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## Highway Tolls in Brazil and the Lawfulness Principle

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Graduate Program in Law

A thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws

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HIGHWAY TOLLS IN BRAZIL AND THE LAWFULNESS PRINCIPLE

(Thesis format: Monograph)

by

Fábio Chagas Theophilo

Graduate Program in Law

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Master of Laws

The School of Graduate and Postdoctoral Studies  
The University of Western Ontario  
London, Ontario, Canada

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## **Abstract and Keywords**

Brazil's toll-highway system is among the most extensive tolling systems on the planet. This extensive toll-highway system affects millions of Brazilians, particularly because it is increasingly difficult for Brazilians to move between work and home without passing through a number of toll gates. Moreover, most toll roads in Brazil have been conceded from the government to private actors, and regulations governing the actions of these private actors (and the rates they charge to highway users) are sparse. This thesis will examine the nature of the highway toll industry in Brazil, the laws conceding toll roads to private actors, and the general lack of regulation of privately operated toll roads in Brazil. It will conclude that the current regulatory regime amounts to a violation of the Lawfulness Principle of the Brazilian Constitution.

**Keywords:** Highway Tolls, Brazil, Lack of Regulation, Lawfulness Principle, Legality, General Law of Concessions.

<p>Os amores na mente, as flores no chão, a certeza na frente a história na mão, caminhando e cantando e seguindo a canção, aprendendo e ensinando uma nova lição...</p> <p>Vem, vamos embora que esperar não é saber, quem sabe faz a hora não espera acontecer...</p> <p>Música – Pra não dizer que não falei das flores</p>	<p>The loved ones in mind, the flowers on the floor, confidence ahead and the history in (our) hands. Walking and singing and following the song, learning and teaching a new lesson...</p> <p>Come on, let's go, expect is not wise, who is wise, makes it happen, doesn't expect it to happen</p> <p>...</p>
--	--

Song – (It is) Not to say  
that I have not mentioned  
the flowers

***Geraldo Vandré (1935 – )***  
***Brazilian singer***

Song placed in the second position in the Third  
International Song Festival in 1968 of Globo  
Television, thereafter, execution forbidden until for  
many years by the military dictatorship in Brazil  
(1964 – 1985).

*To my wife **Wal**,  
for the support and great patience.  
My “teacher-daughter” **Raphaela**,  
joy of my life, and  
to my younger daughters, **Alice and Angelina**  
loved, proudly Canadian daughters  
living proof and produce of this  
challenge and dream-come-true.*

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I would like to thank God and Our Lady of Aparecida. I would also like to thank my wife, Wal, whose patience and support were invaluable throughout this journey. I thank my daughters Raphaela, Alice, and Angelina. I thank my father, Frederico, who has always been my hero. I also extend thanks to my mother-in-law Dona Ruth, as well as my Uncle Haroldo, my Aunt Ângela Marçal, and Romilda – thank you for the prayers.

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I extend special thanks to Veronica D'Souza, one of the sweetest people I have met in this country – for tirelessly assisting me through this journey. Finally, I extend my warm appreciation to the administrative staff at the University of Western Ontario, especially Mary Morris and Natalie Samuel.

London, April of 2013

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## **List of Abbreviations**

407 ETR	Electronic Toll Road of Highway 407 in Canada
ABCR	Associação Brasileira de Concessionária de Rodovias – Brazilian Association of Highway Concessionaires
ANTT	Agência Nacional de Transportes Terrestres – National Agency of Ground Transportation
<i>ANATEL</i>	Agência Nacional de Telecomunicações – National Agency of Telecommunication
<i>ARTESP</i>	Regulatory Agency for Delegated Public Services of Transportation of the State of São Paulo – Agência Reguladora de Serviços Públicos Delegados de Transporte do Estado de São Paulo
CF	Constituição Federal – Federal Constitution
CIDE	Contribuição de Intervenção no Domínio Econômico – Contribution of Intervention in the Economic Order (Fuel Tax)
DBFO	Design, Build, Finance and Operate
DENATRAN	Departamento Nacional de Trânsito – National Department of Traffic
DNIT	Departamento Nacional de Infraestrutura de Transportes – National Department of Transportation Infrastructure
DOT	United States Department of Transportation
ETC	Electronic Toll Collection
EU	European Union
FHWA	The Federal Highway Administration

GDP	Gross Domestic Product
IBGE	Instituto Brasileiro de Geografia e Estatística - Brazilian Institute of Geography and Statistics
IBPT	Instituto Brasileiro de Planejamento Tributário – <i>Brazilian Institute of Tax Planning</i>
IPVA	Imposto sobre a Propriedade de Veículos automotores - Tax on Motor Vehicles
OECD	Organisation for Economic Co-operation and Development
OHL	Obrascon Huarte Lain S.A.
PAC	Programa de Aceleração do Crescimento - Growth Accelerated Program
PNV	Plano Nacional de Viação – Road Network National Plan
PPP	Public-Private Partnership
PP	Partido Progressista – Progressist Party
PMDB	Partido do Movimento Democrático Brasileiro – Brazilian Democratic Movement Party
PSDB	Partido da Social Democracia Brasileira – Brazilian Social Democracy Party
PT	Partido dos Trabalhadores – Worker’s Party
STF	Supremo Tribunal Federal – Federal Supreme Court
STJ	Superior Tribunal de Justiça – Superior Court of Justice
USDOT	United States Department of Transportation

## INTRODUCTION

Most of Brazil's toll-highway system is illegal. While Brazil's domestic and Constitutional laws permit the use of toll-highways for the raising of public revenue, Brazil's current toll-highway system violates several existing statutory and Constitutional norms. Generally speaking, these violations relate to Brazil's "Lawfulness Principle", that is, the principle that all state actions are *prima facie* illegal unless authorized by clear and specific laws.<sup>1</sup>

Brazil's current toll road regime violates the Lawfulness Principle in two specific, related ways, which I shall refer to as (a) failure to address operational concerns and (b) failure to authorize concessions. These two failures of Brazil's toll highway system – failures which will be explored throughout this thesis – can be summarized as follows:

1 – *Failure to Address Operational Concerns*: Brazil's current legal regime is unconstitutionally vague in that it fails to address core issues pertaining to the operation of toll road systems. For example, there are no regulations governing the types of highways subject to tolls, no provisions governing the collection of tolls, no laws establishing toll rates, no laws clarifying the ownership of collected tolls, and no laws<sup>2</sup> governing the proper use of funds raised through tolls. Where a law purports to concede a public resource to a private actor, Brazil's Constitution requires that the law must specify,

---

<sup>1</sup> The content and impact of the Lawfulness principle will be discussed in Chapter 3.

<sup>2</sup> The General Law of Concessions – Federal Law 8,987 of 1995 of 13 February 1995 – is the general legal authority governing highway concessions. This statute governs the concession of numerous types of resources and government undertakings. As I will demonstrate later in this thesis, the General Law of Concessions fails to provide the level of detail necessary for compliance with Brazil's Lawfulness principle.

among other things, the terms of the concession itself and procedures to be followed in the making of the concession and the future operation and maintenance of the conceded resource.

2 – *Failure to Authorize Concessions*. Brazilian laws purporting to authorize the concession of public highways to private actors are impermissibly vague. One corollary of Brazil’s Lawfulness Principle is the requirement of specificity: limitations on personal liberty must be spelled out by clear laws which specify the nature and extent of the relevant state action. Brazil’s Lawfulness Principle requires more than what the current concession regime provides (namely, a single, sweeping concession of toll highways).<sup>3</sup> On the contrary, the Lawfulness Principle requires a specific law governing each act of concession, with each such law addressing specific legal issues that relate to such concessions. That is, the Lawfulness Principle requires that, for every state action which affects the life of Brazilian citizens, the assets of the public administration, public contracts or agreements, public expenses, sales of public assets, etc. – there must be specific statutory authorization.

As we shall see in future chapters, the regime governing toll roads in Brazil fails to comply with the foregoing requirements of Brazil’s Lawfulness Principle. There is no statute expressly authorizing the concession of toll highways in Brazil, and such laws as do exist fail to address important operational issues. As a result, in most cases the executive lacks legal authority for the concessions it has granted.

---

<sup>3</sup> This concession Law, entitled “The General Law of Concessions” is fully described and assessed in Chapter 3.

Chapter 1 of this thesis addresses an important preliminary question: Why are there toll roads in Brazil? What specific policy goals and benefits are sought through the creation of a toll road system and the concession of that toll road system to private actors? Chapter 1 explores three answers to that question. They relate to (1) funding policy, (2) environmental policy, and (3) other miscellaneous benefits from tolls. Each such benefit is examined in chapter 1.

Chapter 2 of this thesis will provide a brief introduction to (a) the Brazilian Legal System, and (b) the current toll road system in Brazil. Chapter 3 contains the core legal argument of the thesis and will be devoted to a comparison of the tolling system in Brazil with the requirements of Brazil's Lawfulness Principle.

## Chapter I

### Why Toll Roads? An Examination of the Benefits of Toll Road Systems

#### 1.1 The Lack of Public Investment in Highways

Over the last decade, Brazil has suffered from a dramatic reduction of public investment in public transportation. In 2003, for example, public investment in Brazil's infrastructure was reduced from 2.4% to only 1% of the country's GDP.<sup>4</sup> This drop in public support for infrastructure included a massive drop in support for public highways.

While investment has dropped off, deterioration has accelerated, suggesting that investment in infrastructure ought to be rising, rather than falling, in order to slow or repair this deterioration. An engineering study of the Foundation for Technological

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<sup>4</sup> José Roberto Afonso and Geraldo Biasoto Jr. "Investimento Público no Brasil – Diagnosticos e proposições" [Public Investment in Brazil: Diagnosis and Propositions] (2007) BNDES Magazine, volume 14, number 27, June, pages 71-122. Both leading Brazilian economists demonstrate the drastic reduction of investment in infrastructure in Brazil.

"This path of public sector investment has an even more negative scenario when it is considered only the investment made in infrastructure (the combination of investments in transport, energy, communications and sanitation). Fixed investment in the sector (i.e., even including large State owned corporations) in infrastructure, which was already low in 1995 (only 2.4% of GDP) declined by almost 60% until 2003, when barely surpassed 1% of the GDP. Radically different was the trend observed by the public sector primary surplus, which rose from 0.3% to 3.9% of GDP between 1995 and 2003, as well as by interest expenses, which rose further, from 6.9% to 8.5% of the GDP over the same period (see Table 6). Clearly, the success of the Brazilian fiscal adjustment was recorded as a depression of fixed investments, especially those invested in infrastructure." (Translated from Portuguese by the author).

In Portuguese: "Essa trajetória do investimento do setor público apresenta um quadro ainda mais negativo quando consideradas apenas as aplicações realizadas em infra-estrutura (o conjunto formado por ações de transportes, energia, comunicações e saneamento). O investimento fixo do setor (ou seja, mesmo computadas grandes empresas estatais) em infra-estrutura, que já era baixo em 1995 (apenas 2,4% do PIB), diminuiu em quase 60% até 2003, quando mal superou a casa de 1% do PIB. Radicalmente outra foi a trajetória observada pelo superávit primário do setor público, que subiu de 0,3% para 3,9% do PIB entre 1995 e 2003, bem assim pelas despesas com juros, que subiram ainda mais, de 6,9% para 8,5% do PIB, no mesmo período (vide Tabela 6). Fica claro que o sucesso do ajuste fiscal brasileiro teve como contrapartida uma depressão dos investimentos fixos, ainda mais daqueles aplicados em infra-estrutura."



Engineering Development (FDTE) and Brazilian Development Bank<sup>5</sup> gave the following account of reasons for the lack of public investment:

The persistence over the last years of limited investment capacity of the various levels of government – through budget funds – forced the Union, States and Municipalities to drastically reduce the resources devoted to the maintenance and expansion of the highway system in Brazil. The result was a growing deterioration of the quality of the highways, accompanied, for some, by a limited capacity against the growing demand for its use. The constraints that States and the Union have to tackle this problem are due not only to the lack of budgetary resources, but also to administrative difficulties in resources management and technical operation of highways.

As a result, governments at all levels lack the funds to improve or even maintain Brazil's highway system, giving rise to quickening deterioration of Brazil's transportation network. If this deterioration is to be halted – and if Brazil's transportation network is to be improved to accommodate growing demand – the government must look for new means of funding the transportation network, and innovative methods of investing in infrastructure.

The improvement and maintenance of highway infrastructure is important for economic development. According to Duflo and Qian<sup>6</sup>, investment in (and maintenance of) highway infrastructure assists economic development by integration, mobility and by the increase of movement of goods and services:

There are a number of reasons why good transportation infrastructure is advantageous for economic development. First, it reduces trade costs and promotes market integration. This should reduce price volatility and reallocate resources in line with comparative advantage. It also increases market size which allows firms to capture gains from increasing returns and promotes more intense competition. Second, it promotes factor mobility. It is easier to migrate to the city if one can come back easily whenever needed. It is easier to lend to someone whose project you

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<sup>5</sup> See document online. Only in portuguese: <[http://3etapaconcessoes.antt.gov.br/upd\\_blob/0001/1204.pdf](http://3etapaconcessoes.antt.gov.br/upd_blob/0001/1204.pdf)> (Accessed on 24 April 2013).

<sup>6</sup> Abhijit Banerjee Esther Duflo and Nancy Qian. *On the Road: Access to Transportation Infrastructure and Economic Growth in China* (2009) Working Paper. MIT. The authors assert that healthy infrastructure is advantageous for economic development. See also Rebecca Shah and Richard Batley. *Private-Sector Investment in Infrastructure: Rationale and Causality for Pro-poor Impacts* (2009) Development Policy Review, Vol 27. No. 4, pp. 397-417.

can visit. It is easier to put your savings in a bank if the bank is more accessible. Third, it is easier to take advantage of opportunities for investment in the human capital: you can send your child to a better school or take him to a better doctor. Fourth, and more intangibly, the free movement of people and goods may bring with it new aspirations, new ideas, and information about new technologies.

All of these reasons can generate increases in output, which, in the short run, also leads to faster growth. In China, the corridors themselves are typically more than a hundred years old. If China were an economy nearing steady state, one might have imagined that the growth impact would be small. But the years we study (1986-2003) are years of explosive growth in China. Therefore, all of China is probably best thought of as being in transition. Given this, it is not hard to imagine that there would be both level and growth effects.

The need for investment in (and maintenance) of Brazil's highway-transport network, coupled with the public administration's failure to prioritize such investments<sup>7</sup>, have recently led to a spree of concessions of highways as one of the government's chief policy priorities. In large part, the private investment has taken place through the vehicle of concessions<sup>8</sup> to private actors. Through these concessions, the government concedes public highways to private actors, allowing these private actors ("concessionaires") to collect (and keep) tolls for use of the highway while typically giving those private actors

---

<sup>7</sup> The lack of resources is a common sense and it is an argument of both parties – the governments and the private entrepreneurs that manage the highways. Available in Portuguese at: <[http://www.antt.gov.br/acpublicas/apublica2008\\_94/EstudosTecnicos/BR381/EstudosdeEngenhariaII\\_Parte1.pdf](http://www.antt.gov.br/acpublicas/apublica2008_94/EstudosTecnicos/BR381/EstudosdeEngenhariaII_Parte1.pdf)> (accessed on 17 May 2010)

It can be found at the Annual Report of 2007 of the Brazilian Association of Highway Concessionaires (ABCR) with the following reasons:

“At the beginning of the highways concessions program, ABCR's challenge was to show the society that the decision to transfer the administration of important sections of Brazilian highways to private enterprise was right. After all, the management, maintenance and expansion of these highways had been jeopardized due to a lack of public resources and increasingly more complex operational demands. Eleven years later, except for isolated positions, the country recognizes the capacity of the concessionaires to make large investments in the operation, maintenance, improvement and expansion of highways, for which they took charge. By joining their experiences, companies and public agents, they were able to aggregate new technologies to conceded highways, especially those applied to pavement, safety and signalling.” Annual Report of 2007 of the Brazilian Association of Highway Concessionaires. Online in English: <<http://www.abcr.org.br/download/RelatorioAnual2007.pdf>> (accessed on 14 July 2009)

<sup>8</sup> For example, the concession of the BR-116 (BR-116 is a highway number) in 1996 – named highway President Dutra, the most important highway of the country, which connects the two largest cities of Brazil – São Paulo and Rio de Janeiro. Chapter 2 will enumerate the conceded highways in the country.

the responsibility for, most of the time, maintaining and, in some cases, improving the capacity of the highway.

## **1.2 The Economic Benefits of Tolls**

The lack of sufficient investment by the public sector to finance transport infrastructure, together with the growing expenditures associated with that infrastructure, have constrained the public authorities to allow private enterprises to participate more actively in this sector through concessions.

The fact that the revenue obtained through taxes has not been allocated<sup>9</sup> toward investments in infrastructure and transportation, i.e., to finance road construction and maintenance has compelled transport authorities to look for alternative solutions for infrastructure funding and development, not only for highways but also on ports, airports and railroads. The most important projects for the purpose of encouraging investment in Brazil's infrastructure are those related to public highways. These projects have taken the form of highway concessions from the federal government to private actors. Phase 1 of this program of concessions and implemented by President Cardoso<sup>10</sup> between 1994 and 1998, was launched by the Brazilian government through the National Department of Highways<sup>11</sup> (DNER). Through these concessions, the government generates significant revenues for public purposes, while the private concessionaires generate massive profits through the collection of tolls and the operation of concessions (the details of this arrangement are spelled out in chapter 2).

