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Presentation

Adylson Motta
President of TCU

It is a great pleasure for me to present this commemorative edition of the TCU Journal, launched during the International Denationalisation Conference, held in Brasília in September 2005. This publication records the thoughts and initiatives of several actors on the national and international scene regarding the topics of privatisation, regulation and Public Private Partnerships-PPP.

The value of this edition, which is available in English and Portuguese, lies essentially in its multiinstitutional aspect and international nature, for it gathers the experience of officials and representatives of the Brazilian government, of the Superior Audit Institutions of the United Kingdom, Argentina, and Brazil, and of the World Bank and Brazilian civil society.

The actions of the Superior Audit Institutions (SAI) regarding oversight of the privatisation processes and of the performance of the regulating bodies requires overcoming great challenges related to employee capacity building and improvement of audit methods and techniques as well as building a solid foundation of knowledge in regulatory best practices, even with the use of compared models. The objective of the SAIs is to carry out important and timely works that will have a positive impact on the effectiveness of the use of public resources in regulatory management, in the benefit of the users of utilities.

As pointed out in several articles, the SAIs have stood out as institutions that are essential to the improvement of management of the regulatory regimes and to the transparency and regularity of the privatisation processes. The legitimacy of their performance certainly results from the independence, technical competence and professionalism developed by these institutions when they incorporate in their oversight actions audit, analysis and evaluation criteria, methods and techniques which are regulated by the International Organisation of Superior Audit Institutions (INTOSAI).

Thus, the approach used in the articles focuses on, but is not limited to, the specificity of the processes that control the denationalisation of public services carried out by SAIs, on the laws that guide the exercise of the oversight of regulatory activities in those countries, as well as on the actions for improvement that have been implemented in this field within the *Tribunal de Contas da União* (Brazilian Court of Audit). Furthermore, the Journal brings the in-depth analysis by Dr. Paulo Corrêa, senior economist of the World Bank, on the different impacts resulting from privatisation in Latin America. It also presents an article by renowned doctrine-maker Carlos Ari Sundfeld on the legal and doctrinal norms that will support the implementation of Public Private Partnerships in Brazil.

With this initiative we hope to promote the exchange of experiences and viewpoints that may contribute to the adoption of solutions aiming to improve the regulatory activity and the public services delivered to society. ■

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Walton Alencar Rodrigues
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I – INTRODUCTION

The control of regulatory agencies in Brazil is still the object of debates that reflect the different conceptions of these entities and their legal competences. The issues under discussion usually focus on the independence or autonomy conferred by law to the agencies and on the existence of so-called "technical discretion".

The Brazilian Court of Audit has already had the opportunity to discuss and to develop the theme[1] widely. Its decisions are based on the assumption that administrative autonomy, conferred by law, is impossible to dissociate from the exercise of control. It understands that, in a democratic and republican regime, delegation of powers cannot take place without the obligatory accountability of the use of the competences granted[2], within a modern framework that includes legality, legitimacy and economy.

Without going into the details of the classifications provided by the doctrine regarding control of the Public Administration, the mechanisms provided aim to compel the Administration to act in accordance with the principles approved by the legal system, such as legality, impersonality, morality, publicity, efficiency, reasonability, proportionality, legitimacy and others that require, to some extent, analysis of the merit of the administrative performance.

In this regard, the action of the *TCU* is endorsed by the Constitution, since it exercises external control, headed by the National Congress. Therefore, it belongs to the *TCU* to carry out, with complete autonomy, on its own initiative or in response to a parliamentary request, audits of an accounting, financial, budgetary, operational and patrimonial nature on the Union and all the entities of the direct and indirect administration, focusing specifically on the legality, legitimacy and economy of the deeds performed.

1. See "O TCU e o controle das agências reguladoras" (The TCU and the control of the regulatory agencies), a lecture delivered at the Seminar "The control of the Regulatory Agencies", TCU, 2003. See also "O Papel do Tribunal de Contas da União no Controle das Agências Reguladoras" (The Role of the Brazilian Court of Audit in the Control of the Regulatory Agencies), lecture delivered by Minister Benjamin Zymler, at the Seminar "External Control of the Regulation of Public Services" promoted by the TCU in 2001.

2. Foreign literature, in the areas of Public Administration and political science, frequently employs the term "accountability", when addressing the issue of accountability and rendering of accounts. Without a direct correspondence with the technical legal terms, "accountability" should be understood as the obligation to answer for use of attribution or delegated power. It corresponds to rendering of accounts, in a broader sense.

The incorporation of the principle of efficiency in the Federal Constitution, through Amendment no. 19/98, caused, simultaneously, a significant change of the paradigm of Public Administration performance and a clear alteration of the focus of External Control. The Courts of Accounts can no longer evade inspecting the efficiency of state action, since this was included in the Constitution as a guiding principle of the entire administrative legality.

With the creation of the agencies, with the legal nature of special autonomous governmental agencies performing the State's regulatory function, a new question emerged: considering the distinctiveness of the regulatory entity's action, and a new concept of the State and ways of pursuing the achievement of the public actions, what would be the limits and the possibilities of the inspection action of External Control exercised through the Courts of Accounts?

The regulatory entities were conceived, nonetheless with ample independence, as a mechanism of protection against the opportunism of electoral interests and against abuse of economic power. However, it is undisputed that there is a risk of such entities basing their actions on interests other than the purposes expressly provided for in the law. Therefore, there is naturally a range of expressed and implicit controls to restrict arbitrary and capricious behaviors on the part of regulatory entities, which are by the way inherent behaviors in every human activity.

In any case, the instrumental nature of Administrative Law should always be kept in mind, for which reason the autonomy or independence granted by law to the agencies must be understood not as an end in itself, but as an instrument for the achievement of the highest public interests, foreseen in the law, that the legislator sought to assure.

In fact, the Administration cannot endorse resulted contrary to the purposes provided in the legislation. Any regulatory decision resulting in a situation that is not the one intended by the law cannot be considered legitimate. Likewise, the means or instrument adopted by the regulator must be appropriate and necessary for the implementation of the constitutional and legal purposes of the public service. The adoption of inappropriate, useless or costly means for the achievement of the goals established in law should be deemed illegitimate and therefore subject to correction.

In this context, the action of External Control is introduced in the regulatory process. It seeks to identify failures and opportunities to improve procedures, preventing the regulating entity from straying outside the limits imposed to it by the law and that establish its legitimate scope of action, curbing inconsistent and questionable technical decisions that are not focused on the implementation of the legal purpose, or that result from the "capturing" [3] of the regulating entity by the interests of the regulated entities.

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3. "Capture" is the technical term used to portray the specific reality of the agency that is composed of entities linked to the sectors that it should supposedly regulate, implying, as a consequence, in the interruption of the fulfillment of its regulation attributions. It is one of the dangers resulting from the absence of a stable bureaucracy, with most of the management positions being changed with each change of government or to alteration in the structure of political support.

To achieve this result, the action of the control agency cannot be limited to the administrative analysis of the conformity and legality of procedures and acts.

The social demand in favor of the action of the Brazilian Court of Audit, in the sphere of control of the action of the regulatory agencies, has been growing. The National Congress has requested that audits be carried out on a wide range of different aspects of the practical operations of these entities. Not infrequently, the actors involved in the regulation process request audits, and that includes the service providers, interested bidders, the Executive Branch[4] and at times even the regulatory agency itself, reluctant to perform its attributions without previous *placet* from the *TCU*[5].

As to the middle area of the regulatory entities, there is no doubt regarding the competence of the Courts of Accounts to inspect it. However, this has not always been so. The first audits carried out by the *TCU* were branded as impertinent and unconstitutional, viewed by some as a classic example of improper interference of the *TCU* in these entities. It was even claimed that these entities were above control, due to the autonomy and independence that, supposedly, was granted to them by the law.

A perfect example of misinterpretation of the original concept regarding the regulatory entities can be found, among others, in the Renderings of Accounts of the National Telecommunications Agency - Anatel, referring to the fiscal years of 1997, 1998 and 1999, in which the entity, to justify the violation of several laws and decrees, stated expressly that the independence conferred to it by the law that created it unbound the Agency from the rules established by other public entities, except in the case of explicit acceptance of these rules by the audited agency itself (TC 004.266/1998-6, TC 007.026/1999-4 and TC 008.249/2000-9)[6]. Several arguments of this type were submitted to the Judiciary Power, without gaining support.

Obviously, such views could not prosper, whether because of the express competence conferred to the *TCU* by the Federal Constitution and the ordinary and complementary legislation, or because it is impossible to conceive of state activity, relevant or not, being outside the law and above inspection.

The existence of norms and controls on the regulatory agencies in no way affects their independence or necessary neutrality for the proper performance of their legal purposes. The autonomy and competence of the regulatory entities has been assured in sentences by the Supreme Federal Court, drawn by Ministers Octávio Gallotti and Sepúlveda Pertence, in several Adin (Direct Unconstitutionality Action), referring to the Agency for Regulation of Delegated Public Services of the State of Rio Grande do Sul - Agergs[7].

4. For example, the TC-005.302/2003-9 – consultation formulated by the Minister of Communications, regarding the application of the resources of the Fund for Universalization of Telecommunications Services – FUST, which resulted in Plenary Sentence 1107/2003-TCU. The remark made by Alexandre Ditzel Faraco, addressing the action of the TCU regarding the application of the Fust resources, should be noted: "The legal impasse created around the Fust was analyzed by the TCU (...) the role of the TCU, in this context, can even be seen as unexpected, since the Court was not viewed as being able to influence sectoral regulation. However, in the exercise of its competence to inspect the spending of public resources and administrative activity, the TCU also gained an influence in this sphere" (FARACO, Alexandre Ditzel. "Concorrência e Universalização nas Telecomunicações: Evoluções Recentes no Direito Brasileiro" (Competition and Universalization in Telecommunications: Recent evolutions in the Brazilian Law), in Revista de Direito Público da Enonomia – RDPE, 8, Oct./Dec. 2004, p.19).

5. See TC-003.995/2004-0 – consultation formulated by the Ministry of Mines and Energy, regarding the possibility of extending concession contracts for oil exploitation entered into by the National Agency of Oil – ANP and Petrobras (Plenary Sentences 934/2004 and 935/2004).

6. Available at http://www.tcu.gov.br

7. The agency's competences for establishing tariffs and homologation of invitations to bid and concession contracts was recognized in the decision on the writ of prevention of Adin nº 2095-0, Rapporteur Minister Octávio Gallotti; and the autonomy, in decision on preliminary order of Adin nº 1949-0, Rapporteur Min. Sepúlveda Pertence.

However, the topic of the action of the Courts of Accounts in the inspection and control of the end activities of the regulatory agencies – an issue not yet resolved in the doctrine – is quite different, particularly the possibility of the *TCU* issuing determinations to the agencies in areas of an obviously regulatory nature.

It is timely to mention the MS 23.761-DF, in which it was alleged, at the STF – Brazilian Supreme Court, that the *TCU* is not competent to inspect a service provided by a concessionaire, to interfere in the execution of the concession contract and to act in the place of the regulatory agency. It was also argued that, since it was not an act related to expenditures, the act of the state entity would not be under the jurisdiction of the *TCU*. The Rapporteur of the case, Minister Sepúlveda Pertence, upon denying the writ of prevention, understood that it is not possible to remove the *TCU*'s competence to control the legality of the act in question, and could see "heavy objections" to the source of the argument. Later, in view of this, the concessionaire gave up the cause, removing the examination of the merit from the dispute.

The limits of the competence of external control in relation to the end activity of the regulatory entities is an evolving theme, having been the object of debates and important discussions for the jurisprudential construction of the *TCU*[8].

In Brazil, the regulation of the public services by independent entities found its major advocate in the Court of Accounts itself, in Minister Alfredo de Vilhena Valladão, whose privileged intelligence allowed him to contribute to the modernization of the Court's performance[9] and, upon invitation by President Alfonso Pena, to prepare, in 1907, the draft of the Water Code[10] that, however, was not appreciated by the National Congress.

Appointed by Getúlio Vargas[11] to join the Sub-commission assigned to update the first draft of the Water Code, Alfredo Valladão modernized its original conception and elaborated the regulatory regime that addressed the utilization of the "hydraulic force of water" for the generation of electric power. After finishing the first draft, in 1933, Minister Valladão dedicated efforts to justify the adoption of the regulation model of the electricity similar to the one in force in the United States, that is, the regulation of public utility services by independent administrative commission, denominated "Public Utility Services Commissions"[12].

In face of the innovative nature of the solution, the proposal for the creation of these commissions was approved, and the Water Code, instituted by Decree 24.643, of July 10, 1934, left the regulation of the electric power sector to the Water Service of the National Department of Mineral Production of the Ministry of Agriculture.

Thus, 63 years went by until the vision of Minister Valladão prevailed, with the creation of the National Agency of Electric Energy – Aneel, by means of Law 9.427, of December 26, 1996.

8. The self-restriction of the Brazilian Court of Audit should be noted, as it at times refuses to decide on a matter to avoid usurping the competence of the regulatory agency. In this line, the TC-020.556/2003-5 – Representation pursuant to the supposed irregular charging of an additional fee for moving cargo already remunerated by tariff established in the lease contract. By means of Plenary Sentence 2023/2004, the TCU demanded from the National Agency of Waterway Transports – Antaq the effective fulfillment of its attributions and the appreciation of the suit, without which the TCU could not pronounce on the issue.

9. For more details on the contribution of Alfredo Valladão in the innovations pursuant to the performance of the Brazilian Court of Audit, see the monograph "O Tribunal de Contas da União na História do Brasil: evolução histórica, política e administrativa (The Brazilian Court of Audit in the History of Brazil: historical, administrative and political evolution, 1890 – 1998), by Artur Adolfo Cotias e Silva, winner of the Serzedello Corrêa Prize in 1998.

10. Foundations for the Code of Waters of the Republic (1907).

11. Decree 19.684, of February 10, 1931.

12. See "Presentation of reasons of the Bill of the Water Code of 1934 ". Brasilia. DNAEE, 1980.

II – THE PERFORMANCE OF THE *TCU* IN THE CONTROL OF REGULATION

Once established the *TCU*'s competence to carry out operational audits and inspections, and to verify compliance with the constitutional principle of the efficiency, as well as the legitimacy of the state's action, the Court of Accounts could not forgo inspecting the final tip of the spear of the performance of the regulatory agencies, the concession contracts, permits and authorization acts, for the rendering of public services. The providers of such services generate goods and public rights – ex. highways, ports etc. – or of a similar nature, such as reversible goods, linked to the rendering of public services and, ultimately, they are held accountable for the delegated service, which belongs to the Union, the title holder of such rendering.

As an example of relevant actions by the *TCU* is the recent operational audit on the management of the tariff burden "*Bill for Consumption of Fossil Fuels of Isolated Systems – CCC-ISOL*"[13] included in subsidies used in the North and Northeast Regions. The huge amount of resources involved resulted from the percentage of three to seven percent of the electricity bills paid by all the users of the system. The *TCU* found a lack of control mechanisms of the regularity of the expenditures; a clear conflict of interest in the action of Eletrobras, which was sometimes manager of the CCC, and at other times the recipient of 49% of these same resources, by means of its subsidiary Manaus Energia S/A; the absence of drafting of the regulation required by law; the problematic and unfair full transfer of the electric losses to the tariffs, which contributed to the inadmissible lack of concern over efficiency on the part of the local electric power concessionaires[14].

When overseeing the bidding process for granting the public service concession for electric power transmission[15], the Court found irregularities related to the calculation of the Maximum Annual Revenue, contained in Bidding Announcement 001/Aneel. The flaws ranged from simple errors in filling out spread sheets to more serious errors with direct economic-financial impact, such as incorrect calculation of the price index variation of the IGP-M and of the burden "Global Reversion Reserve", projected until the year 2034, although Law 10.438/2002 had established its extinction at the end of 2010.

In the Brazilian legal-constitutional regime, where the *TCU*'s inspection can take place *ex ante*, concomitantly and ex post, all these relevant issues requiring immediate correction were brought to the knowledge of the agencies, in time for them to formulate the alterations in the ongoing bidding processes, before the *TCU* having to issue determinations. Later, in the audit reports, the *TCU* issued determinations and recommendations on the same matter with a view to preventing future repetition of the irregularities[16].

Another serious problem, related to the electric power transmission concession, refers to the absence of mechanisms for appropriation of business efficiency and competitiveness gains, as provided for in article 14, IV, of Law 9.472/1997. In the scope of the TC-006.226/2004-8, it was verified that the concession contracts determined that the concessionaires should reduce costs, creating conditions for the reduction of the tariffs when carrying out readjustments and revisions, but in the part that disciplined the readjustments and revisions they did not contemplate any hypothesis that would allow effective achievement of such reduction. At the time, the *TCU*, by means of Sentence 649/2005, expressly determined to Aneel that it comply with the law and establish the mechanisms required for transfer of these gains to the users.

An important contribution of the *TCU* took place with the audit on the "Social Tariff", instituted by Law 10.438/2002, aimed at subsidizing electricity supply to low income home consumers (TC-014.698/2002-7).

13. TC-013.237/2004-1.

14. Plenary Sentence 556/2005 - TCU.

15. TC-006.226/2004-8.

16. Plenary Sentence 649/2005 - TCU.

"By means of audits carried out on the regulatory agencies and the ministries, with the action focusing on the infrastructure area, the Brazilian Court of Audit identified the weakness of the macro-sectoral policies and guidelines. This gap lead to the agencies abnormally exceeding their legal mandates, since to regulate the entire sector, they were forced to make decisions that belong to the public policy-making governmental bodies."

On the occasion, the crossing of the income and consumption data of the sample, extracted from the Survey on Standards of Living carried out by the Brazilian Geography and Statistics Institute, identified problems with the criterion established in law - consumption of electricity - to identify the beneficiaries of that very special tariff. The choice would only be appropriate if there was a strong correlation between electricity consumption and income, which in practice was not found. Thus, the enforcement of the legal criteria, besides excluding low income consumers, included among the beneficiaries a significant number of middle and high income households, producing results contrary to the objectives stated in the law.

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In the energy sector, the absence of policy guidelines resulted, above all, from the lack of action on the part of the National Energy Policy Council (CNPE), instituted by Law nº 9.478/1997, responsible for advising the President of the Republic in the formulation of the national energy policy[17]. In the telecommunications sector, it was found that the Ministry of Communications, whose role was to advise the President of the Republic in the formulation of the sector's policies, was negligent, with no provision in law for a collegiate body with such competence.

Due to this omission, the National Agency of Telecommunications was forced to act as it saw fit in assuring public interest. For example, even in the absence of policies related to the use of notified orbital positions by the Country, the agency sought to implement a program that assured the immediate use of the positions allocated to Brazil at the time.

Similar examples with different results were the choice of the digital television standard and the choice of the cellular telephony standard adopted in Band C, D and E calls. In this case, it fell to the Agency to make the policy choice, expressed in terms of choice of the frequency band used, but it meant, in fact, the choice between the European technology (GSM) and the American (CDMA). In the other case, even though the agency has initiated the procedure of selection of the digital standard for broadcasting, the government took on its role of formulator of public policies, which allowed the matter to be conducted in the appropriate sphere, integrated to the other national development guidelines, and with proper insertion in the world market.

Still in the area of telecommunications, an audit carried out on the fulfillment of the universalization goals, defined in the concession contracts, allowed the identification of serious inconsistencies, both in the agency's data management system (SGOU) and in the inspection procedures. The audit team concluded that the inspection procedures needed total reformulation, and a large number of recommendations were issued to Anatel[18].

17. See TC-005.793/2002-7 – Relation 43/2002 – 2ª Chamber. On the subject, see also "O controle externo das agências reguladoras: questões relevantes sobre os setores elétrico e de petróleo e gás natural" (The external control of the regulatory agencies: significant issues related to the electric and oil and natural gas sectors"). Brasilia: TCU, Sefid, 2003.

18. Plenary Sentence 1778/2004 - TCU.

This particular experience, obtained by the *TCU* along the years, in the monitoring and inspection of economic regulation in the sector of telecommunications, allowed the identification of government policies and Anatel's weak control over the universalization goals, as well as the incipient activity of economic regulation developed by the Agency.

In spite of the express provision in the Law, and in regulations and contracts, Anatel does not have adequate information on the rendering of the services, is unable to verify the economic-financial balance of the concession contracts for Fixed Switched Telephone Service (FSTS), and does not have the necessary knowledge to carry out tariff revisions, the preferred instrument for the economic-financial re-equilibrium of the agreements, as explicitly contained in the concession contracts and the General Law of Telecommunications. In an audit carried out in 2000, it was verified that the Agency limited itself to receiving and filing official balance sheets, forwarded by the operators, without any analysis [19] or proper study.

In the fiscal year of 2003, in the tariff revision processes promoted by the National Electric Power Agency, the action of the Brazilian Court of Audit was widely publicized. In spite of all the *TCU*'s actions along many years in the control of the acts related to the setting of the tariffs and the verification of the economic-financial balance of concession contracts, the debate that followed the audit was exceptional, with unlimited involvement of all the interested parties. The processes are still pending appeal decision.

The inspection action of the *TCU* largely results from the ordinary action of the Court in the oversight of privatizations, as disciplined in the laws that address the National Privatization Plan.

In this field, the action of the *TCU* was extremely fruitful. For example, among others, the corrections determined by the *TCU* in the evaluation of Banespa, nationalized and alienated by the Central Bank, resulted in the rise of its minimum price, in values of the time, more than R$ 1.17 billion reais. Similar corrections were required in the minimum price of the grants of the personal mobile service, in the "C", "D" and "E" bands, whose initial calculations contained errors that totaled R$1.6 billion reais. Such data was, at the time, scarcely publicized.

The *TCU*'s accumulated knowledge in the area of corporate finances, cash flow analysis, evaluation of investments and all the usual issues in the processes of tariff revision, was obtained gradually, since the overseeing of the first privatization processes, with the assessment of the minimum sale value of the privatized companies and with the problems identified in several highway concession contracts, allowing the understanding of terms and procedures that, for being highly technical, remain unfamiliar to the majority of the interested parties.

In face of the importance of these processes, in the particular context of economic regulation, it is natural for the Court to dedicate special attention to the tariff revisions under the responsibility of the new regulatory agencies, to verify their compliance with the law and the concession contracts.

Obviously, once the public service is granted, the *TCU*'s action in the oversight of the execution of concession contracts, is not aimed at - nor could it be - replacing the constitutional and legal role of the regulatory agencies, whose competences are completely different form the *TCU*'s. It belongs to them to regulate the market, and it belongs to the *TCU* to act, not as a second tier or reviewer, but as a constitutional body of superposition and control.

By the way, since the first highway concession processes, the Court was called to inspect the calculation of the value of the basic toll tariff, which is, in fact, the reason decreed the cancellation of the tender (Plenary Decision 763/1994)[20]. After several studies were carried out, the Court concluded that the collection of the Basic Toll Tariff at R$ 1.20 was correct, although the value initially established was R$0.78[21].

19. See TC-003.632/2001-9 and Plenary Decision 215/2002 - TCU.

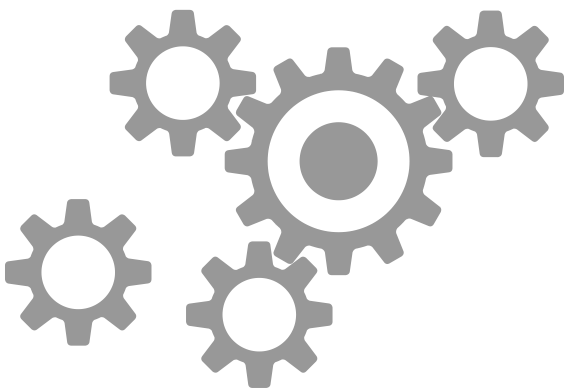
20. This deliberation was partially changed by Plenary Decision 188/1995, in view of a new set of elements presented in the process.

21. Decision - 14/2000 TCU - Second Chamber.

This example demonstrates, in itself, the complete impartiality of the *TCU*'s action, in seeking the enforcement of the legal parameters, whose results are not neutral, as sometimes they favor the users of the services, at others the concessionaires. The action of the *TCU*, therefore, is aimed above all at compliance with the law and favors the security and the stability of the contractual relations, preventing undue profits on either side.

As to the highway concessionaires, a bad memory is the irregular exaction of the Tax on Services of Any Nature, of five percent, on the values corresponding to all the tolls tariffs collected from the users since 1996. The agency responsible for inspection of the execution of concession contracts authorized the collection by the concessionaires of a tax that did not exist, and that, precisely for this reason, after being charged, was not transferred by the concessionaires to the municipal public coffers, because there was no law to authorize its collection. In this case, the irregularity was considered serious, because the agency, since the beginning of the tender procedures, had full knowledge of the lack of legal support for the exaction of the tax and still allowed its collection.

Due to failure to comply with these deliberations, as well as relapse in the illegal practice, several sanctions were imposed on the managers of the entity, and it was necessary to check the values unduly collected by the concessionaires and revert them back to the respective cash flows, in order to re-balance the concession contracts[22].



In the process of overseeing the revision of the tariffs of Escelsa, in 2001, the *TCU* identified irregularities in the procedures adopted by the Agency, especially regarding the calculation of the capital cost (Decision 1483/2002). In spite of Aneel's appeal, most of the issues raised by the *TCU* were duly corrected in a new capital cost study, prepared for the tariff revisions in the year of 2003 (TC-014.291/2003-2).

In this last process, the *TCU*'s analysts found inconsistencies in the method of calculation of the productivity factor (X Factor), adopted by the Agency. "X Factor" is the estimate of the productivity gains by the concessionaire that have to be transferred to the users. The theoretical analysis of the model chosen by the regulator already indicated, in the expert's opinion, the inadequacy of the method. To corroborate its analysis, the technical unit applied this methodology to a hypothetical company with no efficiency gains. Since the data used corresponded to the company with zero productivity gain, "X Factor" would also have to be zero. However, the result was different from zero, being, therefore, incompatible with the actual absence of efficiency gain contained in the data used.

Due to these inconsistencies and other irregularities that were found – such as double counting of certain accounting groups, in the definition of the working capital – the Court determined that Aneel adopt measures to correct the irregularities[23].

In all the cases mentioned, the *TCU* aimed to act within the constitutional and legal boundaries, never hindering the action of the regulatory agency. Therefore, it did not choose the methodology for calculation of the "X Factor", nor fixed the value later considered correct. It's action was limited to pointing out the improper choice of the regulatory entity and to determining the correction of the errors.

22. On the matter, see the Plenary Decisions 434, 485 and 516, all of 1999, and Plenary Sentences 138/1999 and 56/2001.

23. Plenary Sentence 1757/2003.

III – FINAL CONSIDERATIONS

As a result of the new constitutional order, the recent history of the *TCU* has been marked by challenges. The basic challenge is to confer maximum consolidation to the constitutional rules, above all to the principles of legality, morality and efficiency, allowing, within this framework, the safe action of the Administration. This challenge unfolds into innumerable others, concrete and quantifiable, that allow progress in the development of effective, more reliable and more efficient External Control of the Administration.

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Along this line, the International Organization of the Supreme Audit Institutions (Intosai), which congregates government inspection and audit bodies of all the UN member countries, publicized guidelines and best practices for the control of economic regulation[24], evidencing a general and increasingly greater concern with the action of the regulation authorities. In England, for example, the National Audit Office encourages and carries out studies on regulation and control with an exceptional degree of excellence[25].

Regarding the development of the regulatory entities, Brian Levi and Pablo T. Spiller advocate that the institutional evolution of the regulatory agencies derives from the need to limit discretional action in regulation. And, in these terms, they claim that "the analysis of the evolution of the regulation of public utilities in England suggests that the limitation of regulatory discretion is behind the development of the regulatory institutions in industrialized countries" [26].

In this work, the authors present the following summarized conclusions:

a) the performance of regulation can be satisfactory under a wide range of different arrangements and regulatory procedures, **as long as there are mechanisms in place to limit the discretional action of the regulator,** formal or informal restrictions to the alteration of the regulatory system and institutions that assure such limitations; and

b) ample discretional powers assured to the regulator will not induce the desired investments if the institutions of the Country are unable to distinguish the arbitrary behavior of the regulatory authority from the appropriate use of its discretional attributions.

24. INTOSAI. Guidelines on Best Practice for the Audit of Economic Regulation. Seul, 2001. Text available at http://www.nao.gov.uk/intosai/wgap/ecregguidelines.htm.

