: 6 jul 2017.

8 FUNBIO. Fundo Brasileiro para a Biodiversidade. *Annual Report*, 1997, p. 4. Available at: <<http://www.funbio.org.br/category/transparencia/relatorio-anual/page/2/>>. Access on: 17 jul 2017.

9 FUNBIO. Fundo Brasileiro para a Biodiversidade. *Annual Report*, 1997, p. 13. Available at: <<http://www.funbio.org.br/category/transparencia/relatorio-anual/page/2/>>. Access on: 17 jul 2017.

10 FUNBIO. Fundo Brasileiro para a Biodiversidade. *Annual Report*, 2016, p. 25. Available at: <<http://www.funbio.org.br/category/transparencia/relatorio-anual/page/2/>>. Access on: 17 jul 2017.

11 FUNBIO. Fundo Brasileiro para a Biodiversidade. *Annual Report*, 2016, p. 27-28. Available at: <<http://www.funbio.org.br/category/transparencia/relatorio-anual/page/2/>>. Access on: 17 jul 2017.

	2010	2011	2012	2013	2014	2015	2016	Overall
Assets managed (R\$ million)	125	209	326	370	464	549	733	
Total executed (R\$ million)	13	31	48	59	55	58	81	345
Agreements signed (US\$ million)	107	71	78	17	79	55	51	351

FUNBIO's deliberative council is responsible to accept or reject the projects, and thus to decide the destination of the investments. It's formed by 16 individuals that equally represent each of the following sectors: the corporate sector, the academic sector, the non governmental environmentalist sector and the Federal Department of Environment¹². The counselors nomination process is based on indications either by the previous member or by FUNBIO's Secretariat, without any other further requirements specified at the statute.

The fund is divided into three separate units: National and international donations unit; Legal obligations unit and Special projects unit¹³. The first is financed by private donations and international agreements signed by the Brazilian government, with FUNBIO being either the executor of the project or the manager of the resources¹⁴. The legal obligations unit is engaged in identifying sources of private resources derived from legal obligations and also enabling the resources use with efficiency and transparency. Finally, the latter focus on diagnosing the financial conditions and developing new mechanisms and tools to implement conservation projects and also on providing environmental consulting to corporations¹⁵.

Australia had adopted a distinct model and implemented a public fund for protection of biodiversity, directly managed by the Commonwealth, the Australian Biodiversity Fund.

The Australian Biodiversity Fund

The Australia Biodiversity Fund was created by the Commonwealth government to increase the resilience of Australia's ecosystem and the environmental outcomes of carbon projects, with special attention to landholders, and was initially provided with a budget of AU\$ 946 million for six years (from 2011 to 2017)¹⁶. This amount was changed on the 2013-2014 Federal Budget, with a reduction of AU\$ 32.3 million, and rescheduled to AU\$ 225.4 million for 2017-2019¹⁷.

12 Articles 37, 38 and 43 of FUNBIO's Statute establish its deliberative council composition and responsibilities. Available at: <http://www.funbio.org.br/wp-content/uploads/2012/10/Bylaws_Portuguese.pdf>. Access on: 6 jul 2017.

13 FUNBIO. Fundo Brasileiro para a Biodiversidade. *Estatuto social do FUNBIO*. Available at: <<http://www.funbio.org.br/o-que-fazemos/areas-de-atuacao/>>. Access on: 6 jul 2017.

14 "Arpa (Amazon Region Protected Areas Program) is a Brazilian government program led by the Federal Department of the Environment (MMA) and managed by the Brazilian Biodiversity Fund (FUNBIO). The Program is funded by resources from the Global Environmental Facility (GEF) – through the World Bank –, the government of Germany – through the German Development Bank (KfW), WWF network – through WWF-Brazil, and the Amazon Fund – through the Brazilian Development Bank (BNDES). Arpa was created with the goal of expanding and strengthening the Brazilian National System of Protected Areas (SNUC) in the Amazon, through the protection of 60 million hectares, and ensuring financial resources for the management of those areas in the short and long run, while promoting sustainable development in that region". Available at: <<http://programaarpa.gov.br/en/what-is-arpa-3/>>. Access on: 6 jul 2017.

15 Rio de Janeiro State has implemented a fund to support native forest protection, a financial mechanism developed by FUNBIO to make feasible the destination of R\$ 80 million to 40 (forty) protected areas owned by the states, municipalities and the federal union. Available at: <<http://www.funbio.org.br/o-que-fazemos/areas-de-atuacao/>>. Access on: 6 jul 2017.