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<sup>9</sup> See supra note 4.

<sup>10</sup> 34<sup>th</sup> President of the Federal Republic of Brazil between 1st January 1995 and 31st December of 2002.

<sup>11</sup> Official name in Portuguese: (former) Departamento Nacional de Estradas de Rodagem (DNER), currently Departamento Nacional de Infraestrutura de Transportes (DNIT) [National Department of Transport Infrastructure] [translated by author]

To summarize, the purpose of Brazil's program of highway concessions was to allow the government to achieve a sustainable level of investment in public works while (a) minimizing the level of public money needed to achieve such investments<sup>12</sup>, and (b) creating opportunities for the government's private sector partners.

### **1.3 The Environmental Claim**

At the beginning of the 1980s Brazil started to develop its legal framework pertaining to environmental matters. The National Environmental Policy Act<sup>13</sup> included provisions concerning environmental policy consistent with the principles and rules established by the Declaration of the United Nations Conference on the Human Environment of Stockholm,<sup>14</sup> Sweden in 1972. This event was held to coordinate international policy and the final Declaration contains 26 principles concerning the environment and development.

---

<sup>12</sup> The primary expenditures of the Brazilian federal government, i.e., the public payroll and the public expenditures required to maintain the public facilities and to provide social security and pension benefits, corresponded 14.01% of the GDP in 1997. In 2009 the primary expenditures increased to 17.96% of the GDP, a growth of 28.19% in 13 years. The nominal expenditures, that is, the amount of public resources of the federal government went from \$131,5 billion Reais in 1997 to \$572,1 billion Reais in 2009 – a growth of 435.05% in the same period. Available online at the National Treasury website: <[www.tesouro.fazenda.gov.br/hp/downloads/resultado/Tabela3.xls](http://www.tesouro.fazenda.gov.br/hp/downloads/resultado/Tabela3.xls)>

On the other hand (as seen at the supra note 2) and regardless of the extraordinary increase on primary expenditures of the federal government, the investment in highways has decreased over the years.

<sup>13</sup> BRAZIL, National Environmental Policy Act, Federal Law 6,938 of 31 August 1981.

National Environmental Policy Act deals with the National Environment Policy.

As the article 2nd states, the act establishes the National Environmental Policy which “is aimed at the preservation, improvement and restoration of environmental quality conducive to life, to ensure in the country, the conditions for socio-economic development, the interests of national security and the protection of the dignity of human life, attended the following principles:”

<sup>14</sup> U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972) (Stockholm – Sweden : UN, from 5 to 16 June 1972). Online: <<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>> (accessed on 15 June 2009)

The foundations of Brazil's legal framework for environmental law are found in Article 170, subsection VI<sup>15</sup> of the Federal Constitution:

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

(...)

VI – environment protection, including by means of different treatments in accordance with the environmental impact of products and services and their respective production and rendering; (subsection amended by Constitutional Amendment 42 of 19 December 2003).

According to this Article, there is a constitutional requirement to pursue economic development with “due regard” for environmental protection. Added to this requirement is Article 225<sup>16</sup> of the Constitution, which is an exhaustive provision on environmental matters. This Article deals with the preservation of the environment as a whole and the promotion of environmental education and public awareness of the need to preserve the environment.

Brazil's Constitution requires the government to develop and give support to public policies concerning the preservation of the environment. One of the main concerns of our contemporary world is environmental degradation, i.e., the deterioration of the environment through the destruction of ecosystems, depletion of air, water and soil resources and the extinction of wildlife.

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<sup>15</sup> BRAZIL. Federal Constitution. Article 170, VI. [translated by author]: “Artigo 170 – A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios:

...

VI - defesa do meio ambiente, inclusive mediante tratamento diferenciado conforme o impacto ambiental dos produtos e serviços e de seus processos de elaboração e prestação; (Redação dada pela Emenda Constitucional nº 42, de 19.12.2003)”

<sup>16</sup> Article 225 of the Federal Constitution of Brazil can be found online (in English): <<http://web.mit.edu/12.000/www/m2006/teams/willr3/const.htm>> (accessed on 5 February 2013)

Because environmental protection is enshrined in Brazil's Constitution, it has become a fundamental element of Brazilian Law. As a result, it is a principle against which other constitutional rights must be balanced. Fiorillo e Rodrigues (1999)<sup>17</sup> quoting Canotilho and Moreira, reaffirm that some restrictions, including tolls and related charges for the use of public resources, may be applied to the exercise of Brazilians' constitutional rights as a result of environmental concerns:

The protection of the environment may justify some restrictions to other protected constitutional rights. Thus, for example, the freedom of construction always connected with the right of property is configured nowadays as the potential freedom of construction which includes the rules of environmental protection.

As will be seen in Section 1.3.1, below, the concession of highways to private actors might be seen as one way of promoting environmental policies by inhibiting environmental degradation.

### **1.3.1 Environmental Policies**

In addition to providing much-needed funding for transport infrastructure, toll roads may serve the purpose of decelerating environmental degradation. The ability of toll charges to form a component of environmental policy can be demonstrated through the example of "congestion charges"<sup>18</sup> now used in England and Sweden.

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<sup>17</sup> Celso Antonio Paduco Fiorillo and Marcelo Abelha Rodrigues. *Manual de Direito Ambiental e legislação aplicável*. [Environmental Law Manual and applicable legislation] (1999) . São Paulo: Max limonad. [Translated by author]:

"A defesa do meio ambiente pode justificar restrições a outros direitos constitucionalmente protegidos. Assim, por exemplo, a liberdade de construção, que muitas vezes se considera inerente ao direito de propriedade, é hoje configurada como liberdade de construção potencial, nas quais se incluem as normas de proteção ao meio ambiente."

<sup>18</sup> Congestion charge is a fee for motorists travelling within some zone of city centers to relieve the traffic and improve the air quality.

Congestion charges are fees charged to motorists driving within congested city centers. These charges were created for the purpose of relieving traffic jams and air pollution and to encourage people to use public transit, car pool or ride bicycles to work.

Todd Litman<sup>19</sup> ably summarizes the impact of congestion charges:

Just over a million people enter central London during a typical weekday morning peak (7-10am). Over 85% of these trips are by public transport. Prior to the congestion pricing program about 12% of peak-period trips were by private automobile. During the programs first few months automobile traffic declined about 20% (a reduction of about 20,000 vehicles per day), resulting in a 10% automobile mode share.

The majority of drivers changing their travel patterns due to the charge have transferred to public transport with many choosing to travel by bus. Some, who had previously used central London as a cut through, have diverted from the zone. The remainder have switched to using their cars at different times, to different destinations, to taxis, motorcycles, pedal cycles, or to walking.

These changes are also a way to raise funds to finance public transportation infrastructure. As an example, the city of London, England<sup>20</sup> has adopted the congestion charge as a way to fund the maintenance of highways while at the same time reducing traffic congestion. Data collected by the city of London<sup>21</sup> demonstrates that this policy has had the effect of reducing traffic<sup>22</sup> in London's city center while also raising funds for investment in London's transport system. Another report<sup>23</sup> has pointed out that the city's

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<sup>19</sup> Todd Litman. "London Congestion Pricing. Implications for Other Cities." (2004) (Victoria, BC : Victoria Transport Policy Institute, 2004)

<sup>20</sup> See official website of Transport of London online: <<http://www.tfl.gov.uk/roadusers/congestioncharging/default.aspx>> (accessed on 3 April 2009).

<sup>21</sup> See footnote 19 above.

<sup>22</sup> Data of the official Transportation website of the city of London shows that £137 million (about 203 million of US Dollars) has been raised, in the financial year 2007/08, to invest back and improve transportation in London;

<sup>23</sup> Sixth Annual Impacts Monitoring Report. Available online: <<http://www.tfl.gov.uk/assets/downloads/sixth-annual-impacts-monitoring-report-2008-07.pdf>> (accessed on 18 May 2010)

congestion in London is caused by the decreasing levels of road space<sup>24</sup> and the congestion charge/fee would lead to reduced traffic.<sup>25</sup>

Motorized transportation is a major source of greenhouse gas emissions causing environmental problems. According to Oliveira:<sup>26</sup>

Land transportation (48.6%) and methane from landfills (23.5%) are the main sources of greenhouse gas emissions from the city of Sao Paulo, encompassing almost three fourth of the total emissions.

Tolling and road pricing policies may be a method – among several other policies<sup>27</sup> – of reducing the impact of vehicles’ gas emission on the environment. The congestion charge (which is simply a form of toll) is an efficient tool to motivate people

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<sup>24</sup> The official Transportation website of the city of London, England has shown the benefits of such obligation:

- Traffic entering the original charging zone remains 21 per cent lower than pre-charge levels (70,000 fewer cars a day);
- Traffic entering the Western Extension has fallen by 14 per cent (30,000 fewer cars a day);
- There has been a six per cent increase in bus passengers during charging hours;
- There has been a 12 per cent increase in cycle journeys into the Western Extension;

<sup>25</sup> In Canada, Toronto’s environmental commissioner is considering to adopt the United Kingdom’s “congestion charge” model, due to the huge congestion problems faced by Canada’s largest metropolis. Michael Vaughan. *Look out for a Toronto congestion charge*. Globe and Mail. (16 June 2010). Online: <<http://www.theglobeandmail.com/globe-drive/look-out-for-a-toronto-congestion-charge/article1606576/>> (accessed on 19 November 2010):

“Ontario environmental commissioner recommends tolls to cut emissions

It seems all but inevitable now that tax-happy Ontario and tax-loving Toronto will start charging drivers for using the roads. Ontario’s (non-elected) environmental commissioner Gord Miller has recommended tolls and congestion charges similar to those in place in London, England, to reduce greenhouse gas emissions.

It’s interesting to look at London’s experience with congestion charges to get a sense of what’s coming here. The original congestion charge was introduced in February, 2003, at £5 (\$7.50) a day and currently stands at £8 a day. Boris Johnson, the Mayor of London, plans to raise it to £10 a day while giving a free pass to drivers of low-emission vehicles.”

Toronto is the 5<sup>th</sup> largest metropolis in North America. See *Toronto overview* at the City of Toronto official website, online at <[http://www.toronto.ca/invest-in-toronto/tor\\_overview.htm](http://www.toronto.ca/invest-in-toronto/tor_overview.htm)> (accessed on 22 February 2011)

<sup>26</sup> Jose Antonio Puppim de Oliveira. “The implementation of climate change related policies at the sub national level: An analysis of three countries.” *Habitat International* 33 (2009) 253–259.

<sup>27</sup> Others environmental policies to reduce pollution include HOV (high occupancy vehicle) lanes, the encouragement of public transport use over private cars and the promotion of clean energy vehicles. See Shama, M. A.. *Energy and Environment in Engineering Education*, AEJ, Vol.36. (1997) Faculty of Engineering, Alexandria University, Egypt.



to use mass transit, and it has the capacity to reduce the emission of pollutants.<sup>28</sup> In Milan, Italy, with the implementation of congestion pricing, there was a reduction of carbon dioxide by 15% (among other gas emissions) and an increase of 9.2% in the use of public transportation.

The policy and enforcement of tolls and congestion charges applied on roads may, generally<sup>29</sup>, decrease the amount of congestion and consequently reduce emission of pollutants in the air. The reason, of course, is that tolls and congestion pricing make it more expensive to drive.<sup>30</sup> As the cost of driving increases, we are likely to see a decrease in the demand for driving. That is, fewer people will drive if it costs more to drive. If fewer people drive, the rate of emissions and the congestion may lower.<sup>31</sup>

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<sup>28</sup> See Lucia Rotaris, Romeo Danielis, Edoardo Marcucci, Jérôme Massiani. *The urban road pricing scheme to curb pollution in Milan: a preliminary assessment*. (Trieste :Università di Trieste - Dipartimento di Economia e Scienze Statistiche, 2009), about congestion charge of Milan – Italy:

“...  
“

#### Pollution abatement

It is claimed that the MES (*Author's Note – MES means Milan Ecopass Scheme*) reduced air emissions of PM10 by 19% (*Author's Note – PM means particulate matter or fine particles - also called soot. They are tiny subdivisions of solid matter suspended in a gas or liquid. 10 refers to particles of 10 micrometers – i.e. one-millionth of a metre - 1/1,000 of a millimeter or less*), of NOx by 14% (*Author's Note – NOx is the chemical formula of nitrogen oxides NO and NO<sub>2</sub> - nitric oxide and nitrogen dioxide. They are produced from the reaction of nitrogen and oxygen gases in the air during combustion at high temperatures*), and of CO<sub>2</sub> by 15% (*Author's Note - CO<sub>2</sub> is the chemical formula of carbon dioxide*) (AMMA, 2008). Interestingly, similar results were obtained in London (-16%, -13,4% and -16%, respectively) and in Stockholm (-13%, -8,5% and -13%).

...  
“

#### Modal transfer

Public transport use, measured as the number of passengers exiting subway stations inside the tolled area, increased by 9.2%. No data are yet reported for buses.”

<sup>29</sup> Certainly, there is a correlation between increased congestion and increased pollutants, because the same number of cars cause more pollutants when in congestion than they do when motoring-along freely.

But a reduction of congestion does not necessarily mean a reduction of the amount of pollutants. For example, if we doubled the number of cars on the road, but quadrupled the number of highways, we would reduce congestion by increasing the places where you could drive and thereby reducing traffic, but we would also increase pollutants because we would have doubled the number of cars on the road.

<sup>30</sup> Tolls and congestion charges are additional expenditures – beside the ones that every vehicle owner must endure (as fuel, fuel taxes, vehicle insurance, licenses, permits and parking expenses, among others).

<sup>31</sup> In economics, it is called price elasticity of demand or PED, which is the elasticity of the quantity demanded of a determined good or service to a change in its price. The PED can be measured regarding tolls versus travel demand. How sensitive is the road user to the cost of tolls? Samantha Ann Mohamed, a

Toll roads may become a policy tool by which governments can slow the rate of environmental damage. Of course, the congestion and pollution may not decrease if the numbers of cars and drivers people increase at a rate that exceeds the effect of toll charges. For example, if Brazilians start driving 20% less due to the toll and congestion charges, but you suddenly double the number of drivers, overall emissions will rise despite congestion charges or highway tolls. That is what is happening now in Brazil with a high rate of growth of the national fleet (that is, the number of vehicles on Braizlian roads), according to the following clipping of the National Department of Traffic of Brazil:

“Vehicle fleet grows 119% in ten years in Brazil, points National Department of Traffic (Denatran). The balance of the National Department of Traffic points out that Brazil ended 2010 with exactly 64,817,974 licensed vehicles. In ten years, the cumulative increase is 119%, or 35 million more vehicles arrived to the streets in the period.”

Despite this rise in the number of drivers, price theory suggests that the addition of toll charges, nevertheless, reduces the level of vehicle use below the level we would observe in the absence of those charges. All in all, tolls and traffic or congestion charges

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south African scholar of the Cape Peninsula University of Technology conducted a research that shows the price elasticity of demand in the case of implementation of a congestion charge in Cape Town – South Africa, more precisely at the Cape Town business district (CBD), i.e., how road pricing would impact on road users’ behavior: “The introduction of an AM Peak cordon based charge of R50 could potentially reduce traffic volumes into the CBD on average by 12.56%. The reduction is based on travel demand elasticities of between -0.1 and -0.5. The potential reduction is within the reported range for road pricing of 10% to 20% for affected travel as identified by Litman (2008). The results showed that even though there would resultantly be a decrease in traffic volumes, drivers would be less likely to change modes due only to an increase in travel costs. This finding is reinforced by the results of increasing the charge to R90, as it could potentially only reduce trips by at least 6.6%. An introduction of such high charge would give rise to socio-economic challenges, which the City would need to first address, along with a currently poorly perceived public transport system.”

Samantha Ann Mohamed. “The feasibility of a congestion charge for Cape Town central business district from a traffic engineering perspective” (2008). CPUT Theses & Dissertations. Paper 68.

may be an answer and a restraint to air pollution<sup>32</sup> caused by human activity and a matter of necessity.

#### **1.4 Tolling Policy Pros – The User-pay and the Polluter-pay Principles**

Another benefit of the imposition of tolls on public highways relates to the “user-pay”<sup>33</sup> (or “polluter pay”) principle. In accordance with this principle, people who do not own a vehicle or do not use the highway should not be responsible for paying the cost of highway upkeep or environmental clean-up.

The “user-pay model” can be observed in action whenever people use a public facility or public resource, e.g., a public swimming pool, launching ramps on lakes, an ice rink, or a public zoo, etc. The payment of fees or charges is required for the use of some public facilities<sup>34</sup> and the revenue raised by the charge or fee is used to fund the facility’s expenses.