25. See, for example, Pipes and Wires NAO report (HC 723 2001-2002).

26. Regulations, Institutions, and Commitment: Comparative Studies of Telecommunications Cambridge University Press. 1996, p.2.

As can be seen, the same problems are disseminated all over.

In this context, technical discretion would be nothing more than the limits of the action of the manager in the choice of strictly technical solutions.

The conclusions of Sergio Antonio Silva Guerra's lecture are very stimulating. According to him, "the term technical discretion is aimed only at jurisdictional limitation of the control of its exercise, with a view to preventing the technical choices the Administration from not being replaced by the technical options of the judge" and "the Regulatory agencies do not enjoy a strictly technical discretional function in the issuing of their acts, but rather pure administrative discretion"[27].

Diogo de Figueiredo Moreira Neto, when addressing regulatory agencies, claims that "technical discretion only exists when the decision based on it is also motivated technically. This is perhaps the most important limitation, since t removes, all at once, **arbitrary decisions, error, imposture and unreasonableness**, and moves away unnecessary, inadequate and biased decisions"[28].

On the same track, Professor Maria Sylvia Zanella Di Pietro points out that it is always possible, in the establishment of technical criteria, for **abuse of power, arbitrary decisions, error, malice and guilt** to occur[29].

Along the same lines, Marçal Justen Filho teaches that "the decision adopted at the time of enforcement of the law does not reflect the manager's free and limitless assessment, but translates the consolidation of the most appropriate and satisfactory solution, in view of abstract criteria provided in law or derived from technical-scientific knowledge or cautious evaluation of the reality"[30].

The "technical" choices derived from "technical discretion" can also prove to be entirely improper, inadequate, unreasonable, costly, contrary to the public interest and the legal purpose, which would require the adoption of corrective measures, in precisely the same terms as in administrative discretion.

The discretional scope in Brazil, either administrative or technical, is, therefore, unique and deserving of the same treatment. The resulting choice must always be linked to the public purpose, otherwise it will not be valid.

By inspecting the end activities of the regulatory agencies, the Court does not intend to replace the agencies that it controls, otherwise the controller would change into regulator; it cannot establish the content of a regulatory act, which will be issued by the competent agency, nor impose the adoption of measures that it considers appropriate, unless when it finds weaknesses regarding legality, errors, or omission of the agency in proper enforcing of the law.

In any case, this is, perhaps, the biggest challenge for External Control, to distinguish arbitrary behavior by the regulatory authority of the appropriate use of its discretional attributions.

The scope of the irregularities considered by the *TCU* reinforces the imperious need for improvement and strengthening of the system of the regulatory agencies. Particularly in relation to the basic configuration and improvement of its specialized technical staff, whose instability – from lack of permanent staff, high turnover of temporary contracts, changes in commissioned positions, systematic reductions of resources and absence of qualification and training courses – severely hinders and undermines the entire regulatory activity[31].

27. Discricionariedade Técnica e Agências Reguladoras. (Technical Discreion and Regulatory Agencies). Lecture delivered at Seminar "The Regulatory Agencies ", promoted by the ESMAF.
28. Mutações do Direito Administrativo. (Mutations of the Administrative Law 2nd edition. Rio de Janeiro: Renovar 2001, p. 169-170.
29. In Parcerias na Administração Pública (Partnerships in the Public Administration) 4th edition. São Paulo: Atlas, 2002, p. 156.
30. In O direito das agências reguladoras independentes (The law on the independent regulatory agencies) São Paulo: Dialética, 2002. p. 516.
31. See "Report and Previous Expert Opinions on the Accounts of the Government of the Republic: fiscal year 2004". Brasilia: TCU, 2005.

Thus, the action of the *TCU*, on the one hand restricting arbitrary and unjustifiable behaviors on the part of the regulator, and, on the other, stimulating the action of the State, contributes to the proper functioning of the institutions.

Instead of going against the model, this action assures its proper functioning, hindering abuse, arbitrary decisions and error as much as possible and within its specific competence of operational inspection.

In the republican regime, the Congress and civil society demand reliable information on the action and performance of all the government's agencies. On this matter, the *TCU* has the constitutional competence, technical knowledge, political impartiality, access to information related to the Public Administration and organized administrative structure. These factors allow the *TCU* to render to the Parliament and to society all the information, necessary and reliable, that provides the foundation for the democratic debate on state action and, particularly, on the action of the regulatory agencies. ■

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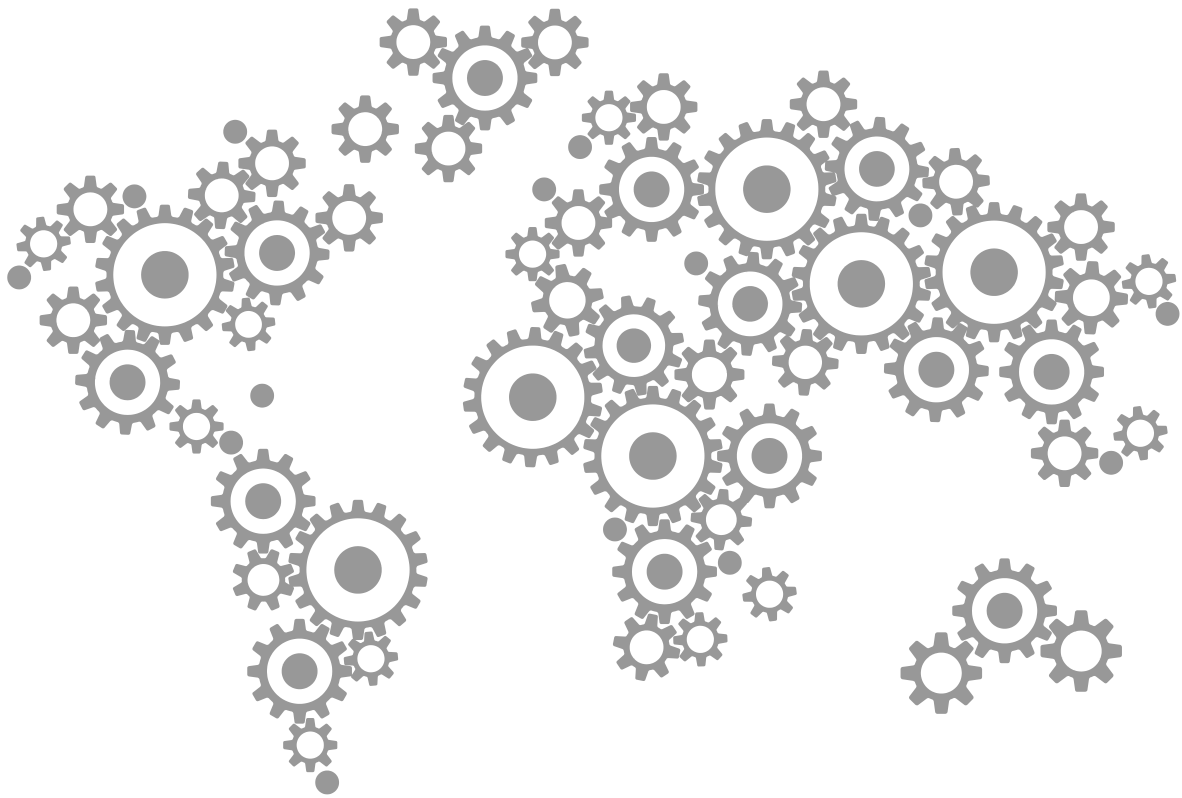

The role of the Intosai Privatisation Working Group and regulatory accountability in the UK

John Bourn

POST PRIVATISATION CONTROL: THE ROLE OF THE INTOSAI PRIVATISATION WORKING GROUP

Since its inaugural meeting in 1993, the INTOSAI Privatisation Working Group has become one of the largest of INTOSAI's Committees and Groups with membership from 40 Supreme Audit Institutions (SAIs). The Working Group's 12th annual meeting in Brasilia in September 2005 is followed by a conference on International Denationalisation hosted by the Brazilian Court of Audit. Discussion of post privatisation control – by which I primarily mean economic regulation – will be a key part of both events.

This is because successful privatisation of utilities and other businesses of strategic national importance necessitates effective regulation. The regulatory framework is, therefore, of central importance to the outcome of such privatisations. Economic regulation has taken a variety of forms and has been applied across the public and private sectors. Regulators are powerful and largely independent public bodies. All parties, especially the ultimate customers, can benefit from the spur to economy, efficiency and effectiveness that scrutiny from a SAI can bring.

A key role for the Working Group is to facilitate the exchange of information between SAIs – at our annual meetings and in between. The Working Group has published four sets of guidelines including, in 2001, guidelines on the audit of regulation.

We continue to monitor the effectiveness of the guidelines and to develop new guidance. The Working Group is currently designing a framework for a series of case studies which will illustrate key technical issues and draw on the experience of member SAIs. The first three deal with privatisation issues and the Working Group will consider the case for moving on to regulation and Public Private Partnerships.

This paper is intended as a contribution to the thinking on regulatory accountability, which is a topical subject, drawing on UK experience.

"This paper is intended as a contribution to the thinking on regulatory accountability, which is a topical subject, drawing on UK experience."

Sir John Bourn is the Comptroller and Auditor General, United Kingdom. Chair, INTOSAI Privatisation Working Group

REGULATORY ACCOUNTABILITY IN THE UK

The United Kingdom's Better Regulation Task Force[1] defines regulation "as any measure or intervention that seeks to change the behaviour of individuals or groups". Typically, regulation is set out in detail in laws passed by the UK Parliament (and increasingly by UK laws which transpose European Union directives). This aspect of regulatory accountability is discussed in the final section. But an important subset of regulation derives not directly from the detailed provisions of an individual law, but from the decisions, guidelines and rules established by independent regulators. The most important of these independent regulators in the UK are called economic regulators.

ECONOMIC REGULATORS

The economic regulators were established by Parliament in the wake of the privatisation programmes of the 1980s and 1990s, and were provided with statutory functions, duties and powers by Parliament. As economic regulators, their principal role is to control the abuse of monopoly power, though they may have other functions such as social regulation. Their duties are framed in such a way as to allow flexibility and discretion to regulators in the exercise of their functions.

The principal economic regulators are the Office of Gas and Electricity Markets (Ofgem), the Office of Communications (Ofcom), the Office of Water Services (Ofwat), the Office of the Rail Regulator (ORR) and the Postal Services Commission (Postcomm).

The relationship between the independent economic regulators and the Government is relatively clear. The Government sets the policy framework within which economic regulators operate but they are independent of direct Ministerial control. Independence is recognised as important and indeed one of the key benefits sought from the independent regulatory model is to shield market rules from potentially 'captured' politicians. The independence granted to economic regulators makes it possible for them to operate within a longer-term framework different from that dictated by shorter term political priorities.

In the UK regulatory model, however, independence is not absolute – for example regulators are appointed for a fixed term and although Ministers, in general, cannot remove regulators within this term, they have the power of appointment and reappointment. The Government can also change the legal framework within which regulators operate, by introducing new legislation subject to Parliamentary approval, although in practice this option to amend the legal framework has been used sparingly.

Furthermore, political developments such as electoral changes may mean that current priorities differ from the objectives of regulators set out in statute, which could create tensions between the regulator and Ministers. Since regulators do not operate in a vacuum, they tend to seek to minimise these tensions by maintaining open and regular discussions with Ministers and the principal Government departments.

1. The UK Government established the Better Regulation Task Force (the Task Force) in 1997. Its terms of reference are: "to advise the Government on action to ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted".

The model then is one of constrained independence granted by Parliament. But how are regulators held accountable? There are four types of oversight:

• Political oversight. This derives from Ministers and Government. In the extreme, Ministers can absolve or dismiss regulators. But this is a fairly blunt, and rarely used, instrument.

• Appeals. Companies affected by regulation can appeal the content of specific decisions – for example, the level of a price control.

• Judicial review. Companies can also appeal to the courts about the process followed by a regulator – that is, the way a decision has been reached.

• The external value for money audit by the National Audit Office, acting on behalf of the public interest and reporting to Parliament.

THE NATIONAL AUDIT OFFICE'S ROLE IN ECONOMIC REGULATION

The National Audit Office's role is to give assurance to the public and Parliament on how public bodies are carrying out their tasks, and in the process to provide a stimulus to improvements in the effectiveness with which public bodies operate.

The National Audit Office contributes to the process of accountability in two main ways:

• By undertaking the annual audit of the accounts of central government and its agencies, including regulators. This audit provides Parliament with assurance that the accounts are "true and fair" and that income and expenditure complies with Parliament's intentions.

• Under Section 6 of the National Audit Act 1983, by examining the economy, efficiency and effectiveness (that is, value for money) with which audited bodies, including regulators, use their resources. In terms of regulation, the National Audit Office conducts value for money audits of the main UK regulators, (Ofgem, Ofcom, Ofwat, ORR and Postcomm) as well as the Office of Fair Trading (which covers competition policy and consumer protection outside these sectors).

The National Audit Office recognises that independent regulation as a model has many strengths and in practice has brought benefits to consumers in the UK. Nevertheless this model of regulation also brings with it some risks, primarily in terms of the exercise of discretion by the regulator: how can Parliament be sure that the regulator has used its independence and discretion effectively and in the public interest? The short answer to this question is value for money audit.

Value for money audits provide unique insight and adds an important layer of accountability over mechanisms like appeals and judicial review. The latter are concerned with the content and process of individual decisions. Value for money audit considers broader questions: such as how far regulators have achieved their objectives.

This means that in regulation we focus less on economy and efficiency than on effectiveness: not because economy and efficiency are unimportant – they are very important – but because the effectiveness of regulators is much more important in public interest terms. Regulators do not spend large sums of money. Ofgem's budget, for example, is only £36 million per annum - as at July 2005 that is some 144 million Brazilian reals, US$63 million or 52 million euros. But regulators take decisions which have a large impact on consumers and regulated companies, and should be held accountable for the effectiveness of such decisions.

The National Audit Office therefore starts by considering how effective regulators have been in meeting their statutory duties and objectives, including a consideration of the tensions between them. The standard template for a National Audit Office examination involves three questions:

• What is the extent and scope of independent decision-making for the regulator in question, both in terms of the legal framework and in terms of the commercial and economic context of the market regulated? For example, our report on the liberalisation of Directory Enquiries (Directory Enquiries – From 192 to 118, National Audit Office, 2005) set out the legal and economic basis of the regulator's decision to liberalise directory enquiries services, and showed how the decision was not well supported by evidence.

• How has the regulator resolved trade-offs and tensions between different aspects of its role, for example between the efficiency of the regulated market and equity of treatment for different groups within society? For example, our report on postal regulation (Opening the Post, National Audit Office, 2002) highlighted the tensions between Postcomm's primary duty to ensure the provision of a universal service everywhere in the United Kingdom, and its secondary duty to promote competition, and how it could manage those tensions.

• Given that balanced and transparent reporting is an important element in any governance framework, how has the regulator reported its own decisions and achievements? For example, our report on new arrangements for the wholesale electricity market (The New Electricity Trading Arrangements, 2003) brought out how the energy regulator had not based its decisions in rigorous impact assessment nor undertaken robust evaluation of its own decisions.

BENEFICIARIES OF THE NATIONAL AUDIT OFFICE'S WORK

In the broadest sense, democratic society as a whole benefits from robust accountability arrangements. Within this broader picture, it is possible to identify three separate groups of beneficiaries from out work on regulation:

• CONSUMERS can obtain reliable, fairly priced services and are able to navigate the complexities of the markets with confidence. For example, we have produced a sequence of reports on competition in energy and telecommunications markets, which have brought to the public's attention ways in which they can switch supplier to save money.

• MARKET PARTICIPANTS are free from unnecessary regulatory burdens and can invest and enter into contracts with confidence that the regulatory regime will not lurch in an unexpected direction. For example, our report on price regulation (Pipes and Wires, National Audit Office, 2002) showed how regulated industries faced a significant burden in dealing with the demands of regulators, and recommended ways that burden could be reduced.

• REGULATORS use their discretion and powers wisely and appropriately, being clear about trade-offs and impacts. We aim to analyse the main decisions and tensions in regulators' functions and report to public and Parliament on results, and encourage regulators to assess their own efficiency and effectiveness and to not over-claim their achievements. For example, our report on the water regulator's work to protect vulnerable households from flood risks encouraged it to report these risks more fairly, fully and transparently in its annual reports.

BETTER REGULATION

Privatisation in the UK has been associated with a better deal for consumers (choice, lower price, better quality of service) and increased efficiency, but the benefits are dependent on the quality of regulation. The success of this model has led to a renewed focus on the quality of regulation as a whole. Increasingly, regulation across the whole economy is seen as a key factor in economic growth and social welfare because:

- Regulation that is badly designed and implemented restrains growth, innovation and efficiency, in particular by placing unnecessary burdens on companies;

- Bad regulation may not in fact offer the protection to individuals and communities that it was designed to deliver.

The focus on the quality of regulation has coalesced into the Better Regulation agenda in Government. Better Regulation seeks to implement measures that maximise the benefits (eg food safety, environmental improvements) for the lowest possible burden on business. Better Regulation often prefers voluntary codes and a principles-based approach to regulation because they impose lower burdens than command-and-control regulation emanating directly from Government.

As a result of the Better Regulation agenda, there is a growing understanding of:

- The nature of burdens imposed by Government;

- The types of benefit delivered by well designed, proportionate regulation; and

- The net costs imposed by regulatory burdens.

This is manifested in the widespread development and use of the tool of Regulatory Impact Assessments (RIA). RIAs identify the costs and benefits of a policy proposal and the risks of not acting. They are intended to inform the policy decision making process and communicate clearly the objectives, options, costs, benefits and risks of proposals to the public to increase the transparency of the process. The UK Government produces over 200 RIAs a year.

It may be that society fears that, so far from acting as a moderating and controlling interest on the excesses of markets, regulation itself has now got out of control.

The National Audit Office is involved in evaluating the quality of the Regulatory Impact Assessments by government departments. In 2001, the National Audit Office produced a report that provided policy makers with good practice examples, and a checklist of what assessments should cover. We have since published two further reports, in 2004 and 2005, which evaluate more recent Regulatory Impact Assessments.

We have also supported two further initiatives undertaken by central government. We contributed to a review of inspection and enforcement which encouraged a more risk-based approach to inspection activities (The Hampton Review, 2005). And we are working with the Government on its programme to estimate and reduce the administrative burden imposed by Government on business (Less is More, The Better Regulation Task Force, 2005).

FINAL THOUGHTS

We would like to close this paper with a speculative assertion. There is a growing interest in the UK in what is variously called regulatory quality, Better Regulation and regulatory burdens. To some extent, this interest takes on a different emphasis depending on political preferences. What is an over-burdensome regulatory approach for one commentator could for another be a reasonable and proportionate protection of society from risks.

But the growing interest may reflect more than simply politics: it may reflect a wider anxiety within developed and developing economies about how ineffective regulation acts as a significant barrier to growth and development. This feeling becomes acute when society perceives regulators acting as independent experts – experts of course being particularly mistrusted in modern discourse – and with a wide degree of discretion.

It may be that society fears that, so far from acting as a moderating and controlling interest on the excesses of markets, regulation itself has now got out of control.

While this assertion is difficult to support with evidence, this paper concludes that the National Audit Office's work reflects a desire to contribute to this debate and to ensure, ultimately, that the regulators and departments use the discretion they have in the public interest. ■

Public-Private Partnership: challenges and opportunities

Paulo Bernardo Silva

The federal government is undertaking a series of reforms in the legal framework that disciplines the procurement of public goods and services in Brazil. Among them, the following should be noted: the updating of Federal Decree nº 3.697, of December 21, 2000, that regulates the electronic reverse auction, the reform of the law of public procurement and administrative contracts (Law nº 8.666, of June 21, 1993), the alteration of the law of concessions (Law nº 8.987, of February 13, 1995) and the regulation of the recently approved law of public-private partnerships – PPP (Law nº 11.079, of December 30, 2004). Such initiatives are in progress and are aimed at conferring to the Administration instruments to increase efficiency, competition and transparency in the procurement of public goods and services.

Law nº 11.079 brought important innovations to the legal framework that rules administrative contracts, starting with the definition of public-private partnership as a service concession contract, rather than the mere acquisition of assets. This implies a change in the scope of contracting and the control of contracts. The rationale becomes based on results and the control of contracts is done by means of performance standards and targets, in contrast with the physical-financial control of works. The public power, when bidding a highway under the PPP modality, is less concerned about the type of pavement or the thickness of its base. Most important, and this will be the object of specification in the contract, is the standard of the service to be provided. In the case of the highway, for example, the pavement must have a certain degree of roughness, it must not allow accumulation of water on the road, and the length of time to respond to emergencies or repairs on the road must comply with previously established reference standards. The focus of the contracting is, therefore, the quality of the service provided to the user.

This change in the contracting rationale poses a challenge to the Public Administration, which has to adapt and qualify itself for results-based management. The public manager, when drawing a PPP contract, must partially abandon the old habit of specifying how the works is to be constructed, and focus on how the service should be provided. This is a fundamental change and not a simple one to implement. The key to a good result in these contracts is the choice of indicators and adequate service parameters which in most cases are more strongly linked to the perception of the user than with the engineering involved in the work.

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The PPPs are contracts where the private partner is responsible for the construction, financing, maintenance and operation of assets that, later, can be transferred to the public power. Such characteristics, together with their long-term contractual nature (5 to 35 years), introduce in the PPPs an intrinsic mechanism of incentive towards efficiency: the optimization of the cost/quality ratio along the life cycle of the project. Since the same agent will be responsible for the construction and maintenance of the enterprise throughout the contractual period, it will be encouraged to use construction materials and techniques that optimize maintenance costs and that meet the pre-established quality standards. Moreover, this integration represents an opportunity to incorporate the technical innovations and managerial skills of the private sector, making room for greater efficiency in the provision of services.

The transfer of this efficiency to the user and to the public power will be greater to the extent that the procurement process is more competitive. On this point, the PPP law brought an innovation to the procurement procedure, by enabling the inversion of the qualification phases and judgment of proposals, which will allow saving up to 60 days in the PPP bidding processes in relation to common concessions. It also incorporated the possibility of correcting flaws in the proposals of the bidders, which reduces the formality of the bidding procedure and facilitates the ample participation of companies.

Another important instrument for ensuring efficiency is that the payment can only be made to the private partner after the service is made available. Thus, the risks of cost increase and delay in the construction are entirely borne by the private partner. The public power does not disburse any amount until the necessary works for the rendering of the service are concluded and the service is operational. The Law of PPP also brought another important innovation, that is the objective sharing of risks among the parties, risks that were previously entirely borne by the public power in the public works and common concessions, such as those related to force majeure and extraordinary events. This means that the distribution will be made in each contract, and must always respect the rule of allocation of risk to the agent that is best fit to manage it.

Since the PPP contracts are long term and the commitments resulting from them will last several governments, one of the great concerns of the private sector in relation to these projects was the guarantee that the public power would honor all the payment commitments throughout the contractual period. In the federal scope, Law nº 11.079 authorizes the Union, its agencies and public foundations to participate in the Guarantor Fund of Public-Private Partnerships (FGP), which provides guarantee to the payment of the public consideration. The FGP is, therefore, a reserve that covers only the risk of default by the public partner in PPP contracts, not guaranteeing any other risk. It is important to make this exception and to point out that, in PPP contracts, the private partner will bear a larger portion of risk than in the contracting of traditional public works and services.

The definition of the degree of risk transfer to the private partner is the result of a rigorous analysis, since the transferred risk results in a risk premium and, therefore, increase of the return demanded by the investor. The solution of this equation is not trivial and this is why the decision to contract a PPP must be preceded by comprehensive technical studies that demonstrate the viability of this modality for the provision of the service.

The decision to invest in PPP requires, therefore, caution and must be based on the pursuit of efficiency in contracting public works and services. This need imposes another challenge to the Public Administration, which is to be prepared to analyze investments from an integrated perspective, including the technical viability, the economic-financial and the fiscal viability of the enterprise.

This requires the strengthening of the capacity of the technical bodies of the Administration in project evaluation and often requires seeking specialized consultancy in the market. The analysis of the international experience shows that the structuring of PPP projects involves high transaction costs, which, however, tend to decrease with the standardization of procedures and contracts and the consolidation of the process. Moreover, new skill need to be developed, mainly related to management of long-term contracts.

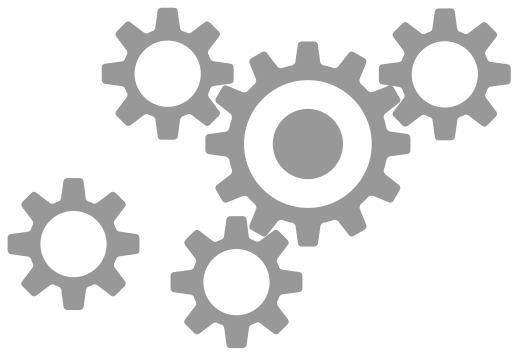
On this point, it is worth pointing out the importance of establishing a central unit, responsible for defining guidelines for selection, analysis and implementation of projects, consolidating and disseminating the knowledge related to PPP to the various agencies of the Public Administration. For the PPP program at the federal level, Decree no. 5.385, of March 4, 2005, institutes the Managing Committee of Federal Public-Private Partnerships – CGP, that has the competence to define the services to be contracted by means of PPP, to establish norms, procedures and requirements of the projects, to discipline and authorize the bidding process, besides approving bidding announcements and evaluate contract execution reports. The CGP is made up of representatives from the Ministry of Planning, Budget and Management (MP), Ministry of Finance (MF) and Civil House of the Presidency of the Republic, under the coordination of the MP. The CGP will rely on technical and administrative support provided by a Technical Commission and an Executive Secretariat (Economic Advisory Office of the MP).

A great concern in relation to the PPP contracts, and that was intensely debated during the process of legislative approval, is the guarantee that these contracts will not result in fiscal indiscipline. On this point, it is important to highlight that Law no. 11.079 did not remove the applicability of Complementary Law no. 101, of May 4, 2000 (Law of Fiscal Responsibility – LRF). In contrast, Law n. 11.079 reiterates the observance of the limits and conditions of application of articles 29, 30 and 32 of the LRF, subjecting, therefore, the PPP commitments to the expenditure and debt controls debt already established by this legal document. Moreover, the PPP Law provides a limit of 1% of the net current revenue (RCL) for the annual commitments with partnership contracts. To guarantee that this limit is respected, each project must have its long-term fiscal impact analyzed and new contracts can only be signed when the sum of the public considerations in PPP contracts in each year does not exceed the limit of 1% of the RCL.

This limitation imposes to the Public Administration the need to make investment decisions based on long-term horizons. With contracts that can reach 35 years, the PPP can become an important instrument for sectoral planning, where the definition of strategic investments is conditioned to the availability of resources in the long run. In fact, in countries with consolidated partnership programs, this form of contract enabled the implementation of investment programs that were structured within a time horizon of more than fifteen years. This was, for example, the case of the hospitals and secondary schools in the United Kingdom.

One of the challenges to be faced to enable the public-private partnership program in Brazil is the supply of long-term financing in national currency. The financial structure of a PPP project follows the rationale of a project finance where a substantial portion of the funding comes from bank loans (or debt issuance in the stock market) that rely on the project's revenue flows to guarantee debt service. A very small share of these investments is financed by means of the capital of the shareholders (internationally, the debt/shareholders' capital ratio is around 90/10).

The greater leverage of these projects allows the reduction of the financing costs, but requires a financial and capital market that provides financial instruments in a period of time compatible with the amortization of the investments. In Brazil, the role of long-term financier has been played almost exclusively by the Brazilian Economic and Social Development Bank (BNDES). The challenge here is to foment a private market for long-term project financing. In many countries, the PPP was an instrument that induced this process and Brazil may follow a similar path.



The challenge posed to the success of the PPP program in Brazil involves adaptation, both in the public and the private sphere, to a new form of long-term contracting, based on performance parameters in the rendering of the service to the user.

Inspired by the international experience, Law no. 1.079 introduces a provision that will contribute to the increased participation of private financial institutions in the financing of PPP projects. It is the possibility of foreseeing in contracts the so-called step-in-rights of the financiers. This provision allows the financiers to take over the control of the specific purpose society that holds the concession when the service falls to levels that can undermine its continuity and, consequently, the payment of the debt. The entry of the financiers – who usually contract professional managers to manage the process – is aimed at reorganizing the business, normally in a period of some months. This protection to the financiers also contributes to the reduction of the spread charged in the financings.