16 AUSTRALIA. Parliament of Australia. *Report from the Senate Standing Committees on Environment and Communications*, June, 2015, p. 5. Available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Ausenviron/Report>. Access on: 13 jul 2017.

17 AUSTRALIA. Australian Government. *Mid-Year Economic and Fiscal Outlook 2013-14*, 17 December 2013, p.

There were four funding rounds executed under the administration of the Commonwealth Department of the Environment from December 2011 until June 2013, before the fund was abolished on 15 October 2013 and closed for new applications in December 2013. At that time 334 projects were approved to receive a total grant of AU\$ 324.3 million¹⁸. During the first two rounds there was an expenditure commitment of AU\$ 271 million to revegetate, rehabilitate and restore over 18 million hectares of the Australian landscape, a challenging task to be executed by 313 applicants¹⁹.

An inspection conducted by the Australian National Audit Office (ANAO) revealed that the unexpended funds returned to consolidated revenue when the Biodiversity Fund program was closed to new applications. The ANAO also recommended that the fund should implement risk-based compliance strategies for the funding programs, since it was identified that 21 out of 64 (31 per cent) payment reports provided by the grant recipients had not sufficiently proved the achievement of all the milestones set out in the funding agreement.

Other findings were: lack of clarity regarding the eligibility selection criteria; insufficiency of the corroborative documents received from the applicants for the assessment process; and absence of clear directions for the departmental assessors to evaluate the applications²⁰.

The Australian experience reinforce the need of permanent accountability and compliance measures to inspect public funds. A fair selection process of projects based on a clear picking criteria that can be accordingly applied by assessors and proposals evaluators is essential to legitimate the funds granted and the investments made. Altogether with sufficient transparency in order to safeguard that public agencies can supervise the enforcement of environmental public policies and appropriation of public resources.

The institution of private funds was appointed as a distinguished institutional alternative subject to a complete different regulation scheme than public funds. Although Brazil has materialized a private fund to deal specifically with biodiversity management and protection, there are other national public funds, just like former Australian Biodiversity Fund, responsible to supply funding to environmental projects.

On the next chapter the discussion will be limited to the National Fund for the Environment and Fund for Defense of Collective Rights, both from Brazil.

Brazil National Fund for the Environment

Brazil has FNAM, its oldest federal fund for protection of the environment, through Federal Act n. 7.797, from 10 July 1989, in order to develop projects designed to promote rational and sustainable use of natural resources. According to the aforementioned law, FNMA resources should be invested on public agencies or non-governmental organizations to finance the following environmental priorities: protected areas; research and technological development; environmental education; forest management and extension; institutional development; environmental control; and rational and sustainable economic usage of native fauna and flora²¹.

FNMA has a deliberative council responsible for its administration and funds granting formed by three representatives of the Federal Department of Environment²², one of the Federal Management and Budget

88. Available at: <http://www.budget.gov.au/2013-14/content/myefo/download/2013_14_MYEFO.pdf>. Access on: 13 jul 2017.

18 AUSTRALIA. Australian National Audit Office. *Tabled Performance Audit Report – Administration of the Biodiversity Fund*, 9 dec 2014. Available at: <<https://www.anao.gov.au/work/performance-audit/administration-biodiversity-fund-program>>. Access on: 8 jul 2017.

19 AUSTRALIA. Parliament of Australia. *Report from Senate Standing Committees on Environment and Communications*, June 2015, p. 6. Available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Ausenviro/Report>. Access on: 13 jul 2017.

20 AUSTRALIA. Australian National Audit Office. *Tabled Performance Audit Report – Administration of the Biodiversity Fund*, 9 dec 2014. Available at: <<https://www.anao.gov.au/work/performance-audit/administration-biodiversity-fund-program>>. Access on: 8 jul 2017.

21 BRASIL. Presidência da República. *Lei n. 7.797, de 10/07/1989*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7797.htm>. Access on: 10 jul 2017.

22 Ministério do Meio Ambiente (MMA).

department²³, one of the Brazilian Environmental and Renewable Natural Resources Institute²⁴ (a federal agency), one of the Chico Mendes Institute for the Biodiversity (a federal agency), one of the National Water Agency²⁵, one of the Brazilian Association of Environmental Institutions²⁶, one of the National Association of Municipalities and Environment²⁷, one of the National Forum of Non-Governmental Organizations and Social Movements for Environment and Development²⁸, one of the Brazilian Society for the Progress of Science²⁹, one of a non-governmental organization nominated by the National Environment Council³⁰ and five of environmental non-governmental organizations, being one from each different Brazilian region³¹.