Related to the “user-pay” principle is the environmental polluter-pay principle<sup>35</sup> where the polluter must pay the costs of pollution. As stated by Eric Larson:

The Polluter Pays Principle is a normative doctrine of environmental law. Although the principle’s precise legal definition remains difficult to ascertain, the core of the principle derives from the fundamental, fair, and logical proposition that the parties who generate pollution, not the government, should bear the cost of abatement.

Of course, it is not merely drivers who are ultimately responsible for the use of roads. For example, non-driving consumers cause businesses to transport goods by

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<sup>32</sup> The case of the congestion charge (as a similar fee as tolls on the highways), adopted by the city of London – UK, is a good example of how people decrease the use of vehicles and help the environment.

<sup>33</sup> It is also called pay-per-use principle.

<sup>34</sup> And that is why only those who benefit from the facility may pay.

<sup>35</sup> See Eric Thomas Larson. “Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle” *Vanderbilt Journal of Transnational Law* 38 *Vand. J. Transnat’l L.* (2005) page 545.

ordering goods that are not manufactured locally. In a case like this<sup>36</sup> (where multiple parties are, in effect, responsible for the pollution), the effect of toll charges is to increase the cost of delivery, and the delivery company will pass this cost along to the ultimate consumer in the form of an increased price of either (a) the goods themselves, or (b) delivery. This principle is reflected in the concept of Pigouvian taxes. The Pigouvian Tax is well defined by Alain-Désiré Nimubona and Bernard Sinclair-Desgagné:<sup>37</sup>

In his classical analysis of market failure, Arthur Pigou (1920) showed that the negative externalities caused by pollution would be internalized by the market if polluters paid a tax equal to the marginal social cost of polluting emissions. This proposition, derived under the assumption of perfect competition, was later amended by Buchanan (1969) and Barnett (1980): when the polluting industry is imperfectly competitive, an emission tax should be set lower than the marginal social cost of pollution, because it trades off the desire to provide incentives for abatement and the necessity to prevent a greater contraction of output. Several authors (see, for example, Katsoulacos and Xepapadeas, 1995; Long and Soubeyran, 1999; Morgenstern, 1995; and Smith, 1992) have now explored, qualified and refined the latter conclusion under more specific industry structures.

In modern economics, the English economist Arthur Cecil Pigou is the developer of the concept of economic externalities<sup>38</sup> and the Pigouvian tax is named after him. The tax is intended to correct the market outcome when the market activity generates negative externalities. Randal Graham<sup>39</sup> points out the same remedy in the realms of torts and contracts:

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<sup>36</sup> If I order a pizza, and the pizza delivery man drives to my house, which of us “caused” the pollution? The driver or me? If I order furniture from City X, and have it delivered to City Y, who “caused” the emissions of the truck that delivers the furniture? Me or the driver, or the company making the furniture? The “polluter pay” principle is a difficult “fit” with transportation.

<sup>37</sup> Alain-Désiré Nimubona and Bernard Sinclair-Desgagné. “The Pigouvian Tax Rule in the Presence of an Eco-Industry” *École Polytechnique – Centre National de la Recherche Scientifique – Version 1* (2005)

<sup>38</sup> Found at Arthur Cecil Pigou. “*The Economics of Welfare – with a new Introduction* by Nahid Aslanbeigui.” (2002). New Brunswick, Jersey. Transaction Publishers.

<sup>39</sup> See Randal N. M. Graham. *Legal Ethics: Theories, Cases and Professional Regulation*. (2004) Toronto: Emond Montgomery. Page 185.

In contract and in tort, as well as in the market for legal services, the presence of negative externalities can give rise to market failures. In the realms of tort and contract remedial systems are designed to correct these market failures (and restore efficient resource allocation) by causing decision makers to pay for each of the costs that they impose. In other words, the remedial systems governing tort and contract force decision makers to internalize externalities they create.

In the case of externalities caused by highway usage, the polluter may pay the toll for the negative externalities (pollution and degradation) caused, thereby internalizing the costs of the polluter's economic activity.

The conclusion is the same in many countries and highly populated areas around the globe: the trend is the adoption of an environmental policy to discourage people from using their vehicles. The following excerpt from a report of Maclean's magazine<sup>40</sup> of 11 January 2011, draws a picture of the situation and suggests tolls as a fast and reliable solution for externalities:

The nub of the argument, whether we are talking about cars, or buses, or tennis rackets, is this: people make better decisions when they know what things cost. Right now the true cost of using the roads is hidden, leading people to drive more and in different ways than they would if they were better informed.

Even a modest road-pricing scheme would be a start: traffic jams wouldn't be entirely a thing of the past, but they would be a lot less common. And the more comprehensive the plan, the greater the payoff: shorter travel times. Lower fuel costs. Fewer accidents. Less noise and pollution. Higher productivity. Road pricing would make us richer, healthier, saner. If London, Stockholm and other cities can do it, why can't we? Why, other than because it would be new, and because we would be paying for something we were used to getting for free.

Only it isn't free now. It's hideously expensive. There ain't no such thing as a free lunch, and as any commuter can tell you, there sure ain't no such thing as a free road.

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<sup>40</sup> Andrew Coyne, "Stuck in traffic. Our rush hours rank with the world's worst. Andrew Coyne has the solution. Maclean's, (11 January 2011) Available online at <<http://www2.macleans.ca/2011/01/11/stuck-in-traffic/4/>> (Accessed on 4 February 2011)

### **1.5 Conclusion**

To summarize, it is important to say that the core of the thesis is that the toll road system in Brazil, while an important tool of public policy, is (as currently implemented) illegal. The point of the present chapter is simply to show that toll roads can be important public policy tools: they are an important tool in the governance tool-box available to any national government. The possible usefulness of toll charge is clear. The objection presented on this thesis is not to the advisability or usefulness of toll roads, but to the manner in which they have been implemented by the Brazilian government (*i.e.*, in violation of the Lawfulness Principle). This objection will be explored in Chapter 3.

### **1.6 Purpose of the Next Chapter**

Although toll roads can be effective and useful tools to promote important public policies, the toll road system currently in place in Brazil is illegal. Arguments concerning the legality of Brazil's toll road system will be developed in Chapter 3. Before getting to those arguments, it is important to examine the manner in which toll roads have, in fact, been implemented by the Brazilian government. This topic, along with a brief introduction to the basics of Brazil's legal system, is discussed in Chapter 2.

## Chapter II

### Tolls in Brazil and the Basics of Brazilian Law

#### 2. Introduction

In order to understand the legality of the current toll road system in Brazil, it is necessary to understand the country's existing toll road framework. The subject has recently grown in importance due to the recent and ongoing spree of concessions and the great increase of the toll road industry affecting the life of millions of Brazilian drivers.<sup>41</sup>

This chapter lays out the contextual groundwork necessary to understand the legality of toll roads in Brazil. Specifically, it sets out (a) a birds-eye view of the legal system in Brazil, and (b) a descriptive account of the current toll road framework that exists in Brazil. The numbers shown below will demonstrate the spree of toll road

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<sup>41</sup> The impact of the sudden spread of Brazilian toll roads was discussed at the Legislative Assembly of the State of Rio de Janeiro: "Deputies Discuss Highway Concession with the local population  
The life of approximately 2.6 million citizens of Rio de Janeiro can change radically, if approved the notice that provides the concession of the highways BR-101 and BR-393. In all, 26 municipalities will be affected, from the sphere of education to trade and commerce. Prices of food, goods and intercity tickets must be increased, with the privatization of 540 km of both highways, 70% of federal highways in the state of Rio de Janeiro will be handed over to private enterprise.

In April, a special commission was created to follow up the privatization of highways BR-101 and BR-393, which has held public hearings in municipalities that will be affected, to gather suggestions and criticisms to the notice. Since its creation, the commission held hearings in cities like São Gonçalo and Volta Redonda, where the local representative bodies were heard"

Original in Portuguese: "Deputados discutem concessão de Rodovias com população local

A vida de cerca de 2,6 milhões de cidadãos fluminenses pode mudar radicalmente, caso seja aprovado o edital que prevê a concessão das rodovias BR-101 e BR-393. Ao todo, 26 municípios terão sua estrutura afetada, desde a esfera da educação até o comércio. Os preços dos alimentos, das mercadorias e das passagens intermunicipais devem sofrer reajustes, uma vez que, com a privatização dos 540 quilômetros das duas vias, 70% da malha rodoviária federal do Estado do Rio de Janeiro estarão entregues à iniciativa privada.

Em abril foi criada a Comissão Especial para acompanhar o processo de privatização das rodovias BR-101 e BR-393, que tem realizado audiências públicas em municípios que serão afetados, para colher sugestões e críticas ao edital. Desde sua criação, a comissão realizou audiências em municípios como São Gonçalo e Volta Redonda, onde ouviu as entidades representativas locais." Online at the website of the Legislative Assembly of the State of Rio de Janeiro at <<http://www.alerj.rj.gov.br/Busca/OpenPage.asp?CodigoURL=16978&Fonte=Dados>> (Accessed on 30 August 2011).

concessions in Brazil and how it affects the lives of millions of people in the country.<sup>42</sup> In the last decade more than 100 toll gates were opened in Brazilian public highways constructed by the Federal and State Governments.

The material presented in this chapter will form the foundation for subsequent discussions in Chapter 3 and will provide data to be used in the analysis in the following chapters. The goal of the current chapter is to demonstrate the impact of toll roads in Brazil. The legality of the system will be addressed in Chapter 3.

In order to understand the toll road system in Brazil, one must first have a “bird’s-eye-view” of the legal context<sup>43</sup> in which that toll road system arose. As a result, the next section of this chapter provides a brief snapshot of the Brazilian legal system, including a brief history of the legal system, and an introduction to Brazilian Constitutional Law.

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<sup>42</sup> There are several movements debating the tolling system in the country. See, for example, Popular Forum Against Tolls (in Portuguese) at <[www.pedagio.org](http://www.pedagio.org)> (accessed on 05 February 2013)

<sup>43</sup> While a general overview of Brazilian law is critical for the purposes of understanding material found in later chapters, a detailed understanding of the Brazilian legal system is not required. As a result, the next portion of the chapter provides a general introduction to the legal system regarding toll highways and concessions in Brazil.



## 2.1 Brief Introduction of the History of the Legal System of Brazil

Brazil is a civil law country. It is also a Federation and Presidential Republic. It has three levels of Government: Federal, State and Municipal. It is constituted by 26 States, 1 Federal District and 5,565 Municipalities.<sup>44</sup> The three branches of government are structured as the Executive, the Legislative and the Judicial. The Executive Chief is the President of the Republic, who is elected for a four year<sup>45</sup> term of office (and may be re-elected for one additional term.

The origin of the Brazilian legal system owes much to its settlement by Portugal. European settlement in Brazil began in 1500 by the Portuguese navigator Pedro Álvares Cabral<sup>46</sup> and the colonization of Brazil was a process of settlement, exploitation and domination of the territory by the Portuguese Court until 1822, when Brazil became independent. Throughout the period of colonization, Brazilian Law was encapsulated by the Ordinances of the Kingdom of Portugal.

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<sup>44</sup>See Brazilian Institute of Geography and Statistics – IBGE online: <<http://www.ibge.gov.br/english/estatistica/populacao/censo2010/default.shtm>> Accessed on 17 June 2011. “The conduction of a survey of this nature represents the ultimate challenge for a statistics bureau, especially in a country of continental dimensions like Brazil, with 8,514,876.60 km<sup>2</sup> distributed in a heterogeneous and sometimes inaccessible territory, made of 27 federation units and 5,565 municipalities, encompassing approximately 67.2 million households.”

<sup>45</sup> The Constitution at article 14, Subsection 5 authorizes members of the executive power to be re-elected for subsequent term only one time: “Subsection 5. The President of the Republic, the State and Federal District Governors, the Mayors and those who have succeeded or replaced them during their terms of office may be re-elected for only one subsequent term.” Original in Portuguese: Article 14, subsection “§ 5º O Presidente da República, os Governadores de Estado e do Distrito Federal, os Prefeitos e quem os houver sucedido, ou substituído no curso dos mandatos poderão ser reeleitos para um único período subsequente.” Online: < [http://www.planalto.gov.br/ccivil\\_03/constituicao/constitui%C3%A7ao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm)> (Accessed on 9 August 2011).

<sup>46</sup> In 1500 King Dom Manuel I trusted the command of the second expedition to the East Indies to the Portuguese navigator Pedro Álvares Cabral. He left Lisbon, Portugal on 9 March 1500 with 13 ships and 1,500 men and sailed farther westward than his original planned route, and the Atlantic Ocean currents drove him even farther west. Cabral reached the lands of Vera Cruz (Brazil) on 22 April 1500 and claimed the land for Portugal. See Teresa A. Meade. *A Brief History of Brazil*. (2004). New York: Checkmark Books. Pages 18-24.

The Portuguese Empire enacted the Afonsinas, Manuelinas and Filipinas<sup>47</sup> Ordinances. Under these Ordinances, civil rights in Brazil were merely extensions of civil rights in Portugal. As a result, Portuguese influence in the Brazilian legal system was substantial.

The Filipinas Ordinances were enacted during the reigns of Philip II and published in the year 1603 and had a huge impact on the legal system of Brazil. They were a legal compilation marked by the influences of Roman, Canon and Germanic Laws, which together constitute the founding elements of Portuguese law. Despite being enacted in Portugal, the Filipina Ordinance were applied in Brazil – as a colony of the Portuguese Empire – along with other rules from 1603 until 1916 when the Civil Code of Brazil was enacted.

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<sup>47</sup> Arlindo Daibert, “Historical Views on Environment and Environmental Law in Brazil”, 40 GEO. WASH. INT’L L. REV. 779, 823 (2009).

“In 1446, the Portuguese enacted the Afonsinas Ordinances, named in honor of King Afonso V, under whose rule their preparation was concluded. The Ordinances were a mixture of codified prior written sources, compilation of two other older pre-existing codifications, and aggregated royal resolutions, concordats, and national and local customs previously in force. The roots of the system were so strongly based on Roman law, however, that “imperial law” (that is, the law of Rome) was to be applied in case of omissions in the ordinances themselves, except in cases of “sin,” when the canonic law would take over.

...

In Portugal, meanwhile, King Manoel I, motivated by a wish to immortalize his name in a legal compilation, ordered the Manuelinas Ordinances, which replaced the Afonsinas Ordinances in 1521, the same year that monarch died.

...

In 1603, a point when Portugal — and hence Brazil — was still under the Spanish rule (1580–1640), King Felipe II from Spain enacted the Filipinas Ordinances, compiling all the Portuguese rules that had been issued to that date, and replacing the Manuelinas Ordinances. The new ordinances remained partially applicable in Brazil until the enactment of the Brazilian Civil Code in 1916.

The ordinances maintained the same notion of applicability of Roman laws only “for the good reason upon which they were based,” but in reality, Roman law “was frequently employed in contravention of the express language of the [Ordinances].”

...

Brazil enacted a Civil (Private Law) Code in Brazil in 1916, finally superseding the remains of the seventeenth century Filipinas Ordinances...”

Brazil's political independence in relation to Portugal did not mean legal independence.<sup>48</sup> From the independence of Brazil in 1822, the Filipinas Ordinances were gradually replaced by domestic Brazilian statutes, but remained as a major influence on the content of Brazilian legislation, including the Criminal Code of 1830<sup>49</sup>, the Code of Criminal Procedure of 1832 and the Commercial Code of 1850. In effect, the Brazilian legal system is the "child" of the Portuguese law, and this is by its turn part of continental European Law. As a result of the influence of Portuguese colonization, civil law<sup>50</sup> system prevails in the Brazilian legal system.

As is the case in other civil law countries, Brazil's Constitution plays a central role as the guardian of fundamental rights and guarantor of democratic relations between the State and the society. It is the law that disposes the division of the powers of Government. Thus, the Constitution is the law of paramount importance of Brazil and is regarded as the "law of laws".<sup>51</sup>

Beyond the "basics" of Brazil's legal system, one need only understand a few specific elements of that system in order to appreciate the issues surrounding the legality of Brazil's toll road system. These specific elements are: (a) The Lawfulness Principle, (b) the Constitutional Rules on concessions, (c) the General Law of Concessions and (d) the doctrine of Constitutional Paramountcy.

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<sup>48</sup> The law of 20 October 1823 determined that the newly resurgent Empire would last at the same time of the Ordinances, laws and decrees promulgated by the date of 25 April 1821 by the kings of Portugal.

<sup>49</sup> It replaced the book V of the Philippines Ordinances.

<sup>50</sup> The Civil Law started when the Emperor Justinian met all laws of the European continent, consolidating them into a single code, named the corpus iuris civilis of Justinian. The Corpus Iuris Civilis was composed of four collections and the most important was the Digest or pandect. Subsequently renamed the Copus Iuris of Civil Law, Continental Law and Roman Law.

<sup>51</sup> All statutes must subordinate to the rules of the Federal Constitution which is the highest Law. Otherwise it can be considered unconstitutional.

## 2.2 The Lawfulness Principle and Article 37 of the Constitution

The Lawfulness Principle is established by Article 37<sup>52</sup> of the Federal Constitution which reads as follows:

Article 37. The direct or indirect public administration of any of the powers of the Union, the States, the Federal District and the Municipalities, as well as their foundations, shall obey the Lawfulness Principle, ...