Under Law no. 11.079, the federal government plans to implement an investment program primarily aimed at leveraging the country's infrastructure. In an initial stage, the aim is to focus on projects that have a positive impact on the competitiveness of the domestic production and contribute to eliminating logistical bottlenecks in the transport corridors used in exportation. The priority projects are being selected according to the following criteria: (i) integration with exportation corridor and impact on national development; (ii) capacity to generate tariff revenue; (iii) interest of private investors; (iv) level of development of the project. In other words, the project must structure a strategic logistical corridor, enable collection of tariff from the user, raise the interest of the private sector and have a technical study already developed (analysis of demand, technical viability, economic-financial or environmental impact study).

The public-private partnerships represent an additional modality for contracting public services and a chance to leverage investments that have a positive impact on the development of the country. The transport sector is considered a priority at this stage of the program and the technical studies for the bidding process of the first projects are in progress. In the international experience, a PPP contract can take about two years from the technical studies technician to contract award. Since this is a type of contract with long-term fiscal impact, it is necessary to address all the technical, economic and legal issues that affect the project. Moreover, many PPP projects will be in regulated sectors and, therefore, the contracting can also involve some degree of tariff regulation and definition of new sectoral frameworks by the agencies. Thus, besides allowing an increase in the investment level, the implementation of a public-private partnership program also represents a chance to modernize sectors and to introduce innovations in the sectoral regulatory frameworks, as long as the models are clear, technically based and, once defined, remain stable.

The challenge posed to the success of the PPP program in Brazil involves adaptation, both in the public and the private sphere, to a new form of long-term contracting, based on performance parameters in the rendering of the service to the user. This will cause a change in the relationship pattern between the public and private sectors and will require that contracts be drawn with mechanisms to encourage the efficiency and the quality of the service, in addition to the strengthening of the planning and management functions of the State. ■

Regulation control in Argentina

Leandro Despouy

Introduction to privatisations

The Argentine Republic developed a widespread process of privatisation in the 1990s which, at the federal level, meant that from being a State that produced public assets and services it became a State that regulates public services. The dimension of the State and its performance changed so much that Argentina is probably at the top of the list of countries that, in a short period of time, radically transformed the relationship between state and public services.

The significant transformations resulting from the privatisation process, far from covering up the consequences of an omnipotent state and attaining and consolidating the "paradigm of the privatising impulse", accentuated and deepened inequalities due to the high cost of these transformations in terms of social equity.

Incentive to privatisations arose from the policies recommended by the Washington Consensus. The policies were based on the conception of a minimum State, focused on the essential areas – justice, security, defence, education, and health – leaving to the market the ability to define what, how, and when regarding public services.

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The objectives were:

- Reduce state expenditures, eliminating contributions to public businesses aimed at reducing their deficit. This practice caused an impact on external debt since the State was unable to finance these contributions with ordinary resources.

- Obtain greater business efficacy from the privatised entities and a higher level of efficiency from economy as a whole.

- Reduce external debt with the product of the sale of the businesses.

- End the large amount of law suits against the State filed by the concessionaires who, in turn, did not fulfil their contractual clauses.

It was proposed to replace the productive State which was a sector that contributed with around 10% of the GDP. This percentage increased to 25% regarding participation in fixed gross investment. The purchasing power of the sector was equivalent to 10 billion dollars per year and it occupied close to 2.5% of the economically active population. This producing State comprehended the most diverse sectors and represented 90% of the national activity in electricity, gas and water, 50% in mining, 30% in communications and transportation and less than 10% in the manufacturing industry.

It covered the majority of the basic sectors and public services:

Petroleum // petrochemistry // steel // electricity // gas // water // telecommunications // air transportation // railroads // water transportation – sailable routes – ports – ferry boats // highways // radio and tv stations // financial entities // military arsenals, businesses and factories // silos and grain elevators // central farmer's market // horse racetrack // tourism hotel // a large amount of state-owned real estate.

The State Reform Law (no. 23.696) requires that the business or activity must be declared subject to privatisation by means of a congressional law and created a Mixed Parliamentary Committee to work together with the Executive Branch, inform the Legislative branch about all privatisation processes, and issue non-binding opinions.

The General Office of Public Companies acted in permanent co-operation with that Committee, intervening concomitantly in the process of each privatisation. In other cases, the Court of Accounts of the Nation at that time was the one who intervened.

The Office of the Auditor General of the Nation (AGN) began its audit activities in the second semester of 1993 when the privatisation process was already well advanced, intensifying inspection of the activities of the Public Services Regulating Entities and carrying out its mandate to control private entities in charge of privatisation processes regarding obligations resulting from the respective contracts.

THE FRAMEWORKS AND REGULATING ENTITIES

The 1994 constitutional reform incorporated (in clause 42) the obligation that the regulatory frameworks must be sanctioned legally.

In fact, the regulatory frameworks of gas and electricity were created by law. The one corresponding to the water and swage services in Buenos Aires was created by a delegated norm and the other regulations were established by decrees of the Executive Branch.

WHO REGULATES THE REGULATOR?

The new appreciation of the role of control of the legislative branch, as of the 1994 constitutional reform, was complemented by the creation and performance of the Office of the Auditor General of the Nation (AGN) – a technical body that assists the legislative branch in its role of control. The AGN has its own oversight competencies and functional autonomy, among them: control of legality, performance and audit of the Regulating Entities.

The AGN implemented within its structure a managerial department in charge of Regulating Entities. Their responsibility is to carry out compliance, performance, and accounting audits of the activities of the regulating entities and control organisms of the privatised national public services.

The AGN is also in charge of controlling private entities responsible for privatisation processes, with regard to obligations resulting from the respective contracts.

WHAT ARE THE POINTS OF INTEREST OF THIS TASK?

1.Evaluation of the control systems applied by the Regulating Entities to oversee fulfilment of the investment plans.

2.Identification and evaluation of the formal or informal circuits applied by the Regulating Entities to oversee the obligations imposed by the norms on provisions – or on basic services – on the private service deliverers in their relationship with the consumers.

3.Verification of application of the penalties set out in the public auction processes when contract obligations are not fulfilled or when there is some irregularity in the delivery of services.

4.Tariff analysis.

5.Analysis of the contracts signed by the Regulating Entities.

AGN'S EXPERIENCE

I would like to comment that the Minister of Economy asked us to carry out a review of the privatisation processes and that the conclusions reached may be obtained from our web page[1].

What was this task? We had to address, classify and establish the hierarchy of the essential aspects of our reports in the past decade. We also had to identify common denominators that enabled us to systematise the audits performed in each concession, the main deviations or findings detected and the lessons learned from the process in each sector.

What was the use of this task? It reaffirmed a critical opinion about what had been done and gave the government a tool to evaluate the denationalisation process. But it also strengthened Argentina's position in face of the demands of the companies when they stated that the changes in the economic framework had been the main reason why they had not fulfilled their contractual obligations. In this sense, our reports were and are a set of findings and verification of serious neglect of obligations in the years that preceded the 2001 crisis.

AGN'S FINDINGS

These findings can be divided into two main thematic axes:

a) Lack of fulfilment of obligation on the part of those responsible for privatisation processes.

b) Deficit in the control carried out by regulating entities and officials in charge of application. Even when this does not represent a justification for the lack of fulfilment of obligations on the part of the concessionaires, it constitutes an important element for evaluation of the causes of the current state of privatised services.

THE ROLE OF CONSUMERS

Our view is that only a strong organisational context, with a well defined guidance, excellence of human resources and predictability schemes, can create a foundation upon which users, with appropriate information and the support of the organisations themselves, can adequately defend their rights. Otherwise, more than consumers' rights we will have a right of petition more or less safeguarded but whose results won't be significant. In summary, a series of complaint records spread out in different government sectors.

denationalisation

1. http://www.agn.gov.ar, see "Concesionaires: Reports presented to the Executive Branch".

SOME EXAMPLES OF MANIFEST NEGLECT OF OBLIGATIONS

AIRPORTS:

The AGN verified that the debt the concessionaire had with the State reached the amount of 350 million dollars – and the mandatory investments had not been made. The AGN warned that this could lead to termination of the contract due to lack of fulfilment of the clauses by the Concessionaire.

Although the officials are now renegotiating the concession contract, the information provided by the AGN was an element taken into consideration by the government who suspended the terms of a previous renegotiation that had been approved by Decree no. 1.227/03[2]. The advantages of the renegotiation for public interest were not clear.

Public corruption as an integral concept is seen not only as a moral issue, but also as an alert that affects the possibilities of economic, institutional, and social development.

CONTROL OF THE RADIO-ELECTRIC SECTOR:

In 1997, control of the radio-electric sector was awarded to a company and the AGN showed that the concessionaire had not carried out an initial survey of the uses and users of the radio-electric sector to detect – among other things – those who were and those who were not authorised; neither had it initiated planning, development, provision, installation, maintenance and adequate updating of an integrated IT system designed to manage the radio-electric sector; neither had it managed correctly billing and collection of the "unified collection" for administration of the sector. Persistence of a high level of interference that did not decrease along time is a sign of the deficiencies of the process of technical proof of emissions that was implemented.

It is noteworthy that the gains obtained by the concessionaire had increased at the same pace as the neglect of its obligations: the "average annual profitability rate" was 113%, between 1997 and 2001. This amount exceeds the profitability obtained by the public services sectors. The "internal rate of annual return" regarding the invested capital (after deduction of the tax on profits) is 145%.

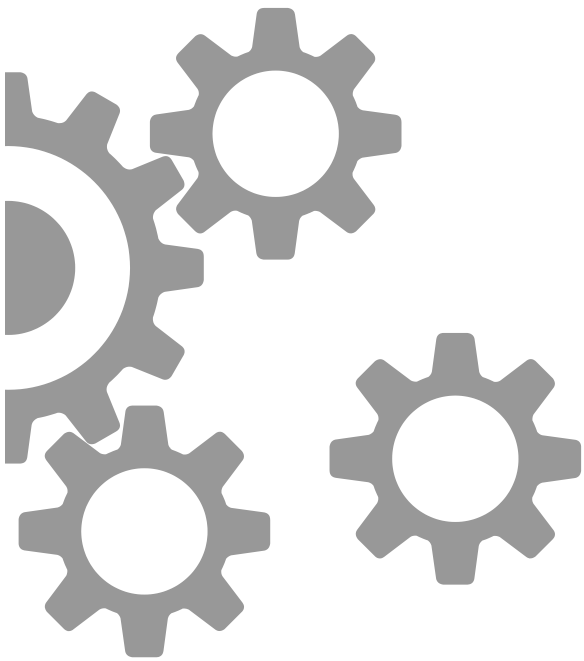
The government decided that the concession contract was null and void. The considerations of the resolution mention the AGN findings as a foundation for the decision.

UNIVERSAL SERVICE FIDUCIARY FUND:

The Universal Service is a set of telecommunications services that should be delivered with a certain level of quality and with prices that are accessible. Initially, the intention was to meet the needs for basic phone services and, in second place, the need for internet access for all inhabitants of the Republic of Argentina throughout the national territory, especially for people who live in regions that are hard to access or who have physical limitations or concrete social needs. For this purpose, the plan was to form a fiduciary fund to be financed by 1% of the total revenue obtained by delivery of telecommunications services. This fund was never created.

A recent resolution issued by the Telecommunications Secretariat - that mentioned in its considerations the AGN findings - ordered the service deliverers who had listed in the invoices issued to their clients and collected from those clients resources to be invested in the Universal Service Fiduciary Fund in an amount equivalent to the mentioned percentage, whatever the title under which they had issued the invoice or collected such resource, to stop this practice. Service deliverers were also ordered to reimburse their clients the total amount of resources unduly collected.

2. B.O. 05/22/2003.



CONCLUSIONS

A. WHAT ARE THE RESULTS OF THE PROCESS?

If one of the manifest objectives of the privatising impulse was to reduce significantly State expenditures by eliminating contributions to public companies in order to cover their deficit, reality shows us that the privatisation process alone is not enough since, currently, the public services concession system receives explicit subsidies, for example, in the railroad sector and in road concessions.

If another of the objectives was to achieve a higher level of business efficacy from privatised entities and more efficiency in economy as a whole, the satisfaction level of consumers is negative and management of the concessionaires did not fulfil many of its obligations – a fact constantly pointed out by the AGN – regarding investment plans, consumer service and quality of service.

With regard to reduction of external debt as a result of sale or concession of companies, it is worth noting that the amounts obtained were not significant.

It is also worth noting that litigiousness against the State did not decrease; what occurred was exactly the opposite. Litigiousness increased. An example is the several suits faced by the Argentine State before the CIADI which amount to more than 3.5 billion dollars.

B. WHAT ARE THE LESSONS LEARNED?

To be successful, the denationalisation process must offer conditions for obtaining investments. Investment is a key element to public services. In second place, it must achieve the highest degree of competence possible. Competence enables improvement of costs and quality. However, we are also aware that in cases of natural monopoly or due to conditions inherent to the infrastructure of an existing public service, the State must intervene and regulate so that the actors perform by simulating market conditions; in this sense, to regulate means to achieve social optimum.

In third place, the process should focus more on consumers. In the beginning of the process consumers act according to cultural traditions but they soon begin to organise themselves, non-governmental organisations that group them emerge, they overlap the informative asymmetry that characterises the relationship between company-individual consumer, they petition against the entities, participate in public hearings, address the City Defence Officer, they appeal to the AGN and demand that AGN reports be followed and, finally, they change the context of the relationship. These are citizens who demand their rights to essential public services and fully understand the concepts of access to minimum social rights and quality with a fair and reasonable tariff.

The State, an ethical entity by excellence, should perform not only within the limits of the law but also taking into consideration social equity and the principles therein. The state should optimise its management and transparency as well as ensure respect to rights that have been left aside.

Public corruption as an integral concept is seen not only as a moral issue, but also as an alert that affects the possibilities of economic, institutional, and social development.

In this context, I would like to close by leaving you with a thought by Aristotle: "One does not study ethics to understand what is virtue but to learn to be virtuous and good". ■

TCU initiatives to perfect regulation external control

Paulo Roberto Wichers Martins
Mauricio de A. Wanderley
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PRIVATISATION AND REGULATORY REFORM IN BRAZIL: THE ADVENT OF THE REGULATORY STATE

The privatisation process and the regulatory reform resulted in new institutional arrangements in the public services delivery model in the Brazilian infrastructure sector. The participation of private agents in the telecommunications, oil, natural gas and electricity sectors was a response to the pressures of an international movement to reduce the State as a direct provider of goods and services.

The establishment of this new public administration environment gave origin to a deep change in the role of the State. At the same time in which public companies were being transferred to the control of private investors, this new environment required the strengthening of the institutions responsible for regulating these sectors.

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By reducing its participation in the direct delivery of public services, the State's performance becomes more focused on the transfer of public services exploitation rights over to the private initiative by means of privatisations or the granting of new concessions, permits and authorisations. Following these initiatives, public power is encharged with the regulation and oversight of the service suppliers.

This conjuncture was the grounds for the amendment of the Brazilian Constitution[1]. After the constitutional amendments, between 1996 and 2001, the agencies responsible for the regulation of infrastructure public services were created: National Electricity Regulatory Agency-Aneel (1996), National Telecommunications Agency-Anatel (1997), National Petroleum Agency-ANP (1997), National Land Transportation Agency-ANTT (2001) and National Water Transportation Agency-Antaq (2001).

ROLE OF TCU IN THE PRIVATISATION PROCESSES

The Brazilian Court of Audit - TCU monitored this cycle of the reform of the State. Initially, its performance was carried out mainly by opinions on the procedures adopted in the privatisation processes. In this context, the Court issued internal rules that obligated privatisation managers to supply TCU with documents that allowed for concomitant oversight of such processes. This model of monitoring enabled TCU to act promptly, correcting mistakes in several stages and promoting greater transparency in the procedures adopted by the federal government.

To perform this task, the Court detected a need to capacitate a team of external control specialists. It was verified that the examination of the privatisation process demanded knowledge of topics related to corporate finances, accounting, law and business management and that the approach to these topics was different from that experienced by the TCU technical staff during examination of more common audit procedures.

It was noticed that the success in controlling privatisations demanded an institutional structure that would give support to such capacity building effort. Initially, a work group was formed with analysts dedicated exclusively to the control of privatisation processes. This structure was consolidated by creating a specialised technical unit, the Denationalisation Inspection Secretariat – Sefid, that was integrated into TCU in 2000.

MONITORING OF REGULATORY MANAGEMENT ACTS

The examination of the privatisation processes evidenced the need for TCU to monitor the execution of contracts arising from these processes, mainly the end performance of the regulatory agencies. This new challenge was made easier by the Constitution of 1988 which broadened TCU's mandate to include the possibility of carrying out audits of an operational nature – in addition to traditional accounting, budgetary, financial and asset audits.

When the delivery of public services was preponderantly performed by state companies, the role of external control was based, mainly, on the analysis of the companies' financial reports. The control of the Court focused on the management acts of administrators, relegating to second plan the analysis of the companies' performance as suppliers of public services.

Aiming to monitor and oversee the institutional changes arising from the delegation processes, TCU, by means of internal normative rules, regulated the oversight of public services delegation processes.

The control of delegations is performed in two stages: granting of delegatory act and execution of contract[2]. This granting is a process delimited in time but the conditions set by it remain in effect throughout the term of the delegation, which is normally decades. Thus the criticality of this stage which lies in the verification over a short period of time of all legal aspects, technical, economical and financial feasibility of transferring the public service, as well as the environmental implications inherent to the business in question.

"Aiming to monitor and oversee the institutional changes arising from the delegation processes, TCU, by means of internal normative rules, regulated the oversight of public services delegation processes."

The execution of the contracts is controlled by means of audits and inspections, in addition to the Consolidated Monitoring Report prepared by the federal granting organs. In the cases of granting of electricity distribution, the periodical tariff reviews, in view of their importance during the execution of the contracts, motivated the issuance of a TCU Internal Rule (no. 43/2002) establishing a concomitant control of procedures adopted by the regulatory agency.

It is worth noting that TCU's role in the control of public services regulation should not be mistaken for the role attributed to the regulatory agencies. The Court, first of all, directs its monitoring at the agency's performance, which does not mean it discards the possibility of also performing audits and inspections directly in the concessionaires and holders of permissions of public services.

The control performed by TCU involves forming an opinion about the results, the economy, efficiency and effectiveness of regulatory bodies' performance. Moreover, it identifies and recommends regulatory management practices that may leverage the performance of those involved, analyses governance of the regulatory regimen and, also, attempts to create a history of regulation policies that serves as the basis for decision making, without, however, overlapping or being confused with the regulator's role.

Recently, with the issuance of Act 11.079, dated 12/30/2004, which covers the norms for hiring public-private partnerships (PPP) within the scope of public administration, TCU started incorporating in its oversight systematics the monitoring of the performance of the PPP contracts.

TCU'S CHALLENGES IN FACE OF THE NEW INSTITUTIONAL ARRANGEMENTS

Due to these systemic privatisation processes and the appearance of complex institutional arrangements in the model of infrastructure public services delivery and while discussing the role to be played by the Brazilian Superior Audit Institution in this new context, it was identified the need to perfect and consolidate TCU's operational capacity aiming to perform a more effective external control in respect of privatisation processes, regulatory reform and federal regulation.

During these discussions it was possible to identify the main causes that seemed to prevent TCU from having a more efficient and effective role when performing its duties related to the external control of federal regulatory activities in the area of infrastructure. These causes are highlighted below:

1. Constitutional Amendments numbers 8, of 08/15/1995 and 9, of 11/10/1995.

2. TCU Internal Rules numbers 27/1988, 43/2002 and 46/2004.

3. This problem was preponderantly characterised by the lack of information on events, editorial releases and specialised publications in the area; difficulty to maintain a regular exchange with specialists and researchers; difficulty to access existing bibliography an also by the fact that most texts were written in a foreign language.

4. As an example that the theoretical and methodological outlines on the subject of regulation and privatisation still require a better consolidated point of reference, one should note recent studies carried out by the World Bank which indicate that that institution is going through a "crisis" on the fragile foundations of privatisation and regulatory processes resulting from it, foundations that the institution itself promoted. The Wall Street Journal, on July 21, 2003, published the following article: "The World Bank, the apostile of privatization, is having a crisis of faith. What seemed like a no-brainer idea in the 1990's – that developing nations should sell off money-losing state infrastructure to efficient private investor – no longer, seems so obvious. Investor who once seemed eager to risk their money on Brazilian power plants or African sewers are pulling back. Commercial banks' power-project financing in the developing world and former eastern bloc nations. Which peaked at $ 25,9 billion in 1998, totalled just $ 5,7 billion last year, according to Dealogic, a British data firm. Consumers, felling deceived, increasingly associate privatisation with higher rates for them and higher profits for foreign companies and corrupt officials. The unexpected turn of events has left privatisation enthusiastic at the World Bank wondering what went wrong" (Excerpt from Kessides, 2004:260).

I – In what concerns the acquisition and dissemination of knowledge on regulation and its control:

1. Difficulty to access sources of information on privatisation doctrines, theories and practices, regulatory reform and federal regulation[3].

2. Lack of consolidated knowledge on regulatory reform and federal regulation, particularly in domestic literature[4].

3. Lack of systematic actions aimed at capacity building and specialisation of the technical staff.

4. Absence of a corporate education model which contemplates regulation control.

II – In what concerns systematisation, consolidation and development of methods[5] and techniques[6] applied to external control regulation:

1. Shortage of methods and techniques already developed in regulation control[7].

2. Need for consolidation and systematisation of methods and techniques already employed by TCU in the exercise of regulation control.

3. Difficulty to access the data base and difficulty to obtain knowledge of the information available in the scope of the regulatory agencies[8].

III – In respect of the organisation, management and planning of regulation control activities:

1. Absence of a clear definition of the role and extent of TCU's control over de regulators[9].

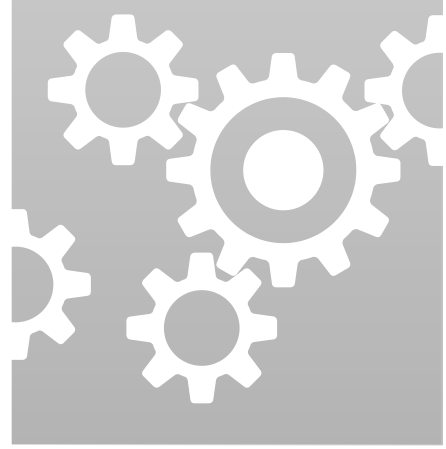
2. Need for perfecting the models of planning, organisation and regulation external control.

3. Uncertainty regarding the ideal structure needed to efficiently and effectively control regulation.

IV – In respect of the strategy to communicate the regulation control activities:

1. Lack of communication and promotion strategy of the control of regulatory activities that meets the needs of the diverse target audiences, to whom the control information, decisions and recommendations are addressed.

2. Not enough interaction with the public[10] in regard to privatisation and regulation processes.



THE WAYS TO STRENGTHENING REGULATION EXTERNAL CONTROL

Aiming to meat such needs, TCU is developing the "Project for Modernisation of Regulation External Control", financed by the Inter-American Development Bank – IDB, and technically supported by the Getúlio Vargas Foundation.

The need for a specific project in the area of regulation control resulted from the identification of opportunities to improve the work that was already being performed, not only in areas already under the control of TCU but also on new projects for external control of the federal regulatory activity in the segment of infrastructure.

The project, whose products are represented in Figure 1, was conceived to cover both the actions of diagnostics of TCU's performance as well as of the performance of regulators, as well as to cover the actions of development and sustainability of work processes created or perfected after the implementation of the foreseen products.

5. Methods: general procedures found in control tools of TCU that are used in the production and transformation of important information on public management external control. These procedures aim to ensure the accuracy of control information as well as to legally and technically support the determinations and recommendations presented by the Court. The method to be developed must be able to guide the analysts in charge of the control activities related to that object. In the scope of TCU, the methods are explained in the auditing manuals, procedures and guides. Examples of manuals include: Operational audit manual, System audit manual. Procedures include Procedures for bids and contracts, Procedures for analysis of privatisation, among others. Guides include Guide for monitoring via Siafi and Siape extractor.

6. Techniques: specialised procedures whose use is in harmony with the control methods for collection, analysis and dissemination of more specific information. These techniques must include those already employed by TCU as well as others that will be developed within the scope of the project. Control techniques include, among others: presentation of data, focal group; planning matrix; findings matrix, benchmarking, performance indicators matrix, output mapping, process mapping, RECI analysis, logical framework analysis, stakeholder analysis, SWOT analysis, risk assessment matrix, audit interviews.

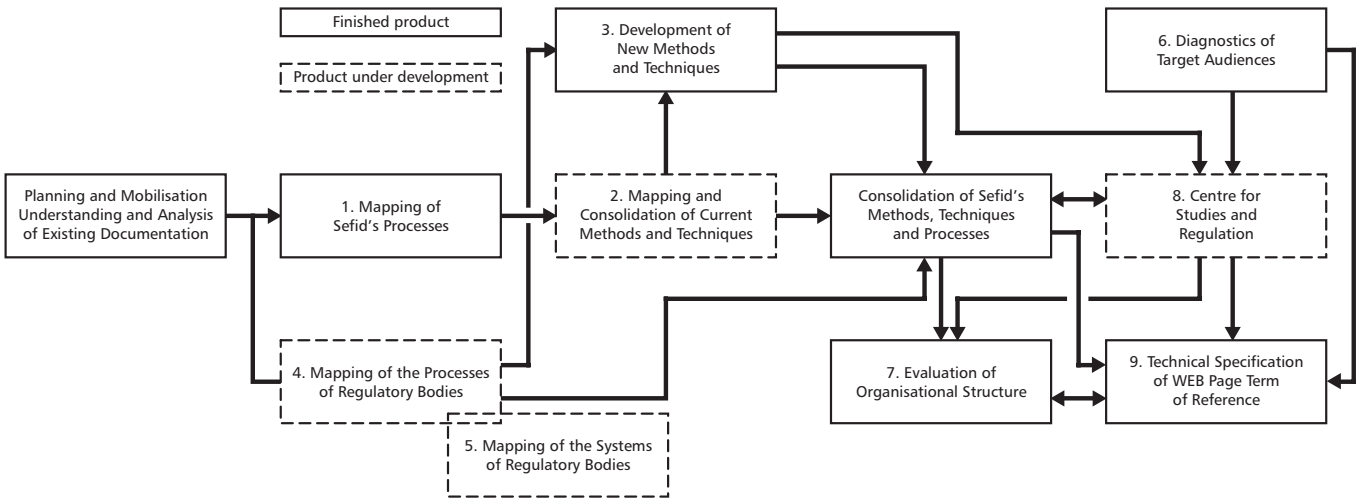
7. This problem results from the complexity of regulatory issues on one hand, and, on the other hand, from the time needed for maturation in order to develop new methods, considering the recentness of the discussions on this matter.

8. This problem does not concern the legal competence of TCU having access to the information needed to carry out oversight because TCU already has this mandate. It refers to difficulties of a technical-operational nature.

9. Due to the fact that the role and extent of performance of the regulators are not very well defined (overlap between actions amongst Councils, Ministries and Regulatory Agencies), besides the absence of complete regulatory references per sector, it is difficult to define the control performed by the Court. However, it is worth noting that the role of the controller is not mistaken for the role of the regulator. On the contrary, it complements it in the dimension of accountability and transparency which is essential for the consolidation of regulatory management.

10. Target audience: persons or entities to whom decisions, recommendations and information resulting from TCU's performance in the exercise of external control are addressed. The target audience does not refer only to the direct recipients of control information but also to those who may produce a positive impact on the image of TCU as well as help TCU in the performance of its institutional mission of ensuring the effective and regular use of public funds to the benefit of society. Thus, there included are the issues on media impact and social control.

FIGURE 1: "PROJECT FOR THE MODERNISATION OF REGULATION EXTERNAL CONTROL" – INTER-RELATION OF PRODUCTS



Source: Getúlio Vargas Foundation, Project for Perfecting Regulation Control, 2004.

The diagnostics outcomes have the objective of recording the processes of the work performed, as well as the methods and techniques currently employed by TCU. By comparing such information and identifying the objects of control that were mapped in the regulatory agencies, it can be proposed the improvement or new approaches for the performance of TCU the control of public services regulation.

