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General aspects of oil and gas regulation in Brazil and its contracts

Brazil before the Constitution of 88

- Entrepreneurial State / Weber
- Large number of state-owned companies

Brazil after the constitution of 88 - change of focus

- Capitalism
- Goals and grounds
- Principle of subsidiarity
- Freedom of enterprise
- Increase social rights

CONSTITUTION OF 1988

Art. 1º

Art. 3º The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the federal district, is a legal democratic state and is founded on:

IV – the social values of labour and **of the free enterprise**;

Art. 170

Art. 170 the economic order, founded on the appreciation of **the value of human work and on free enterprise**, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:

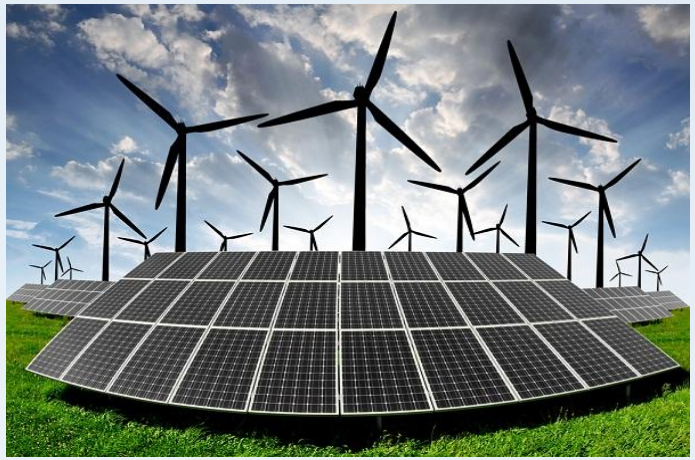
III – the social function of property;

IV – free competition;

Art. 173

Art. 173. With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the state shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law.

The Central Administration has left its role as the direct regulator on the privatized infrastructure subsystems



CONSTITUTIONAL AMENDMENT No. 09/95
BREAKING THE MONOPOLY

ORIGINAL TEXT

Art. 177 The following are the monopoly of the Union:

I – prospecting and exploitation of deposits of petroleum and natural gas and of other fluid hydrocarbons;

Paragraph 1, The monopoly provided for in this article includes the risks and results arising from the activities mentioned therein, **and the Union shall not assign or grant any kind of participation, in kind or in value**, in the exploitation of oil or natural gas deposits, except as provided in Art. 20,

AMENDMENT 9/95

Art. 177 The following are the monopoly of the Union:

I – prospecting and exploitation of deposits of petroleum and natural gas and of other fluid hydrocarbons;

Paragraph1. The union **may contract** with state-owned or with private enterprises for the execution of the activities provided for in items I through IV of this article, **with due regard for the conditions set forth by law**.

Paragraph 2. The law referred to in paragraph 1 shall provide for:

I – a guarantee of supply of petroleum products in the whole national territory;

II – the conditions of contracting;union.

III – the **structure and duties of the regulatory agency of the monopoly of the Union**

Law N° 9.478/97
(Petroleum Law)

- It was established ANP as a regulatory agency
- One general Director and four Directors with four year tenure
- The members of the Board will be appointed by the President of the Republic, after approval of the respective names by the Federal Senate
- ANP's decision-making process shall observe the principles of legality, impersonality, morality and publicity
- The initiatives of bills or amendments to administrative rules that affect the rights of economic agents and users of the sector shall be preceded by public hearing
- Concession agreement, preceded by bidding, as an instrument of exploration, evaluation, development and production activity;
- Arbitral clause as essential clauses of the concession contract

INITIAL DISCUSSIONS

- Independent agenci… …n of powers

  1. Prevented that the Pre… …trol over public administration to exercise his government plan

  2. Only Legislative Powe… …es

- Impossibility of the p… …tration to solve t… …rough arbitration

DISCUSSIONS ARE NOW OUTDATED

- The constitutionality of the intervention format through agencies is septated by the federal supreme court
- There is currently a strong prestige of the agencies decisions by the judiciary
- Recent laws and decisions reforced the use of arbitration by the public administration

DECISIONS OF THE SUPREME COURT

- In 1998 in the decision given in the direct action of unconstitutionality No 1668-DF The STF recognized the constitutionality of the law which created the National Telecommunication Agency

> *"The competence of the National Telecommunications Agency to issue standards is subordinate to the legal and regulatory provisions governing the granting, provision and enjoyment of telecommunications services in the public regime and in the private regime"*

DECISIONS OF THE SUPREME COURT

- 2018 - Direct Action of unconstitutionality 4874 filed against ANVISA's Resolution of the Board of Directors (RDC) 14/2012 in the judgment, it was expressly stated that:

  "The advent of sectoral regulatory agencies represents an undeniable improvement in the institutional architecture of the contemporary rule of law in the sense of offering a response from the Public Administration to address the complexity of social relations in modernity“

- In her vote, the Minister pointed out that:

  "The normative power attributed to the regulatory agencies is an instrument for the implementation of the guidelines, purposes, objectives and principles expressed in the Constitution and in the sectorial legislation.”