According to Celso Antônio Bandeira de Melo<sup>53</sup>, one of the most influential administrative scholars of the country, Article 37...

...means that the Administration can't do anything but what the law requires. Unlike individuals, which can do everything that the law does not prohibit, the Administration may do what the law authorizes in advance. Hence, public management is to provide public interests so specified in the law, making it in accordance with the means and ways established by the law or individualized according to their provisions [sic].

In other words, the Lawfulness Principle means that the government of Brazil, through the public administration, may only take actions that are authorized by law: every act undertaken by the government of Brazil must be preceded either by direct constitutional authority or through the constitutionally approved passage of an authorizing enactment.

The fundamental premise of “The Lawfulness Principle” is that the government holds no residual or extra-legal authority: every act it undertakes, in order to comply with

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<sup>52</sup> Federal Constitution of Brazil – Article 37 translated by the author: “Artigo 37 - A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte:”

<sup>53</sup> Celso Antônio Bandeira de Mello. *Curso de Direito Administrativo*. (2004) São Paulo: Malheiros Publishing House, page 95. Translated by the author:

“O princípio da legalidade, no Brasil, significa que a Administração nada pode fazer senão o que a lei determina. Ao contrário dos particulares, os quais podem fazer tudo o que a lei não proíbe, a Administração só pode fazer o que a lei antecipadamente autorize. Donde, administrar é prover aos interesses públicos, assim caracterizados em lei, fazendo-o na conformidade dos meios e formas nela estabelecidos ou particularizados segundo suas disposições.”

Article 37 of the Constitution, is legitimate only if authorized by statute, or authorized directly by the Constitution itself.

### **2.3 The Lawfulness Principle and Article 5, Subsection II of the Constitution**

A further instance of Brazil's Lawfulness Principle is established by Subsection II of Article 5<sup>54</sup> of the Constitution, which provides (in part) as follows:

Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

...

II - no one shall be obliged to do or not to do something other than by virtue of law;

The public administration is subject to both Article 37 and subsection II of Article 5. By virtue of Article 37, the government can act only through statutory authorization. And by virtue of subsection II of Article 5, the government can impose obligations on individuals only "by virtue of law". Because Brazil is a civil law country, this reference to law means democratically enacted legislation as "common law" is unknown in the country. Any attempt to impose obligations by means other than democratically passed law is a violation of this provision of the Federal Constitution. As a result, any intrusion on individual liberty must, according to Article 5, be spelled out in legislation. The implications of this for the toll road system are discussed in Chapter 3.

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<sup>54</sup> Federal Constitution – Subsection II of the Article 5<sup>th</sup> translated by the author: "Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

I - homens e mulheres são iguais em direitos e obrigações, nos termos desta Constituição;

II - ninguém será obrigado a fazer ou deixar de fazer alguma coisa senão em virtude de lei;"

## 2.4 Paramountcy of the Federal Constitution

The doctrine of “paramountcy”<sup>55</sup> governs conflicts between the domestic laws within a jurisdiction, determining which law prevails in the event of inconsistency. In Brazil, the paramountcy of the Constitution is described by the phrase “the Principle of the Supremacy of the Constitution” (or “Princípio da Supremacia da Constituição” in Portuguese), *i.e.*, the Constitution is at the top of the hierarchy of legal norms in Brazil and all other ordinary laws must comply with it.

Luis Flávio Gomes and Valério de Oliveira Mazzuoli<sup>56</sup> address the concept of the Supremacy of Brazil’s Constitution:

Of course it is absolutely undeniable the superiority of the Constitution in the face of internal laws. It is, moreover, the origin, the basis or foundation of all other rules (the internal law). The Constitution has a binding power over the legislature, the interpreter and the judge. No legal interpretation can move away from its legal framework (or axiological).

Interpretation conformed to the Constitution means to interpret all other provisions of law in accordance with constitutional rules and principles. This is the correct interpretation (not otherwise).

Brazil, as said before, is a federal state composed of autonomous States and there are three original sources of law – federal, state and municipal. The hierarchy established

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<sup>55</sup> An excellent Canadian source on the doctrine of paramountcy can be found at Peter W. Hogg, *Constitutional law of Canada* (2007), 5th ed. supplemented. Scarborough, Ont.: Thomson Carswell.

<sup>56</sup> Luiz Flávio Gomes and Valerio de Oliveira Mazzuoli. “Características gerais do direito (especialmente do direito internacional) na pós-modernidade.” [General features of law (especially international law) in postmodernity] (2010) *Revista Forense*, volume 412, pages 467-485.

Original in Portuguese:

“Claro que é absolutamente incontestável a superioridade normativa e jurídica da Constituição em face das leis internas. Ela é, ademais, a origem, a base ou o fundamento de todas as outras normas (do Direito interno). A Constituição possui força vinculante em relação ao legislador, ao intérprete e ao juiz. Nenhuma interpretação legal pode se afastar do seu quadro normativo (ou axiológico). Interpretação conforme à Constituição significa interpretar todas as demais normas do ordenamento jurídico de acordo com as regras e princípios constitucionais. Essa é a forma correta de interpretação (não o contrário).”

Available online at <<http://sare.anhanguera.com/index.php/rdire/article/view/1875/847>> (accessed on 30 August 2011)

by the Constitution makes it clear that a municipal law cannot conflict with the State law, while the latter cannot conflict with the provisions of a federal law. To the extent that such a conflict is found, state law is paramount over municipal law, and federal law is paramount to state law. In the event of conflict, the “paramount” law prevails, and the law which conflicts with the paramount law is, to the extent of the inconsistency, of no force or effect. The Federal Constitution is the law at the top of the pyramid of hierarchy of laws, known as Hans Kelsen’s “normative pyramid”.<sup>57</sup> All laws are unconstitutional to the extent that they do not comply with the Constitution.

As this thesis will demonstrate in Chapter 3, the current toll road regime in Brazil fails to comply with the Constitution’s Lawfulness Principle (found in Articles 5 and 37), largely because current toll concessions (and other elements of the toll road system) are not authorized by statute. As a result, the toll road system is unconstitutional (and therefore illegal). In order to understand the legal failings of the toll road system, it is necessary to understand the legal instruments which purport to authorize the concession of toll roads to private actors. These instruments, which are discussed in detail in Chapter 3, are introduced briefly in the following subsection of this chapter.

### **2.5 Article 175 of Brazil’s Constitution**

Because the lion’s share of this thesis is concerned with the legality of toll roads in Brazil – specifically toll roads that are conceded to private actors – it is important, at this stage, to provide a brief introduction to the legal mechanism governing the concession of highways and the imposition of tolls. Concession is the main legal

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<sup>57</sup> Known as *Stufenbau*. See Hans Kelsen. *Teoria pura do direito*. [Pure Theory of Law]. trans. Max Knight (1967). Berkeley: University of California Press.

arrangement for the private management and maintenance of highways in Brazil. The Brazilian Constitution authorizes concessions in Article 175:<sup>58</sup>

Article 175 - In a manner prescribed by law, the Government is responsible for providing public utility services either directly or by concession or permit, which will always be through public bidding.

Sole paragraph - The law shall provide for:

- I. the regime for public service companies, the special nature of their contract, and of the extension thereof, as well the conditions of forfeiture, control, and termination of the concession or permit;
- II. the rights of the users;
- III. rate policy;
- IV. the obligation of maintaining adequate services.

The General Law of Concessions – Federal Law 8,987 enacted on 13 February 1995 is a statute passed pursuant to this part of the Constitution that enacted provisions governing the system of conceding public services to private entities.

The General Law of Concessions deals with the guaranteed provision of adequate services, the rights and obligations of highway users, rate policy, bidding procedures, contracts, permits, duties and obligations of the grantor and the concessionaires, intervention by government actors and the cessation of concession. The specific details of the General Law of Concessions are beyond the scope of this introductory chapter, but are discussed in great detail in Chapter 3. For now, it is sufficient to note that – as we will see in Chapter 3 – the specific provisions of the General Law of Concessions are insufficiently specific and precise to comply with Brazil’s Lawfulness Principle. This

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<sup>58</sup> Federal Constitution – Article 175 translated by the author: “Art. 175. Incumbe ao Poder Público, na forma da lei, diretamente ou sob regime de concessão ou permissão, sempre através de licitação, a prestação de serviços públicos.

Parágrafo único. A lei disporá sobre:

- I - o regime das empresas concessionárias e permissionárias de serviços públicos, o caráter especial de seu contrato e de sua prorrogação, bem como as condições de caducidade, fiscalização e rescisão da concessão ou permissão;
- II - os direitos dos usuários;
- III - política tarifária;
- IV - a obrigação de manter serviço adequado.”



argument, developed throughout the remainder of the thesis, is the cornerstone of the argument that Brazil's current toll road regime is unconstitutional.

## **2.6 Summary of Brazilian Legal Principles**

As we have seen in the foregoing sections of this chapter, the law of Brazil is based on a number of governing principles, including (a) the Supremacy of the Constitution, (b) Civilian Law, (c) the need for statutory authorization for government interference in the lives of Brazilian people, and (d) the principle of paramountcy in the event of inconsistency between laws. These principles will be of central importance to the core legal argument of this thesis. In brief, the core arguments of this work are: (i) the law of concessions fails to address operational concerns and other core issues pertaining to the operation of toll road systems; (ii) the government has failed to authorize concessions in accordance with constitutional requirements, and this constitutes a violation of the Lawfulness Principle.

Having summarized the Brazilian legal system and the core legal argument of this thesis, it is important to understand the factual issues underpinning the arguments to be presented in Chapter 3. The next sections of this chapter lay the foundation for this discussion by explaining the toll highway system in Brazil.

## **2.7 Brazil's Toll-Highway System: Design and Administration**

Many countries adopt highway tolling systems<sup>59</sup> as a method of raising funds to maintain existing highway facilities and build new ones. Statutory provisions governing toll highways vary from country to country. The legal framework and the on the ground

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<sup>59</sup> G. Fischer, S. Babbar. "Private Financing of Toll roads" (1996) RMC Discussion Paper. Series No. 117, The World Bank. This paper cites some tolls in different countries. It is about 8 projects in 8 different countries: Chile, Colômbia, México, China, Malaysia, Hungary, United Kingdom and United States.

experience are distinct in each jurisdiction. One key distinction between different tolling systems is the method by which the toll systems are managed. There are two prevailing forms of management system: the Public Management System, and the Private Management System.

When public administrations choose to concede highways or highway systems to private actors, they typically do so through one of two forms of concession contracts. The first type is the Design-Build-Finance-Operate<sup>60</sup> (DBFO) partnership. By this method, the private entrepreneurs bear the responsibility to design, build and finance a new highway<sup>61</sup> as well as responsibility to operate it. The second type of arrangement is the “maintenance and operational contracts” model, which is the model adopted in 100% of conceded highways in Brazil. By this method, the private actor is responsible only to maintain and operate an existing highway. In this form of concession arrangement, the government is responsible for designing, building and financing the creation of the highway.

The main difference between the two prevailing forms of concession contract is that, under the “maintenance and operational contract” form of concession, the private actor is relieved of the obligation to build new highways. This thesis will investigate the arrangement of “maintenance and operational contract”, which, as noted above, is the

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<sup>60</sup> There is a variation of the DBFO schemes which is the Build-Operate-Transfer (BOT) adopted in some Asian countries as Hong Kong, Japan, Malaysia, Philippines and Taiwan. In Canada and New Zealand is it called Build-Own-Operate-Transfer (BOOT). The approach can be found online at the website of the Federal Highway Administration of United States: <[http://www.fhwa.dot.gov/ipd/p3/defined/design\\_build\\_finance\\_operate.htm](http://www.fhwa.dot.gov/ipd/p3/defined/design_build_finance_operate.htm)> (Accessed on 24 April 2013).

<sup>61</sup> Most turnpikes in the United States adopted the DBFO Approach.

exclusive arrangement used in Brazil. The nature of this arrangement is discussed in the following section.

## 2.8 Maintenance and Operational Contracts

Brazil has a unique toll road system. As noted in the previous section, all conceded tolled highways in the country are under “maintenance and operational contract”. They are regulated by concession contracts signed pursuant to the provisions of the General Law of Concessions and through the National Procurement Law of Brazil.<sup>62</sup> Both laws cited establish the rules for concessions.

The purpose of a “maintenance and operational contract” is demonstrated by the following contractual clause released by the Agência Nacional de Transportes Terrestres (ANTT – National Agency of Ground Transportation) of Brazil:<sup>63</sup>

### 2 Contract Object

2.1 The object of the contract is the concession for exploration of infrastructure and rendering of public service of recovery, management, maintenance, surveillance, conservation, improvement and enlargement of the highway system’s capacity (“Concession”), on the terms and provisions established by the contract and according to the performance parameter and minimal specifications established on the Exploitation Program of the Highway (Programa de Exploração da Rodovia –PER).<sup>64</sup>

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<sup>62</sup> Law 8,666 of 21 June 1993 applies to government procurement at the Federal, State and Municipal levels and to public bodies and agencies.

<sup>63</sup> Bid 001 of 2008 of the Agência Nacional de Transportes Terrestres (ANTT) – It is about the concession contracts of

- a) the Federal Highways BR 116 – State of Bahia – from Feira de Santana to the State border of Bahia and Minas Gerais.
- b) BR 324 – State of Bahia from Salvador to Feira de Santana;
- c) the following State Highways: BA-526 and BA-528; (Highways were delegated from the State of Bahia to the Federal Government, that, by its turn, performed the Concession through its national body – the National Agency of Ground Transportation – ANTT);

Online: <[http://appeantt.antt.gov.br/avisolicitacao/bahia/ContratoConcessao\\_v2.pdf](http://appeantt.antt.gov.br/avisolicitacao/bahia/ContratoConcessao_v2.pdf)> (Accessed on 22 June 2009) translated by the author:

“2 Objeto do Contrato

2.1 O objeto do Contrato é a concessão para exploração da infra-estrutura e da prestação do serviço público de recuperação, operação, manutenção, monitoração, conservação, implantação de melhorias e ampliação de capacidade do Sistema Rodoviário (“Concessão”), no prazo e nas condições estabelecidos no Contrato e segundo os Parâmetros de Desempenho e especificações mínimas estabelecidas no PER.”

<sup>64</sup> Exploitation Program of the Highway – PER is the basic project of investments and activities of the concessionaire's winning bid.

In general, public administrations all over Brazil build the highways<sup>65</sup> and then concede them to private entrepreneurs as a general policy.<sup>66</sup> Pursuant to these highway concessions, the private actors have the duty to operate and maintain and, sometimes, improve the capacity of existing highways as traffic or revenue increase.

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<sup>65</sup> The Rodoanel is an example. It is planned and partially built in the metropolitan area of São Paulo city as a beltway with the length of 172 km, interconnecting several state and federal highways, as seen in the following news:

“Initially proposed to be ready in June of 2011, the connection of the west segment with the south part of the Rodoanel is anticipated in contract to April of 2010.

...

The celebration will have the attendance of the governor José Serra, probably the president Luiz Inácio Lula da Silva and, certainly, the Minister of the Civil Cabinet, Dilma Rousseff, because one third of the southern part is financed by the federal government – just like the west segment.

In 2002, the west segment cost \$1,4 billion Reais and the federal government of Fernando Henrique Cardoso contributed with almost a third part, \$400 million Reais.

The engineering work, dispossessions, resettlements, environmental mitigations and compensations, the total cost of the south part of Rodoanel, in prices of December of 2005, is expected to be \$3,6 billion Reais – \$58.6 million Reais per kilometre. The civil works were budgeted to cost \$2,587 billion Reais.

The State Government will invest \$2,4 billion Reais. The Federal Government, \$1,2 billion Reais, with allocation of the “Programa de Aceleração do Crescimento” (PAC – Growth Acceleration Program of the Federal Government of Brazil – it is comparable in Canada with the Canada’s Economic Action Plan), and with rigorous quarterly disbursement of \$75 million of Reais.” At newspaper Valor Econômico of 4 June 2009 apud Webtranspo. Translated by the author: “Previsto inicialmente para junho de 2011, o encontro dos trechos Oeste e Sul do Rodoanel foi antecipado em contrato para abril de 2010.

...

A festa terá a presença do governador José Serra, muito provavelmente do presidente Luiz Inácio Lula da Silva, e, certamente, da ministra da Casa Civil, Dilma Rousseff, pois um terço do trecho Sul é financiado pelo governo federal - como já acontecera com o trecho Oeste. Em 2002, o Oeste custou \$ 1,4 bilhão e o governo Fernando Henrique Cardoso participou com pouco menos de um terço, \$ 400 milhões.

Em obras de engenharia, desapropriações, reassentamentos, compensações e mitigações ambientais, o custo total do trecho Sul, a preços de dezembro de 2005, é de \$ 3,6 bilhões - \$ 58,6 milhões o quilômetro. As obras civis foram orçadas em \$ 2,587 bilhões. O Estado investe \$ 2,4 bilhões. O governo federal, \$ 1,2 bilhão, com verbas do Programa de Aceleração do Crescimento (PAC), e desembolsos rigorosamente trimestrais de \$ 75 milhões.” Online:

<<http://www.webtranspo.com.br/modais/rodoviario/4556-rodoanel-avanca-na-periferia-da-sao-paulo-sitiada.html>> (accessed on 23 June 2009).