The diagnostics outcomes and their objectives are listed below:

a) Mapping of organisational processes of Sefid: comprehends assessment, definition and documentation of the organisational processes and activities of Sefid;

b) Mapping of the methods and techniques of regulation control employed by Sefid: comprehends assessment and documentation of methods employed in regulation control, whether tacit or explicit;

c) Mapping of macro processes of regulatory bodies under the Sefid's jurisdiction: it aims to gain a better knowledge of the essential activities of the regulators under the Sefid's jurisdiction taking into consideration criteria such as materiality, risk, importance and others necessary for regulation control, with the purpose of improving them; and

d) Mapping of the informatics systems of the regulators: comprehends the assessment of the existing systems in the regulatory bodies under the Sefid's jurisdiction and identification of the information and reports that are of importance to regulation control.

The development outcomes address TCU's future performance in the area of regulation control and foresee the creation of methods and techniques that will be employed in order to enable a more comprehensive and effective performance in the area of regulation control. The products foreseen are the following:

a) Development of new methods and techniques in regulation control: comprehends the development of new models of regulation control applied to new objects considered important to Sefid; and

b) Analysis of the organisational structure of TCU for regulation control: comprehends the rationalisation of regulation control management, by means of a proposal for an organisational structure that is appropriate for TCU, taking into account economy, efficiency and effectiveness criteria related to the actions of regulation control.

The sustainability of the actions of the Project must be attained by strengthening TCU's relationship with target audiences who are interested in the field of regulation as well as in the strategy for collection and treatment of the data necessary for external control of the regulatory bodies. For this purpose, three products are foreseen:

a) Diagnosis of target audiences – comprehends efforts to improve visibility of TCU's actions related to regulation control. This can be achieved by improving communication with target audiences;

b) Preliminary specification of the information systems that will support automation of Sefid's organisational processes; and

c) Implementation of the Centre for Studies and Regulation – CECR.

The Project is scheduled to be developed in thirty months, but the impact of the products developed has already been having an effect on Sefid's work. Considering that the information produced should be updated, communicated or processed by Sefid, the creation of CECR was provided for. This centre will have the objective of collecting, systematising, disseminating and supporting the generation of information and knowledge on infrastructure regulation and its control.

Besides the products that are being developed with the support of the IDB, with consultations to the Getúlio Vargas Foundation, TCU has already given a graduate course on Regulation Control. In this course, employees who work in this area produced papers that deal with the topic of regulation of public services.

Other products to be developed are a Plan for Corporate Education in Regulation Control and definition of the technical competencies for those who perform in the field of regulation control, to be developed with the support of the Serzedello Corrêa Institute.

By implementing the "Project for Modernisation of Regulation Control", the proposal is to create within the scope of TCU the professional competencies and the technical infrastructure needed to adopt a comprehensive control systematics for the processes of delegation of public services, focused on external control of the regulator. In addition, we expect to receive contributions to perform a direct and critical analysis of the performance of the delegated economic agents in aspects related to the quality of the services delivered, to the financial-economic balance of the contracts and to other factors that will allow for a more comprehensive understanding of the political, economic, and operational model adopted to provide the public services that are the object of federal delegation.

CONTRIBUITIONS OF THE SUPREME AUDIT INSTITUTIONS TO THE SUCCESS OF THE REGULATORY REGIME

TCU understands that the development of new roles for the Superior Audit Institutions is essential to sustain the regulatory regime. The high level of transparency and accountability regarding the regulatory processes must be ensured since the independence of the regulatory bodies – which is essential for them to carry out their roles unbiased – can also lead to undesirable behaviours on the part of those who delegated specific mandates to the mentioned bodies.

"TCU understands that the development of new roles for the Superior Audit Institutions is essential to sustain the regulatory regime. The high level of transparency and accountability regarding the regulatory processes must be ensured since the independence of the regulatory bodies"

Their is a wide range of literature that deals with the processes in which the regulating agent is captured by the regulated body, by specific consumer groups (normally large consumers) or even by political interest groups, in detriment of the regulatory principles of equity, productive efficiency and allocation efficiency.

In the Brazilian case, the Brazilian Court of Audit has acted in an exemplary manner to ensure accountability and in an attempt to improve the regulatory management processes. In this sense, the control body has monitored closely the whole cycle of reform of the State in this area, issuing opinions in all the processes of privatisation and of concession of public services and, later, monitoring federal regulation and the execution of these grants. What is noteworthy is that performance of external control in Brazil has proven to be of extreme importance to the system implemented in order to achieve the objectives of regulatory reform, regarding the aspects of accountability and transparency of the model.

TCU has become the true depository of information on the practices and trajectory of the public policies on regulatory management that started as of the second half of the 1990s in Brazil. It could not have acted differently. Supported by a constitutional mandate to carry out operational audits provided for in the 1988 Federal Constitution – besides the traditional accounting, budgetary, financial and assets audits – the Brazilian SAI did not run from the narrow path to organisational learning aiming at building the capacity of its technical staff to face the challenges foreseen since then.

In view of the institutional changes resulting from the privatisation processes, TCU, by means of internal norms, edited regulations that deal with the oversight of the processes of denationalisation, concession, permission and authorisation of public services. These norms provide for the monitoring of these mechanisms of flexibility of the State in the both in the grant monitoring stage – issuing opinions on the legality and economy of these processes – as in the contract execution monitoring stage, that is, in the regulatory processes resulting from flexibility. TCU's control has proved to be timely and to give important contributions to perfecting the system. Of course it is not an isolated transition effort. There is an irreversible strategic decision to be willing to answer complex questions involving judgement regarding the results, economy, efficiency and effectiveness of the governmental action. Moreover, there is an effort to identify and recommend management practices (regulatory) that may leverage the performance of federal bodies involved, analyse governance of the regulatory regime and, in addition, create a history in regulation policies that serves as a basis for decision making. This basis, even in moments of political transition, was considered important by several decision makers of the political executive branch and by members of the National Congress. Thus, it is advocated that TCU's role should be maintained and intensified with respect to external control of the regulatory regime, once the possibilities of capturing the national regulator increase a great deal in a context where there is a low level of accountability and transparency.

TCU's understanding has been that the external control exercised by SAIs over regulatory agencies is capable of ensuring accountability of regulatory management, as well as contributing to improve the performance of those agencies regarding efficiency, economy, effectiveness and equity in the implementation of public regulation policies. The papers in this area that are mentioned in this journal, in the article by Minister Walton Alencar Rodrigues, "Regulation Control in Brazil", and the processes of strengthening and improvement sought by TCU in its improvement project, as described in the current paper, show, inexorably, the important role of the external control carried out by TCU in the end activities of regulatory bodies and confirm a trend described by several countries that are members of the INTOSAI working group which is to further analysis, evaluations and studies regarding the substance and application of public policies on regulatory management. ■

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Infrastructure reforms and the performance of privatized utilities in Latin America: the way ahead

Luis Andres
Paulo Correa
Jose L. Guasch*

1. MOTIVATION

As part of structural reforms in infrastructure industries during the 1990s, more than US$ 750 billion was invested in 2,500 private infrastructure projects in developing economies. Nearly half went to the Latin American region, mainly through the divestiture of public assets in telecommunications and electricity sectors. Six countries – Argentina, Brazil, Chile, Colombia, Mexico and Peru – absorbed more than 90 percent of all private investments. Overall, the region was the most important beneficiary of the huge flow of private investments for infrastructure worldwide with private investment peaking at around US$ 130 billion in 1997. Since then, investors' appetites have waned, public support to privatization decreased, and the role of public investments in the provision of infrastructure services has gained momentum again[1]. While the increase of public investments is welcomed, given the magnitude of infrastructure needs in the region – roughly 4 to 6 percent of GDP per year to catch up or keep up with countries that once trailed it, such as China and Korea – and the fiscal limitations of the public sector, private sector financing for infrastructure will always be important in Latin America[2]. And while privatization has received most of the public attention, reforms have involved much more than asset transfers.

* World Bank, 1818 H Street, Washington D.C. Findings, interpretation and conclusions expressed herein do not necessarily reflect the views of the Board of Executive Directors of the World Bank or the governments they represent.

1. In Brazil, for example, dissatisfaction with privatization has increased from 40 to 60 percent of the population during 1998-2004 while in smaller countries, such as Guatemala and Panama, this index reaches more than 80 percent of the population. Even in Chile, commonly seen as the champion of structural reforms, dissatisfaction is predominant (see *Latinobarómetro* surveys for 1998 and 2004). Indeed, public authorities and multilateral institutions, such as the IMF and the World Bank, once sponsors of privatization, are now discussing ways of increasing public investments in infrastructure without jeopardizing sound fiscal management. The policy-making pendulum is, then, back to public investments as either if infrastructure reforms and privatization had never been implemented or, even worse, if reforms were fully completed, all lessons had been taken, and adjustments had been made.

2. See The World Bank (2005).

In this note, therefore, we try to highlight some of the lessons of infrastructure reforms in LAC during the 1990s with an emphasis on privatization. In the next section we try to understand how much infrastructure reform – including competition and regulatory change – was in fact implemented during the 1990s. The third section offers evidence on the impact of privatization on utilities' performance.

The last section, summarizes the results and offers some policy implications in terms of the way forward. Two main results emerge. First, infrastructure reforms, including privatization, are still incomplete – either in the sense that several countries have not even initiated such reforms or because those that started earlier have virtually stopped in a dangerous intermediate stage of partial reform.

Second, privatization generated important improvements but they were neither extended beyond a transition period around the event itself nor always transferred to final consumers.

These two results suggest one main policy implication: the need to complete reforms, particularly the so-called second generation regulatory reforms. Without those reforms – that include the completion of the regulatory framework, avoiding excessive contract renegotiations and increasing competition, where feasible – post-privatization improvements will be limited and, probably, unsustainable.

2. HOW MUCH TO REFORM?

Infrastructure reforms during the 1990s were motivated by operational, fiscal and technological factors. On the operational side, state-owned monopolies were both providing inefficient services (poor quality and high cost) to consumers and generating financial losses to the shareholders. The need to tighten fiscal policies, on the other hand, reduced the capacity of the public sector to counterweigh the financial losses and invest in services' expansions. At the same time, high indebtedness levels created additional incentives for the sale of public assets. Finally, technological progress had significantly reduced the minimum efficient scale in segments of these industries, creating the possibility of using competition as the main mechanism for resource allocation. Considering country and sector nuances, it was expected that de-verticalization, privatization and (new) regulation would increase efficiency, generate profits and create the conditions for network expansion.[3] Competition – mostly seen as an automatic result of de-verticalization and privatization – was seen as a key incentive for improved performance.[4]

Privatization, therefore, was just one of the components of structural reforms. In this sense, before discussing the performance of privatized firms, it seems appropriate to look at reforms' evolution more broadly. Measuring reforms, however, is a difficult task. In this section we provide evidence on the evolution of two main variables – privatization (the share of private provision) and competition – and discuss the evolution of infrastructure, focusing on telecommunications, electricity and water and sanitation.

3. De-verticalization of state-owned enterprises would separate natural monopolies segments (e.g. transmission of energy) from those where competition could be feasible (energy generation).Privatization would bring the discipline of budget constraint and profit-objective to firm management; while regulation would protect consumers from monopoly power and investors from capital expropriation.

4. When competition in the market was not possible, as in the water and sanitation sector, competition for the market and yardstick competition were considered appropriate replacements.

TELECOMMUNICATIONS

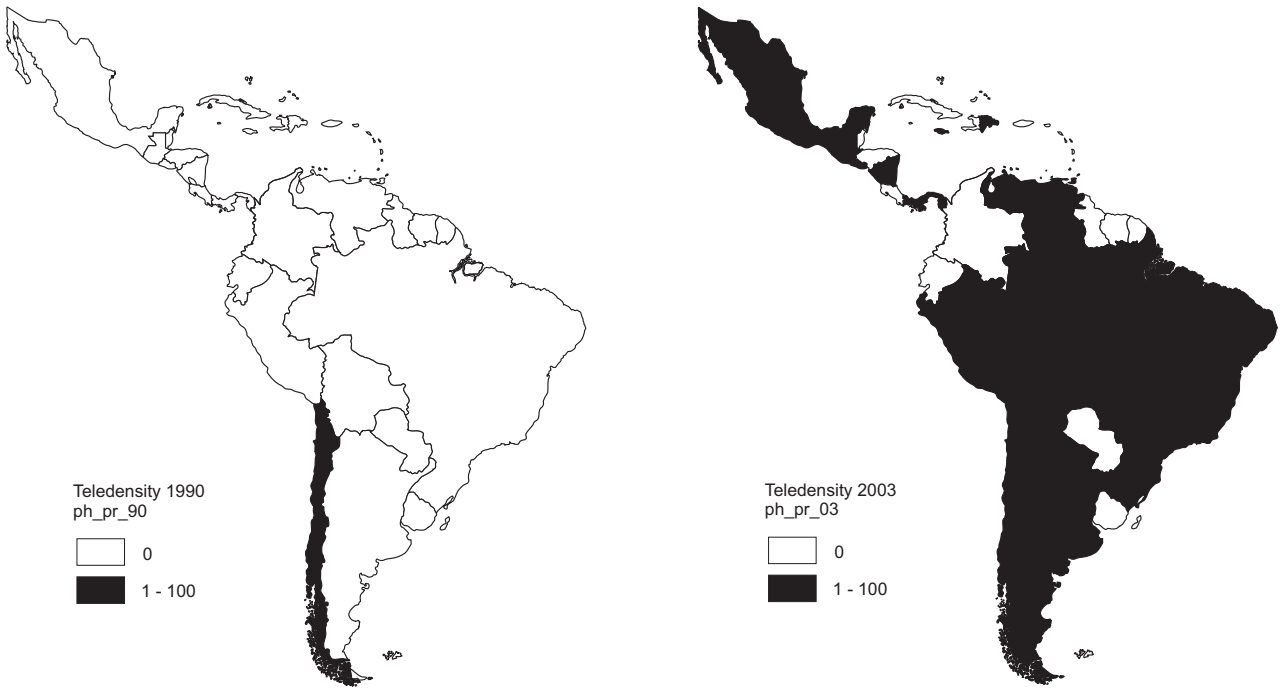
Telecommunications reforms were essentially motivated by technological advance, particularly in microwave, satellite and optoelectronic technologies. Technical progress tremendously reduced the operating costs of long-distance and traffic-sensitive segments, redefining minimum efficient scale and opening up opportunities for multiple providers in the long-distance market. The potential for introducing competition in the local network was lowered but appropriate regulation of access to the "last-mile" or the local loop would mitigate dominance abuse by incumbent firms and increase contestability. While privatization was a common ingredient among reform strategies, several countries – such as Argentina, Brazil and Panama – opted for granting a period of exclusivity to the newly privatized incumbent to compensate for investment and coverage requirements established by the privatization process. On the other hand, few other countries – such as Chile, Colombia and El Salvador – introduced competition since the beginning of the process. Exclusivity periods varied from 4 years in Nicaragua to 10 years in Argentina.

Figure 1 shows the evolution of private participation in fixed telecommunications in the region during the 1990s. Latin America was the leading region among developing economies in terms of privatizing former state-owned enterprises.

Private participation, at the beginning of 1990, was rare, with only 3 percent of households being supplied by a private company. This share significantly grew, reaching 86 percent in 2003.

Privatization and sector reforms were much slower in Costa Rica, Ecuador, Honduras, Paraguay and Uruguay while privatization was not emphasized but market reforms were implemented in the case of Colombia. Despite significant progress in privatization, competition in fixed telecommunications has shown slower progress. In none of the Latin American countries, new entrants were able to gain more than 15 percent of the market: even in Chile, usually considered the main reformer in the region, new entrant's share after almost 20 years of market liberalization was slightly less than 15 percent. Results in developed economies are not much better, reflecting difficulties in regulating access to the local loop ("last" mile) and market power from incumbent firms. Data on fixed telecommunications, however, do not reflect competition among technologies: thanks to technological change and convergence, not only private participation is greater in related segments (such as mobile telecommunications, cable and internet), but substitution for these segments is increasingly possible. By 1999, a large number of Latin American countries – including Panama, Paraguay, and Venezuela – had the number of mobile subscribers being larger than that of fixed-line subscribers.

FIGURE 1. EVOLUTION OF PRIVATE PARTICIPATION IN FIXED TELECOMMUNICATIONS IN LATIN AMERICA IN THE 1990s



Unlike fixed-line services, the mobile industry tended to face competition since its early periods of liberalization: half of liberalizing countries in the region had licensed a second mobile operator by 1999. Despite lower required fixed investments, competition in the mobile segment also depends on institutional features, such as mobile number portability and technical standards.

In spite of the fact that most Latin American countries enacted new sector laws during the 1990s, the regulatory framework in telecommunications significantly varied in the region. In terms of autonomy, for example, Chile and Uruguay kept regulatory bodies within a particular ministry, while other countries – such as Argentina, Brazil, Dominican Republic and Peru – have established specialized autonomous institutions. In some cases, as in El Salvador and Panama, regulatory bodies are autonomous and multi-sector. Following the international trend, most regulatory institutions are collegiate bodies, instead of single-headed institutions.

Finally, price-capping was the most frequent source of tariff-policies – although sometimes restricted to market segments subject to imperfect competition, such as the case of Colombia – while cross-subsidization for long-distance was extinguished in most cases. Overall, managing competition and regulation – in a context of fast technological change and convergence – is a critical challenge for telecommunications regulators if consumers are to benefit from price reductions and innovation in the industry.

"In spite of the fact that most Latin American countries enacted new sector laws during the 1990s, the regulatory framework in telecommunications significantly varied in the region."

ELECTRICITY

Electricity sector reforms in Latin American countries significantly varied during the 1990s. Chile was the pioneer in the early 1980s and its success inspired several other countries in the region one decade later. While privatization was a key element in Chile's reforms, prices were set by an administrative system rather than through interaction of demand and supply and the role of competition were minor. By contrast, the Colombian and Salvadoran models of centralized auctions were similar to the "England and Wales" pool. In an intermediate position, Argentina and Dominican Republic adopted a cost-based dispatch but vertically and horizontally broke-up the sector structure and limited cross-ownership. Bolivia and Peru followed the Chilean model. In other countries, such as Costa Rica, Ecuador, Mexico, Paraguay, and Uruguay reforms are still in their initial stages.

Table 1 presents the share of private participation in the electricity sector by 2000. Data indicates that reforming countries have extensively privatized. For example: in Bolivia and Chile, private sector accounts for 90 percent of the supply in the generation, transmission and distribution segments. Interestingly, privatization has been relatively more extensive in distribution than in generation and transmission: in El Salvador and Guatemala, two extreme cases, private sector accounts for 100 percent of the distribution sector but no more than 50 percent of the generation. Private participation in transmission is still very low in the region, with the exceptions of Argentina, Bolivia, and Chile. Table 1 also provides data on market concentration. Contrasting with the extension of privatization, competition in generation, as proxied by the share of the three largest producers, is still very limited. In extreme cases, such as Bolivia, El Salvador, and Guatemala this concentration rate is 70 percent or larger. Even in Colombia, where competition was supposed to play a key role, the market-share is still relatively high, around 50 percent. These results, that reflect at least in part the small size of Latin American economies, are worrisome because the generation segment is expected to be the main source of competition in the industry. Concerns increase as one takes into account that geographic market segmentation and demand variation during the day may increase market power of certain firms.

TABLE 1. SHARE OF PRIVATE SECTOR PARTICIPATION AND MARKET SHARE OF THE THREE LARGEST FIRMS IN THE GENERATION SEGMENT (IN PERCENTAGE)

Country	Share of private sector participation			Market share of the three
	Generation	Transmission	Distribution	Generation
Argentina	60	100	70	30
Bolivia	90	90	90	70
Brazil	30	10	60	40
Chile	90	90	90	50
Colombia	70	10	50	50
Costa Rica	10	0	10	100
Dominican Republic	60	0	50	50
Ecuador	20	0	30	50
El Salvador	40	0	100	90
Guatemala	50	0	100	70
Jamaica	20	0	0	90
Mexico	10	0	0	90
Paraguay	0	0	0	100
Peru	60	20	80	100
Trinidad and Tobago	40	0	0	100
Uruguay	0	0	0	100
Venezuela	20	10	40	90

Source: Espinasa (2001) *apud* Milan, Lora and Micco (2001).

Most reforming countries also enacted new sector legislation during the 1990s. Broadly speaking, these new pieces provided for the creation of a sector regulator, which, in most of the cases, was formally autonomous with its own budget and appointments lasting up to 4 years. New legislation also provided for the separation of attributes between the regulatory body and the government. The latter tended to be responsible for policy-making, but not to tariff setting, standards supervision, and monitoring compliance to contracts. A World Bank study estimated that, overall, Latin America had advanced relatively more than other regions in the world in reforming the electricity sector[5]. Does it mean that the appropriate regulatory framework is in place?

It clearly does not. In one extreme illustration, Guatemala's regulator was placed under the Ministry of Energy. Colombia's regulator did not have oversight attributions. In El Salvador, until recently, the government had no mandate to define energy policies. In most countries, regulators are poorly staffed and funded, in addition to the lack of appropriate regulatory instruments and the occurrence of serious procedural problems. Therefore, it is not surprising that several regulatory decisions have been overturned by the courts, reducing regulatory credibility. Finally, almost 10 percent of concession contracts have been renegotiated and concession returns have barely matched the cost of equity[6].

5. See ESMAP (1999).
6. See Guasch (2004) and Sirtaine *et al.* (2005).

WATER AND SANITATION

Technical change was a minor motivation for reforms in the water sector during the 1990s. In fact, the most significant innovation in this sector was the widespread introduction of metering at the point of consumption, far from major breakthrough in product costs that happened in telecommunications and, to a certain extent, electricity generation. The sector reform seems rather to have been motivated by a downward spiral of weak performance incentives for state-owned monopolies, low willingness to pay by consumers, insufficient funding for maintenance, which lead to asset deterioration, and political interference[7]. As a consequence, reforms have naturally focused much less on competition and much more on attracting the private sector as a new source of capital and efficient management. As the economics of water supply remained essentially unchanged with respect to the sector's natural monopoly characteristics, the achievement of such efficiency gains would necessarily need to rely upon well designed concession mechanisms and appropriate regulation.

Private participation at the beginning of 1990 was rare, reaching roughly 11 percent of households. It is interesting to notice that the list of the least reforming countries in this sector has significantly increased by Central American countries. Even El Salvador and Panama, two champions of infrastructure reforms, did not significantly advance institutional changes in the water and sanitation sector. Therefore, it is not surprising that private participation grew at a lower pace as compared to telecommunications and electricity. And it is not by accident that 94 percent of municipal water systems in the U.S. – approximately 5,000 utilities – are publicly owned. But, in Latin America, apart from industry-specific structural reasons, another important limitation was the political opposition to tariff changes aiming at rationalizing subsidies and water consumption.

At this point, a better pro-poor tariff structure and well focused subsidies may be important accompanying tools to increase private participation in the sector. In addition to discouraging private investments, these circumstances have resulted in a wide variety of approaches to private participation, ranging from short term management contracts, such as a three-year contract in Trinidad and Tobago, to long term concessions, such as a 40-year concession in Cochabamba (Bolivia).

Another characteristic of the water and sanitation sector is excessive contract renegotiation. This generates, in some cases, unnecessary high costs to consumers and, in others, artificially low costs to service providers. Roughly 74.4 percent of water and sanitation contracts (compared to 9.7 percent in energy) were eventually renegotiated on average 1.6 year after its signing (compared to 2.2 on average for all sectors) by initiative of the government (in 66.3 percent of the cases)[8]. This does not imply that water and sanitation concessions were excessively profitable. On the contrary, telecommunications and energy concessions have, on average, feared better than water and sanitation: indeed, this was the only case in which the long-term financial return of concessions was expected to remain below the sector's corresponding weighted average cost of capital by a 2 percentage points[9]. Table 2 indicates that certain contract characteristics are associated with higher incidence of renegotiations: non-existence of regulator (87.5 percent of contracts eventually renegotiated), regulatory framework embedded in the contract (70.0 percent) or decree (83.3 percent) instead of embedded in law; and regulation by means, such as investments (85.0 percent), as opposed to performance indicators[10].

7. PPIAF (2002).
8. Guasch (2004).
9. Sirtaine *et al.* (2005).
10. *Op cit.* footnote 7.

TABLE 2. WATER SECTOR INCIDENCE OF RENEGOTIATED CONCESSION CONTRACTS ACCORDING TO CHARACTERISTICS (IN PERCENTAGE)

Feature	Incidence of renegotiation (%)
Award criteria	
Lowest tariff	81.9
High price	66.6
Regulation criteria	
Regulation by means (investments)	85.0
Regulation by objectives (performance indicators)	25.0
Regulatory framework	
Price cap	88.8
Rate of return	14.3
Existence of regulatory body	
Regulatory body in existence	40.9
Regulatory body not in existence	87.5
Impact of the legal framework	
When regulatory framework imbedded in law	55.6
When regulatory framework imbedded in decree	83.3
When regulatory framework imbedded in contract	70.0

Source: Guasch (2004), p.156.

3. HOW DID IT GO?

Table 3 summarizes the evolution of coverage, technical losses, prices (in real local currency) and labor productivity (connection per employee) for fixed telecommunications, electricity distribution and water and sanitation before, during and after the privatization process, as reported by Andres, Foster and Guasch (2005).

TABLE 3. STATISTICS FOR AVERAGE ANNUAL GROWTH IN FIXED TELECOM, ELECTRICITY DISTRIBUTION AND WATER AND SANITATION

Variable	Stats	Average annual growth			Annual difference in growth		
		(1)	(2)	(3)	(2) – (1)	(3) – (2)	(3) – (1)
Fixed telecommunications							
Coverage (number of lines per 100 HHs)	mean	4.9%	11.0%	6.0%	6.1%***	-5.9%**	1.2%
	p50	4.4%	9.4%	4.9%	4.5%***	-8.0%*	-0.1%
	sd	5.9%	6.2%	7.8%	8.1%	10.8%	10.0%
	N	16	16	14	16	14	14
Quality (percentage of incomplete calls)	mean	-1.5%	-16.4%	-14.3%	-13.9%	-0.2%	-13.7%**
	p50	-1.5%	-7.8%	-9.3%	-5.1%	0.0%	-8.8%**
	sd	1.0%	23.4%	14.7%	26.4%	14.0%	15.6%
	N	6	8	7	6	7	6
Price Avg. price for a 3-minute call (in real local currency)	mean	35.7%	-2.5%	-0.6%	-9.6%*	-5.7%	-32.6%*
	p50	44.3%	4.3%	0.6%	-5.2%	-2.6%	-18.2%
	sd	55.4%	19.1%	4.9%	36.5%	44.6%	40.1%
	N	7	10	9	9	9	4
Avg. monthly charge for residential service (in real local currency)	mean	35.6%	16.5%	7.1%	-12.7%	-9.4%	-29.4%
	p50	-0.9%	15.6%	3.2%	-32.9%	-1.9%	0.6%
	sd	50.1%	32.1%	13.1%	52.9%	30.9%	54.6%
	N	9	12	10	9	10	7
Avg. charge for the installation of a residential line (in real local currency)	mean	-8.6%	-16.1%	-11.6%	-4.7%	-6.7%	-19.1%**
	p50	-26.3%	-20.0%	-30.5%	-35.0%	-2.0%	1.4%*
	sd	32.3%	46.4%	40.4%	43.5%	48.0%	48.4%
	N	7	10	7	7	7	4
Efficiency (total number of lines per employee)	mean	7.8%	17.6%	16.0%	9.8%**	-3.1%	8.0%
	p50	6.6%	21.3%	15.7%	10.9%**	-9.9%	9.4%
	sd	11.6%	15.3%	11.5%	15.5%	18.9%	16.7%
	N	15	15	14	15	14	14
Electricity distribution							
Coverage (residential connections per 100 HHs)	mean	2.0%	2.2%	1.9%	0.4%	-1.0%**	-0.6%
	p50	1.5%	1.9%	1.3%	0.4%	-0.9%***	-0.3%
	sd	3.9%	3.0%	3.6%	65	50	42
	N	65	76	50			
Quality (freq. of interruptions per year per consumer)	mean	2.7%	-10.6%	-11.4%	-11.1%*	-2.9%	-17.8%***
	p50	-5.0%	-10.8%	-6.6%	-2.8%*	-2.4%	-14.4%**
	sd	29.0%	20.3%	20.5%	32	26	11
	N	32	51	26			
Price (avg. tariff per residential GWH, real local currency)	mean	10.2%	2.0%	0.6%	-7.8%***	0.2%	-12.3%***
	p50	5.9%	2.3%	1.8%	-5.3%***	0.9%	-9.7%***
	sd	12.6%	7.3%	7.9%	59	56	35
	N	59	86	86			
Efficiency (connections per employee)	mean	13.4%	18.4%	5.5%	4.2%**	-16.4%***	-4.2%**
	p50	11.1%	14.0%	5.6%	4.5%**	-10.6%***	-3.5%**
	sd	12.6%	16.8%	5.1%	53	43	32
	N	53	66	43			

Water and sanitation							
Coverage Residential water connections per 100 HHs	mean	1.0%	4.1%	3.3%	1.1%**	-1.3%	0.4%
	p50	0.3%	2.8%	1.6%	0.2%	-1.3%*	0.1%
	sd	1.7%	5.0%	4.4%	2.1%	6.1%	1.7%
	N	16	34	19	16	19	5
Residential sewer connections per 100 HHs	mean	1.6%	8.0%	2.8%	2.9%	-0.9%	-1.6%**
	p50	1.4%	2.9%	0.6%	0.1%	-1.6%	-0.9%**
	sd	17.9%	17.9%	6.1%	6.0%	6.2%	1.3%
	N	14	25	14	14	14	5
Quality (continuity in hours per day)	mean	0.0%	7.2%	4.6%	22.4%	-0.1%	0.0%
	p50	0.0%	0.0%	0.9%	0.0%	0.0%	0.0%
	sd	0.0%	16.0%	8.7%	38.7%	6.0%	1
	N	3	18	11	3	11	
Price Avg. price per cub. meter of water (in real local currency)	mean	10.1%	9.4%	4.5%	-6.0%**	-8.9%	-3.9%
	p50	10.1%	5.4%	2.6%	-4.3%	-6.5%	-2.1%
	sd	6.7%	18.4%	10.0%	8.1%	25.1%	10.1%
	N	8	17	9	8	9	3
Avg. price per cub. meter of sewer (in real local currency)	mean	-1.1%	7.0%	9.7%	5.0%*	-4.3%	-15.1%
	p50	-1.1%	1.4%	9.8%	5.0%	-18.4%	-15.1%
	sd	13.9%	13.5%	16.0%	1.8%	24.7%	1
	N	2	5	3	2	3	
Efficiency (water connections per employee)	mean	5.5%	17.5%	7.3%	11.6%***	-9.6%***	1.2%
	p50	4.9%	15.8%	4.5%	9.9%**	-7.8%	0.1%
	sd	5.4%	13.5%	10.1%	13.7%	14.3%	8.3%
	N	13	32	32	13	19	6

Note: (1) Pre-privatization. (2) Transition. (3) Post-privatization. *Significant at 10%; **significant at 5%; ***significant at 1%.