- The constitutionality of the agency rule was recognized

DECISIONS OF THE SUPREME COURT

- Direct action of unconstitutionality 5501 against Law 13.269/2016

- Congress x National Sanitary Surveillance Agency .

- According to the rapporteur's vote (Minister Marco Aurélio Mello)

  "There is an offense to the postulate of the separation of powers, since it is not the competence of the National Congress to enable the distribution of any medicinal product, but rather, to Anvisa“

- Minister Luis Roberto Barroso, respected constitutionalist, in his vote held that:

  "There are, in the event, violation of the Reserve of Administration, since, by authorizing the use of phosphoethaolan without compliance with the legal requirements for clinical and registration tests, Legislative power replaces the essentially technical judgment of Anvisa, for a political judgment, interfered in an undue in a typically administrative nature.”

DECISIONS OF THE SUPREME COURT

- The STF suspended the effectiveness of the law
- The STF understood in this case that even the law emanating from the National Congress may not invade the exclusive sphere of competence of the regulatory agency
- Decision of great relevance for the regulatory agencies because it prestiges its technical understanding even in the face of a law emanated by the National Congress
- This leading case supports the independence of regulatory agencies and favors technical decisions in the regulated sectors against possible political decisions

CONSOLIDATION OF ARBITRATION

- Today, there is no doubt that the public sector may use arbitration

- Law No 9307/98 (Arbitration Law) was amended in 2015 and has expressly predicted the use of arbitration by public entities

  Art. 1º Persons capable of contracting may settle through arbitration disputes related to patrimonial rights over which they may dispose.

  § 1° Direct and indirect public administration may use arbitration to resolve the conflicts regarding transferable public property rights.

- Two requirements: It have do involve disposable rights and the arbitration must be “by the law“. It is not possible decision by equity.

CONSOLIDATION OF ARBITRATION

- Conflict of competence 13.9519: CCI X Federal Regional Court of the 2nd Region

- Application of the principle of competence competence by the Superior Court of Justice

> *"Arbitral jurisdiction precedes state jurisdiction, and the arbitral jurisdiction shall decide on the limits of its assignments, previously to any other judgment body (principle of competence-competence), as well as on issues relating to existence, validity and effectiveness of the arbitration agreement and the contract containing the arbitral clause"*

- Consolidation of the use of arbitration by the public sector and competence of the arbitral tribunal to say what is understood by the disposable rights.

CONSOLIDATION OF ARBITRATION

- Consultation and public hearing No 24/2017 occurred in November 2017: Arbitral clause of contracts for exploration and production of oil and natural gas

- The Arbitral Clause provides that the arbitration procedure will be administered by an notoriously recognized arbitral institution with spotless reputation

- If the Parties do not reach agreement as to the choice of the arbitration institution, ANP shall indicate one of the following institutions: (i) International Court of Arbitration of the International Chamber of Commercial; (ii) International London Court; or (iii) Permanent Court of Haia arbitration.

- If the ANP does not make the designation within 30 days, the other party can choose any of the three institutions mentioned above.

PRAGMATISM AND JUDICIAL DEFERENCE

- Brasil is experiencing a pragmatic twist with the prestige of technical decisions based on empirical studies to the detriment of abstract legal values

- A pragmatic bias law was incorporated into the Brazilian legal system with the objective of promoting consequentialist decisions.

- LAW No 13.655/18

Art. 20 At the administrative, control or judicial sphere, it will not be decided on the basis of abstract legal values without the consequences of the decision.

Sole Paragraph. Motivation will demonstrate the need and adequacy of the measure imposed or the invalidation of act, contract, adjustment, administrative process or norm, including in the face of possible alternatives.

Art. 21. The decision which, in the administrative, controller or judicial spheres, decreasing the invalidation of act, contract, adjustment, administrative procedure or norm shall indicate its legal and administrative consequences

Art. 22. In the interpretation of public management standards, the obstacles and the real difficulties of the manager and the requirements of public policies shall be considered, without prejudice to the rights of the administrators.

PRAGMATISM AND JUDICIAL DEFERENCE

- Ex: Amendment promoted in local content policy through Resolution ANP 726/2018

- ANP has edited resolution enhancing local content requirements in concession agreements, enabling companies, who thus desired, to conduct additives to existing contracts.

- Resolution 726 was challenged in a federal court, having the judge of the case, in a limited decision, honored the ANP act. According to the decision:

"In principle, it is necessary to acknowledge the suitability of the activity of the public administrator who is clearly presented here by the effort to organize one of the most productive sectors of the national economy."

CONCLUSION

- It is an undeniable fact that the regulation of strategic sectors such as oil and gas through regulatory agencies has achieved a prestige never seen in Brazilian legal order.

- Regulatory interventions made by regulatory agencies should be adopted on the basis of well-founded decisions in technical studies that take into account other possible alternatives and always prestigious consensuality through public proceedings and open to the participation of interested parties

- The well-founded technical decisions of the agencies, within their sphere of competence, must be respected by the control bodies, which are prevented from deciding on the basis of abstract values

- In the event of conflicts arising from the concession agreements signed by the ANP, the dealers have the security that their case will be judged by an independent arbitral tribunal and experience in matters, with arbitrators chosen by the parties.

THANK YOU!

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