The Growth Acceleration Program is a Federal Program to stimulate the economy just like Canada’s Economic Action Plan.

See Rodoanel Mario Covas online: <<http://www.dersa.com.br/rodoanel/especial/index.html>> (accessed on 23 June 2009)

<sup>66</sup> There is no visible reason for that.

## 2.9 The Brazilian Highway Network

The highway network of Brazil comprises Federal, State and Municipal<sup>67</sup> highways. The only explicit reference to highways in the Brazilian Constitution is the 2nd paragraph of Article 144.<sup>68</sup> It provides that the federal highway police force is the only police force permitted to “patrol the federal highways”. Under the constitutional division of powers regarding public works, the Federal Union is responsible for the federal highways, the State highways are under the responsibility of the States, the Municipal highways are under the responsibility of the municipal governments, and the highways of the Federal District are under the responsibility of the Federal District administration. These features are very important for concession arrangement matters.

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<sup>67</sup> Including the highways at the Federal District. Those highways which connect multiple States altogether are characterized by the initials "BR", and three numbers of the highway afterwards, while Brazilian regional and State highways are the one running entirely in the States, and they are named with the abbreviation of the State name where the highway is located (two letters) and, likewise, the Federal highways, with three numbers. As the BR-101 along the cost of Brazil. It has the length of 4,551 km from north to south. As the PR-445, State Highway of the State of Paraná. Those highways which connect multiple States altogether are characterized by the initials "BR", and three numbers of the highway afterwards, while Brazilian regional and State highways are the one running entirely in the States, and they are named with the abbreviation of the State name where the highway is located (two letters) and, likewise, the Federal highways, with three numbers. As the BR-101 along the cost of Brazil. It has the length of 4,551 km from north to south. As the PR-445, State Highway of the State of Paraná.

<sup>68</sup> Federal Constitution. “Article 144. Public Safety, which is the duty of the State and the right and responsibility of all, is exercised to preserve public order and the invulnerability of persons and property, by means of the following bodies:

...

2<sup>nd</sup> Paragraph - The federal highway police is a permanent body structured into a career and intended, according to the law, to ostensibly patrol the federal highways.”

Statutory provision in Portuguese:

“Article 144. A segurança pública, dever do Estado, direito e responsabilidade de todos, é exercida para a preservação da ordem pública e da incolumidade das pessoas e do patrimônio, através dos seguintes órgãos:

...

§ 2º A polícia rodoviária federal, órgão permanente, organizado e mantido pela União e estruturado em carreira, destina-se, na forma da lei, ao patrulhamento ostensivo das rodovias federais.(Redação dada pela Emenda Constitucional nº 19, de 1998).”

However, there is an unusual case at the State of Paraná where the extinct National Department of Highways (DNER), currently National Department of Transportation Infrastructure (DNIT), a Federal transportation entity, delegated several stretches of federal highways through the convention of delegation number 007 of 1996 to the Department of Highways of Paraná (DER-PR), and this entity, by its turn, granted them to private entrepreneurs in 1998.

Highway concessions must of course be made by the entity entitled to govern the relevant highways.<sup>69</sup>

Usually, each entity (Federal Union, States, Municipalities or the Federal District) has jurisdiction over the highways that they build. Brazil has a total of 1,73 million km (1,074 million miles) of highways, of which 217,833.2 km<sup>70</sup> are paved.<sup>71</sup> There are exceptional situations in which responsibility for a highway can be delegated from one entity to another. This includes the situation dealt with in this thesis: the delegation of highways to private entrepreneurs for their maintenance and operation.<sup>72</sup> Naturally, conceded highways, no matter if granted by the Federal Union, States, and Municipalities or by the Federal District are under private management, and the investors are legally (by contract) responsible for maintenance and/or improvement of the highway. The following sub-chapters relay the data on conceded highways in the country.

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<sup>69</sup> There is another case of delegation of Federal Highways to State Governments. It happened at the State of Rio Grande do Sul.

DNER in Portuguese – Departamento Nacional de Estradas e Rodagem. Currently DNIT – Departamento Nacional de Infraestrutura de Transporte (National Department of Transportation Infrastructure). Available online: <<http://www.dnit.gov.br>> (accessed on 1<sup>st</sup> May 2010)

<sup>70</sup> Data collected at the website of the DNIT – Departamento Nacional de Infraestrutura de Transporte (National Department of Transportation Infrastructure). Available online: <<http://www.dnit.gov.br/plano-nacional-de-viacao/totais-gerais.pdf>> (accessed on 1<sup>st</sup> May 2010).

<sup>71</sup> In the case of the Federal Union, the Law 10,233 of 5 June 2000 that created the National Agency of Ground Transportation and the National Department of Transportation Infrastructure (or Departamento Nacional de Infraestrutura Terrestre – DNIT), requires general maintenance from the latter, according to the article 82, Subsection I:

“Article 82. The duties of DNIT in its sphere of activity:  
I - Establish standards, technical standards and specifications for the programs of operational safety, signaling, maintenance or preservation, restoration of roads, terminals and facilities;”

<sup>72</sup> Indebted States may delegate State highways to the Federal Union in order to ensure federal investments. Or the opposite, the Federal Government may delegate a federal highway to some State that may invest resources and maintain it. The Law 9,277 of 10 May 1996 authorizes the federal government to delegate to Municipalities, States and the Federal District, the administration and operation of federal highways and ports.

## 2.10 Data Collected of Existent Tolls in Brazil

Currently Brazil has a total of 284<sup>73</sup> privately operated toll booths in 9 States out of 26 and the Federal District. It is among the countries with the most toll gates in the world – granted to 55 different private concessionaires operating highways.



**Figure 1 – States with Toll Facilities in Brazil<sup>74</sup>**

<sup>73</sup> The privately operated tolls are in 9 states out of 26 – the 3 States of the South Region, the 4 States in the Southeast Region, 2 States in the Northeast Region. There are also another 11 publicly operated tolls in Brazil: 1 in Ceará – in the Northeast Region; 1 in Mato Grosso do Sul and 4 in Mato Grosso, States of the Center-West Region, 4 publicly operated tolls in the State of Rio Grande do Sul in the South Region and 1 in the State of São Paulo in the Southeast Region. Source: ABCR – Brazilian association of highways concessionaires. Online: <<http://www.abcr.org.br/Conteudo/Secao/46/recursos+operacionais.aspx>> Accessed on 25 March 2013.

<sup>74</sup> The states with toll facilities privately operated in Brazil are the ones in gray. 9 out of 26 States and 1 Federal District, comprising 68.26% of the total population and 78.5% of the total Gross Domestic Product (GDP) of the country. Source – Population (2012) and GDP (2010) – National Institute of Geography and Statistics – Instituto Brasileiro de Geografia e Estatística (IBGE). Online at

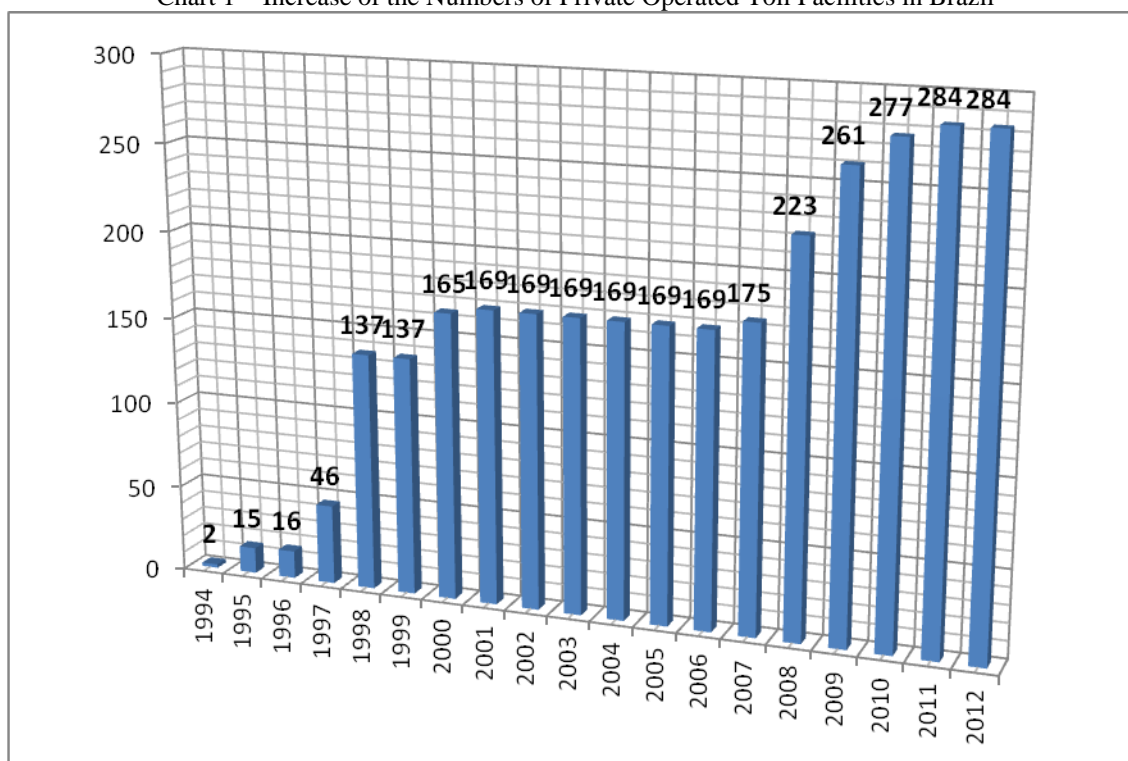
## 2.11 Increase in the Number of Tolls

The increase in the number of private operated toll facilities in Brazil is quite remarkable. In five years, from 1994 to 1997, they grew from 2 to 46. A big increase happened in 1998 when there was 137 toll booths in the country. From 1999 until to 2012, they more than doubled from 137 to 284 booths in only 13 years.

Table 1 – Evolution – Numbers of Private Operated Toll Facilities in Brazil

Year	1994	1995	1996	1997	1998	1999	2000
Number of Tolls	2	15	16	46	137	137	165
Year	2001	2002	2003	2004	2005	2006	2007
Number of Tolls	169	169	169	169	169	169	175
Year	2008	2009	2010	2011	2012		
Number of Tolls	223	261	277	284	284		

Chart 1 – Increase of the Numbers of Private Operated Toll Facilities in Brazil





Since 1994, in the past 18 years, on average, Brazil has built just over one toll facility per month, or 4 new toll facilities every 3 months (15 to 16 yearly).<sup>75</sup>

## 2.12 Ratio of Privately operated Highways vs Paved Highways

Out of Brazil's 10,343.7 Km of multilane highways, 53.98% (see table below<sup>76</sup>) are privately operated. This means that over half of the multilane highways in Brazil are under private management rather than maintained and operated by public authorities.

Table 2 – Ratio Paved Highways vs Private Concessions in Brazil<sup>77</sup>

	Single Lane (Km)	Multilane Construction <sup>78</sup> (Km)	Multilane (Km)	TOTAL
<b>Total<sup>79</sup></b>	200,289.5	1,227.6	10,161.8	211,678.9
<b>Roads Conceded<sup>80</sup></b>	7,380.77		5,485.60	12,866.37
<b>%</b>	3.69%		53.98%	6.07%

The State of São Paulo has a total of 4,624 Km of multilane highways and 77.99% of them are conceded to private companies. In this case, almost 8 out of 10 km of multilane highways are under private management in São Paulo. This places the State

<sup>75</sup> In 18 years (1994 – 2012) it was built in Brazil 284 toll facilities, with an extraordinary average of 15.77 tolls facilities per year or 1.314 tolls built per month. Online: <<http://www.abcr.org.br/Conteudo/Secao/46/recursos+operacionais.aspx>> Accessed on 25 March 2013.

<sup>76</sup> All the data collected from the websites of ABCR (above) and DNIT (below). Statistic calculated by the author.

<sup>77</sup> See Departamento Nacional de Infraestrutura de Transportes – DNIT (National Department of Transportation Infrastructure) online: <[http://www.dnit.gov.br/menu/rodovias/rodoviasfederais/index\\_html#Quilometragem%20das%20Rodovias](http://www.dnit.gov.br/menu/rodovias/rodoviasfederais/index_html#Quilometragem%20das%20Rodovias)> (accessed on 6 April 2009). Not included Concessionaires Cart and Rodovias do Tietê.

<sup>78</sup> By the public sector.

<sup>79</sup> Not included Concessionaires Cart and Rodovias do Tietê. Source – PNV – Plano Nacional de Viação (Road Network National Plan) at the Departamento Nacional de Infraestrutura de Transportes – DNIT (National Department of Transportation Infrastructure) online: <<http://www.dnit.gov.br/menu/rodovias/rodoviasfederaisarquivos>> (accessed on 22 June 2009)

<sup>80</sup> Not included Concessionaires Cart and Rodovias do Tietê. Source – Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires) Online: <[http://www.abcr.org.br/publi/pub\\_osector\\_trechos.php](http://www.abcr.org.br/publi/pub_osector_trechos.php)> (accessed on 24 June 2009)

of São Paulo at the top of any list of States featuring toll roads conceded to private actors. This makes it clear that the policy of conceding highways and toll facilities to private entities has become a key feature of governance in Brazil.

Table 3 – Ratio Paved Highways vs Private Concessions in the State of São Paulo

	Single Lane (Km)	Multilane Construction (Km)	Multilane (Km)	TOTAL
<b>Total<sup>81</sup></b>	28,775.20	83.0	4,624.10	33,482.30
<b>Roads Conceded<sup>82</sup></b>	1,721.80		3,606.21	5,624.71
<b>%</b>	5.98%		77.99%	16,80%

### 2.13 Toll Industry Concessionaires

In 2012,<sup>83</sup> there were 55<sup>84</sup> private concessionaires managing highways in Brazil, listed by the Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires).<sup>85</sup> These concessionaires operate 15,469.00 Km of Highways. At least 4 new concession bids<sup>86</sup> will take place in the next few years and will concede to private corporations (i) the highway BR–040 in Minas Gerais, Goiás and the Federal District, (ii) the Highways BR–116, (iii) the BR–381 in Minas Gerais and

<sup>81</sup> Not included the concessionaires Concessionária Rodovias do Tietê, Concessionária Auto Raposo Tavares and future Highway concession Rodoanel Mario Covas – southern section. Source – PNV – Plano Nacional de Viação (Road Network National Plan) at the Departamento Nacional de Infraestrutura de Transportes – DNIT (National Department of Transportation Infrastructure) online: <<http://www.dnit.gov.br/menu/rodovias/rodoviasfederaiS.A.rquivos>> (accessed on June, 22<sup>nd</sup> of 2009) Not included Concessionaires Cart and Rodovias do Tietê.

<sup>82</sup> Source – Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires) Online: <[http://www.abcr.org.br/publi/pub\\_osetor\\_trechos.php](http://www.abcr.org.br/publi/pub_osetor_trechos.php)> (accessed on 24 June 2009)

<sup>83</sup> as of numbers of 2012. Source: – Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires) Online: <<http://www.abcr.org.br/Conteudo/Secao/43/estatisticas.aspx>> (accessed on 25 March 2013)

<sup>84</sup> as of numbers of 2012.

<sup>85</sup> List of operating concessionaires in Brazil. Online: <[http://www.abcr.org.br/publi/pub\\_osetor\\_trechos.php](http://www.abcr.org.br/publi/pub_osetor_trechos.php)> (accessed on 24 June 2009)

<sup>86</sup> See the website of Agência Nacional de Transportes Terrestres (ANTT – National Agency of Ground Transportation) online: <<http://www.antt.gov.br/>> (accessed on 26 June 2009)

(iv) the Southern part of the Rodoanel Mário Covas, the beltway of the largest<sup>87</sup> city of the country – São Paulo, capital city of the State of São Paulo.

Table 4 – Number of Private Concessionaires in Brazil and km Conceded

Year	Number of Concessionaires	Km operated
1995	5	765.00
1996	6	822.00
1997	13	3,438.00
1998	31	8,303.00
1999	31	8,303.00
2000	35	9,719.00
2001	36	9,859.00
2002	36	9,859.00
2003	36	9,859.00
2004	36	9,859.00
2005	36	9,859.00
2006	37	9,865.00
2007	38	10,237.00
2008	46	12,868.00
2009	52	15,243.00
2010	53	15,365.00
2011	55	14,569.00
2012	55	15,469.00

The three major players of the toll industry operate 6,256.3 km of highways in Brazil. These are (i) the Spanish contractor OHL Brasil<sup>88</sup>, (ii) the multinational Brazilian

<sup>87</sup> with 10,99 million habitants in the municipality, and 19,61 millions habitants in the metropolitan area that comprehends 39 municipalities.

<sup>88</sup> See Obrascón Huarte y Lain Brasil S.A. OHL Brasil. Online in English: <<http://www.ohlbrasil.com.br/>> (accessed on 26 June 2009) pages 10 and 19. The Spanish contractor OHL Brasil<sup>88</sup>, subsidiary of OHL Concesiones – this one a division of Obrascón Huarte Lain S.A. of Spain – is the leading concession holder in Brazil and it is the sole owner of 9 Concessions in 4 different States of Brazil.

based Companhia de Concessões Rodoviárias<sup>89</sup> (CCR – Highway Concessions Company) and (iii) the Brazilian corporation Primav Ecorodovias Co. (owned by Italian shareholders as well).<sup>90</sup> In absolute numbers, these three concession holders manage 21 concessions out of 53 currently existing ones.