In Table 3, the sample consists of an unbalanced panel data set (number of observations reported in the table) that goes from 116 firms in the electricity distribution sub-sample during the transition period to less than 10 in the case of price variable in the water sector. The "pre-privatization" period is defined as the one in the years previous to 2 years before the award of the concession, while the "transition" period starts when the concession is announced and lasts until one year after the concession was awarded, and the "post- privatization" period is defined as the period after the transition. The motivation for this segmentation was that some of the more important changes started as soon as the privatization was announced and lasted one year after the change in ownership. In addition, some of these indicators were driven by firm specific time trends and not privatization itself. Thus, the authors controlled for that effect, too. The main results can be summarized as follows:

(i) After controlling for a (positive) firm-specific time trend, data for service coverage suggest that privatization had a positive impact on telecommunications, but no effect on electricity and water and sanitation;

(ii) Indicators for technical losses were positively affected by privatization. While most of the improvement for electricity happened during the transition period, for telecommunications and water and sanitation, it happened later on;

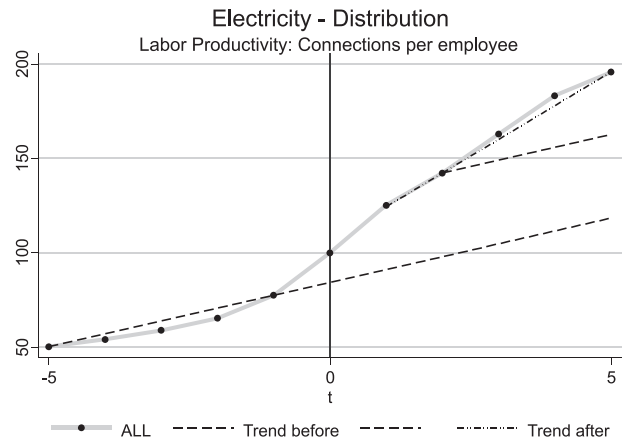
(iii) Prices had also significantly increased for two sectors during the transition and after that (except in telecommunications). In telecommunications the average cost of installation of a residential line decreased in every period (the monthly charge for residential service, however, increased substantially); and,

(iv) Labor productivity had a significant change in all the three sectors, mainly during the transition period, and fundamentally caused by an important reduction in labor redundancy: in the electricity and water and sanitation sectors, employment decreased, on average, 10 percent per year during the transition period.

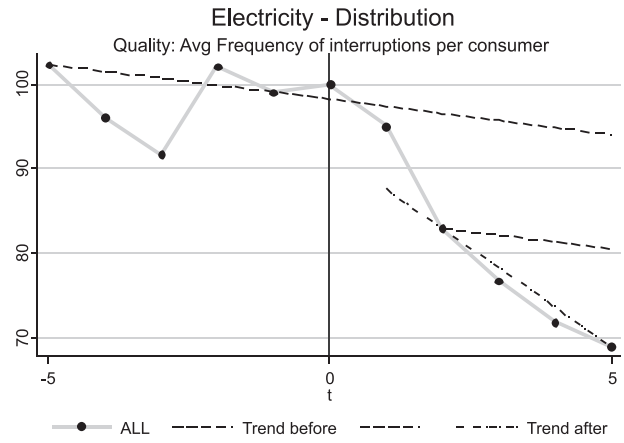
Figure 3a provides a more specific illustration. It describes the average level of labor productivity measured as connections per employee. First, the levels across companies are standardized with a level equal to 100 for the last year when the company was owned by the government. Then, in order to aggregate the information across companies, we define as "time zero" the last year when the company was owned by the government. The continuous line plots the average weighted standardized level, starting five years prior to the change in ownership and lasting 5 years after the privatization. This graph enlightens trend changes during the transition period. Roughly, the average increases in labor productivity were 10 percent per year. For the years after the announcement of the change in ownership, the average annual growth doubled.

Figures 3b and 3c provide additional examples for electricity. Figure 3b shows that there were no significant differences in the level of quality – measured as the average frequency of interruptions per consumer – during the years prior to the privatization. However, after that, a significant reduction in the average number of interruptions can be observed. An additional example is the average price (in real local currency). This indicator suffered a remarkable increase prior to the change in ownership. The accumulated change was over 65 percent. After the privatization, there were still some increases in which these changes were significantly smaller than the previous rates, with a total change of 13 percent.

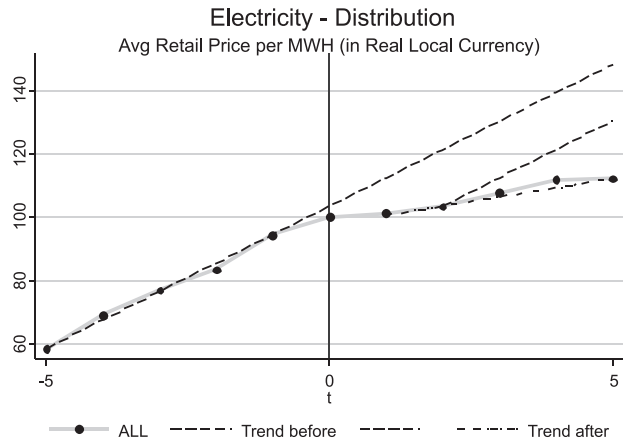
FIGURE 3. ELECTRICITY DISTRIBUTION



(a) Labor productivity



(b) Quality



(c) Average price

A related issue is how institutional characteristics of the reform process may have affected the performance of the privatization. Andres, Foster and Guasch (2005) focus on the eight basic characteristics: (1) the award process (direct selection *vs.* auction process); (2) the award criterion (highest price; lower tariff or investment plan); (3) age; (4) budget autonomy; (5) legal autonomy of the regulatory body; (6) tariff regulation (price cap, rate of return, other); (7) public provision of guarantees; and, (8) the nationality of the concessionaire. The basic idea is that these differences may significantly affect the incentives on the managerial decision, which, in turn, affects firms' performance on efficiency, quality and price.

Some of the main results are:

(i) When the process was awarded through an auction, higher improvements in quality and efficiency were observed in contrast to those cases when the mechanism was a direct sale;

(ii) When the criterion was according to the best investment plan, more expansion of the network was observed than the case when it was awarded according to the highest price. Consistently, the first firms also had lower reductions of their labor force during the transition period and some additional improvements on distributional losses;

(iii) When the regulatory body was generally autonomous, there were higher reductions in number of employees, while older (longer duration) had lower price increases;

(iv) When pricing was regulated according to the rate of return, companies had higher network expansion than in the case of price-capping regulation. Consistently, those firms under price-cap had higher reductions of their labor force, but lower increases in labor productivity. Additionally, the latter firms presented less improvement in both distributional losses and quality. Finally, these firms also showed higher price increases compared to those under the rate-of-return regulation; and

(v) Firms with only foreign investors had higher reductions of their labor force than those with only domestic investors. Contrary to this case, when there were foreign and domestic investors together, there were larger reductions than in the case of firms with only domestic ones, but less than in the case of sole foreign investors.

4. THE WAY AHEAD

After this short overview of infrastructure reforms in Latin America during the 1990s, three main results emerge. First, infrastructure reforms, including privatization, are still incomplete – either in the sense that several countries have not even initiated such reforms or because those that started earlier have virtually stopped in a dangerous intermediate stage of partial reform. Second, privatization generated important improvements, but they were neither extended beyond the transition period around the privatization event nor always transferred to consumers. In addition, significant heterogeneity within and among sectors may be explained by intrinsic characteristics of the reform process, such as the privatization mechanism, the level of regulatory development and concession design. The emerging lessons seems very clear: the way governments reform (or privatize, in particular) can significantly affect outcomes.

These results suggest one main policy implication: the need to complete reforms, particularly the so-called "second generation regulatory reforms." Without these reforms – that include the completion of the regulatory framework, avoiding excessive contract renegotiations, and increasing competition when feasible – post-privatization improvements will be limited and probably unsustainable whereas private financing will be difficult to attract. Obviously, the importance of competition, regulation and contract design will be closely related to technological characteristics with an industry. For example, reduction in the telecommunications costs and substitution by means other than fixed telephony increased the role of competition, with regulation as a tool to avoid abuse of dominance (and relatively less relevance for contract design).

In water and sanitation, remaining natural monopolies make the move to competition in the market a more difficult task. This implies relying more on well-designed concession contracts with regulation as a tool to guarantee the appropriate contract management. In either case, regulation is a key instrument, especially if one needs to reduce regulatory risks and attract private investments to support the Latin American needs in infrastructure. ■

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The normative framework of the Public-Private Partnerships in Brazil

Carlos Ari Sundfeld

1. BROAD AND STRICT CONCEPTS OF PPP

On the 30th of December, 2004, the law of public-private partnerships - PPP (Federal Law no. 11.079) was created. State laws had already been issued, such as of the States of Minas Gerais (no. 14.868, of the 16th of December, 2003) and São Paulo (no. 11.688, of the 19th of May, 2004) and several others.

In view of the current Brazilian legislation, the expression can be used legally in two parallel ways.

In a broader sense, public-private partnerships are the multiple business bonds of a continued nature established between the Public Administration and private partners to enable the development, under the responsibility of the latter, of activities with some degree of general interest. In this sense, the partnerships are different from contracts that, albeit also involving the State and private partners, either do not generate a continuous relationship or do not create legally relevant common interests (ex.: simple sale, for the lowest price, of governmental good without use for the Administration). In the contracts that, in contrast, create such interests and whose execution is carried out over time, the challenge emerges to discipline the relationship between the contract parties and to define how the contributions and responsibilities for the achievement of the objectives will be shared, as well as the risks deriving from the enterprise.

This wide range of partnerships includes well known contracts, such as the *public service concession* ruled by Law no. 8.987, of 1995 (Law of Concessions – LC) – that assigns to a private partner the profitable management of a public enterprise, under state regulation – and the more recent *management contracts* with social organizations (SOs) and *terms of partnership* with public interest civil society organizations (PICSO). There are several other different mechanisms, whether contractual or not, that enable the *private use of public good,* free of charge or not, in activities of some social relevance (setting up a new industry or community school, use of public university logo by professors' entity for sale of consultancy services, etc.). There is the case of private partners who, out of altruism or image benefit, graciously take on public responsibilities. And there is the case of entrepreneurs that exchange tax benefits for investment commitments. The variations are almost infinite.

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"The new PPP laws are aimed at complementing the legislation to make possible specific contracts that, albeit interesting for the Administration, still could not be done, whether due to normative insufficiencies or because of legal prohibition."

The legal basis of these multiple partnerships is not found in PPP law, but in the legislation that organized them gradually, especially from the 1990's. Possibly the best known is the Law of Concession. It is undeniably a partnership law, in a broad sense, not only for disciplining a classic arrangement that it makes logical sense to call a partnership, but also – and especially – for having been conceived under the impact of ideas and solutions that have been internationally associated with the expression PPP. But this is not all. The abundance of sectoral legislation, in areas as vital as telecommunications, energy, oil and gas, ports, railroads, etc., that emerged after the Law of Ports (no. 8.630, of 1993) initiated the trend, is also completely absorbed of these ideas and solutions. These examples of partnerships are the ones that involve economic public services. But, if we think about the social services, there are the laws on the SOs (Federal Law no. 9.637, of 1998) and on the PICSOs (Federal Law no. 9.790, of 1999). For partnerships aimed at establishing urban planning enterprises, there is the Statute of the City (Federal Law no. 10.257, of 2001), regulating urban operations in consortia and other mechanisms.

All this legislation has a common general goal – to enable the non-exclusive state management of the public interests – and adopts normative guidelines that repeat themselves and are in some way contrary to the previous legislative trends.

The new PPP laws are aimed at complementing the legislation to make possible specific contracts that, albeit interesting for the Administration, still could not be done, whether due to normative insufficiencies or because of legal prohibition. PPP Law (that is, Federal Law nº 11.079) had, then, the limited scope of instituting precisely the rules that were missing. And what was missing?

In the first place, norms disciplining the provision of a payment guarantee of tariff supplement by the awarding authority to the concessionaires of public services or works. It is true that, under the regime of the Law of Concession, it was already viable for the concessionaire to have other revenue sources in addition to the tariffs charged from the users, including additional amounts paid by the Administration. But, although these contracts were already legally possible, their practical viability depended on the creation of an appropriate system of guarantees, that protected the concessionaire against default by the awarding authority.

So, to create this system, PPP Law gave a name, *sponsored concessions,* to the public service concessions (including public works concessions) that involve the payment of tariff supplement by the Administration. The sponsored concessions are not something new, since they already existed legally. The novelty is the name, created only to facilitate communication. Thus, due to PPP Law, the already known service concessions of the Law of Concession were divided into two groups: the *sponsored* ones, with tariff supplementation, and the *common* ones, without tariff supplementation. In fact, beyond the name, there are new rules applicable to the sponsored concession modality, especially to enable the guarantees, as will be shown below.

Secondly, it was necessary to create legal conditions for the celebration of other contracts where, similarly to the traditional concessions, the private partners undertook the responsibility of investing and establishing state infrastructure and maintaining it afterwards, making it fulfill its purpose and being remunerated in the long term. It was necessary, in short, to allow the application of the economic-contractual rationale of the traditional concession to other objects, other than exploitation of economic public services (such as water supply and sewer services, electric energy distribution, fixed telephony, etc.).

After all, why not use it in administrative services in general, that is, the penitentiary, policial, educational, sanitary, judiciary, infrastructure services, etc. or even those resulting from division into stages or parts of the economic public services per se (establishment and management of a sewer treatment plant for a state-owned basic sanitation company or of an automated system of collection for a state-owned collective transport company, for example)? For such purposes, PPP Law created the *administrative concession* that copies the economic-contractual rationale from the traditional concession (obligation of initial investment, stability of the contract and long-term validity to allow capital recovery, result-based remuneration, flexibility in the choice of means to achieve the purposes established in the contract, etc.), and drew from the sponsored concession the rules aimed at enabling the guarantees.

In this way, it is evident that PPP Law is not a general law of partnerships, but rather a law on two modalities: the sponsored concession and the administrative concession. Therefore, specifically for disciplining this law, the PPPs are these two contracts, and nothing more. This is how the public-private partnership in a strict sense emerged.

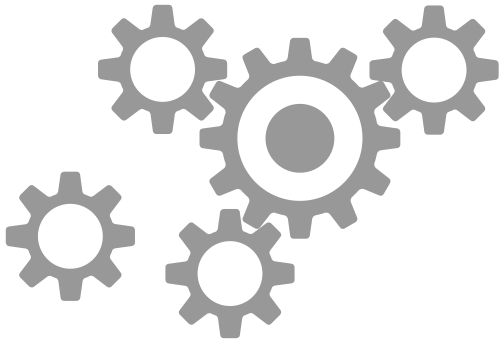
The two parallel ways in which the expression public-private partnership can be legally employed in Brazil are thus clarified. In a broad sense, PPPs are the multiple business bonds of a continued nature established between the Public Administration and private partners to enable the development, under the responsibility of the latter, of activities with some degree of general interest (common, sponsored and administrative concessions; sectoral concessions and deals; management contracts with social organizations; terms of partnerships with PICSOs etc.). Their legal regime is disciplined in many specific laws. In a strict sense, PPPs are the business bonds that adopt the form of sponsored concession and administrative concession, as defined by Federal Law nº 11.079, of 2004. Only these contracts are subject to the regime created by this law.

2. GENERAL ASPECTS OF THE PPP LAW

The central characteristic of the administrative and sponsored concessions that motivated the new legal discipline is to generate solid and long-term state financial commitments. Since the concessionaire will make investments right from the beginning of the execution and will be remunerated later, two goals emerge: to prevent the present administrator from irresponsibly committing future public resources, and to offer guarantees that persuade the private partner to invest.

The sponsored concession was already viable before, since tariff supplements could be paid as a complementary revenue (LC, article 11). Fiscal responsibility in the undertaking of these financial commitments was already provided for (Federal Constitution, article 167; Law no. 4,320/64; and Law of Fiscal Responsibility, complementary Law no. 101/2000). What the PPP Law did was to reaffirm these requirements (article 10) and create specific limits for expenditures with PPP contracts (articles 22 and 28). The clear objective is to strengthen fiscal responsibility (PPP Law, article 4, IV).

However, the administrative concession did not exist. The procurement of services by the Administration was only viable by means of the administrative contract of services provided for in the Law of Public Procurement, under the following regime: the Administration defines previously and comprehensively the way the service is to be provided (LP, article 7, paragraph 2, I and II); there must be monthly payment, corresponding to the cost of the rendering executed in the period (LP, article 7, paragraph 2, III and article 40, XIV, a; the price portions are calculated according to executed task, not the final result achieved (LP, article 7, paragraph 2, II and article 40, XIII); the contracted party cannot finance the operation (LP, article 7, paragraph 3); in the continuous services, the maximum original period of contract is one year, extendable until the limit of five years (LP, article 57, *caput* and item II).



The administrative concession is a new contractual formula for the Administration to obtain services (PPP Law, article 2, paragraph 1). Although the Administration defines the object and means of delivery of the service, it does not need to do it at length, it may allow freedom in the detailing and means to be employed (both PPP Law, article 3, *caput* and LP, article 25, combined); see also the reasons for vetoing article 11, II, of the PPP Law). The contracted party will make investments, a minimum of R$20 millions (article 2, paragraph 4, I). The remuneration will depend on the achievement of results (article 6, only paragraph and article 7), not deriving automatically from the execution of the service rendering (articles 4, VI and 5, III). The service will be delivered for at least 5 years (article 2, paragraph 4, II and article 5, I) and for a maximum period of 35 years (article 5, I).

Therefore, the creation of this new contractual formula – the administrative concession – made possible an arrangement for obtaining services for the State that was impossible before: one in which the private partner invests financially in the creation of the public infrastructure needed for the existence of the service and helps to conceive it.

Finally, the PPP Law overcame a weakness of the previous legislation: the lack of a well-organized system of guarantees of the long-term financial commitments of the State with the contracted party. The PPP Law not only affirmed the legality of these guarantees (article 8), but also conceived a new legal entity for this purpose: the Guarantor Fund of Public-Private Partnerships – FGP (article 16).

However, it should be taken into account that any new instrument can be misused by the Brazilian state apparatus, which has serious problems of control, in spite of all the undeniable advances of the last years. Specifically in relation to the partnerships in a strict sense, some risks should be pointed out.

The first one is the irresponsible commitment of future public resources, either by entering unpayable commitments, or by the choice of non-priority projects. the PPP Law took this into consideration, when it established rigid requirements of fiscal responsibility (article 4, IV and articles 10, 22 and 28), imposed previous public debate of the projects (article 10, VI) and created a centralized management agency to define the priorities and to evaluate the economic-financial possibilities for the federal contracts, as well as to oversee their execution (articles 14 and 15).

The second risk is that, due to haste or technical incapacity, the Administration might take on commitments with long-term contracts that are badly planned and structured. Deals of this type are very complex, for the number of variables involved (determination of the object, identification of the risks and their attribution to the parties, selection of evaluation criteria, etc.) and for the disarrangements that can occur over time. The option between a PPP contract and a common administrative contract requires comparison of the responsibilities and advantages of each one, based on sound elements. In its guidelines, the PPP Law pointed out the need to weigh all this (article 4). This norm has to be taken seriously; otherwise, there will be wasting of resources, conflicts between the parties and poor services.

The third risk is populist abuse in the state sponsorship of the concessions. The economic public services (telecommunications, energy, sanitation, collective transport, toll-paid highways, etc.) generate individualized economic value for its users. Therefore, it makes sense for them to pay the respective cost, by means of the tariff. The public service concessions are viable precisely for this: for the existence of users with interest and economic capacity to enjoy the services. But obviously organized groups will always fight to increase their economic advantages, whence the permanent criticism against the public service tariffs. Populist governments are very sensitive to these pressures and, if they can, they will always tend to contain tariff readjustments and to create exemptions for segments of users, transferring the respective responsibilities to those who do not vote in elections: the public coffers. The sponsored concession, in spite of its undeniable value and importance, is also a potential instrument for this misuse. Intent on this, the PPP Law, in addition to the guidelines in article 4 – that are added to those in the Law of Fiscal Responsibility – instituted a mechanism to try to contain the distortions: it demanded specific legislative authorization for each sponsored concession where more than 70% of the remuneration of the concessionaire is paid by the Administration.

The fourth risk of a program of partnerships is of misuse of the administrative concession. This new contractual modality was invented to allow the service provider to finance the creation of the public infrastructure, making investments gradually amortizable by the Administration. This is why its length may extend to 35 years (articles 2, paragraph 4, I and 5, I). However, it is to be expected that the interest of certain administrators and companies generates a fight for the loosening of the concepts, by means of interpretation, in order to use the administrative concession in the very same situations in which the administrative contract of services of the Law of Public Procurement was used. If the maneuver is successful, it will result in absurd contracts for surveillance or cleaning of public buildings, economic consultancy, maintenance of equipment, etc., for 10, 20 or 30 years, without any investment to justify this long duration.

It is predictable that two strategies be used by the interested parties to promote this misuse. One is to interpret article 2, paragraph 4, I of the PPP Law – that prohibits PPP contracts of a "value lower than" R$20 million – as if it were referring to the sum of the price portions to be paid to contracted party throughout the validity of the contract, and not the investment to be made by it. This interpretation does not make any sense, and even goes against the reason for the existence of the institute, well expressed in article 5, I: the attainment of private investments in the creation of public infrastructure. Furthermore, it would be ridiculous for the law to be simply aimed at increasing the cost of the administrative contracts, by providing for a "minimum value" of R$20 million. It is obvious, therefore, that what article 2, paragraph 4, I prohibits is the PPP contract that does not provide for the undertaking, by the private partner, of investment of at least R$20 million.

"Therefore, the creation of this new contractual formula – the administrative concession – made possible an arrangement for obtaining services for the State that was impossible before: one in which the private partner invests financially in the creation of the public infrastructure needed for the existence of the service and helps to conceive it."

Another strategy of the interested parties in the misuse of the administrative concession is the use of the argument that article 2, paragraph 4, I of the PPP Law would not be a general norm (Federal Constitution, article 22, XXI), but rather a specific norm, only applicable to the Union, not to the States and Municipalities, which would be free to establish the minimum value of investment in PPP contracts. The argument is clearly mistaken. The general norm includes both the definition of the existing contractual modalities in the Brazilian Law (e.g.: administrative contract of services and administrative concession contract), as well as, obviously, of the criteria for their application (object, duration, value, etc.). The minimum investment of R$20 millions, indicated in article 2, paragraph 4, I of the PPP Law, is a criterion that identifies the suitability of the administrative concession, therefore it is a general norm. The rhetorical argument that small or poor States and Municipalities would be discriminated, since their contracts do not reach the value limit, is only empty rhetoric. However, if these entities do not have the economic power for such enterprises, they simply do not need administrative concessions. Their businesses, which have to be small because of scarce financial resources, can well be carried out by means of common administrative contracts.

3. COMMON, SPONSORED AND ADMINISTRATIVE CONCESSIONS

The public service concessions referred to in article 175 of the Federal Constitution are a type of concession characterized by their object: the attribution, to the concessionaire, of the responsibility for the execution of public services (including establishment and maintenance of public works, such as highways and bridges). Regarding the remuneration regime, there are three possible types: the common, the sponsored and the administrative concession.

According to article 2, paragraph 3 of the PPP Law, common concession is the one where the awarding authority does not pay consideration in money to the concessionaire. The remuneration of the latter can include the collection of tariffs as well as other alternative revenues (LC, article 11), provided they do not involve payments of a pecuniary nature by the awarding authority. Therefore, the common concession is still applicable if the remuneration includes (or is limited to) non-pecuniary consideration made by the Administration, in the modalities foreseen in article 6, III and IV of the PPP Law.

The common concessions are not included among the PPP contracts. By the way, the only function of the concept of common concession is to clarify that it is ruled exclusively by the Law of Concessions and related legislation, and the provisions in the PPP Law are not applicable to it. This means, for instance, that in the common concession it will not necessarily be required that the concessionaire constitute a specific purpose society (as provided in article 9 of the PPP Law), and the more flexible rule of article 20 of the LC applies. Furthermore, in the bidding for common concession, it is not possible to use the reverse auction created by the PPP Law, in its articles 10 to 13.

The sponsored concession is, together with the common concession, a type of public service concession. Therefore, it is under the regime of the general legislation for this type of contract (the Law of Concession and other related laws, such as Federal Law no. 9.074, of 1995), with the complement of the norms of the PPP Law (article 3, paragraph 1).

What characterizes the sponsored concession is its remuneration regime, that must include both a tariff charged from the users and pecuniary consideration from the awarding authority (PPP Law, article 2, paragraph). If, in a utility concession, the concessionaire does not charge tariff from the users, and is remunerated by subvention from the awarding authority (with or without other non-tariff revenues), this will not be a sponsored concession, but rather an administrative concession.

And what it is the "pecuniary consideration of the public partner", essential for characterizing the concession as sponsored (article 2, paragraph 1)? It is, to use the language of article 6, the one done by "banking order" (numeral I) or by "cession of non-taxable credits" (numeral II). Article 6 alludes to other non-pecuniary forms for the Administration to remunerate concessionaires: granting rights over government goods and other rights against itself (e.g. the right of alternative use of real estate or to build above the coefficient of use of the place, referred to in articles 28 and 29 of the Statute of City). These revenues, in principle, are included in the alternative revenue concept referred to in article 11 of the Law of Concession. The mere fact that a concessionaire receives them does not turn its contract into a sponsored concession, since this only happens when the Administration provides a "pecuniary consideration"; otherwise the concession will be "common".