Along FNMA's 28 years of history R\$ 266 million were appropriated to support over 1.430 social and environmental projects of conservation and sustainable use of natural resources to comply with the national environmental policy, as announced by the Federal Department of Environment³². Amid financing priorities are actions targeting conservation and sustainable management of biodiversity and natural resources, implementation of sustainable production alternatives and elaboration of management plans for public protected areas.

Most of collection arise from processes and administrative fines under Federal Act n. 9.605/1998 (Environment Criminal Law), loans provided by Inter-american Development Bank (BID) and international donations³³. From 1999 until 2005 there were 498 projects financed with R\$ 94 million in funds supplied during the execution of BID's lending contract³⁴ and over R\$ 40 million in resources appropriated to FINMA annually at the budget law³⁵. Hereafter the annual budget³⁶ dropped significantly to less than R\$ 10 million in 2014 as reported:

23 Ministério do Planejamento, Orçamento e Gestão (MPOG).

24 Instituto Chico Mendes de Conservação da Biodiversidade (ICMBIO).

25 Agência Nacional de Águas (ANA).

26 Associação Brasileira de Entidades do Meio Ambiente (ABEMA).

27 Associação Nacional de Municípios e Meio Ambiente (ANAMMA).

28 Fórum Brasileiro de ONGs e Movimentos Sociais para o Meio Ambiente e Desenvolvimento (FBOMS).

29 Sociedade Brasileira para o Progresso da Ciência (SBPC).

30 Conselho Nacional do Meio Ambiente (CONAMA).

31 BRASIL. Presidência da República. *Decreto nº 3.524, de 26 de junho de 2000*. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/D3524.htm>. Access on: 30 jul 2017.

32 BRASIL. Ministério do Meio Ambiente. *Fundo Nacional para o Meio Ambiente*. Available at: <<http://www.mma.gov.br/fundo-nacional-do-meio-ambiente>>. Access on: 10 jul 2017.

33 BRASIL. Ministério do Meio Ambiente. *National Fund for the Environment Annual Report*, 2014, p. 8. Available at: <<http://www.mma.gov.br/apoio-a-projetos/fundo-nacional-do-meio-ambiente/relatorios-de-gestao-e-auditoria>>. Access on: 31 jul 2017.

34 BRASIL. Ministério do Meio Ambiente. *National Fund for the Environment Annual Report*, 2006, p. 37. Available at: <<http://www.mma.gov.br/apoio-a-projetos/fundo-nacional-do-meio-ambiente/relatorios-de-gestao-e-auditoria>>. Access on: 31 jul 2017.

35 BRASIL. Ministério do Meio Ambiente. *National Fund for the Environment Annual Report*, 2014, p. 27-28. Available at: <<http://www.mma.gov.br/apoio-a-projetos/fundo-nacional-do-meio-ambiente/relatorios-de-gestao-e-auditoria>>. Access on: 31 jul 2017.

36 On Brazil the Federal Act n. 4.320, from 17 March 1964, prescribes the annual budget law must discern all revenue and expenses in order to point out the Government economic and financial policy. It's also ordered by the financial law that the annual budget have to detail the revenues and investment plans for the special funds. BRASIL. Presidência da República. *Article 2 of Federal Act n. 4.320/1964*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L4320.htm>. Access on: 22 jul 2017.

	2007	2008	2009	2010	2011	2012	2013	2014
Draft of Federal Annual Budget Act	20.2	16.5	14.3	15.1	11.4	9.8	10.3	7.3
Federal Annual Budget Act	50.2	15.7	14.3	15.1	11.4	9.8	10.3	7.3
Expenses limit	32.7	13.7	10.5	7.8	4.3	8.0	2.4	6.0
Amount executed	31.9	13.7	10.1	7.2	4.3	6.8	2.4	5.1
%	97,62	99,98	95,81	91,84	99,88	85,94	100	84,94

But over the past 5 years the amount effectively reported as disbursed by the fund was only R\$ 20.9 million, much lower than the promised investment of R\$ 182 million listed on the budget law for the years of 2012-2017, as of 19 July 2017. The expenditure commitment and investments executed are comprised on the table³⁷ below:

Year / (R\$ million)	2012	2013	2014	2015	2016	2017
Expenditure commitment on fiscal budget law	11.1	14.6	15.4	36.4	80.0	24.5
Total granting executed (until 20 July 2017)	7.3	2.4	5.1	3.7	3.5	0.4
Amount disbursed (until 20 July 2017)	2.6	5.6	6.1	0.8	3.6	2.2

Same lack of effectiveness on the application of resources can be identified at other public fund created to frame and finance compensation measures connected to environment, consumers, economic order and other issues of public interest.