Table 5 – Largest Private Concessionaires

	<b>Concessionaire</b>	<b>Km operated</b>
<b>1</b>	<b>OHL</b>	3,226.00
<b>2</b>	<b>CCR</b>	1,571.00
<b>3</b>	<b>Ecorodovias</b>	1,459.30
	<b>Total Conceded</b>	6,256.30
	<b>Total of Conceded Highways<sup>91</sup></b>	12,866.37

## 2.14 - Toll Revenues

In 16 years (1996 to 2011), the total revenue collected with tolls in Brazil was \$30.824 billion USD<sup>92</sup>, or an average of \$1.96 billion USD annually, according to data at the Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires). The revenue from the toll business has been increasing year over year.

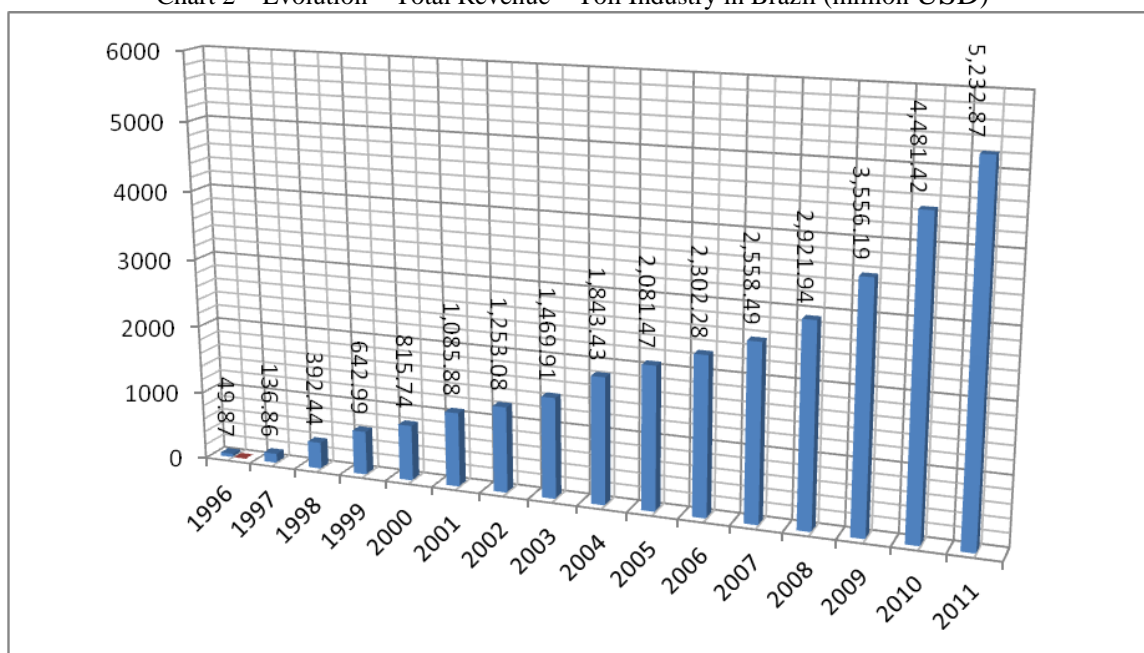
<sup>89</sup> The Companhia de Concessões Rodoviárias (CCR – Highway Concessions Company) runs 5 concessionaires in 3 states and is the major shareholder of 2 Concessionaires in 2 other States.

<sup>90</sup> The Primav Ecorodovias Corporation owns 4 concessionaires in 2 States and is a major shareholder of 1 Concessionaire in another State.

<sup>91</sup> In Brazil.

<sup>92</sup> Numbers of 2012. Source: – Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires) Online: <<http://www.abcr.org.br/Conteudo/Secao/42/dados+financeiros.aspx>> (accessed on 25 March 2013)

Chart 2 – Evolution – Total Revenue – Toll Industry in Brazil (million USD)



The report from the daily Folha de São Paulo of 25 December 2009<sup>93</sup>

shows that toll revenues in the State of São Paulo have reached record heights:

Collection of toll hits record in São Paulo

Reporting by Agnaldo Brito this Friday for Folha de São Paulo reveals that the collection of tolls on highways in São Paulo will reach \$4.55 billion reais [approximately \$1.97 billion USD] in 2009, a record level, 17,3% higher than that collected in 2008. The data are from Artesp (Transportation Agency of the State of São Paulo).

<sup>93</sup> Article translated by the author: “Arrecadação de pedágio bate recorde em SP

Reportagem de Agnaldo Brito para a Folha desta sexta-feira revela que arrecadação de pedágios nas rodovias paulistas vai atingir \$ 4,55 bilhões em 2009, nível recorde, 17,3% superior ao arrecadado em 2008. Os dados são da Artesp (Agência de Transportes do Estado de São Paulo).

A transferência de recursos dos usuários de rodovias para as concessionárias ao longo deste ano foi impulsionada pela a correção pelo IGP-M dos 12 contratos antigos e a abertura de 21 novas praças de pedágios em todo o Estado.

Com esses novos lotes em operação, o Estado alcançará um número de 117 praças de pedágio, a maioria com cobranças nos dois sentidos.

Segundo a Artesp, desde o início do processo de concessões de rodovias em São Paulo, a arrecadação com pedágios no Estado já soma R\$ 27 bilhões.

Mauro Arce, secretário dos Transportes de São Paulo, argumenta que o modelo de concessão paulista não considera reduzir o custo do pedágio se as concessões obtiverem taxas de retorno acima das projetadas inicialmente.

Arce diz que essa previsão não existe em São Paulo porque optou-se por transferir ao concessionário todo o risco contido na previsão de tráfego de veículos pela rodovia. Mas o risco se dilui numa economia em crescimento como a atual.” Available online: <<http://www1.folha.uol.com.br/folha/dinheiro/ult91u6711139.shtml>> (accessed on 5 April 2010).

The transfer of resources from users of highways to concessionaires this year was stimulated by the monetary restatement using the General Price Index of the Market [in Brazil, the Índice Geral de Preços do Mercado - IGPM] for 12 old contracts and the opening of 21 new toll plazas throughout the State.

With these new concessions in operation, the state will reach a number of 117 toll plazas, with most of them charging in both directions.

According to Transportation Agency of the State of São Paulo – Artesp, since the beginning of the process of highway concessions in the State of São Paulo, the tolls have already raised \$27 billion reais [approximately \$11.681 billion USD]<sup>94</sup> in the State.

Mauro Arce, Secretary of Transportation in São Paulo argues that the concession scheme of São Paulo does not consider the reduction of the cost of tolls to obtain return rates above to the originally projected.

Arce says that this prevision does not exist in São Paulo because it was decided to transfer all risk to the private actors and in the prediction of the traffic of the highways. But the risk is diluted in a growing economy like the current one.

In short, private entrepreneurs of highways in the State of São Paulo collected \$1.98 billion USD in 2009 and \$11.681 billion USD since the program of Highway concessions started in São Paulo. By comparison, the Ministry of Transportation of the Federal Government<sup>95</sup> allocated<sup>96</sup> the total federal budget for transportation of any kind, for 2009 a total of \$12.97 billion reais<sup>97</sup> or \$5.61 billion USD. The executed budget for the same period was \$7.72 billion reais,<sup>98</sup> or \$3.34 billion USD –

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<sup>94</sup> Or equivalent to \$11.681 billion USD. Currency exchange rate 12/31/2008 – 2.3113 – in \$ (Brazilian Reais) for \$1.00 USD (United States Dollars). “Certified by the Federal Reserve Bank of New York for customs purposes as required by section 522 of the amended Tariff Act of 1930” on line: <[http://www.federalreserve.gov/Releases/H10/Hist/dat00\\_bz.txt](http://www.federalreserve.gov/Releases/H10/Hist/dat00_bz.txt)> (accessed on 5 April 2010)

<sup>95</sup> Federal Government.

<sup>96</sup> Information available online at the Brazilian Senate website: <<http://www8.senado.gov.br/businessobjects/enterprise115/desktoplaunch/signa/abreSiga.do?docId=2133982&kind=Webi>> (accessed on 6 April 2010)

<sup>97</sup> Or equivalent to \$5.611 billion USD. Currency exchange rate 12/31/2008 – 2.3113 – in \$ (Brazilian Reais) for \$1.00 USD (United States Dollars). “Certified by the Federal Reserve Bank of New York for customs purposes as required by section 522 of the amended Tariff Act of 1930” on line: <[http://www.federalreserve.gov/Releases/H10/Hist/dat00\\_bz.txt](http://www.federalreserve.gov/Releases/H10/Hist/dat00_bz.txt)> (accessed on 5 April 2010)

<sup>98</sup> Or equivalent to \$3.340 billion USD. Currency exchange rate 12/31/2008 – 2.3113 – in \$ (Brazilian Reais) for \$1.00 USD (United States Dollars). “Certified by the Federal Reserve Bank of New York for customs purposes as required by section 522 of the amended Tariff Act of 1930” on line: <[http://www.federalreserve.gov/Releases/H10/Hist/dat00\\_bz.txt](http://www.federalreserve.gov/Releases/H10/Hist/dat00_bz.txt)> (accessed on 5 April 2010)

59.52% of the total allocated. In sum, private entrepreneurs collected<sup>99</sup> in 2009 35% of the allocated budget and almost 60% of the budget executed by the public sector<sup>100</sup>.

Table 6 – Private and Public Investment in Transportation

	<b>Investment</b>	<b>Budget Allocated (Billion USD)</b>	<b>Budget Executed (Billion USD)</b>
<b>1</b>	<b>Public – Union – Ministry of Transport</b>	5.61 <sup>101</sup>	3.34
<b>2</b>	<b>Private – Concessionaires – only in SP</b>	1.98	1.98
	<b>% of the Federal Government</b>	35.29%	59.28%

The numbers above show the importance of the toll industry in Brazil and the scale of its role in the economy. Toll roads have become an important source of revenue and an important tool of public policy in Brazil. The wisdom of the use of toll roads on such a massive scale is beyond the scope of this thesis. Given the scope of the toll road system's on Brazil's governance and economy, one would expect the government to pay careful attention to the legality and constitutionality of toll road arrangements. Unfortunately, Brazil's government has failed to do so. The next chapter will explain why much of Brazil's toll road system is illegal.

## 2.15 Other Countries

The importance of the use of toll roads in Brazil is perhaps best demonstrated by comparing the use made of toll road concessions in other countries. In Canada, according

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<sup>99</sup> with tolls.

<sup>100</sup> Usually, concessionaires' revenue is subject to pay income tax among other taxes, and such revenue is not shared with the public government, except for new highway concessions' arrangements in the State of São Paulo.

<sup>101</sup> In billions of dollars.

to Fred Nix<sup>102</sup> there is a grand total of 18 toll facilities<sup>103</sup>, 12 of which are border crossings to the United States and only six of which are entirely in Canada (representing a total of 344 Kms<sup>104</sup> of tolled highways<sup>105</sup>). The operation of the Canadian highways varies considerably. There are two privately operated highway connections between Canada and the United States and two privately operated toll highways in Canada – the first one is the highway 407<sup>106</sup> managed by 407 International Inc.<sup>107</sup> (“407 ETR”) – which extends 108 kilometers east–west just north of Toronto.<sup>108</sup> The second one is the Fredericton-Moncton highway<sup>109</sup> in New Brunswick.

By its turn, United States has a total of 8,215.44 Km<sup>110</sup> (5,104.90 miles) of tolled highways, bridges and tunnels<sup>111</sup> comprised of 297 toll facilities. There are 51 new toll

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<sup>102</sup> Fred Nix, “Alternative Road Financing Arrangements” (2001) Canada Transportation Act Review. Available online: <<http://www.reviewcta-examenlrc.gc.ca/CTARReview/CTARReview/english/reports/nix.pdf>> (accessed on 30 June 2009).

<sup>103</sup> The tolls are distributed along 5 Provinces: 12 bridges and 1 private owned toll Highway in Ontario, 3 in Nova Scotia, 1 Bridge in New Brunswick and 1 bridge between New Brunswick and Prince Edward Island. The 18 tolls facilities are: (i) Angus L. MacDonald Bridge; (ii) A. Murray MacKay Bridge; (iii) Cobequid Pass ; (iv) Confederation Bridge ; (v) Saint John Harbour Bridge; (vi) Seaway International Bridge; (vii) Ogdensburg Bridge; (viii) Thousand Islands International Bridge; (ix) Highway 407; (x) Lewiston-Queenston Bridge; (xi) Whirlpool Rapids Bridge; (xii) Rainbow Bridge; (xiii) Peace Bridge; (xiv) Ambassador Bridge; (xv) Detroit-Windsor Tunnel; (xvi) Blue Water Bridge ; (xvii) Sault Ste Marie and (xviii) Fort Francis-International Falls Bridge;

<sup>104</sup> Including the Coquihalla Tolled Highway – toll recently closed.

<sup>105</sup> The toll in Coquihalla highway in British Columbia was taken off in September of 2008

<sup>106</sup> See ETR 407 online: <<http://www.407etr.com/>> (accessed on 30 June 2009)

<sup>107</sup> 407 International Inc. is owned by a consortium comprised of the Canadian subsidiary of a Spanish company called Cintra Concesiones de Infraestructuras de Transporte – which is co-owned by Grupo Ferrovial and Australian-headquartered Macquarie Infrastructure Group – and Canadian-based SNC-Lavalin of Montreal.

<sup>108</sup> This highway features a very developed system of toll charge – by filming license plates and toll charges are based on kilometers travelled.

<sup>109</sup> See MRDC Operations Corporation online: <<http://www.mrdc.ca/mrdc/en/index.aspx>> (accessed on 30 June 2009)

<sup>110</sup> Source: USDOT – Department of Transportation online: <<http://www.fhwa.dot.gov/ohim/tollpage/facts.htm>> (accessed on 30 June 2009)

<sup>111</sup> See “Toll Facilities in the United States Bridges-Roads-Tunnels-Ferries” of December 2007, of the Office of Highway Policy Information of the U.S. Department of Transportation (USDOT).



facilities currently being planned<sup>112</sup> making a total of 348 toll facilities in 35 out of 50 States, most of them operated by public authorities.

Of all existing toll facilities in the US, just over 50% are found in 5 states (Texas, Florida, New York, New Jersey and Illinois) – precisely 50.43%<sup>113</sup> of the toll gates of the country.



Figure 2 – US States<sup>114</sup> with Toll Facilities – in Gray.

In Asia, an account of the newspaper China Daily<sup>115</sup> of 26 June 2006 places China as the world leader in the use of toll gates. The country used to hold 71.4 % of the world's

<sup>112</sup> In operation, under construction, and financed as of 1<sup>st</sup> January 2007.

<sup>113</sup> See footnote 112 above.

<sup>114</sup> In grey.

<sup>115</sup> See China Daily News article “Road tolling policy to stay – minister” – “Tolls on China's roads are here to stay as they are the only way to pay for the rapid construction and maintenance of expressways and highways, Minister of Communications Li Shenglin has announced.

"Without this policy, the national road network development plan would not be realized within the time limit and the huge debt would never be repaid," Li said.

The road tolling policy established in 1984 stipulated that toll revenues be dedicated to repaying the cost of construction and supporting maintenance and new road construction.

Official figures show 90 percent of expressways, 70 percent of first-grade highways and 40 percent of second-grade highways are funded with toll revenues.

However, a growing number of motorists have expressed resentment at the policy, calling for more free roads.

China has 3,112 toll charge points and 71.4 percent of the world's 140,000 kilometers of tolled roads.

Li pointed out that toll charges on second-grade highways were the worst problem.

"Toll charge points on second-grade highways need to be cut as they have two thirds of the country's tolled mileage and points, but contribute less than one third of the total toll revenue," Li said.

140,000 kilometers of tolled roads: 99,960 Km of tolled highways and a total of 3,112 toll facilities. Recently, however, the country decommissioned 65% of all of its toll gates<sup>116</sup> of secondary highways in 12 provinces. This decommissioning was completed at the end of April of 2009.

In absolute numbers, China's government is shutting down 1,300 tolls. The government is preserving 653 tolls (35%) out of 1,867 on secondary highways. It is also

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"However, the road tolling policy should remain unchanged as China will need it for a long time to come." Li said the ministry was considering measures to control the scale of tolled roads, while encouraging local governments in developed areas to buy out some of the second-grade roads.

At the end of last year, 1.597-million kilometers roads had been built in China with expressways and first and second-grade highways accounting for 20.4 percent.

China has classified main roads into expressway, and first-grade, second-grade, third-grade and fourth-grade highways according to their traffic volume and function. The expressway and the first-grade highway require an average daily traffic volume of more than 10,000 small passenger cars and second-grade highways 2,000 to 7,000."