On the other hand, in the presence of tariffs charged from the users and the pecuniary consideration of the awarding authority, it will be considered a sponsored concession, even if the concessionaire also receives non-pecuniary consideration from the Administration (numerals III and IV of article 6 of the PPP Law) and other alternative revenues.

And what is the sense of these rules that exclude from the PPP contract concept those without pecuniary remuneration by the Administration to the concessionaire? It is simple to understand. The PPP Law was drafted to address concession contracts that involve special financial challenges: to organize the undertaking of long-term commitments by the Public Authority and to guarantee their effective payment to the private partner. Regarding concessions without such commitments, the PPP Law would have nothing to say.

For the concessions of public services ruled exclusively by the Law of Concession (those now called common concessions), there are no minimum or maximum legal lengths, nor legal minimum investment; it all depends on the Administration's decisions in each in case, to be provided for in the contract. However, when addressing the sponsored concession, the PPP Law prohibited the Public Administration from committing itself contractually to paying tariff supplement in certain public service concessions: those where the investment to be made by the concessionaire does not reach R$20 million (article 2, paragraph 4, I), and when the contract is for less than five or more than thirty-five years, including extension (both article 2, paragraph 4, II, and article 5, I, combined).

There are two types of administrative concession: of public services and of services to the State.

The administrative concession of public services is the one in which the object is the public services referred to in article 175 of the Constitution, that are rendered directly to managed parties without the collection of any tariff, and the concessionaire is remunerated by the awarding authority in pecuniary consideration (with or without other alternative revenues). In this case, although the managed parties are the immediate beneficiaries of the payments, the Public Administration is considered an indirect user, and has the economic rights and responsibilities that otherwise would belong to the concessionaire.

The administrative concession of services to the State is the one whose object are the same services referred to in article 6 of the Law of Public Procurement, that is, the rendering of utilities to the Administration, which will be the direct user of the services and will pay the corresponding remuneration. Regarding these aspects, the administrative concession of services to the State is close to the administrative contract of services ruled by the Law of Public Procurement. But there are significant elements that distinguish them, and that bring the administrative concession of services to the State closer to the traditional concession of public services. While the contract of services is limited to the rendering of services, the administrative concession of services to the State also includes a minimum investment of R$20 million by the concessionaire (PPP Law, article 2, paragraph 4, I) in the creation, expansion or recovery of the necessary infrastructure for the services, by means of the execution of works or supply of goods (article 2, paragraph 2) , that will be carried out for at least five years (article 2, paragraph 4, II). While the administrative concession of services to the State is in force, and the investment is not amortized, this infrastructure will constitute the concessionaire's asset, and may be reverted to the awarding authority at the end, if provided in the contract (article 3, *caput,* of the PPP Law and articles 18, X, and 23, X, of the LC combined). Thus, the contractual structure and the economic rationale of the administrative concession of services to the State and of the traditional concession of public services are identical.

The literal text of the PPP Law does not include the expressions that, for didactic reasons, we use here to explain the two types of administrative concession. But the corresponding categories are the creation of the law itself that, in its article 2, paragraph 2, defined the administrative concession as "the contract of service rendering of which the Administration is the direct user" (the hypothesis that we call administrative concession of services to the State) "or indirect user" (the hypothesis that we call administrative concession of public services).

The administrative concession of public services is a type of concession of public services referred to in article 175 of the Federal Constitution, together with the common concession and the sponsored concession. The three types are distinguished by the form of remuneration of the concessionaire, as explained above.

Now the administrative concession of services to the State is a type of administrative contract of services to the State. This includes two forms: the administrative contract of services of the Law of Public Procurement, whose object is restricted to the rendering of services; and the contract of administrative concession of services to the State, whose object also includes private investment to create, to expand or recover public infrastructure.

The PPP Law, to prevent confusion between the administrative concession and any of contracts ruled by the Law of Public Procurement – thus disorganizing the legal system – imposed *complexity* as an essential characteristic of the object of this new contract.

The administrative concession is not a simple service rendering contract, in contrast with the impression gathered from isolated reading of article 2, paragraph 2, since it will always include the investments by the concessionaire for the creation, expansion or recovery of infrastructure, to be amortized along the length of the contract (article 5, I), amounting to at least R$20 million.

Likewise, the administrative concession cannot be restricted to the execution of public works (article 2, paragraph 4, III), that is characteristic of the contract for public works under the Law of Public Procurement. It is true that the administrative concession can include the works (article 2, paragraph 2), but two other requirements must be present: the concessionaire will have to make a minimum investment of R$20 million and, after the infrastructure is ready, it should be used for the rendering of services for a period of at least five years (article 2, paragraph 4, II). These requirements do not exist in mere public works contracts. The requirements of rendering of services for a minimum time and of remuneration always tied to service rendering (article 7) – not, therefore, tied to the execution of portions of he works – prevents the administrative concession from becoming a simple contract of works with the contractor's financing.

Moreover, the administrative concession, although it can include the supply of goods for creation of infrastructure (article 2, paragraph 2), cannot be restricted to this (article 2, paragraph 4, III). The law intended to hinder the use of the concession as a simple alternative to the purchase contract under the Law of Public Procurement, as well as the financed purchase of goods. The minimum investment of R$20 million, as well as the rendering of services linked to such goods for at least five years, are indispensable.

Finally, when speaking of services as the object of the administrative concession, one is referring to the independent execution of service rendering to achieve previously established results. The PPP Law does not consider as such the mere supply of human labor (that is, of "man power") to work under the management of the Administration (article 2, paragraph 4, III).

The administrative concession, in its two types, is subject to the legal regime of the Law of Concession (according to PPP Law, article 3, *caput* and article 11, *caput*), except for: *a)* norms not pursuant to the new concession, relative to the conceptualization (articles 1 and 2), to the tariff matter and to the economic protection of the users (articles 6 to 13), and other aspects (articles 16, 17 and 26); and *b)* other norms that have corresponding norms in the PPP Law (articles 3, 4, 5, 14 and 20) or in the LP (article 22).

Article 6 of the PPP Law provides for various possible modalities for the offering of consideration by the Administration: there is the pecuniary considerations (by means of "banking order" or "cession of non-taxable credit") and non-pecuniary considerations (rights over government goods and over other rights of the Administration).

This raises the doubt on whether a contract can be categorized as an administrative concession when, although the consideration is entirely paid by the Administration, its nature is not pecuniary.

The answer is that, if the contract involves the public rendering of services to the managed party, it will be a common concession, remunerated exclusively with alternative revenues (LC, article 11). On the other hand, if the contract is for rendering of services to the Administration, and the other requirements of article 2, paragraph 4 are met (especially the private investment of at least R$20 millions and the minimum period of 5 years), it should be considered an administrative concession.

It should be noted that, when defining administrative concession, article 2, paragraph 2 left it implicit that the remuneration of the concessionaire is the responsibility of the Administration, not of the managed parties, because the Administration is the direct or indirect user of the services. But, in contrast with the sponsored concession (article 2, paragraph 1), the law does not require that, in the administrative concession, the consideration of the awarding authority be in money. It can be so under the other forms provided by article 6. The only form of remuneration that would remove the characteristics of the administrative concession is the receiving of a tariff by the concessionaire of the managed parties specifically to remunerate its services.

Concession is not a univocal term in the administrative legislation. Contracts that involve the transfer of the execution of public services and contracts that confer the right to the exclusive use of public goods by private entities are both denominated concession contracts. The common trait of these contractual figures is their long duration, justified by the need to allow the amortization of the concessionaire's investments. This explains why the PPP Law chose this term to denominate the new contractual modality that it was creating: after all, it was a deal where the private partner undertakes to make a significant initial investment, in order to create, expand or recover public infrastructure, thus enabling its use in the subsequent rendering of services. But the legislative option was not only terminological. The aim was to use, in new objects, the contractual structure and the economic rationale of contracts ruled by the Law of Concessions. Therefore, the PPP contracts were submitted to this law (according to article 3 of the PPP Law).

The PPP Law was drafted to provide private financing options for the creation, expansion or recovery of public infrastructure. The aim was to avoid generating the traditional state indebtedness, through purely financial contracts, with the subsequent contracting of contractor for the execution of works and, at the end, the infrastructure is taken over by the Administration itself.

Thus, to achieve the political objectives of the PPP program, its contracts cannot be limited only to execution of services or works. They must, necessarily, include the private investment. The R$20 million is the minimum private investment considered by the law to justify the award to the contracted party of the benefits of the concession regime – the long duration, the special safeguards against termination, etc.

One of the problems of traditional contracts of works is the economic lack of interest of the contracted party for the good execution of the contract. The only risk of poor execution is that the Administration might refuse to receive the object. But, apart from this only being a risk if the Administration has the technical capacity to identify the flaws – which it often does not – the fact is that fraud in the execution generates enough resources for the contracted party to bribe the inspection of the works and to attain easily the definitive receiving of the object. By preventing the PPP contracts from being limited to execution of works or supply of equipment (article 2, paragraph 4, III), the PPP Law linked the remuneration of the private partners directly to the fruition of the services by the Administration or the managed parties (article 7) and enabled its variation according to the performance of the private partner, according to established quality and availability targets and standards (article 6, only paragraph). Therefore, the good or bad quality of the works or goods used in the infrastructure will directly impact the determination of the amount to be received by the private partner. This should arouse, for the private partner, an interest in the proper execution of the part related to the infrastructure, since the services must be rendered for at least five years and the infrastructure must be capable of resisting well throughout this period.

The contractual regime of the sponsored concession is, in broad lines, similar to the one of the common concessions (PPP Law, article 3, paragraph 1), including not only the rules of the Law of Concessions relate to the text of the contract, but also to the responsibilities of concessionaire and awarding authority, the intervention and the extinction of the contract (LC, articles 23 to 39, with exception under article 26, on sub-concession, which is not applicable). But there are some peculiarities, foreseen in some topics of article 5 of the PPP Law.

Article 5, in its many numerals, in general repeats or better clarifies the sense of the provisions that are already in the Law of Concession and that, therefore, are also applicable to the common concessions. This is also the case of article 11, III, related to the use of arbitration, which was already authorized (LC, article 23, XV).

However, there are certain contractual requirements that are applicable to the sponsored concessions, but not to the common ones. They are foreseen in article 5, numeral I (regarding the minimum and maximum periods of effectiveness) and V (relative to pecuniary insolvency of the awarding authority). Moreover, paragraph 1 of the same article 5 creates for the concessionaire a right to tacit homologation of price readjustment or correction that does not exist in the other administrative contract modalities.

The second paragraph of article 5 authorizes the introduction, in the sponsored concession, of contractual clauses to protect the financial agents that have contracted, with the concessionaire, the financing of the project undertaken by the concessionaire. In the Brazilian context, the rule tends to protect, particularly, the interests of a state entity, the Brazilian Economic and Social Development Bank - BNDES, which is the great financier of this type of projects. The measures can include the taking over of societary control of the concessionaire by the bank, to promote the reorganization of the business (article 5, paragraph 2, I), as well as direct payment to it, by the awarding authority or guarantor entity, both of the invoices of the services (article 5, paragraph 2, II) as well as of indemnities for anticipated extinction (article 5, paragraph 2, II), such payments being used for partial or total repayment of the financial obligations of the concessionaire vis-à-vis the bank.

Another contractual topic of the sponsored concessions that does not exist in the common concessions refers to the guarantees of payment of the pecuniary obligations of the awarding authority, in the modalities under article 6.

Finally, the sponsored concession can only be granted to a specific purpose society, that is, one created exclusively for this purpose (article 9).

As to the administrative concession contracts, they are subject to the same regime as that of the sponsored concessions, since the legal rules on the subject are indistinctly applicable to both modalities. The difference regarding content is only in the tariff matter, which does not exist in the administrative concession, since this concessionaire does not receive tariffs from the users (which, by the way, is why articles 6 to 13 of the Law of Concession do not apply to the administrative concessions). ■

Supreme Audit Institutions in search of accountability and performance improvement in regulatory utility agencies

A comparative analysis of oversight practices in the telecommunication sector regulators in Brazil and the United States in the last decade

Marcelo Barros Gomes

1. INTRODUCTION

This paper is the resume of a research carried out during the International Fellowship Program of the US Government Accountability Office, attended by the Brazilian SAI *Tribunal de Contas da União* between May and August of 2004 among other eighteen SAI´s. It is an attempt to provide an argumentation about recent public management policies of audit and evaluation conducted by Supreme Audit Institutions (SAI) in utility regulatory agencies. Such policies seem to be reflecting two doctrines. A first one is that a public organization of external control of the bureaucracy should balance and integrate the pursuit of two types of accountability of such agencies, namely, compliance accountability and performance accountability. This paper relies on the performance accountability stream of SAI practices. A second doctrine is that - on the one hand - a good design of the regulatory system should guarantee that agencies have degrees of independence as a way to fulfill their mandates, but should - on the other hand - be reviewed not only by compliance with norms and regulation, but also be assessed on their performance, including those related to the agencies regulatory goals.

The study provided here aims to fulfill three outcomes. A first outcome is to provide a review of some practices conducted by the Brazilian Court of Audit (*TCU*) and US Government Accountability Office – GAO in the utilities regulatory agencies. The issue here is to inform to whom and to what extent are those agencies accountable for in both National Public Administrations.

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Secondly, the paper identifies that a choice of Supreme Audit Institutions to conduct performance audit in regulatory agencies is a political phenomenon. As such, the paper should explain facts and events (Elster, 1989). An example of an event related to regulatory reform is the creation of many regulatory agencies in Brazil after privatization during the 1990´s.

Another event relates to the Telecommunications Act of 1996 as a first major overhaul of telecommunications law in almost 62 years in the United States. A fact is that SAI´s are increasingly shifting their type of control over the bureaucracy - including regulatory agencies - from compliance audit to performance audit.

This fact is a relevant policy issue for this strategy paper. Since it involves many countries and as a political phenomenon, analysis of this fact should engage discussion in a comparative perspective (Sartori, 1994:15). In this sense, a comparative analysis between the Brazilian SAI and the US SAI should help built explanations and evaluation of good regulatory systems designs and their control environment. The issue here is to elicit the proper role of Supreme Audit Institutions as a main actor in the regulatory arena.

Finally, practices in this paper are narrated as a way to bring lessons about performance auditing as conducted by both SAI – in a policy learning transfer context - from one country to another in the area of oversight of regulatory agencies. The issue here is to assess the extent and the ways accountability of regulatory agencies as conducted by Supreme Audit Institutions might be learned from one country to another.

2. THE US PUBLIC ADMINISTRATION AND THE ROLE OF THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO)

Public Administration in the United States is fragmented in both governmental and bureaucratic levels. Arguably, power on policy-making process is divided between the executive and the legislature in an unclear design. The complexity of the policy-making geometry of Washington is metaphorically characterised as the 'iron triangle'. In this geometry, interest groups, congressional committees and subcommittees, and executive agencies are tied symbiotically together, 'controlling specific segments of public policy to effective exclusion of other groups or government authorities' (Salisbury et al., 1992).

The executive is highly fragmented inside. Departments and sub-departments may have traditions and policy stances that the president should respect if policy objectives are to be achieved (Peters, 1995:18). These stances, however, are a compound of career civil servants 'think tankers' and 'outsiders' appointed by the president. This fragmented structure within the executive level is mirrored in the many Congressional committees and sub-committees. Institutional politics in the United States is 'government against sub governments' (Rose, 1980).

In such fragmented environment operates the Government Accountability Office – GAO. Its main function is to assist the Congress in its legislative oversight of the executive branch. The vast majority of GAO's work is audit and evaluation but it also has other responsibilities, including prescribing accounting standards for the entire federal government in conjunction with the Office of Management and Budget and the treasury. GAO is formally independent of the Congress. The Comptroller-General is appointed for a fixed term of 15 years.

"The executive is highly fragmented inside. Departments and sub-departments may have traditions and policy stances that the president should respect if policy objectives are to be achieved"

The work of GAO is unconstrained because the executive policy-rulers are not coordinated enough to oppose consistently to external evaluation of their programs. Moreover, the Government Accountability Office has built a strong client relationship with Congress that has permitted less questioning about performance audit and evaluation it might conduct. GAO has evolved into an effective policy analytical and advice organisation for Congress (Rist, 1990). In fact, almost every GAO engagement is initiated by a congressional request[1].

GAO exists to support the congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people. The core values of GAO are accountability, reliability and integrity. GAO produces high quality reports, testimonies, legal opinions, and other product and services that aim to be timely, accurate, useful, and clear. The Us Government Accountability Office is the government's accountability watchdog. Its highly trained evaluators examine everything from missiles to medicine, from aviation safety to food safety, from national security to social security. GAO is an independent legislative branch agency. GAO investigates on behalf of Congress. GAO serves the public interest by providing Members of Congress and others who make policy with accurate information, unbiased analysis, and contractive recommendations on the use of public resources and the operations of government programs. GAO also aims to serve as a model of organizational efficiency, effectiveness and accountability in the federal government. GAO examines the use of public funds, evaluates federal programs and activities, and provides recommendations and other assistance to help the congress make effective decisions. GAO helps the congress decide how to allocate federal funds and oversee the effectiveness and efficiency of government operations.

Since GAO was established in 1921, its approach to government accountability has four phases:

1.Checking vouchers (1920-1940).

2.Audit of Federal spending (1950-1960).

3.Program audits (1970-1980s).

4.Improving government performance and accountability (after the 1990s).

In fact, a recent law has changed the name of the General Accounting Office to Government Accountability Office, as a way to make easier to the general public understand the proper GAO function in Government.

3. THE BRAZILIAN PUBLIC ADMINISTRATION AND THE ROLE OF *TRIBUNAL DE CONTAS DA UNIÃO* IN THE REGULATORY OVERSIGHT PROCESS

Like the US, the Brazilian National Public Administration is extremely fragmented, in both the political and the bureaucratic levels. Although there is a strong emphasis in the executive branch in the policy making process, the powers are divided in an unclear way in the two branches. The executive itself is extremely fragmented. Moreover, the ministries have not yet created a strong community of policy advice, including the ministries of infrastructure.

In this fragmented environment operates the *Tribunal de Contas da União*. Its main function is to assist the National Congress in controlling the federal public administration and watching over the sound and regular use of public funds. It is responsible for the external audit of the country and its agencies in the three branches of government. There is a high level of independency of *TCU* from any other public administration entities, because it has a mandate to carry on his audits by its own initiative. After the new constitution in 1988, *TCU* has spread its control practices and included operational audits in his review portfolio. Since then, a lot of efforts have been put into practices to increase the institution capacity to perform works on program evaluation, operational audits in many areas.

1. It is claimed by many GAO experts that those requests are highly influenced by GAO perspective, since the organ has more technical policy expertise to address proper questions to policy problems. This claim is very plausible, but the level of this influence, however, is not a matter investigated for this paper.

Nowadays, *TCU* is known as a distinguished body of excellence of sound policy advice and has spread good practices in regulation and performance accountability, including in the control of regulatory agencies, as it is going to be exposed in this paper. The next section will try to clarify the concept of performance auditing as practiced by SAI.

4. THE ROLE OF SAI IN REGULATORY MANAGEMENT POLICY ISSUES

Regulation activity is rooted in the power consigned to states to intervene in the relationship between suppliers and consumers. Regulation of the utility industry activities can be characterized as a form of control exercised by government "over prices, safety, and quality of services"(Baldwin and Cave, 1999:03). Systemic privatisation (Feigenbaum & Henig, 1994:200) and attempts to liberalisation in different times brought to the scenario of the utility sectors a new regulatory regime broadly similar in both cases.

In Brazil regulatory agencies were created for each key utility industry. The Telecommunication sector is a remarkable example of such transformation. The facts of the reform in this sector happened as follows: In August 1995, the constitutional amendments took place. In July 1997, Congress approved the general telecommunications law proposed by the executive branch. In November 1997, the regulatory entity – *Anatel* was created. In April 1998, the cellular telephone licenses – B Band was approved. Finally, In July 1998 *Telebras* and its subsidiaries were privatised and in November 98 the *Telebras* "mirror" licenses (duopoly) were operating. Other regulatory agencies were created in the same period in each key infra structure sector: *Agência Nacional de Energia Elétrica (ANEEL)*, for electricity and *Agência Nacional do Petróleo (ANP)* for oil and gas. After 2000 other agencies were created for tranport, namely, *Agência Nacional de Transporte Terrestre (ANTT)* and *Agência Nacional de Transporte Aquaviário (ANTAQ)*.

The rationale behind the decision of privatising public enterprises made Brazil a similar model of organisation of the US System with private companies delivering public services and regulation (through independent regulatory bodies) rooted in responses to similar problems these governments have faced. The claim that arises here is that governments have reformulated regulation in response to a common set of pressures (Vogel, 1996:12).

The regulatory authority in Brazil has spread its responsibilities not only in technical issues regarding licenses and interconnections, but also in monitoring anticompetitive behaviors and unwelcome take-over. It shares powers at the same level of authority with the Ministerial Council of Fair Trading regarding to the latter concern. In the US, the Federal Communications Commission (FCC) is an independent United States government agency, directly responsible to Congress. The FCC is directed by five Commissioners appointed by the President and confirmed by the Senate for 5-year terms, except when filling an unexpired term. The President designates one of the Commissioners to serve as Chairperson. Only three Commissioners may be members of the same political party. None of them can have a financial interest in any commission-related business. The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions. The long history of the FCC is also a positive aspect that could be studied by Brazil to bring lessons for *Anatel* and regulation of *Telecom* as a whole.

The Commission staff is organized by function. There are six operating bureaus and ten Staff Offices. The bureaus' responsibilities include: processing applications for licenses and other filings; analyzing complaints; conducting investigations; developing and implementing regulatory programs and taking part in hearings. Even though the bureaus and offices have their individual functions, they regularly join forces and share expertise in addressing Commission issues.

Contrasting patterns of style are likely in regulatory regimes of different countries. Arguably, regulatory activity is a public policy choice. Therefore, historical and cultural biases in which they are embedded suggest, "that beyond a certain point convergence on a single management model is not simply implausible but likely to be impossible" (Hood, 1998:20). This claim implies that a country should look to other models as way to enhance their capacity to develop good practices but should not make mindless copies of policies from one country to another.

Empirical evidence shows that regulatory reform took place in both countries and it may lead to a claim that these States have responded to similar pressures (Vogel, 1995: 260). Divergence can be explained by other factors, such as institutional and ideological legacies particular to each country. The remainder of this paper will try to built an argument on how should, then, policies be transferred from one country to another without jeopardizing the own countries public administration legacy.

Literature about regulation, as well as doctrines about the best institutional design of regulatory agencies sustain that an stable regulatory regime should guarantee degrees of autonomy for the regulatory body from the Executive Government (Moraes, 1997; Stern, 1997; Salgado, 2003). This is essential for the agencies as they can implement in a credible manner the regulatory policies. The regulatory objectives are multifaceted and often deals with conflictions – for example the regulator should guarantee equity and efficiency in the delivery of the service. Mainly the regulatory mandate includes economic regulation, social regulation and technical or quality regulation.

One condition for the success and stability of the regulatory regime depends on the autonomy and independence of the regulator. This condition, however, may insulate the regulatory body from the pulse of the elected officials and decrease their capacity to formulate public policy for the sector. As a way to avoid this bureaucratic pathology, the regulatory agency should have a good system of accountability and transparency of their decisions. It is argued here that Supreme Audit Institutions play a key role to improve accountability and best practices in the regulation of utilities as much it has in other government policies and program.

THE ADVENT OF THE 1996 TELECOMMUNICATION ACT

For more than fifty years the U.S. telecommunication sector was a regulated private monopoly, dominated by AT&T. During most of that period the Federal Communication Commission (FCC) and a variety of state authorities controlled the relative prices of telephone service and restrict entry. In the 1970s the first breath of liberalization swept over the sector as the FCC began to allow limited competition in the market for interstate dedicated business connection and won a battle with state regulators to open the market for terminal equipment, such as telephone handsets, answering machines, and modems, to competition. Competition in long-distance markets opened wider when MCI launched long-distance service for businesses without FCC permission.

AT&T's use of its local facilities to frustrate the burgeoning competition in long-distance services and terminal equipment led to a lengthy antitrust case, which resulted in a consent decree that broke up the company in 1984 and imposed a quarantine that prevented the divorced regional Bell operating companies from offering long-distance services. For twelve years the AT&T trial court wrestled with several difficult issues in implementing the consent decree. At the same time the regional Bell companies chafed at their continued exclusion from long-distance services, while long-distance carriers were equally concerned about the slow progress toward competition in local markets, a problem beyond the reach of the AT&T decree. As a result, Congress was finally prodded to reform the entire telecommunications regulatory structure through passage of the 1996 Telecommunication Act.

This legislation:

1.Opens local telecommunication markets to competition.

2.Seeks to complete the earlier market-opening in long-distance services (including freeing the Bell operating companies from their quarantine).

3.Creates an economic environment intended to lead to the "deployment of advanced telecommunications and information technologies and services to all Americans".

The effectiveness of the 1996 Act is highly debatable. The more deregulation oriented authors argue that the law was a drawback in the US experience with deregulation in numerous other sectors, some experts argue that from the outset, the 1996 law represents a major step backward from the recent tendency of state regulators and the FCC to abandon cost-based regulation in favor of price caps[2]. Wholesale rated and universal-service subsides are to be determined by cost models, according to the act. Moreover, although the 1996 law opens all telecommunications markets to competition, even the once-protected local markets, it requires incumbents to cooperate in facilitating entry of potential competitors to a degree that has not been prescribed for any other recently regulated sector of the economy.

In fact, the 1996 Act provides much more than a prescription for regulated competition in telecommunication. It makes major changes in universal service policy; mandates new subsidies for schools, libraries, and rural healthy facilities; substantially deregulates cable television rates; liberalizes broadcast-ownership rules; and even regulates entry into the provision of alarm services. The universal service policies are to be supported by fees levied on all telecommunications services and are to be portable so that new entrants can receive the same payments as incumbents for offering services in areas where rates are bellow cost.

The 1996 law requires local carriers to unbundled their network elements and, moreover, allow entrants to resell their service. Such resale simply transfers the marketing and billing function from existing local carrier to the new (reselling) entrant. The 1996 law is silent on retail telecommunication prices, except for mandating that explicit rural subsidies be sufficient to keep local rates in high-cost rural areas at levels comparable with urban rates. State commissions still regulate incumbent carriers' intrastate services and most of these commissions continue to administer a distorted rate structure (Crandall, 2000:84). Although the 1996 law prescribes cost-based wholesale rates, it does not require the state commissions to move retail rates toward cost. Indeed, the FCC has increased the distortions between retail rates and costs by assessing charges to fund the Internet subsidies to school and libraries (ibid.).

2. The FCC shifted from cost-based regulation to price caps in 1989 (for AT&T) and 1990 for the local carriers' interstate rates).

The main critique of the 1996 legislation is that detailed cost-based regulation of wholesale rates proved not to be a satisfactory approach for stimulating competition in the telecommunication network industry. Rather, it would be preferred an attempt by regulator to undo the regulatory created barriers to entry built into the retail rate structure

THE ROLE OF THE GOVERNMENT ACCOUNTABILITY OFFICE IN THE OVERSIGHT OF UTILITIES REGULATION

The Government Accountability Office approach to utility regulatory policies is sharp and often deep. It has a specialized team that deals with infrastructure themes. Specialization and expertise in this area are also found in the Natural Resources and Environment Team, Applied Research Methods Team, Strategic Issue Team and International Affairs and Trade Team.

"TCU *has been playing a key role in the implementation of the new regulatory arrangement in Brazil and became a very respected policy analyst of the regulatory regime in Brazil.*"

Performance audit carried out by the GAO out in the area of utility regulation is extensive. It include mergers of local telephone companies, promoting competition within the utilities markets, financial information audit in telecom companies, telecommunications technologies in rural area, the changing status of competition to cable television, many reports on critical infrastructure protection, development of information superhighway, benchmarks with other countries on DTV, wire base competition analysis, universal service, gas deregulation, competition and concentration of markets and other analysis, electricity restructuring, role of the Federal Energy Regulatory Commission, California electricity crisis in 2000-2001, experiences of states in deregulating electricity, availability of service, assessment and cost-benefit analyses of public private partnership projects, and a lot of work on all modes of transport (de)regulation among much others works.