Brazilian Fund for Defense of Collective Rights

FDD is a broader spectrum public fund and it was created by Federal Act n. 7.347, from 24 July 1985, in order to compensate damages to the environment; to consumers; to valuable artistic, aesthetic, historical, touristic or landscape assets and rights; for violation of the economic order; and to other diffuse and collective concerns³⁸. The FDD is administered by a management council formed by seven representatives named by the Government and three counselors indicated by three different non-governmental organizations³⁹, particularly Lawyers for a Green

37 BRASIL. Senado Federal. *Painel Cidadão sobre o Orçamento da União – SIGA Brasil*. Available at: <http://www9.senado.leg.br/QvAJAXZfc/pendoc.htm?document=senado%2FSigaBrasilPainelCidadao.qvw&host=QVS%40www9&anonymous=true&select=lbTemas,*000218*>. Access on: 19 jul 2017.

38 BRASIL. Presidência da República. *Lei n. 7.347, de 24 de julho de 1985*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L7347orig.htm>. Access on: 20 jul 2017.

39 The present constitution of the FDD's management council is defined on article 3° of Presidential Decree n. 1.306/94 and article 2° of Federal Act n. 9.008/95 as described next: one representative of the Consumer National Secretary of the Federal Department of Justice, one representative of the Federal Department of Environment and Legal Amazon, one representative of the Department of Culture, one representative of the Federal Department of Health, one representative of the Federal Department of the Treasury, one representative of the Administrative Council of Economic Defense (CADE) and three delegates of non-governmental organizations. BRASIL. Presidência da República. *Decreto n. 1.306, de 9 de novembro de 1994*. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D1306.htm>. Access on: 10 jul 2017. *Lei n. 9.008, de 21 de março de 1995*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9008.htm>. Access on: 10 jul 2017. BRASIL. Fundo de Defesa dos Direitos Difusos. *Decisões e Ata de Reuniões do Conselho Gestor do FDD*. Available at: <http://www.justica.gov.br/Acesso/decisoes-dos-conselhos/arquivo_decisoes-dos-conselhos/conselho-federal-gestor-do-fundo-de-defesa-dos-direitos-difusos-cfdd/reunioes-2016/ata-203-cfdd-minuta.pdf/view>. Access on: 20 jul 2017.

Planet Institute⁴⁰, Brazilian Institute for Consumers Rights and Public Policies⁴¹ and National Forum of Non Governmental Organizations for Consumers Defense⁴².

Some of FDD's management council responsibilities are to watch over the application of financial resources, to approve and sign funding agreements, to promote educational or scientific events in partnership with public agencies and non-governmental organization and also to examine and endorse financing for modernization and improvement of public agencies in charge of protecting the environment, consumers, valuable artistic, aesthetic, historical, touristic or landscape assets and rights, the economic order, and other diffuse and collective concerns⁴³.

There are public calls for projects every year conducted by FDD's management council with the assistance of the Coordination of Diffuse Rights of the National Secretary of Consumers of the Department of Justice, in charge of analyzing the accordance of the proposals to the eligibility criteria defined on the convocation notice. After approved the project and specified the financing granted by FDD's management council, the proponent, either a public agency, the federal Union, a state, a municipality or a non-governmental organization, will sign an agreement to start the implementation of the project that has to be monitored, inspected and audited by FDD's management council⁴⁴.

On the environmental sector FDD is allowed to support projects of implementation, construction of infrastructure and preservation of protected areas, recovery of natural areas and preservation, management and monitoring of biodiversity species⁴⁵. The law determines the application of financial resources on damaged goods recovery, on the promotion of educational or scientific events, on the edition of information material specifically related to the nature of the infringement or damage caused, and also on the modernization and improvement of public agencies in charge of protecting the environment, consumers, valuable artistic, aesthetic, historical, touristic or landscape assets and rights, the economic order, and other diffuse and collective concerns⁴⁶.