Online: <[http://www.chinadaily.com.cn/china/2006-06/26/content\\_625475.htm](http://www.chinadaily.com.cn/china/2006-06/26/content_625475.htm)> (accessed on 27 June 2009)

<sup>116</sup> See China Daily News article of 5 June 2009: "Free ride as toll gates disappear" – "Motorists and haulage companies using more than 70,000 km of roads in 12 eastern and central provinces will find a wide-open highway ahead following the decommissioning of 1,300 toll gates.

The toll charge points – accounting for some 65 per cent of all toll points on second-grade highways – were cleared away in recent weeks and were gone by the end of April, said He Jianzhong, a spokesman with the Ministry of Transport.

The move will reduce transportation costs and boost economic activity, He said.

But there will be a heavy cost. Some 70,000 toll point workers now need new jobs, added Li Hua, head of the ministry's highway bureau.

Li said local governments have drafted relocation plans for displaced workers and expect to reassign them to crack down on overloaded trucks, collect tolls on new expressways and maintain rural roads.

The 12 provinces that are decommissioning the toll points will calculate their loss of income and the size of remaining debts for the construction of the roads, said Wu Xiao, deputy director general of the Basic Industries Department with the National Development and Reform Commission. The State Council, or China's Cabinet, will allocate \$26 billion Yuan out of the fuel tax revenue each year to help local governments repay the debts, he said.

China had more than 3,000 toll charge points, and more than 70 percent of the world's 140,000 km of tolled roads in 2006, according to a Xinhua News Agency report.

China has 260,000-km of second-grade highways. Many of those roads were tolled and second-grade highways recently made up around 60 percent of all total tolled roads in China.

However, the second-grade highways accounted for less than one-third of the total toll revenue, Minister of Transport Li Shenglin was earlier quoted as saying in a Xinhua report.

In January, when the State Council launched its fuel tax reform, it stipulated that by 2012, tolls on second-grade highways in eastern and central China would be reduced by 60 percent. Provinces and regions in Western China are not taking part in the current decommissioning of toll points.

In Western China, governments can decide to keep the toll charge points on second-grade highways if they are needed to pay back debts, maintain roads and support new road construction." Available online: <[http://www.chinadaily.com.cn/bizchina/2009-06/05/content\\_8253884.htm](http://www.chinadaily.com.cn/bizchina/2009-06/05/content_8253884.htm)> (accessed on 27 June 2009)

preserving all 1,159 tolls found on major expressways. Even with its recent reduction in the use of toll highways, China still holds world leadership in the toll industry with a current total of 1,812 tolls gates.<sup>117</sup>

The table below gives an overview of the toll industry in the world. Brazil, which is one of the world's largest countries in terms of land mass, features the second most extensive network of toll highways in the world (measured by overall length of tolled highways).<sup>118</sup>

Table 7 - Toll Plazas in Selected Countries

	Country	Kms operated	Number of toll facilities	Companies
<b>1</b>	China	99,960	1245	N/A <sup>119</sup>
<b>2</b>	<b>Brazil</b>	<b>15,469</b>	<b>284</b>	<b>55</b>
<b>3</b>	United States	8,215	349	N/A
<b>4</b>	France	8,522	124	17
<b>5</b>	Argentina	8,837	59	11
<b>6</b>	Japan	6,900	N/A	N/A
<b>7</b>	Croatia	1,198	73	4
<b>8</b>	Norway	835	88	35
<b>9</b>	Indonesia	630	N/A	N/A
<b>10</b>	South Africa	N/A	75	N/A
<b>11</b>	Chile	N/A	30	N/A
<b>12</b>	Canada	344	18	N/A

<sup>117</sup> See footnote 115.

<sup>118</sup> As China, Canada and United States.

<sup>119</sup> not available.

Table 8 – Km Conceded - Selected Countries<sup>120</sup>

Country	Total Network	Km Conceded
<b>Brazil</b>	<b>1,584,103</b>	<b>15,469</b>
Germany	644,288	12,788
France	951,200	8,847
Italy	487,700	5,689
Spain	667,064	3,365
Austria	110,778	2,176
Turkey	424,964	2,000
Portugal	76,802	1,701
Greece	116,711	1,658
Czech Republic	130,573	1,319
Croatia	29,248	1,241
Hungary	197,534	1,081
Norway	93,247	872
Slovenia	38,872	607
Serbia and Montenegro	40,130	603
Slovakia	43,848	415
Ireland	96,424	329
Poland	383,313	300
Great Britain	419,634	42
Denmark	73,257	34
Netherlands	136,135	20
Switzerland	71,355	17
Sweden	574,741	16
Albania	18,000	N/A
Belgium	153,595	N/A
Bulgaria	40,231	N/A
Estonia	58,034	N/A
Finland	78,860	N/A
Latvia	69,684	N/A
Lithuania	81,030	N/A
Macedonia	13,922	N/A
Romania	198,817	N/A
Russia	963,000	N/A

Source: ASECAP/AA/IRF

<sup>120</sup> Numbers of 2012. Source: – Associação Brasileira de Concessionária de Rodovias (ABCR – Brazilian Association of Highway Concessionaires) Online: <<http://www.abcr.org.br/Conteudo/Secao/43/estatisticas.aspx>> (accessed on 25 March 2013)

## **2.16 Conclusion**

Obviously, the country of Brazil has quickly become a “world leader” in both highway tolling and the concession of highways to private actors. The massive revenues (and we are talking about over \$30 billion USD in the past 16 years) generated by the toll system is derived, of course, from rates paid by ordinary people driving on Brazilian highways – rates that add directly to the cost of moving from place to place. This constitutes a large change in the lives of Brazilian commuters. Given the scope and scale of the impact of toll roads on Brazilians, it is important to assess the legality of this toll road system. That is the overall goal of this thesis, and the specific focus of the next chapter.

## Chapter III

### The Lawfulness Principle and the Lack of Regulation on Tolls

*“When law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or unreasonableness.  
Philip Anizman<sup>121</sup> - 1975*

#### 3.1 Introduction

As we saw in chapter 2, the Brazilian Constitution features a principle known as “The Lawfulness Principle”.<sup>122</sup> This principle roughly corresponds to what we might call “The Rule of Law” in North America. Pursuant to this principle, all government acts must be authorized by law: whether the government is levying taxes, conceding resources to private actors, or establishing fines and penalties, the government must proceed through the passage of a statute and (where necessary) detailed regulations. Without a prior law, there can be no valid government action.

Celso Antônio Bandeira de Mello<sup>123</sup> writes that “The principle of Lawfulness, in Brazil, means that the public administration can do nothing but what the statute

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<sup>121</sup> Philip Anizman (ed.) (1975) “A Catalogue of Discretionary Powers in the Revised Statutes of Canada”, 1970. Ottawa: Law Reform Commission of Canada.

<sup>122</sup> Also known as “The principle of legality”. All three phrases mean the same thing: The principle of Lawfulness, Lawfulness principle and the principle of legality. For translation purposes, in Portuguese these three phrases are interchangeable. On the general nature of the Lawfulness principle, see Cármen Lúcia Antunes Rocha. *Princípios Constitucionais da Administração Pública*. [Constitutional Principles of the Public Administration] (1994) Belo Horizonte: Del Rey Publishing house. Page 81 and Odete Medauar, *Direito Administrativo Moderno* [Modern Administrative Law] (2011), RT Publishing House, São Paulo.

<sup>123</sup> See Celso Antônio Bandeira de Mello. *Curso de Direito Administrativo* [Administrative Law Course] (2003) São Paulo: Malheiros Publishing House 2003, page 95. Translated by the author:

authorizes.” Similarly, Diógenes Gasparini<sup>124</sup>, an expert in Brazilian administrative law, explains the Lawfulness Principle as follows:

The Lawfulness Principle means that the public administration, in all its activity, is bound to the commandments of the law and cannot move away from it, due to the invalidity of the act and the responsibility of its author. Any state action without the corresponding legal provision or exceeding the meaning of the law is contrary to the principle and subject to annulment. The government’s field of action, as can be seen, is much smaller than that of the individual.

In chapter 2, Brazil’s Lawfulness Principle is enshrined in Articles 5, Subsection II<sup>125</sup>, and Article 37<sup>126</sup> of the Brazilian Constitution:

“Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

...

II - no one shall be obliged to do or refrain from doing something except by virtue of law;”

“Article 37. The direct or indirect public administration of any of the powers of the Union, the states, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, morality, publicity and also the following:”

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“O princípio da legalidade, no Brasil, significa que a Administração nada pode fazer senão o que a lei determina. Ao contrário dos particulares, os quais podem fazer tudo o que a lei não proíbe, a Administração só pode fazer o que a lei antecipadamente autorize. Donde, administrar é prover aos interesses públicos, assim caracterizados em lei, fazendo-o na conformidade dos meios e formas nela estabelecidos ou particularizados segundo suas disposições.”

<sup>124</sup> Diógenes Gasparini. *Direito Administrativo* [Administrative Law] (2003) São Paulo : Saraiva Publishing House. Pages 7 and 8. Translated by the author: "O princípio da legalidade significa estar a administração pública, em toda a sua atividade, presa aos mandamentos da lei, deles não se podendo afastar, sob pena de invalidade do ato e responsabilidade de seu autor. Qualquer ação estatal sem o correspondente calço legal, ou que exceda ao âmbito demarcado pela lei, é injurídica e expõe-se à anulação. Seu campo de ação, como se vê, é bem menor que o do particular. De fato, este pode fazer tudo que a lei permite e tudo que a lei não proíbe; aquela só pode fazer o que a lei autoriza e, ainda assim, quando e como autoriza."

<sup>125</sup> Original in Portuguese: “Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

...

II - ninguém será obrigado a fazer ou deixar de fazer alguma coisa senão em virtude de lei;”

<sup>126</sup> Federal Constitution of Brazil – Article 37 translated by the author: “Artigo 37 - A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte:”

Both provisions will be discussed, below. The purpose of the first part of this chapter is to examine the Lawfulness Principle as it applies in Brazil, and to consider its impact on the Brazilian toll road system. The chapter will conclude with a discussion on the dearth of laws authorizing the executive to grant concessions on roads in the country. As we shall see below, the only law purporting to provide authority for the concession of toll roads in Brazil is Brazil's General Law of Concessions.<sup>127</sup> For reasons given below, the General Law of Concessions is insufficient to constitute compliance with the Lawfulness Principle – in other words, this chapter will argue that the statutory authority purporting to concede Brazilian toll highways to private actors is insufficient, and the grant of such concessions in the absence of sufficient statutory authority violates the Lawfulness Principle. Because these concessions violate Brazil's Lawfulness Principle, they are offside of the Brazilian Constitution, and therefore illegal.

Brazil's Lawfulness Principle will help us answer a key question for the purposes of this thesis, namely, what are the Constitution's specific requirements with respect to the concession of public utilities? In other words, what must be included for a "concession law" for that law to count as a constitutionally permissible "concession law"? In order to answer this question, two points must be addressed: (1) the meaning and scope of Articles 5 and 175 of the Constitution and (2) the content of the General Law of Concessions. These points are the topics of the next sections of this chapter.

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<sup>127</sup> Law number 8,987 of 13 February 1995. It can be found online, only in Portuguese - <[http://www.planalto.gov.br/ccivil\\_03/leis/L8987cons.htm](http://www.planalto.gov.br/ccivil_03/leis/L8987cons.htm)> (Accessed on 28 October 2011)



### 3.2 The Lawfulness Principle

The main legal source for the Lawfulness Principle is Brazil's Constitution. The Constitution prohibits state action without prior legislative authorization and this includes the concession of state resources, such as highways. As noted above, this principle is set out in Article 37<sup>128</sup> of the Federal Constitution. Clearly, Article 37 of the Constitution establishes that the government of Brazil is bound by "Lawfulness". What is this "Lawfulness Principle"? Pursuant to Brazil's Lawfulness Principle, the public administration or the administrator can only do what is expressly authorized by pre-existing statutes.<sup>129</sup>

Beyond its entrenchment in Article 37 of the Federal Constitution, the Lawfulness Principle finds additional expression (as noted above) in subsection II of Article 5 of the Federal Constitution. As we have seen, this provision states that no person (whether Brazilian or a foreigner resident in the country) can be obliged (by the government) to do any act, unless that obligation is established "by virtue of law". This applies to any obligation that the government seeks to impose, whether directly or indirectly. If the

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<sup>128</sup> Federal Constitution of Brazil – Article 37 translated by the author: "Article 37. The direct or indirect public administration of any of the powers of the Union, the States, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, morality, publicity and also the following:"

Original in Portuguese: "Artigo 37 - A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte:"

<sup>129</sup> Hely Lopes Meirelles. *Direito Administrativo Brasileiro* [Brazilian Administrative Law] (2005) 30<sup>th</sup> Edition. São Paulo: Malheiros Publishing House. Translated by the author – "The Lawfulness principle, as a principle of the public administration means that the public administrator is, in all its functional activity, subject to the commandments of statutes and the requirements of the common good, and they can not move away or divert, otherwise the act will be invalid and they will be subject to civil and criminal liability, as appropriate"

Original in Portuguese: "A legalidade, como principio de administração (CF, art. 37, caput), significa que o administrador público está, em toda a sua atividade funcional, sujeito aos mandamentos da lei e às exigências do bem comum, e deles não se pode afastar ou desviar, sob pena de praticar ato inválido e expor-se à responsabilidade disciplinar, civil e criminal, conforme o caso."

government seeks to impose an obligation for any person to pay tolls for the use of public resources (for example), it may impose that obligation only “by virtue of law”.<sup>130</sup> It cannot impose such obligations by simple administrative fiat: any attempt to do so would constitute a clear violation of this provision of the Federal Constitution.<sup>131</sup>

### **3.3 The General Concession Law and Article 175 of the Constitution**

In addition to the general requirements established in connection with the Lawfulness Principle, Brazil’s Constitution also includes specific requirements with respect to the governments’ actions in supplying public utility services. These additional specific constitutional obligations are spelled out in Article 175.

It is incumbent upon the Government, as set forth by law, to provide public utility services, either directly or by concession or permission, which will always be through public bidding.

Sole paragraph - The law shall provide for:

I - the operating rules for the public service concession- or permission- holding companies, the special nature of their contract and of the extension thereof, as well as the conditions of forfeiture, control and termination of the concession or permission;

II - the rights of the users;

III – the rate policy;

IV - the obligation of maintaining adequate service.

Clearly, Article 175 requires not only the provision of public utilities, but also the regulation of several key aspects of those utilities.

The sole paragraph of Article 175 requires regulation of public utilities and the content of such regulation must provide for: (i) the regime for public service companies;

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<sup>130</sup> Note that that the quote of Gasparini above is in the context of a Civil Law country (as opposed to a common law jurisdiction). As a result, when Gasparini notes that the public administration “can only do what the law allows”, he uses the phrase “the law” to mean “legislation” (as opposed to common law or custom). In other words, Gasparini makes it clear that, in order for Brazil’s government to take any action, that action must be directly authorized by a statute. One point here is that in Civil Law systems, “Law” must mean “statute”, rather than simply a common law principle or tradition.

<sup>131</sup> See Odete Medauar below at Chapter 3.5.1.

(ii) the rights of utility users; (iii) the rate policy and (iv) the obligation of maintaining adequate services. In order for the Government's provision of public utilities to pass constitutional muster the law (required by the Lawfulness Principle) must follow the specific rules laid out in Article 175, and spell out regulations on each of the specified subjects.

At present, an advocate of the government's current position regarding tolls might contend that the regulations required by the Constitution do exist, specifically in the form of the General Law of Concessions. For reasons set out below, this position should be rejected.

My contention is that the General Law of Concessions fails to provide an adequate framework to constitute compliance with the Lawfulness Principle, together with the specific requirements articulated in Article 175. This Article expressly requires specific provisions to regulate the rights of users and rate policy. The current law fails to meet this basic constitutional requirement. Savaris<sup>132</sup>, administrative scholar, Federal Justice in Curitiba and Professor of the Magistracy School of Paraná summarizes the current regulation of toll roads in Brazil as follows:

The collection of tolls on federal highways does not meet any legal parameter. Everything is possible. There is no law requiring an alternative free route to the tolled highway. There is no law that sets the price. And this is, indeed, the greatest weakness of the collection of tolls on federal highways: there is no law.

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<sup>132</sup> José Antônio Savaris. *Pedágio: Pressupostos Jurídicos*. [Highway Tolls: Legal presupposition] (2004) Curitiba: Juruá Publishing House. Page 260 translated by the author: "A cobrança de pedágio nas vias federais concedidas não respeita qualquer parâmetro legal. Tudo é possível. Não há lei que a condicione à existência de via alternativa gratuita. Não há lei que fixe o preço. E esta é, realmente, a chaga maior da cobrança de pedágios nas rodovias federais: não há lei."

With respect, Savaris is correct. There are no meaningful laws regulating toll roads in Brazil – certainly none that regulate the specific subject matters described by Article 175 of the Constitution (namely, the rights of users and rate policy). As a result, it is clear that the requirements of Article 175 are not fulfilled by the General Law of Concessions.