Specifically, GAO Audits in the Telecommunications are many, some of these audits include:

1. Before the 1996 Act, in 1994 GAO disclosed financial information on 16 telephone and cable companies – in fact, GAO provided Congress with information on total operating revenues, cash flow from operations, and profitability, In addition, it provided more detailed financial information on the uses of cash flow from operations, including the extent to which capital expenditures are made inside and outside of the companies primarily line of business. This study certainly helped Congress to develop in depth analysis on the US Telecom Market.

2. Also in 1994 GAO made a report about information superhighway – addressing the key issues affecting its development.

3. GAO also made studies on Rural Development in 1996 – the report identified the steps towards realizing the potential of telecommunications technologies in rural area. This is a key regulatory issue addressed by the 1996 law

4. The GAO in 1998 studied about 27 federal programs that can be used to fund technology for schools and libraries.

5. The process by which mergers of local telephone companies are reviewed was studied by GAO in 1999 – This audit aimed to assess one of the primary purposes of the Telecommunications Act of 1996. GAO answered whether the application of the 1996 by FCC was promoting competition within the telecommunications markets.

6. Regarding to competition, GAO studied issued a report in 1999 about the changing status of competition to cable television such as that provided by cable and satellite.

7. GAO has produced many other reports on critical infrastructure protection, especially after the September 11th event.

8. Comprehensive review of U.S. spectrum management with broad stakeholder involvement is neededed according to a GAO study.

9. GAO reported about federal and state universal service programmes and challenges to funding (February 2002)

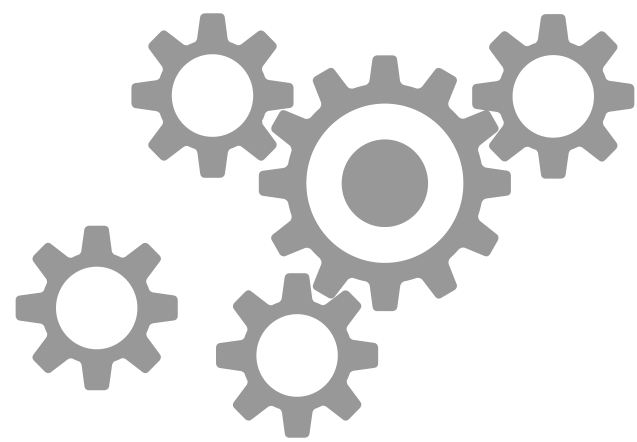
10. Another GAO report concluded that wire base competition benefited consumer in selected markets. This study was issued in February 2004.

11. Recently, GAO made a comparative study on German DTV and concluded that it differs from U.S. transition in many respects, but certain key challenges are similar. This report was issued in July 2004.

THE ROLE OF THE *TRIBUNAL DE CONTAS DA UNIÃO* IN THE OVERSIGHT OF UTILITIES REGULATION

In Brazil a specialized unit staffing 28 auditors was established in 1998 to oversee regulation with a performance perspective. The control practices of this unit encompasses among others concomitant control of new concessions (since 1995); performance audit in the agencies (since 1999); audit, evaluation and review of regulatory processes (since 2000); concomitant control of the periodic tariff review in electricity distribution sector (since 2002).

Some results from *TCU* work include the review of calculation method for telephone, cable TV and hydroelectric power station concessions; operational audits were conducted in each key sector, including telecommunication. Roads toll reduction as result of undue taxes inclusion, investments overestimated and additional revenue not taken under consideration by the regulator; better treatment of environment issues in the oil and gas sector; identification of unclear definition of the duties of ministries and regulatory agencies and ineffective social tariff policy in electricity, assessment of universal service effectiveness in telecom and transport. *TCU* has been playing a key role in the implementation of the new regulatory arrangement in Brazil and became a very respected policy analyst of the regulatory regime in Brazil. *TCU* has in many important respects helped to the stabilization of the system as well as the improvement of the performance of regulatory agencies in terms of good regulation. Much work has to be developed to reach a good regulatory system, but in the initial path of the reforms *TCU* works were essential to the regime continuity.



5. ISSUES FACED BY THE BRAZILIAN SUPREME AUDITING INSTITUTION IN THE OVERSIGHT OF THE UTILITY REGULATION SECTOR AND POINTS OF POSSIBLE CONTRIBUTIONS FROM GAO EXPERIENCE ON THE OVERSIGHT OF UTILITIES REGULATION

This section shows the main problems faced by the Brazilian Supreme Audit Institutions that might be imperiling the institution to achieve better results in the oversight of the utilities industries and the actions to overcome them are settled. The areas of major concerns are the acquisition of knowledge in regulation and control; the development of novel methods and techniques of control that could be applied in the performance auditing of regulation; the best organization, administration, and planning process to achieve better results; and finally the increase of Public dialogue (communication) of the SAI. In those five areas it is critical that *TCU* can find benchmarks of good practices to implement in the future.

In the area of acquisition of knowledge *TCU* can see how GAO recruits, trains and manages its capital knowledge inside the institution. *TCU* could also benefit from the "stock" of knowledge already accumulated by the GAO to try to build relationships with key skillful staff within GAO. There should be also more exchange of contacts between *TCU* teams and GAO teams in common areas of expertise. Some staff were already identified and contacted during the program and certainly more information will be exchanged soon.

In the area of methods and techniques of audit *TCU* can find the best contribution from GAO. The Brazilian SAI in two ways can learn GAO practices. A first one is related to the own methods of work. The other way is to learn for the own issues that GAO analyses in its reports in the many areas of the regulation of utilities. Regarding the organization, administration, and planning there are also lessons from one institution to another. GAO has a more comprehensive strategic planning than *TCU* and has found the key performance indicators.

TCU has too many performance indicators that might be imperiling a better utilization of such system. *TCU* is also relying his work too strongly in the attestation and judgments of the accounts of public agents that might lead the institution to a less relevant role in the policy cycle in crucial area of improvements needed in the public sector in Brazil. GAO has not, however, developed a more balanced score card approach to his performance indicators. And it is also difficult to say if the strategic vision of GAO can be accomplish fully because it depends very much in the Congress request to initiate engagements.

Lastly in the public dialogue side both GAO and *TCU* are given a very strong attention on the effectiveness and efficiency of their communication with the recipients of their information. This is the critical area of an SAI that has a strategic intention of increasing accountability, transparency and improvement of the public sector. *TCU* has implemented some good improvements in the way it formats the reports. *TCU* has provided important stakeholders with very well designed reports and included graphics and more visual analysis to catch the audience's interest. GAO has developed a more scientific approach to writing. GAO writing principles is one of the keys learning process that could be transferred to the Brazilian SAI, specially the highlight issued in each GAO report. One of the key points this strategy paper intend to stress is that *TCU*, albeit having made much progress in the design of its report, should learn from the writing process of GAO when conducting performance auditing. GAO reports are mainly addressed to Congress. *TCU* project will try to build products to different stakeholders as well, including media, citizens, consumers, scholars and public managers.

6. THE ROLE OF SUPREME AUDIT INSTITUTIONS IN PERSPECTIVE

The argumentation provided by this paper may lead to a claim that regulatory reform has challenged institutionalized oversight practices in many ways:

1. Revamping performance auditing techniques and methods inside the external control environment in general, and in Supreme Audit Institutions, specifically.

2. Creating new arrangements among government actors, especially the relationship between the executive and regulatory agencies, with reflexes in the Supreme Audit Institutions practices. The General Accountability Office is facing less problems to oversee regulatory agencies that its Brazilian counterpart because the independence of regulatory agencies from the executive branch is a more acceptable cultural arrangement in the US public administration and because the organ has created a stronger relationship with Congress, that in its turn, is more prepared to affect the police making process in the US, especially regarding to utility regulation issues. In fact, the 1996 Act is mainly the result of Congressional discussion with strong participation of interest groups. The new reform in the regulatory system in Brazil is mainly an executive proposition that is unlikely to be affected substantially by Congress discussion.

3. Creating more specialization in the Supreme Audit Institution as a way to attend the oversight of regulatory agencies.

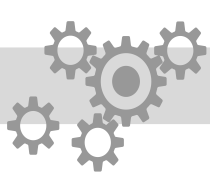
4. Demonstrating that SAIs are main stakeholders in the good design of a regulatory system. The US GAO reports are the main input to Congress to address transformation in the policy making process of regulatory matters. The *TCU* reports depends less on Congress for the implementation of their recommendation. It has addressed more detailed oversight regulation issues than their US counterpart. However, the US regulatory regime style has been exposed to in-depth works conducted by the GAO that has helped the system to evolve to more competition, without jeopardizing the social obligations of the regulator.

In short, the GAO does not address detailed control over the regulatory system, but more broad themes of sustainability and effectiveness of the system as a whole. *TCU* has played a key role in the construction of a new regulatory system in Brazil. Nonetheless, it is very likely that a future role of the Brazilian SAI might evolve to kinds of works developed by the GAO. In fact, some audits on universal services and regulation effectiveness are examples of this tendency.

5. Rapidly changing the vision of an oversight institution. Arguably, regulation of telecom is an evolving concept. Mainly because it is a rapidly changing technological area. In such vein, the SAI should be constantly addressing the issue of effectiveness of regulation. On the one hand, SAI´s should verify if the regulatory environment is permissible for development of competition and investment on new technologies and, on the other hand, if there is a fair distribution and access to the services by the population.

6.Setting the proper role of an oversight of the regulatory system, which should be seen as a key success factor for good governance on regulatory matters. Arguably, the credibility of such system is achieved if regulatory agencies are able to conduct independently their mandate, on the one hand, and if they are accountable to their external constituencies, especially the Congress; with support of a technical body like Supreme Audit Institutions, on the other hand.

7.Being a learning organization is a key success factor for supreme audit institutions. Vicarious learning is also desirable if public sector specificities, culture values and dependent paths of reforms are taken into consideration. The case of comparing the US oversight practices with Brazil in the utilities of regulation is an exemplar way on how such comparison may lead to conclusion about smart practices.



7. FINAL REMARKS

It was argued that there are two critical success factors for a stable regulatory regime. On one hand, the agency should have autonomy to implement regulatory policies, without direct interventions of other government institutions. On the other hand, stability also means transparency and accountability. In this vein, Supreme Audit Institutions are key to the success of a well-designed regulatory regime style.

Supreme Audit Institutions increased in importance in many countries as organs of distinctive constitutional position endowed with the necessary independence, expertise, and professionalism to conduct performance audit. Surveyed practices among OECD countries have led to a claim that SAI´s seem to be following the doctrine that a SAI embedded in a democratic and market-oriented economy should balance and integrate the pursuit of two types of accountability: compliance accountability and performance accountability. The first type is of high priority because it secures the proper conduct of those who deal with public money. However, this proper conduct does not seem to be enough to reach good and responsible government (Aucoin, 1995). In such vein, performance accountability seeks to fulfill an expectation gap (Power, 1997). The gap between what societies expects as good public service and what is practiced. Performance auditors seek to aid government and agents that work for it to create public value (Moore, 1995) when discharging their duties.

In this paper, performance audit was placed as a strand of public management policy and this latter as a main strand of the New Public Management. Such location has permitted to approach performance audit as a field of academic research and argumentation, and professional discussion about management policy interventions within executive government. So defined, the argumentation about performance audit provided here has focused on the political and organisational processes through which policy change takes place. Further, the kernel issue of this paper was to propose that this subject matter should focus on substantive analysis of public management policy.

It is argued that Supreme Audit Institutions have a key role for the sustainability and improvement of a sound regulatory regime. The US and Brazilian cases are exemplars in this area of oversight. The latter is trying to build a more systematic approach to the regulatory oversight; the former has created the conditions to advice Congress on sound policies in the regulatory arena.

It has been argued in this paper that performance audit applied to the utility regulation is an area of increasing interest for SAI. The discussion provided in this paper intended to confirmed that institutional collaboration capacity building among SAI´s is not only a feasible task to be reached but also desirable. However, contrasting patterns of style are likely in regulatory regimes of different countries. Arguably, regulatory activity is a public policy choice.

This paper has provided an initial framework where a collaboration capacity building project might be advanced from the Brazilian *Tribunal de Contas da União* and the US Government Accountability Office in the area of utilities regulation. If the present analysis can be expanded to other areas of expertise or even to other SAI´s is an interesting issue to be developed in the future. ■

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Internal rule no. 27, December 2nd, 1998

Regulates the oversight of the denationalisation processes by the Brazilian Court of Audit

THE BRAZILIAN COURT OF AUDIT, in the exercise of its constitutional, legal and regulation mandates;

Considering its regulatory power established by article 3 of Law 8.443, of 16 July 1992;

Considering the provision of item VIII of article 18 of Law no. 9.491, of 9 September 1997, resolves:

CHAPTER I
PRELIMINARY PROVISIONS

Article 1. The BRAZILIAN COURT OF AUDIT is responsible for accompanying, overseeing and evaluating the denationalisation processes carried out by the Federal Administration, comprehending privatisation of State businesses, including the financial institutions, and the concessions, permissions and authorisations of public service, according to article 175 of the Constitution of the Republic and other pertinent legislation.

Paragraph 1. For the purposes of this Internal Rule, the following definitions must be considered:

I – denationalisation: the transference to the private sector of the participation in stocks and of the execution of public services exploited by the Union through the Federal Administration entities;

II – privatisation: the selling by the Union of the rights that ensure to it, directly or by means of other controlled, the power to make the social decisions and elect the majority of the administrators of the society;

III – concession of public service: the delegation by the conceding power of delivery of the public service, through an auction, to a company or a consortium of companies, that shows the capacity to perform the service, at its own risk and for a specified term;

IV – concession of public service, preceded by the execution of a public work: total or partial construction, conservation, refurbishment, expansion or improvement of any work of public interest, delegated by the conceding power through an auction, to a company or to a consortium of companies that shows capacity for performing the service, at its own risk, in such a way that the investment made by the concessionaire be remunerated and paid off through the exploitation of the service or public work in a specified period of time;

V – permission of public service: temporary delegation of the execution of public services by the conceding power, through an auction, to the individual or company that shows the capacity to perform the service, at its own risk;

VI – authorisation: administrative act of discretionary and temporary nature by which the conceding power makes it possible for the postulant to execute a certain activity or service or to use certain public or private assets, of exclusive or predominant interest to the conceding power, conditioned to previous approval by the Administration;

Paragraph 2. The provisions of this Internal Rule are applicable, when appropriate, to the denationalisation processes to be carried by means of simplified procedures according to article 33 of Decree no. 2.594, of 15 may 1998, as well as to the concession processes for use of a public asset associated to public services.

CHAPTER II
PRIVATISATION OVERSIGHT

Article 2. Oversight of the privatisation processes will be performed in five stages, by analysing the following documents and information:

I – FIRST STAGE:

a) reasons and legal support for the privatisation proposal;

b) Receipt of Deposit of Stocks referred to in paragraph 2 of article 9, of Law no. 9.491/97;

c) the mandate that grants the manager specific powers to perform all the acts inherent to and necessary for the privatisation;

d) public notice of the auction for hiring the consulting services referred to in article 31 of the Decree no. 2.594/98.

II – SECOND STAGE:

a) auction process for hiring the consulting services, including the respective contracts;

b) auction process for hiring the audit services referred to in article 21 of the Decree no. 2.594/98, including the respective contracts;

c) auction processes for hiring the specialised services.

III – THIRD STAGE:

a) reports of the economic and financial evaluation services and of the services of assembly and execution of the privatisation process;

b) report from the third evaluator referred to in article 31 of the Decree no. 2.594/98, when applicable.

IV – FOURTH STAGE:

a) report containing the date, value, conditions, and form of implementation of the securities and other means of payment used to solve the financial state of the company or institution;

b) report containing the date, value, conditions, and form of implementation of the securities and other means of payment used for investment of any kind that was made in the company by the organs or entities from the Federal Administration or those directly or indirectly controlled by it;

c) report containing the date, value, conditions and form of implementation of the waiver of rights to a private entity or individual, whenever the amount waived surpasses 1% (one percent) of the net equity, as of the company's legal authorisation for the privatisation;

d) proposal and document establishing the minimum selling price, accompanied by the respective justifications;

e) copy of the minutes from the stock holders assembly in which the minimum selling price was approved;

f) public notice of privatisation.

V – FIFTH STAGE:

a) report containing the final selling price; terms, condition, and privatisation currency used for paying for the operation; list of the buyers, with the indication of types, prices, and the quantity of stocks bought; date, value, and financing conditions granted by a public institution to privatise the company;

b) opinion of the independent auditors, accompanied by detailed report containing analysis and evaluation of the following aspects, among others: observance of the relevant legal provisions applicable to the case; equal treatment of the contenders and regularity of the proceedings in the contenders qualification phase.

Article 3. The organ responsible for the execution and monitoring of the privatisation shall send to the Brazilian Court of Audit the documents described in items I through V in the previous article, observing the following deadlines:

I – five days, at most, after the publication of the public notice for the auction intended to hire consulting services, regarding the documents listed in the first phase;

II – five days, at most, after signing the contracts of the audit consulting service and of specialised services, regarding the documents listed in the second phase;

III – at least sixty days before the public auction or any other kind of selling allowed by Law takes place, regarding the documents listed in the third phase;

IV – at least forty-five days before the public auction or any kind of selling allowed by Law takes place, regarding the documents listed in the fourth phase;

V – thirty days, at most, after the privatisation, regarding the documents listed in the fifth phase.

Paragraph 1. The documents listed in the second article, regarding the public notices and economic and financial evaluation report, must also be sent by electronic means.

Paragraph 2. Any modification in the public notice must be sent to the Brazilian Court of Audit, at least, five days before the publication established in article 28, Paragraph 5, Decree no. 2.594/98.

Article 4. The responsible Technical Unit of the Brazilian Court of Audit shall analyse the elements and send the process to the Rapporteur observing the following deadlines and phases:

I – first phase – the elements related to the four initial stages, at least fifteen days before the date established for the public auction or other type of selling allowed by Law;

II – second phase – the elements related to the fifth stage and the statement referred to in article 6 of this Internal Rule, within ninety days after conclusion of the privatisation.

Article 5. In case there are stocks that represent company control which were not sold, the organ responsible for executing or monitoring the process of privatisation shall send the studies that determine the opportunity for selling the remaining stocks and for establishing their price, at least forty days before the new sale takes place.

Sole Paragraph. Under the hypothesis foreseen in the heading of this article, the Technical Unit in charge shall examine the process within twenty-five days and submit it to the Rapporteur.

Article 6. After the privatisation has taken place, the following documents shall be sent to the Brazilian Court of Audit: statement indicating the amount of resources collected in currency or in privatisation monies; description of all the deductions made during the operation, including those referred to the administrative and promotional expenses; and the net value transferred to the seller or to the organ or the conceding federal entity, according to each case.

Sole Paragraph. The statement due in this article shall be sent within forty five days after the privatisation, by the organ in charge of the execution and monitoring of the process.

CHAPTER III
THE OVERSIGHT OF PUBLIC SERVICES CONCESSIONS, PERMISSIONS AND AUTHORISATIONS

FIRST SECTION
THE PROCESS OF GRANTING

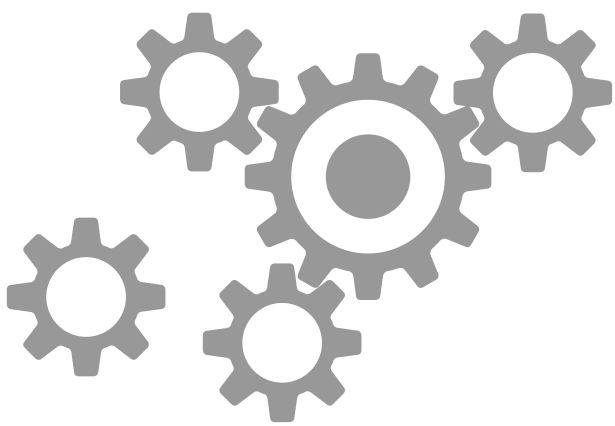
Article 7. The oversight of the processes that grant concessions or permissions to deliver public services will be carried out previously or concomitantly, and in the following stages, with analysis of the respective documents.

I – FIRST STAGE:

a) brief report on the studies on technical and economic viability of the business, including information about the object, area and term of the concession or permission, budget of the works done and of those to be done, date that the budget refers to, estimated costs for delivery of the services, as well as information on possible sources of alternative, complementary, and accessory revenue or revenue from associated projects;

b) report of the studies, investigations, surveys, projects, works and expenses or investments connected to the grant and useful to the auction, that have already been executed or authorised by the organ or by the ceding federal entity, whenever applicable;

c) brief report about the environmental impact studies, indicating the status of the environmental license.



II – SECOND STAGE:

a) pre-qualification public notice;

b) minutes of the opening and closing of pre-qualification phase;

c) report on the pre-qualification judgement;

d) appeals filed and decisions made concerning the pre-qualification phase;

e) auction public notice;

f) contract draft;

g) all the clarifications and additional information sent to the companies participating in the in auctions, as well as the refutations of the public notice, accompanied by the respective answers.

III – THIRD STAGE:

a) minutes of the opening and closing of the qualification phase;

b) report on the qualification judgement;

c) the auctioneers' questions regarding the qualification/eligibility phase and appeals presented accompanied by their respective answers and decisions;

d) minutes of the opening and closing of the proposal's judgement phase;

e) judgement reports and other reports written;

f) appeals filed, concerning the proposal's judgement phase and their decisions.

IV – FOURTH STAGE:

a) granting act;

b) concession or permission contract.

Paragraph 1. In cases where a large number of granting rights of the same service is simultaneously put up for auction, with uniform procedures and standardised public notices, the Rapporteur, based on the legal opinions, may authorise the use of sampling techniques and other simplified procedures with the purpose of selecting the grants that should be examined individually in the phases provided for in this article, waiving the examination of all others.

Paragraph 2. The procedures dealt with in the above paragraph will not waive the obligation of sending the documentation requested in this article, within the respective deadlines, unless such waiver is ordered by the Rapporteur.

Article 8. The manager responsible for the conceding organ or federal entity shall send to the Brazilian Court of Audit the copies of all the documents described in the previous article in the following terms:

I – first stage – at least thirty days before the public notice for the auction is published;

II – second stage – within five days of:

a) its publication, regarding the pre-qualification public notice;

b) the final result of the judgement, regarding the documents listed in letters "b" through "d" of this stage;

c) its publication, regarding the auction public notice, accompanied by the contract draft;

d) expiration of the term for filing appeals against the public notice, regarding the documents listed in letter "g" of this stage;

II – third stage – within five days:

a) expiration of the term for filing appeals against the results of the qualification phase, regarding the documents listed in letters "a" and "b" of this stage;

b) the decisions concerning the appeals, regarding the documents listed in letter "c" of this stage;

c) the ratification of the result of the proposal's judgement, regarding the other documents;

II – fourth stage – five days after signing the contractual document.

Article 9. The Technical Unit responsible for analysing the process referred to in article 7 shall file it and analyse its elements, with the required urgency, in no more than thirty work days, sending them to the Rapporteur after the third stage is over.

Sole Paragraph. In order to allow examination by the Brazilian Court of Audit, the conceding organ or federal entity shall wait at least forty five days between the ratification of the result of the proposal's judgement and the signing of the contract.

Article 10. If to the process of concession or permission of public services granting are eligible for waiver of auction dealt with in the specific law ruling the subject, or in the hypothesis of authorisation of public services granting, the conceding organ or the federal entity shall send, until five days after the end of each semester, a brief report, containing a list of the following documents signed during the previous semester, among other information:

I – concession or permission granting with waiver of auction, specifying its object, area and term and indicating the legal basis;

II – authorisation granting, specifying its object, area and term, indicating the legal basis;

III – signed contracts or any other kind of obligation terms.

Paragraph 1. The conceding organ or federal entity shall maintain an up-to-date file containing the documents concerning the acts described in the heading of this article, in order to respond to any request for information, inspection or audit from the Brazilian Court of Audit.

Paragraph 2. While examining the information and the documents, referred to in this article, the responsible Technical Unit shall observe the provision in article 17 of this Internal Rule.

SECOND SECTION
CONTRACT EXECUTION

Article 11. During the contractual execution phase, oversight shall monitor the faithful observance of the relevant laws and the clauses of the contract and those of the posterior changes made in the contract signed with the concessionaire or with the permissionaire, or the clauses of the term of obligation. Besides this, oversight shall include evaluation of the action exerted by the organ or the conceding federal entity, or by the respective regulatory agency, as well as the guidelines established by them.

Sole Paragraph. The oversight provided for in this article shall be performed according to paragraphs 1 and 3 of article 13 of this Internal Rule, and by examining the Consolidated Monitoring Report prepared by the organ or conceding federal entity, or by the respective regulatory agency. The report must be forwarded to the Brazilian Court of Audit every semester.

Article 12. The organ or conceding federal entity, or the respective regulatory agency, shall inform the Brazilian Court of Audit:

I – the causes, objectives, and limits of intervention in public service concessionaires or permissionaires and, at a later date, the decisions resulting from the administrative procedures referred to in the article 33 of law no. 8.987/95;

II – the causes for declaring expiration of the concession or permission or for applying contractual penalties;

III – the public interest motivation for taking back a service concession or permission, as well as the legal basis for the act;

IV – the vices or illegalities that motivated the annulment of the concession or permission contract;

V – the law suit filed by the concessionaire or permissionaire against the organ or conceding federal entity, with any purpose, including for the purpose of terminating the contract;

VI – changes made to the contract signed with the concessionaire;

VII – the transference of the concession, permission or of the legal control of the concessionaire or of the permissionaire;

VIII – the extension of the concession, permission or authorisation of public services;

IX – regrouping of the concessions of public services, established in article 22 of Law no. 9.074/95.

Paragraph 1. The term for the fulfilment of the provisions in this article is of five days, counted from the formal characterisation of each of the situations listed in numbers I through IX of this article.

Paragraph 2. While examining the information and respective documents, referred to in this article, the responsible Technical Unit shall observe the provisions listed in article 17 of this Internal Rule.

CHAPTER IV
FINAL PROVISIONS

Article 13. The oversight of the processes of privatisation, concession, permission and authorisation of public services shall be carried out by the responsible Technical Unit, under the guidance of the Rapporteur in whose list the company to be privatised is included, in the first case, and in the other cases by the ceding organ or federal entity or the respective regulatory agency.

Paragraph 1 – In order to fulfil its obligation, the Technical Unit can perform an audit, inspection or survey in the organs and entities responsible for execution and monitoring of the process of privatisation, concession or authorisation of public services, as well as in the company being sold itself.

Paragraph 2 – The responsible Technical Unit can demand the help of the regional unit of the Brazilian Court of Audit for the execution of the tasks foreseen in previous paragraph.

Paragraph 3 – The responsible Technical Unit can, under the guidance of the Rapporteur, demand from any organ or federal entity involved in the process, the elements considered indispensable to the execution of the activities of monitoring, oversight and evaluation, establishing a term to the their response.

Paragraph 4 – The responsible party that does not comply with the provisions of the previous paragraph, except when there is a reasonable justification, will be subject to the penalties provided for in article 58, number IV, of Law no. 8.443/92, according to the amounts established in the Internal Regulation of the Brazilian Court of Audit.

Article 14. The oversight of the process of liquidation of the company included in the National Denationalisation Program shall be executed by the responsible Technical Unit, within the process of annual account rendering.

Article 15. During the oversight of the process of granting concession or permission of public services, executed by public auction, the provisions of this Internal Rule will be followed, when applicable.

Article 16. The provisions of this Internal Rule should be applied, when appropriate, to the processes of granting of subconcession of public services, authorised by the conceding organ or federal entity.

Article 17. Should any indication or evidence be verified in any stage of the oversight of the denationalisation processes, the documents shall be immediately submitted to the Rapporteur's consideration, along with a proposal describing the measures to be adopted.

Article 18. The Technical Unit in charge can propose to the Rapporteur that specialised technical services be requested, according to article 101, of Law 8.443/92.

Paragraph 1 – In the hypothesis foreseen in the heading of this article, the Technical Unit shall supervise the activities, appointing one civil servant to participate in the execution of the work.

Paragraph 2 – The party responsible for an organ or entity of the Public Federal Administration that does not comply with the request specified in this article, unless there is a reasonable explanation, will be subject to the fine described in the heading of article 58, of Law no. 8.443/92. The amounts of the fine will be set according to what is established in the Internal Regulation of the Brazilian Court of Audit.

Article 19. The ordering of the technical-operational procedures to be observed in the oversight process described in this Internal Rule shall be set out in a manual, to be approved by a Decision from the President of the Brazilian Court of Audit.