Some information gathered about the overall number of applicants for funding and agreements undersigned by FDD at 2012-2017 are available on the table⁴⁷ next:

40 Instituto O Direito por um Planeta Verde.

41 Instituto Brasileiro de Política e Direito do Consumidor (BRASILCON).

42 Forum Nacional das Entidades Cíveis de Defesa do Consumidor (FNECDC).

43 All responsibilities and competences of FDD's management council can be found on article 6° of Presidential Decree n. 1.306/94 and article 3° of Federal Act n. 9.008/95. BRASIL. Presidência da República. *Decreto n. 1.306, de 9 de novembro de 1994*. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D1306.htm>. Access on: 10 jul 2017. *Lei n. 9.008, de 21 de março de 1995*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9008.htm>. Access on: 10 jul 2017.

44 BRASIL. Fundo de Defesa de Direitos Difusos. *Annual Report*, 2015, p. 22. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017.

45 BRASIL. Fundo de Defesa de Direitos Difusos. *Annual Reports*, 2007-2008. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017.

46 *Lei n. 9.008, de 21 de março de 1995*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9008.htm>. Access on: 10 jul 2017.

47 BRASIL. Fundo de Defesa de Direitos Difusos. *Annual Report*, 2015, p. 28. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017. *Projetos conveniados*. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/projetos-conveniados>>. Access on: 18 jul 2017. *Seleção de projetos 2015*. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/anexos/selecao-de-projetos-2015>>. Access on: 18 jul 2017. *Seleção de projetos 2017/2018*. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/anexos/selecao-de-projetos-2015>>. Access on: 18 jul 2017.

Year of selection process	2012	2013	2014	2015	2017 ⁴⁸
Total requests for funding grant received by FDD	507	699	526	897	1.691
Number of environmental projects presented	271	343	257	470	843
Quantity of projects appointed as priorities by FDD	45	36	29	20	
Total number of agreements signed the year after	13	22	11	7	
Agreements signed to fund environmental projects	3	9	2	0	

Most of the resources collected to FDD has its origin on administrative fines applied by the Administrative Council of Economic Defense (CADE) and rulings on public collective actions from the Federal Justice⁴⁹. CADE has played a relevant role on providing funds for FDD in the last three years it has collected R\$ 169 million in 2014, R\$ 524 million in 2015 and R\$ 700 million in 2016⁵⁰. Collection and investment information about years 2012 until October 2017 are listed thereunder:

Year (until 2017) / R\$ million ⁵¹	2012	2013	2014	2015	2016	2017
Expenditure commitment on fiscal budget law	51.7	71.9	108.6	169.1	345.3	569.8
Grants committed on environmental agreements	1.83	0.47	2.9	0.64	0	-
Total granting executed	5.6	3.6	6.3	3.8	2.4	-
Total amount disbursed	3.4	4.6	6.3	4.4	1.7	0.67
Total collection	57.0	120.3	192.3	563.3	775.0	396.9
Collection from environmental judicial rulings	0.68	1.0	0.15	0.19	2.7	4.1
Judicial convictions of unidentified origin	6.4	17.0	11.3	29.7	10.2	8.1
Donations received and other generic revenues	0.3	0.24	0.19	1.0	0.16	0.47
Devolution of overbalance from past years agreements	1.1	1.1	0.64	0.8	0	0.26

48 There is one more stage of the process for evaluation of the admitted proposals' work plan and the final result disclosure is scheduled for 25 August 2017. *Edital de Chamamento Público CFDD n. 3, de 16 de junho de 2017*. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/anexos/selecao-de-projetos-2017-2018>>. Access on: 18 jul 2017.

49 Article 1, § 2º of Federal Act n. 9.008/95 settle that the resources deposited at the FDD are the product of the collection of the judicial convictions at the Federal Justice on public collective actions, fines and compensations arising from violation of consumers rights, fines for infringement of the economic order and for damages to securities owners or investor at the national capital market, the income received from the application of the resources of the Fund, other revenues that may be destined to the Fund, including donations. BRASIL. Presidência da República. *Lei n. 9.008, de 21 de março de 1995*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9008.htm>. Access on: 10 jul 2017.

50 BRASIL. Conselho Administrativo de Defesa Econômica. *CADE apresenta balanço de suas atividades em 2016*. Available at: <<http://www.cade.gov.br/noticias/cade-apresenta-balanco-de-suas-atividades-em-2016>>. Access on: 20 jul 2017.

51 BRASIL. Senado Federal. *Painel Cidadão sobre o Orçamento da União – SIGA Brasil*. Available at: <http://www9.senado.leg.br/QvAJAXZfc/pendoc.htm?document=senado%2FSigaBrasilPainelCidadao.qvw&hst=QVS%40www9&anonymous=true&select=lbTemas,*000190*>. Access on: 30 nov 2017. Fundo de Defesa de Direitos Difusos. *Arrecadação mensal de receitas por origem de recursos*. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/recfdd2017-setembro.pdf/view>>. Access on: 30 oct 2017.

The data enclosed on the upward tables reveals that on the past five years R\$ 5.84 million were committed on grant agreements for environment projects while R\$ 8.82 million were collected from judicial convictions on judicial processes discussing environmental damages or related issues. Nevertheless on the same period R\$ 82.7 million entered FDD's account without origin indication, much over the R\$ 21 million effectively disbursed on fundings.

Article 7º of Presidential Decree n. 1.306/94 determines that resources collected to FDD should be distributed to support the implementation of the measures enlisted on the act and related to the specific nature of the infraction or damage caused, preferentially to repair or compensate the specific damage. Same commandment accrues from article 10 of Federal Decree n. 1.306/94 which dictates that all resources made available to FDD either by judicial convictions or administrative fines must be properly identified and sorted in line with the origin of infringement or damage caused to be invested on correlated projects.

Despite those rules every year FDD's contribution reports show a large amount of money obtained from judicial convictions but doesn't indicate the transgression's nature or the origin of the condemnation, going against legal orders. The same can be said about devolution of overbalance from previous year agreements which are not separated respecting the categories of projects financed. FDD's latest annual reports likewise reveal its management council needs to overcome a critical barrier to outgrow the lack of investment.

The Federal Government has been forcing FDD and other federal funds to form surplus amounts that will be later be transferred to the Federal Union's account. However, a recent ruling from the Federal Supreme Court decided the resources of National Penitentiary Fund (FUNPEN) could not be used to pay the Federal Union's incidental expenses but only to finance and support the activities and programs of modernization and upgrading of the National Penitentiary System. FUNPEN is a public fund which revenues are bound by law to a specific application just like the FDD, meaning the Supreme Court decision should be applied to both funds.

More details about budgetary and tax related subjects in addition to the analysis of the aforementioned precedent of the Federal Supreme Court will be provided at the next topic.

Budget contingency, public funds and financial classification of FDD's revenue

FDD's latest annual reports have proclaimed an extreme difficulty in supporting a greater number of projects mostly due to systematic reduction of the financial resources made available to the fund on the last years⁵². FDD is a budgetary unit that receives directly collected resources and also related revenues diverted from its original destination. As established by federal budget acts the Federal Government has been making up surplus⁵³ to form contingency reserves on federal funds⁵⁴ that later end up at the Federal Union's account⁵⁵.

It is estimated that FDD has destined R\$ 66 million to compose contingency reserve on 2013, R\$ 102 million on 2014, and R\$ 163.3 million on 2015⁵⁶. Federal Act n. 4.320, from 17 March 1964, is the main financial law about elaboration and control of public budgets and balance sheets. The legal definition of special public funds is presented at article 71 of the law as transcribed afterwards: "*A special fund is the product of specified recipes, which by law are linked to the achievement of certain objectives or services, with the possibility of adopting specific norms of application*"⁵⁷. FDD is a special public fund as conceived by Federal Act n. 4.320/1964. Going further Federal Decree n. 93.872, from 23 December 1986, forbid the use of resources bounded to special public funds to support expenses not directly linked to the achievement of its objectives or services⁵⁸.

52 BRASIL. Fundo de Defesa de Direitos Difusos. *FUNBIO Annual Reports*, 2013-2015. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017.

53 Difference between revenue collection expectation and expense limit authorized by budget annual law.

54 BRASIL. Fundo de Defesa de Direitos Difusos. *Annual Report*, 2015, p. 28-29. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017.

55 CONJUR. Revista Consultor Jurídico (online). *Governo usa bilhões do Fundo de Defesa dos Direitos Difusos para inflar o caixa*. 31 de março de 2017, por Marcos de Vasconcellos. Available at: <<http://www.conjur.com.br/2017-mar-31/governo-usa-dinheiro-fundo-direitos-difusos-caixa>>. Access on: 20 jul 2017.