Article 20. This Internal Rule goes into effect on the date of its publication.

Article 21. Internal Rules no. 07, of 29 November 1994, and no. 10, of 22 November 1995, are hereby revoked.

HOMERO SANTOS
President

Internal rule no. 43, July 3th, 2002

Establishes rules for the Brazilian Court of Audit to monitor the cases of periodic tariff review regarding contracts of concession of electricity distribution services.

THE BRAZILIAN COURT OF AUDIT, using its constitutional, legal and internal mandates;

Considering the power granted to it by article 3, of Law no. 8.443, of 16 July 1992;

Considering its mandate to carry out performance audits of institutions belonging to the direct and indirect public administration, according to article 71, item IV, of the Federal Constitution;

Considering the public power's mission to deliver public services, directly or under the regime of concession or permission, according to the provisions of article 175, of the Federal Constitution and relevant legal norms;

Considering the mandate of the Union to explore direct or indirectly electricity services and facilities, according to article 21, item XII, "b", of the Federal Constitution;

Considering the provisions of article 11 of Internal Rule no. 27, of 02 December 1998, regarding monitoring by the Brazilian Court of Audit of the fulfillment of the concession contracts, decides to:

CHAPTER 1
PRELIMINARY PROVISIONS

Article 1. It is the duty of the Brazilian Court of Audit to monitor, through all phases, the cases of periodic tariff review related to the contracts of concession of electricity distribution services, carried out by the regulating agency of the electrical sector.

Paragraph 1. For the purposes of the provisions of this Internal Rule, the following definitions will be followed:

I – periodic tariff review: review of contract which consists in:

a) repositioning the tariffs of electricity supply to a level that is compatible with the conservation of the economic-financial balance of the concession contract;

b) definition of the X factor, that will be applied to the subsequent tariff readjustments, with the objective of sharing productivity profits with the consumers.

II – tariff repositioning: redefinition of the level of electricity tariffs of the concessionaire, considering the relation between the required revenue and the revenue verified, besides other revenues that contribute to low tariffs, with the purpose of preserving the economic-financial balance of the contract;

III – X factor: percent coefficient to be applied to the variation index of the inflation that readjusts the installment of manageable costs of the parametric formula used for calculating the Tariff Readjustment Index – IRT, when annual tariff readjustments occur in between the periodic reviews; it represents sharing the estimated productivity profits among the concessionaires and the consumers;

IV – contractual date for tariff review: a date in the concession contract establishing when the tariff repositioning and the X factor will go into effect;

V – public hearing: a public event open to the participation of the interested parties, where the regulating agency presents the periodic tariff review proposal and the tariff restructuring proposal, which is designed to obtain additional subsidy and information for the improvement of these two processes.

CHAPTER 2
OVERSIGHT OF THE PERIODIC TARIFF REVIEW PROCESS

SECTION 1
PRELIMINARY EXAMINATION

Article 2. Oversight of the periodic tariff review processes will be supported by a preliminary examination carried out by the technical unit, by studies and procedures that can be applied uniformly to all the tariff review processes.

Paragraph 1. The regulating agency, aiming at enabling the preliminary examination referred to in the heading of this article, will send to the Brazilian Court of Audit information regarding:

I – standard procedures, with a consistent methodology and respective technical basis, to be used for:

a) choosing the test year;

b) calculating the bases for capital remuneration;

c) projection of market demand, in case this is used in the calculations;

d) definition of the operational expenses;

e) definition of the taxes on tariffs;

f) definition of the quotas for reintegration, depreciation, and amortization;

g) definition of the non-operational result;

h) definition of the investment plans to be considered;

i) definition of the revenues of provisions, supply and other revenues;

j) definition of the amount of extra-concession revenues that will be considered to contribute with the low tariffs;

k) definition of the X factor;

II – parameters to be used when defining the rate of remuneration of the capital, accompanied by the respective calculations and criteria of definition, consisting of:

a) projected rates for inflation and interest;

b) capital structure adopted and a sample of the companies used to define the ideal capital, in case any were used;

c) rate of remuneration of the own capital, informing the model to be used, and, also:

c.1) time perspective for application of the model;

c.2) parameter β:

c.2.1) sample of stocks for calculation of the representative β;

c.2.2) marketability indexes of the sample stocks;

c.2.3) leverage and deleverage of calculations;

c.3) risk-free return index;

c.4) market return index;

c.5) country risk index (if necessary);

d) remuneration rate of third party capital:

d.1) remuneration rate of third party capital for fund raising in the market;

d.1.1) sample of fund raising to be considered;

d.2) cost of third party capital raised from public institutions with subsidized rates.

Paragraph 2. A case can only be filed in the preliminary examination phase if indications or evidence of irregularities are found in the studies presented by the regulating agency. In this case, the technical unit will file a document with the Brazilian Court of Audit.

Paragraph 3. If there are any alterations in the information related to the standard procedures or to the rate of capital remuneration, listed in Paragraph 1, the regulator must notify the Brazilian Court of Audit of the alterations and present the appropriate justifications, indicating the applicable tariff review cases.

Paragraph 4. The examinations carried out by the appropriate technical unit regarding the information object of Paragraph 1 of this article and their alterations, according to Paragraph 3, will be presented to the Rapporteur, immediately after conclusion, even when a case is not filed.

SECTION II
SPECIFIC EXAMINATION OF THE TARIFF REVIEW PROCESSES

Article 3. Every year by August 15th, the regulating agency will inform the Brazilian Court of Audit which periodic tariff review processes of concession contracts for electricity distribution services will be initiated the following year, indicating for each concessionaire the gross operating revenue of the most recently published balance sheet as well as the number of consumer unites that received the service.

Paragraph 1. Out of the processes informed, four tariff review processes will be selected to be fully monitored, according to the following criteria:

I – three, related to the companies that delivered services to the largest number of consumer units;

II – one process chosen randomly by the technical unit, subject to approval by the Rapporteur.

Paragraph 2. In case the difference between the number of consumer units selected by the criterion listed in item I of Paragraph 1 is inferior to fifty thousand, the gross operating revenue will be used as a tie-break criterion and the company with the largest revenue will be chosen.

Paragraph 3. In case any of the companies chosen according to the criterion of item I of Paragraph 1 deliver services to less than forty thousand consumer units, another company should be selected randomly.

Paragraph 4. The Court will inform the regulating agency that a certain process will be monitored fully, within 260 days after its formal beginning.

Article 4. Oversight of the four processes referred to in Paragraph 1 of article 3 above, will be carried out in two phases, by analyzing the following documents:

I – FIRST PHASE:

a) proposal for tariff review is presented to the regulating agency to the electricity distribution concessionaire supported by the corresponding calculation spreadsheets, in a magnetic device;

b) response from the concessionaire to the tariff review proposal created by the regulating agency;

c) analysis by the regulating agency regarding the manifestation of the concessionaire dealt with in item "b" above;

d) technical notes and calculation spreadsheets, recorded in magnetic devices, that serve as basis for the proposal of tariff repositioning and an estimate of the X factor, disclosed before the public hearing;

e) report by the representatives of the Brazilian Court of Audit regarding the opinons expressed by participants in the public hearing mentioned in item V of Article 1, above;

II – SECOND PHASE:

a) second technical note and calculation spreadsheets, recorded in magnetic devices, that support the final decision of ANEEL, related to tariff review;

b) occasional important facts related to the ongoing tariff review process ;

c) tariff homologation act.

SECTION III
DEADLINES

Article 5. The regulating agency of the electricity sector will forward to the Brazilian Court of Audit the documentation listed in items I and II of Paragraph 1 of article 2 as well as that listed in items I and II of article 4, observing the deadlines below:

I – 165 days after the formal opening of the tariff review process, regarding the standard procedures (article 2, paragraph 1, item I);

II – 195 days after the formal opening of the tariff review process, regarding definition of the capital remuneration rate (article 2, paragraph 1, item II);

III – 275 days after the formal opening of the tariff review process, regarding the tariff repositioning process and the X factor, supported by calculation spreadsheets and regarding the opinion of the concessionaire (article 4, item I, letters "a" and "b");

IV – 295 days after the formal opening of the tariff review process, regarding the technical note disseminated on the internet, together with the calculation spreadsheets that serve as basis for it (article 4, item I, letter "c" and "d");

V – 365 days after the formal opening of the tariff review process, regarding documents that are a part of the second phase (article 4, item II).

Paragraph 1. The documents related to the preliminary examination listed in items I and II of Paragraph 1, of article 2, will be forwarded to the Brazilian Court of Audit only once, on the occasion of the first tariff review process in which they will be used.

Paragraph 2. In case there are alterations in the standard procedures and in the studies about capital remuneration rates, the regulating agency should forward to the Brazilian Court of Audit the new studies respecting the established deadlines, respectively, listed in items I and II of this article, counted taking into consideration the first tariff review process in which they will be used.

Article 6. The appropriate technical unit should analyze the documents sent according to the following deadlines:

I – thirty days for analysis of the tariff review proposal sent to the concessionaire by the regulating agency, and of the resulting opinion from the concessionaire (article. 5, item III);

II – thirty days for analyzing the tariff review proposal contained in the technical note disseminated on the internet and the corresponding calculation spreadsheet, besides analyzing the manifestation of the Public Hearing participants (article 3, item I, letter "e", and article 5, item IV);

III – twenty days for analysis of the technical note and the calculation spreadsheets that are the basis for the final decision of the regulating agency regarding periodic tariff review, besides analysis of occasional important facts that may interfere in the process (article 5, item V).

Sole paragraph. The dockets of the process will be sent to the Rapporteur after their merit has been analyzed in the last stage, except in the situations provided for in article 7 of this Internal Rule.

CHAPTER III
FINAL PROVISIONS

Article 7. Oversight of the periodic tariff review processes will be carried out by the appropriate technical unit, under the guidance of the Rapporteur in charge of the regulating agency of the electricity sector.

Sole paragraph. For the purposes of the provisions in this article, the technical unit, at the discretion of the Rapporteur, may perform an audit, inspection or survey of the regulating agency or of the concessionaire of the public service whose tariff review process is being examined.

Article 8. In any of the phases of monitoring of the periodic tariff review, if there are indications or evidences of irregularities, the technical unit will submit the dockets to be the Minister-Rapporteur for examination, proposing that the appropriate measures be taken.

Article 9. This Internal Rule goes into effect on the date of its publication.

VALMIR CAMPELO
Vice-President, Acting President

Internal rule no. 46, August 25th, 2004

On the oversight carried out by the Brazilian Court of Audit of the processes of concessions of federal roads, including roads or part of roads delegated by the Union to Federal States, Federal District, Municipalities or a consortium among them.

The BRAZILIAN COURT OF AUDIT, according to its constitutional, legal and regimental mandates;

Considering its regulation power established in article 3, Law no. 8.443, 16 July 1992;

Considering that accounts shall be rendered by any individual or public entity who uses, collects, keeps, or manages public monies, assets or values, or those for which the Union is responsible or who, on behalf of the Union, assumes obligations of a pecuniary nature, as established in the sole paragraph of article 70 of the Brazilian Federal Constitution;

Considering its mandate to evaluate the processes of the National Program for Denationalisation (PND), including those related to public services under concession, permission or authorisation, according to article 2, III and article 18, VIII, Law no. 9.491, of 9 September 1997;

Considering that the federal roads, preceded or not by the execution of public works, are subject to the concession regime, as foreseen in article 1, IV, Law no. 9.074, 7 July 1995; and

Considering that the Union may delegate, through the Ministry of the Transports, for up to twenty five years, extendable for twenty-five more years at the most, to a municipality, a federal state, the Federal District or a consortium among them, the management of roads and the exploitation of part of roads or works at federal roads, according to article 1, Law no. 9.277, 5 October 1996; decides to:

CHAPTER I
PRELIMINARY PROVISIONS

Article 1. The control of the Brazilian Court of Audit on the processes of concession of federal roads, including roads or part of roads delegated by the Union to states, Federal District, municipalities or a consortium among them, will be oriented by this Internal Rule.

Article 2. This Internal Rule uses the following technical terms:

I – concession of public service: the conceding power, by means of a bidding process, delegates delivery of a specific service to a company or to a consortium of companies for a fixed period of time. The company or consortium has to show it is capable of delivering the service, accepting the risks;

II – Concession of public services preceded by the execution of public works: construction, total or partial, maintenance, refurbishment, enlargement or improvement of any woks with public interest, delegated by the conceding power, after bidding process, to companies or to a consortium of companies capable of carrying out the works and service, at their own risk, in a way that the investment of the concessionaire be paid and amortised by the exploitation of the services or the works for a fixed period of time;

III –delegation agreement: agreement in which the Union, represented by the Ministry of the Transports, delegates the management of roads and the exploitation of parts of roads or federal roads works to municipalities, states of the federation, the Federal District or a consortium among them, for an established period of time.

CHAPTER II
OVERSIGHT OF THE CONCESSIONS FOR THE EXPLOITATION OF FEDERAL ROADS

SECTION I
CONCESSION GRANT

Article 3. The previous and concomitant oversight of the concession grant processes of exploitation of federal roads will be executed in five stages, through the evaluation of the following documents:

I – STAGE ONE:

a) justification of the convenience of the concession grant – this document must define the object, the area, and the period of the concession, as well as information on the exclusive nature of the concession, according to article 5 and article 16 of the Law 8987/1995;

b) confirmation that the object was included in the Plan of Grants, foreseen in article 24, III of the Law 10233/2001;

c) studies of technical and economic viability of the enterprise, with the following data, among others:

1. object, area and period of the concession;

2. number and place of tolls – duly justified;

3. estimate technical studies of the rate of escapes from tolls and impedance;

4. specific and substantiated study of traffic estimates to the road or part of the road that is subject to the bidding process;

5. budget, with reference date, of the works to be carried out as foreseen by the conceding power for the object of the bid;

6. estimated cost of the implementation of the services, including operational costs;

7. projection of the operating revenue of the concessionaire;

8. projection of productivity gains, due to technological advance, industrial improvement, innovative technical solutions and new products/solutions;

9. occasional sources of alternative, complementary or accessory revenues and of revenues resulting from associated projects;

10. projected cash flow of the enterprise, coherent with the viability studies.

d) reports of studies, researches, projects, works, expenditures or investments already made, related to the grant, useful to the bidding process, carried out or authorised by the conceding organ or federal institution, when available;

e) Road Exploitation Program (PER), prepared by the conceding power or by a contracted company, or another document that defines the works, investments and services to be executed by the concessionaire during the period of the contract, along with the physical-financial timetables;

f) summarised report of the available environmental impact studies, indicating that there is an environmental license for the execution of the foreseen works, as well as environmental liability on the part of the road subject to the bid and also indicating the agent in charge of implementing its recovery;

g) contractual and legal demands imposed by international organisms, when they participate in the financing of the enterprise;

II – STAGE TWO:

a) public notice of the bidding process prepared according to the general criteria and norms of the legislation that deals with bids and contracts, specifically those provided for in article 18 of Law 8987/1995 and article 26, paragraph 2 and article 34-A, paragraph 2 of Law 10233/2001;

b) attachments to the bidding process notice: draft of the contract of the concession, observing the essential conditions of the contracts as stated in article 23, Law 8987/1995 and articles 35 and 37, of the Law 10233/2001, among others;

c) justification to the choice of the parameter or the indicator to be used to measure the economic and financial balance of the concession contract, foreseen in Chapter IV, Law 8987/1995;

d) communications and explanations sent to the companies that are part of the bidding process, as well as changes in the bidding notice;

e) arguments against the bidding process notice and the respective analyses prepared by the bidding process commission;

III – STAGE THREE:

a) questions, communications and explanations about the qualification phase that might have been sent to the companies;

b) opening and closing minutes of the qualification phase;

c) judgement report of the qualification phase, with the following aspects:

1. legal qualification;

2. fiscal regularity;

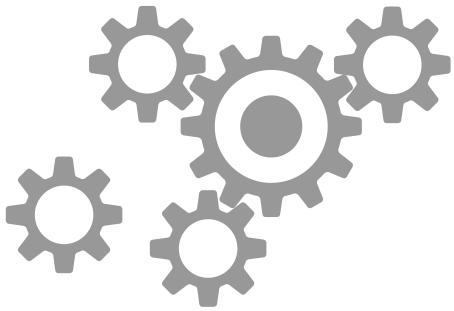
3. technical qualification;

4. economic and financial qualification;

5. declaration from the participants of the bidding process acknowledging the receipt of all the documents of the bidding process (notice, attachments, plants and others), as well as the acknowledgement of all information related to the local conditions of the road or part of the road under bidding process, after inspection;

6. commitment by the executor of the bidding process to inform the conceding organ of the any fact that might impede the qualification, according to paragraph 2º, article 32, Law no 8.666, 21 June 1993.

d) decisions related to appeals against the results of the qualification phase;



IV –STAGE FOUR:

a) phase of judgement of the technical proposals, when existent:

1. questions, communications and explanations sent to the executors of the bidding process, related to the phase of judgement of the technical proposals;

2. minutes of the opening and closing phases of judgement of the technical proposals;

3. judgement report of the technical proposals;

4. decisions related to appeals against the results of the phase of judgement of the technical proposals;

b) phase of judgement of the economic-financial proposals:

1. questions, communications and explanations sent to the executors of the bidding process, related to the phase of judgement of the economic-financial proposals;

2. minutes of the opening and closing phases of judgement of the economic-financial proposals;

3. judgement report of the economic-financial proposals, with the evaluation of the feasibility of the proposals presented, according to paragraph 3º, article 15, of Law no 8.987/1995, and of the need for advantages or subsidies not previously authorised in law and not available to all participants, according to article 17 of Law no 8.987/1995;

4. decisions related to appeals against the results of the phase of judgement of the economic-financial proposals;

V – STAGE FIVE:

a) document of grant;

b) signed concession contract;

c) Road Exploitation Program (PER) presented by the concessionaire or any another document that defines the works and services to be executed during the period of the contract;

d) copy of economic-financial proposal – and attachments – presented by the winner of the bidding process, also in electronic media, with the following information:

1. traffic matrix and premises used to prepare the economic-financial proposal;

2. specification of all expected revenues;

3. specification and economic financial timetable of investments and operational costs;

4. cash flow of the concession enterprise, including the Internal Return Tax (TIR) or another parameter that allows the measurement of the economic financial balance of the concession contract, as foreseen in the bidding process notice.

Article 4. The manager of the federal organ will send copies of the documents described in the previous article to the Brazilian Court of Audit, according to the following deadlines:

I – stage one – at least forty-five days before the publication of the bidding process notice;

II – stage two – ten days, at the most, after the:

a) publication of the bidding process notice and its attachments;

b) communications and explanations are sent to the participants of the process;

c) rectification of the bidding process notice;

d) conclusive analysis of arguments presented against the bidding process notice;

III – stage three – ten days, at the most, after the:

a) publishing of the final results of the qualification phase;

b) conclusive analysis of the appeals against the results of the qualification phase;

IV – stage four – ten days, at the most, after the:

a) publishing of the final results of the judgement phase of the technical proposals, whenever this occurs;

b) conclusive analysis of the appeals against the final results of the judgement phase of the technical proposals;

c) publishing of the final results of the judgement phase of the economic financial proposals;

d) conclusive analysis of the appeals against the final results of the judgement phase of the technical proposals;

V – stage five – ten days, at the most, after the concession contract is signed.

Sole Paragraph. In order to improve the oversight carried out by the Brazilian Court of Audit, the conceding federal organ must observe the minimum term of forty five days, between the confirmation of the results of the judgement of the proposals and the signature of the contract.

Article 5. The technical unit responsible for the analysis of the oversight process dealt with in article 3 must, after the process is filed, analyse the referred stages as the correspondent elements are received.

Paragraph 1. After the conclusion of stage four, the process must be sent to its respective Rapporteur within twenty work days.

Paragraph 2. Once the signed concession contract is received, as mentioned in stage five, the responsible technical unit must send to the Rapporteur, within fifteen work days, information related to the adequacy of the contract to the bidding process rules and with a proposal for closing the case, or any other necessary measure.

Paragraph 3. The competent technical unit must observe article 13 of this Internal Rule when analysing documents and information of the mentioned in this article.

Paragraph 4. The conceding federal organ will organise and maintain an updated file to support any further inspection or audit carried out by the Brazilian Court of Audit, under the scope of the oversight provided for in the heading of this article.

SECTION II
EXECUTION OF THE CONTRACT

Article 6. In the stage of execution of the contract, the control must observe whether the pertinent rules and the clauses of the contract and additive terms signed with the concessionaire are being obeyed. The evaluation of the actions of the conceding federal organ or the regulatory agency, as well as evaluation of the guidelines established by the conceding power or the federal organ or the regulatory agency responsible for monitoring and overseeing the execution of the contract.

Sole Paragraph. The role of the technical unit in the oversight of the execution of the contract will be performed though surveys, inspections or audits of the conceding organ, the regulatory agency or the concessionaire, on a case by case basis.

Article 7. The conceding federal organ or the regulatory agency must inform the Brazilian Court of Audit about the occurrence of any of the following situations:

I – approval of request for the review, adaptation or readjustment of the Basic Toll Tariff (BTT), made by the concessionaire, supported by spreadsheets – in electronic media – that show the changes in the cash flow and the parameter or indicator used to measure the economic financial balance of the concession contract, according to article 3, II, c of this instruction;

II – signing of additive term to the concession contract;

III – changes in the conditions of the contract;

IV – application of the legal and contractual penalties to the concessionaire;

V – intervention in a concessionaire of a federal road, according to articles 32 and 33 of Law no. 8.987/1995;

VI – extinction of the concession in the advent of the contract, as well as measures adopted in order to guarantee the continuity of the conceded service, according to article 36, Law no. 8.987/1995;

VII – the conceded service is taken back due to public interest, as well as measures adopted to guarantee the continuity of the service, according to article 37, Law no. 8.987/1995;

VIII – declaration of expiration of the concession, based on the conclusions of the administrative process filed to check the insolvency of the concessionaire, according to article 38, Law no. 8.987/1995;

IX – judicial action taken by the concessionaire against the conceding federal organ, with any objective, including contractual rescission, as foreseen in article 39, Law no. 8.987/1995;

X – cancellation of the concession contract, as foreseen in article 35, V, Law no. 8.987/1995;

XI – bankruptcy or extinction of the concessionaire company, as foreseen in article 35, VI, Law no. 8.987/1995;

XII - subconcession of the contractual object, according to article 26, Law no. 8.987/1995;

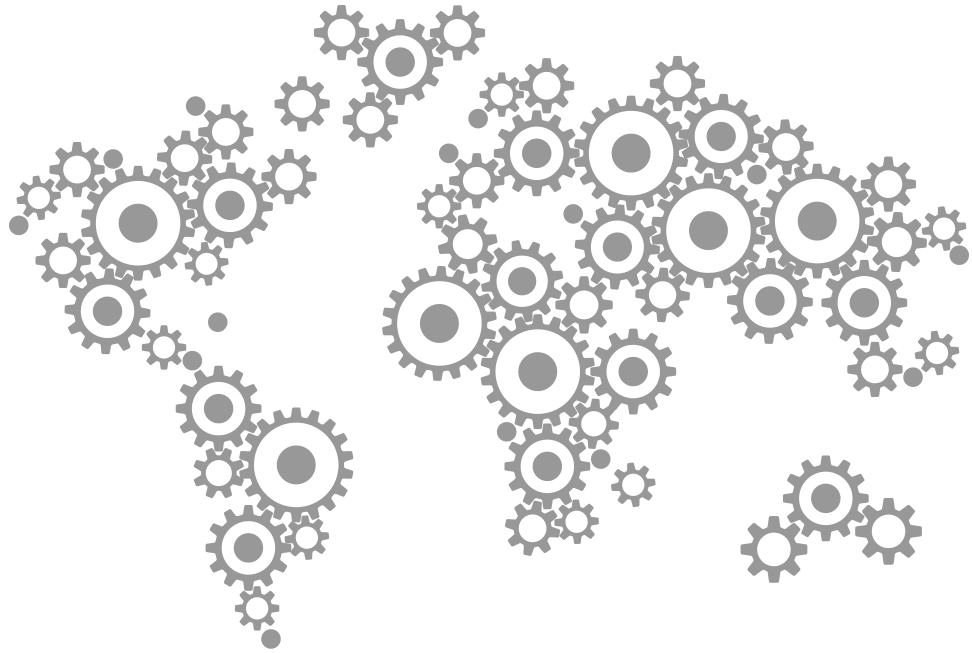
XIII – transference of the concession of the company control, as foreseen in article 27, Law no. 8.987/1995;

XIV – extension of the contractual term.

Paragraph 1. The deadline for complying with the provisions of this article is ten days, counting from the date each of the situations mentioned above are formalised.

Paragraph 2. If there is evidence of irregularities in the documents sent to the Brazilian Court of Audit, the technical unit will present a complaint to the Rapporteur, proposing the adoption of appropriate procedures.

Paragraph 3. Each technical unit must obtain, with the responsible organ or regulatory agency, the elements needed to support the process filed according to the previous paragraph.



CHAPTER III
FEDERAL ROADS DELEGATED TO STATES, THE FEDERAL DISTRICT, MUNICIPALITIES OR A CONSORTIUM AMONG THEM

Article 8. Oversight of the federal roads that have been delegated by the Union to states, the Federal District, municipalities or a consortium among them, and that are directly operated or operated through concession to the private sector, will be motivated by:

I – a request of the National Congress, its houses or committees, according to article 38, Law no. 8.443/1992, and articles 231 to 233 of the Internal Regulation of the Brazilian Court of Audit (RI/*TCU*);

II – an initiative of the Brazilian Court of Audit, according to article 1, II, Law no. 8.443/1992, and article 230 RI/*TCU*;

III – a denunciation sent by any citizen, political party, association or labour unions, according to arts. 53 a 55, Law no. 8.443/1992, and articles 234 to 236 RI/*TCU*;

IV – a complaint presented legitimately, according to article 237 RI/*TCU*.

Article 9. The conceding organ will send to the Brazilian Court of Audit copies of the following documents:

I – delegation agreement, signed with a municipality, a state, the Federal District or a consortium among them, dealing with the exploitation of part of federal road;

II – denunciation of accord of delegation, made with municipality, state, Federal District or a consortium among them, related to the exploitation of part of a federal road.

Paragraph 1. The above-mentioned documents must be sent within ten days of the occurrence of each event listed in this article.

Paragraph 2. The conceding organ must inform the Brazilian Court of Audit, in ten days, the beginning of bidding process for the concession of part of the delegated federal road.

Article 10. The performance of the technical unit in the oversight of the federal roads delegated by the Union to a state, the Federal District, a municipality or a consortium among them, will be carried out by means of inspections, surveys or audits in the conceding organ or the concessionaire, on a case by case basis.

CHAPTER IV
FINAL PROVISIONS

Article 11. Oversight of the grant processes and the execution of federal roads concession contracts, as well as oversight of the federal roads delegated to federal agencies, will be carried out by the competent technical unit, under the guidance of the Rapporteur in charge of overseeing the conceding organs or entities or the regulating agency of the sector.

Paragraph 1. The competent technical unit may count on the co-operation of the external control offices in the federal states to perform the oversight foreseen in this Internal Rule.

Paragraph 2. The technical unit may ask any federal organ or entity involved in the process to provide the elements considered indispensable to the execution of the monitoring and oversight activities, giving them a reasonable term to comply with the requests, according to article 245, III RI/*TCU*.

Paragraph 3. The competent technical unit may propose to the Rapporteur that he/she requests specialised technical services, according to article 101 Law no. 8.443/1992.

Paragraph 4. In the hypothesis of the previous paragraph, the technical unit must supervise the services, indicating, when necessary, public servants to work with the outsourced staff.

Article 12. The technical operational procedures to be observed in the oversight process dealt with in this Internal Rule will be published in a manual to be approved by the President of the Brazilian Court of Audit.

Article 13. At any stage of the oversight of the conceded or delegated federal roads, if evidences of irregularities are observed, the technical unit will immediately send the process to the Rapporteur's consideration, proposing adoption of the appropriate measures.

Article 14. The provisions of this Internal Rule will apply, whenever possible, to the processes of grant of subconcession of public services according to the terms of the concession contract and as long as explicitly authorised by the conceding federal organ, as foreseen in article 26 Law no. 8.987/1995.

Article 15. This Internal Rule will go into effect on the date of its publication.

VALMIR CAMPELO
President

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