56 BRASIL. Fundo de Defesa de Direitos Difusos. *Annual Report*, 2014, p. 12 e 17. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017.

57 BRASIL. Presidência da República. *Article 71 of Federal Act n. 4.320/1964*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L4320.htm>. Access on: 22 jul 2017.

58 BRASIL. Presidência da República. *Article 77 of Federal Decree n. 93.872/1986*. Available at:

Since FDD is a public fund subjected to Federal Act n. 4.320/1964 the application of its revenues should be made through appropriation set forth in the budget law or in additional credits. The law also orders that the annual surplus registered on the balance sheet must be credited to the same public fund the following year, unless otherwise determined by the law that regulates the fund⁵⁹. In FDD's and FNMA's cases there is no express authorization for the Federal Government to use their resources to make up contingency reserves.

A few more lines must be written about the nature and the legal classification of the resources appropriated to FDD. They are formed by judicial convictions on public collective actions at the Federal Justice, fines and compensations arising from violation of consumers rights, fines for infringement of the economic order and for damages to securities owners or investors at the national capital market, the income received from the application of the resources of the Fund, along with other revenues that may be destined to the Fund, including donations.

All these amounts collected are inflows and differ from tax incomes since they bear specific destination and are intended to compensate damages caused to public interests or public goods⁶⁰. FDD resources originated from judicial condemnations over environmental damages under Federal Act n. 7.347/85 subsume to that category of inflows and consist merely of amounts to compensate injuries⁶¹, meaning they are earmarked to finance projects to recover and preserve the environment.

Even though FDD has its own and specific fund provision and has collected R\$ 2.1 billion from 2012 until October 2017, it only has executed R\$ 21.7 million in funding, meaning a little over 1% percent of the resources were allocated legally. It is registered on FDD's 2014 Annual Report that its management council has claimed to repay the financial resources from contingency reserve and enable its use for financing other projects, but the Federal Department of Planning, Development and Management⁶² has denied the request⁶³. It is worth to mention that Federal Complimentary Act n. 101, 4 May 2000, stipulates that the annual budget law contingency reserve is destined to support contingent liabilities and other risks and contingencies⁶⁴.

Year (until 2017) / R\$ million ⁶⁵	2012	2013	2014	2015	2016	2017
Total granting executed	5.6	3.6	6.3	3.8	2.4	-
Total amount disbursed	3.4	4.6	6.3	4.4	1.7	0.67
Total collection	57.0	120.3	192.3	563.3	775.0	396.9

Notwithstanding, recent rulings from the Supreme Federal Court may impact all public funds application and their contingency reserve formation. As the Constitutional Court decided on September 2015 after analyzing the contingency of resources from Brazil National Penitentiary Fund (FUNPEN), the public interest must guide the release of funds and since they have a legal specific destination can't be used to satisfy contingency measures. Judge

<http://www.planalto.gov.br/ccivil_03/decreto/d93872.htm>. Access on: 22 jul 2017.

59 BRASIL. Presidência da República. *Articles 72 and 73 of Federal Act n. 4.320/1964*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L4320.htm>. Access on: 22 jul 2017.

60 BALEEIRO, Aliomar. *Uma introdução à ciência das finanças*. 16. ed. atualizada por Dejalma de Campos. Rio de Janeiro: Forense, 2004, p. 126.

61 OLIVEIRA, Regis Fernandes de. *Curso de direito financeiro*. 3. ed. São Paulo: Revista dos Tribunais, 2005, p. 126.

62 Ministério do Planejamento, Orçamento e Gestão.

63 BRASIL. Fundo de Defesa de Direitos Difusos. *Annual Report*, 2013, p. 12. *Annual Report*, 2014, p. 45. *Annual Report*, 2015, p. 49. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/Arrecadacao>>. Access on: 15 jul 2017.

64 BRASIL. Presidência da República. *Lei Complementar n. 101, de 4 de maio de 2000*. Available at: <http://www.planalto.gov.br/ccivil_03/leis/LCP/Lcp101.htm>. Access on: 16 jul 2017.

65 BRASIL. Senado Federal. *Painel Cidadão sobre o Orçamento da União – SIGA Brasil*. Available at: <http://www9.senado.leg.br/QvAJAXZfc/opendoc.htm?document=senado%2FSigaBrasilPainelCidadao.qvw&host=QVS%40www9&anonymous=true&select=lbTemas,*000190*>. Access on: 30 nov 2017. Fundo de Defesa de Direitos Difusos. *Arrecadação mensal de receitas por origem de recursos*. Available at: <<http://www.justica.gov.br/seus-direitos/consumidor/direitos-difusos/recfdd2017-setembro.pdf/view>>. Access on: 30 oct 2017.

Marco Aurelio explained on his decision that paragraph 2° of article 9° of Federal Complementary Act n. 101/2000 prevent limitations and thus contingency measures over expenses that consist in constitutional or legal obligations⁶⁶. And that's FDD's situation and legal framing.

Same understanding was reaffirmed by the Supreme Federal Court on May 2016. On that occasion Judge Gilmar Mendes asserted that contingency of FUNPEN's resources was against constitutional provisions and expressly requested the lawmaker to evaluate the possibility of reforming the legal framework to prohibit contingency provisions over FUNPEN⁶⁷.

The whole scenario leads to a conclusion: if FUNPEN and FDD are public funds and the two are subject to the same legal regime, FDD's resources should not be directed to any kind of contingency measures or redirected to the Union's account but wholly applied in performing the objectives settled on its foundation law. And according to the Federal Supreme Court, any misallocation or non allocation of resources from public funds is unconstitutional.

Conclusions

Both public and private funds are organizational structures created by legal instruments and idealized as part of a major governmental strategy to finance the environment protection. A way of thinking their effectiveness is to evaluate how much has been invested compared to the total amount collected. FDD and FNMA are two relevant public funds that should invest all their collection on protection and management of the environment, but that's not what has been happening.

All these conservation initiatives demand financial support to be accomplished. FDD have been compelled to form surplus amounts that will be classified as contingency reserve and later transferred to the Federal Union's account. Resources that should be invested on environmental projects, consumer defense and other public and collective interests end up on the Treasury account. The relevance of respecting budgetary laws was highlighted to Brazilian institutions last year when Congress impeached former President Dilma Rousseff over allegations of federal budget manipulation⁶⁸. Confidence on governmental institutions depends not only on the legal allocation of public funds resources but also on the accuracy and transparency of public expenses information, mostly when reported through official disclosure channels.

Nevertheless, decisions from the Federal Supreme Court regarding public funds are starting to change that, mostly considering the emergency of using FUNPEN's values to modernize and upgrade the National Penitentiary System. The misallocation and also the non allocation of all resources collected to public funds are against constitutional provisions, specially the misappropriation of public resources bounded by law to be invested in the protection of the environment, consumers defense and reparation of damages to public and collective goods.

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66 BRASIL. Supremo Tribunal Federal. *Arguição de Descumprimento de Preceito Fundamental n. 347*. Tribunal Pleno, julgado em 09/09/2015 e disponibilizado no DJe de 19/02/2016.

67 BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário n. 641.320*. Tribunal Pleno, julgado em 11/05/2016 e disponibilizado no DJ-e de 01/08/2016.

68 FINANCIAL TIMES (online). *Dilma Rousseff impeached by Brazil's Senate in historic vote*. By: Joe Leahy and Samantha Pearson. 31 August 2016. Available at: <<https://www.ft.com/content/4ce2d55e-6f9f-11e6-a0c9-1365ce54b926>>. Access on: 31 jul 2017. ABC NEWS. *Dilma Rousseff: from Brazil's iron lady to impeachment*. AFP/REUTERS, 12 May 2016. Available at: <<http://www.abc.net.au/news/2016-04-18/dilma-rousseff-from-brazils-iron-lady-to-impeachment-target/7333956?pfmredir=sm>>. Access on: 31 jul 2017. BBC UK. *Brazil President Dilma Rousseff removed from office by Senate*. By: Daniel Gallas. 1 September 2016. Available at: <<http://www.bbc.com/news/world-latin-america-37237513>>. Access on: 31 jul 2017. BRASIL. Senado Federal. *Impeachment de Dilma Rousseff marca o ano de 2016 no Congresso e no Brasil*. Agência Senado, 28 December 2016. Available at: <<http://www12.senado.leg.br/noticias/materias/2016/12/28/impeachment-de-dilma-rousseff-marca-ano-de-2016-no-congresso-e-no-brasil>>. Access on: 31 jul 2017.

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