To the extent that the government has made any attempt to regulate toll roads, it has been through the passage of the General Law of Concessions. This law is inadequate, and fails to comply with Article 175. On the subject of “rate policy”, for example (one of the features requiring regulation under Article 175), the General Law of Concession states in section IV, Article 13<sup>133</sup>, only that rates “may vary”. This statement is too vague to constitute compliance with (a) the Lawfulness Principle, and (b) the Constitution’s requirement to regulate rate policy. It is important to note that this is Brazil’s only statutory provision purporting to regulate rates on toll roads. The meaning and impact of the provision stating that the rates “may vary” is discussed in Section 3.3.2 of this chapter.

### **3.3.1 Contracts as Brazilian Law**

While it is clear that there is insufficient statutory authority regulating toll rates, one might be tempted to argue that other legal instruments – such as private contractual agreements – fill the regulatory void. For example, Brazil’s government has entered various contracts with private concessionaires, and many of these contracts stipulate rules with respect to toll road rates. While these contracts may (if enshrined in duly enacted

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<sup>133</sup> Article 13 of the General Law of Concessions translated: “Article 13. The rates may be variable according to the technical characteristics and specific costs from the service to different user segments.” Original in Portuguese: “Art. 13. As tarifas poderão ser diferenciadas em função das características técnicas e dos custos específicos provenientes do atendimento aos distintos segmentos de usuários.”

legislation) supply the level of detail required to constitute compliance with “the Lawfulness Principle” or the Constitution’s requirement to regulate rates in Article 175, these contracts do not have the force of law in Brazil, and have not been incorporated into legislation.

In a civil law jurisdiction such as Brazil, the government cannot discharge its constitutional obligations (or comply with the Lawfulness Principle) through the creation of private instruments, such as contracts. In order to fulfil its obligations under the Lawfulness Principle, the government of a civil law jurisdiction must pass appropriate legislation. As a result, the details found in contractual provisions cannot cure the vagueness and unconstitutionality of the General Law of Concessions, as any such details must themselves be provided through legislation or regulations. This argument is further developed in the following sub-chapter.

### **3.3.2 Contract versus Law – The Lawfulness Principle**

In civil law jurisdictions such as Brazil, the State is held to a particular “form” when satisfying the Lawfulness Principle – that is, the “rules” must be expressed through legislation, rather than through the terms of a contract between the State and a concessionaire. In civil law jurisdictions, neither private or public contracts count as legislation<sup>134</sup> for the purposes of the Lawfulness Principle, i.e., as a means of discharging constitutional obligations in civil law jurisdictions like Brazil. This is why the government cannot discharge its Constitutional obligations via contract due to the Lawfulness Principle.

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<sup>134</sup> Legislation is the only mechanism through which obligations under the Lawfulness principle can be discharged.

Marçal Justen Filho<sup>135</sup> has said that contract may not count as legislation for constitutional purposes, which is a role of the legislators:

Contract is as an act produced by the combination of will of two or more parties, legally authorized to create, modify or terminate legal relations, but not in the exercise of State legislative function.

Odete Medauar<sup>136</sup> echoes this statement, pointing of that compliance with the Lawfulness Principle requires the passage of legislation:

In general, within the measures with higher impacts on citizens' rights, there is a strict bond of the administrative act to the content of the legislation. It should also be noted that for many issues, the Federal Constitution, State Constitutions and organic laws of the municipalities require formal discipline by legislation, that is, by statutes which must necessarily arise from the process by the legislative body.

Contracts<sup>137</sup> are not legislation. While they might be authorized by legislation or they might even be created through legislation, in every case, they are not the legislation itself.

As a technical matter, it may be important to note that, while the contracts governing toll roads in Brazil are not legislation, the statute authorizing them – namely, the General law of Concessions – is an ordinary statute that arose by legislative process.

As we have seen, this statute authorizes the government to enter contracts in which the

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<sup>135</sup>Marçal Justen Filho. *Teoria geral das concessões de serviço público*. [General Theory of the Concessions of Public Services] (2003) São Paulo: Dialética Publishing House. Page 152. *Original in Portuguese*: “O contrato conceitua-se como ato jurídico produzido pela conjugação da vontade de duas ou mais partes, autorizada normativamente a criar, modificar ou extinguir relações jurídicas, mas não no exercício de função legislativa estatal.”

<sup>136</sup>Odete Medauar. *Direito administrativo moderno*. [Modern Administrative Law] (1996) São Paulo: Revista dos Tribunais publishing house. Page 140. *Original in Portuguese*: “Em geral, nas medidas de repercussão mais forte nos direitos dos cidadãos, há vinculação mais estrita da medida administrativa ao conteúdo da norma.

Deve-se lembrar também que, para muitas matérias, a Constituição Federal, as constituições estaduais e as leis orgânicas de municípios exigem a disciplina por lei formal, ou seja, por lei que deverá necessariamente resultar de tramitação no Legislativo.”

<sup>137</sup>As the highways concession contracts between the State and a private corporation.

rates “vary”. So one could argue that we do have a law that applies, and that it came from the ordinary legislative process.

At this point, it is important to remember the core claim of this chapter, namely, that the General Law of Concessions is insufficiently precise to count as compliance with the Lawfulness Principle. While pertinent details have, in some cases, been fleshed out in contracts, there is simply no legal basis for claiming that contracts can legally supply details that a public law lacks. Simply put, the required precision cannot come from contracts and discretionary action by the Government without democratically enacted guidelines or regulation.

### **3.3.3 The General Law of Concessions<sup>138</sup> – Broad Sense of the Law**

As mentioned in section 3.3.1 above, the General Law of Concessions lacks the specificity needed for the lawful implementation of toll highways in Brazil. It is impermissibly vague and does not exhibit the level of specificity required in order to comply with the Lawfulness Principle. The overall goal of this section is to explore why further regulation, (apart from the General Law of Concessions) is required by the Lawfulness Principle of the Constitution.

The General Law of Concessions is not a law aimed directly at highway concession. On the contrary, it sets up the rules for the conceding of public resources to private actors, and in doing so it deals with many different types of economic activities and services. The General Law of Concessions does not contain specific provisions governing individual economic activities or resources, but instead establishes broad, general procedures that regulate the process of conceding public resources without

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<sup>138</sup> The translation of the General Law of Concessions is at Appendix A.

actually regulating the specific (and Constitutionally required) terms of those concessions.

Brazil's legal framework allows dozens of types of concessions to be implemented through reliance on the General Law of Concessions, namely: (i) concession of urban public bus transportation; (ii) concession of urban public railway transportation; (iii) concession of intercity or interstate bus transportation; (iv) concession for waterway transportation services; (v) concession for airway transportation services; (vi) concession for railway transportation services; (vii) concession of ports; (viii) concession of airports; (ix) concession of highways; (x) concession for the provision of sewage services; (xi) concession for the provision of basic sanitation services; (xii) concession for the public service of supply of water; (xiii) concession for the public service of supply and distribution of piped gas; (xiv) concession for public service of supply and delivery of electric energy; (xv) concession for the public service of garbage collection; (xvi) concession for the implementation and maintenance of the landfill; (xvii) concession for the provision of funeral services; (xviii) concession for public postal services.

All these types of concessions have been granted. Apart from toll highway concessions, all were granted and implemented through additional legislation beyond the simple procedures set out by the General Law of Concessions – see, for example, the discussion of telephony in Subchapter 3.4. The toll industry started 26 years<sup>139</sup> ago with

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<sup>139</sup>See the introductory website of the national agency of ground transportation – ANTT online: <<http://www.antt.gov.br/concessaorod/apresentacaorod.asp>> (Accessed on 29 November 2011).

“Our goal with the use of this mean of communication is disclose in a comprehensive and transparent way the information about the Federal program of Highways Concessions. The implementation process began in 1995 with the concession by the Ministry of Transport of 858.6 km of federal highways.



the first Federal program of highways concessions and still lacks any specific implementing legislation. It is unique among publicly conceded resources in this respect.

In other words, the existence of specific laws for public services such as sanitation, ground water, ground transportation, etc. in Brazil suggests that the Brazilian legislature considers these laws necessary, in other words, the legislature itself regards the General Law of Concessions as insufficiently specific to regulate these activities. This suggests, as a matter of legislative intent, that the General Law of Concessions is not designed to cope with individual economic activities, but instead simply provides a framework pursuant to which specific legislation can be passed.

While the presence of specific laws for other types of concession suggests that the government feels such laws are necessary (as a matter of legislative intent), it is equally true that the absence of such a law with respect to toll roads could be construed as a signal of legislative intent that this level of specificity is not (for some reason) required with respect to toll roads. However, this is unpersuasive. It is unlikely that a rational legislature would regard the General Law of Concessions as a sufficiently precise law for the regulation of roads. This is because the scope of the General Law of Concessions is extraordinarily broad, and that the sole<sup>140</sup> provision (apart from the General Law of Concessions<sup>141</sup>) relating directly to highway concessions in Brazil is Article 1<sup>142</sup> of Law 9,074 of 7 July 1995<sup>143</sup>:

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<sup>140</sup> And only.

<sup>141</sup> There is a Public-Private Partnership (PPP) Law – Law 11,074 of 30 December 2004, dealing with concessions as well and with no reference at all to highways concessions, neither regulating the industry. See the PPP Law online – only in Portuguese: <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2004/lei/111079.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/111079.htm)> (accessed on 5 February 2013). The PPP Law has not been used by public governments to concede highways in Brazil. The only known case in the industry, is in the State of Minas Gerais – the PPP of the highway MG-050. Available online, only in Portuguese:

The concession or, where applicable, the permission shall be subject, under the Law 8,987 of 13 February 1995, to the following services and public works of the Union:

...  
IV - federal highways, preceded or not by the execution of public works;

No further guidance is provided. While there are generic bidding and rate procedures mentioned in the General Law of Concessions, no specifics are laid out with respect to specific forms of conceded resources, including highways. And as we have seen, for other resources, the government has passed legislation spelling out all the necessary details. Highways concession is one left with a regulatory void.

### **3.3.4 The Rate Policy – Requirement of a Specific Law**

As noted in Section 3.3 above, the Constitution requires the government to legislate “rate policy” if it chooses to concede a public utility. Article 13<sup>144</sup>, the last Article of Chapter IV of the General Law of Concessions deals with rate policy. It is, therefore, crucial to determine if this provision fulfills the relevant constitutional obligation to regulate rates. Article 13 of the General Law of Concessions provides as follows:

Article 13. The rates may vary according to the technical characteristics and specific costs from the service to different segments of users.

It is important to recall that the General Law of Concessions purports to regulate all forms of conceded public utilities – it is not specifically aimed at regulating toll roads.

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<<http://www.ppp.mg.gov.br/projetos-ppp/projetos-celebrados/mg-050/noticias/equipe-de-licitacao-abre-propostas-de-precos-para-obras-da-mg-050-1>> (accessed on 14 January 2013).

<sup>142</sup>Law 9,074 of 1995. Article 1st translated by the author: “Art. 1º Sujeitam-se ao regime de concessão ou, quando couber, de permissão, nos termos da Lei nº 8.987, de 13 de fevereiro de 1995, os seguintes serviços e obras públicas de competência da União:

...  
IV - vias federais, precedidas ou não da execução de obra pública;”

<sup>143</sup> This provision authorizes only the concession of federal highways – neither State or regional ones.

<sup>144</sup> General Law of Concessions – Law 8,987 of 1995. Article 13. translated by the author: “Art. 13. As tarifas poderão ser diferenciadas em função das características técnicas e dos custos específicos provenientes do atendimento aos distintos segmentos de usuários.”

The meaning of specific provisions of the law in the context of toll roads must accordingly be examined. In the present context, what does it mean to say that toll rates “may vary”? Taken at face value, this provision means that toll rates can vary in response to some un-named criteria. For example, rates might vary depending upon the characteristics of the consumers or users of the relevant utility, the nature of the concession or some other variables. One good example is the case of energy supply concessions where the rates vary if the use is residential, commercial or industrial. In the case of toll highways, the rates charges to users currently vary according to the type, weight or even emissions<sup>145</sup> class of the vehicles.<sup>146</sup>

Article 13 of the General Law of Concessions authorizes rates that “vary”. This raises a question: Is this provision enough to constitute compliance with Article 175 of the Constitution? Article 175 of the Constitution specifically requires that the government must regulate “rate policy” for any public resource that it concedes. Despite the

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<sup>145</sup> As in the case in Germany.

<sup>146</sup> Germany adopted the toll system only for trucks of twelve tonnes gross weight or more. The German system is based on distance and emission class of the vehicle. Toll charges/fees are determined by satellite technology through Global Positioning System (GPS) so as not to affect the flow of traffic. The charge is calculated on a per kilometer basis, depending on the number of axles, but the most positive surprising fact was the adoption on 1<sup>st</sup> January 2009 of charges according to the vehicle's emission category – an innovative advancement:

“The level of the toll is based on the emissions class and number of axles on the truck and on the distance travelled on the toll route. The new German Heavy Goods Vehicle Toll Level Ordinance, that came into force on 1st January 2009, assigns each vehicle to one of four categories, A to D, based on its emissions class. The new toll rates mean that trucks with the latest-generation exhaust systems and those that have been upgraded with particle reduction systems pay significantly less than high-emission vehicles. Therefore, trucks in emissions class S2, combined with particle reduction levels 1, 2, 3 or 4, now enjoy the lower toll rates of category C, while vehicles in emissions class S3, combined with particle reduction levels 2, 3 or 4, pay the category B rates. Users are required to make accurate declarations of emissions classes (principle of self-declaration). Registered vehicles classified in emissions classes 2 or 3, fitted with the required particle reduction systems, can be re-registered to a lower toll rate with Toll Collect.”

Constitutional requirement, the General Law of Concessions makes no further provision for rate policy with respect to toll roads except that the rates may “vary”.<sup>147</sup>

Of great significance is the fact that the General Law of Concessions authorizes different rates for different kinds of consumers/users without specifying or regulating any further aspects of the rate policy. Several questions, therefore, arise in connection with rate policy: To which group of users or consumers do the rates apply? For which kind of concession is the rate policy assigned?<sup>148</sup> Does this include highway concessions? If so, what is the specific rate policy for highway concessions? What kinds of vehicles are subject to the rate policy of the General Law of Concessions? Which kinds of highways are subject to rates? Are two lane<sup>149</sup> highways subject to tolls? Can the price of a toll vary by the number of lanes in a highway?

The General Law of Concessions currently cannot answer these important questions because it is too vague. In order to clarify the issue of tolls on roads, new laws must be written, as no current legislation offers the information necessary for compliance with constitutional requirements to regulate “rate policy”.

The regulation of rate policy is a Constitutional requirement and the General Law of Concessions merely authorizes that rates “may vary”. What is required by the Constitution is more than a single provision of the General Law of Concessions

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<sup>147</sup> In the case of public utilities other than toll highways, the specific ways in which rates may vary are spelled out in subordinate legislation, discussed below.

<sup>148</sup> Presumably, the General Law of Concessions reference to rate policy refers to all types of concessions.

<sup>149</sup> In Brazil, there are several tolls on single carriageways, also known as undivided highways or two-lane highways specially in the States of Paraná and Rio Grande do Sul. Hely Lopes Meirelles, one of the most important (and now deceased) administrative scholars in Brazil taught: "In the particular case of the toll highway, it is required that the highway may present special conditions of road traffic (expressed high-speed highway and good levels of security), be gridlocked and offer alternative possibility for the user (another road that leads to the same free destination), although on less advantageous terms of traffic."

authorizing variable rates. Moreover, saying that a rate “may vary” is the same as saying nothing at all. If a rate “may” vary, it “may not” vary too.

In sum, the meaning of the phrase “the rates may vary” is so empty, that it is logically the same as having no rate policy at all.

If no direction is given to “how much” or “how little” something might vary, or along which lines it might vary, then the phrase “rates may vary” is essentially meaningless. In effect, this means that there is no rate policy at all, and if there is no rate policy at all, the General Law of Concessions violates Article 37<sup>150</sup> and Article 175<sup>151</sup> of the Constitution.

In effect, the government’s current regulation of toll road rates amounts to *no regulation of rates at all*. In other words, the government has not actually passed a meaningful regulation concerning the rates that apply on conceded toll roads. The outcome is that the General Law of Concessions’ “rate policy” is insufficient to constitute a true “rate policy” within the meaning of Article 175. As a result, there is no statutory rate policy with respect to highways concession, and the concession system is accordingly unconstitutional.

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<sup>150</sup>Article 37. The direct or indirect public administration of any of the powers of the Union, the States, the Federal District and the municipalities, as well as their foundations, shall obey the principles of Lawfulness, impersonality, morality, publicity, efficiency and also the following:

<sup>151</sup>Article 175. It is incumbent upon the Government, as set forth by law, to provide public utility services, either directly or by concession or permission, which will always be through public bidding. Sole paragraph - The law shall provide for:

I - the operating rules for the public service concession- or permission- holding companies, the special nature of their contract and of the extension thereof, as well as the conditions of forfeiture, control and termination of the concession or permission;

II - the rights of the users;

III - rates policy;

IV - the obligation of maintaining adequate service.

### 3.3.5 Second Regulatory Lacuna: User Rights and Vehicle Classes

Article 175 of the Federal Constitution imposes an obligation for the Federal government to regulate the highway tolling system in Brazil. In the previous sections of this chapter, we saw that the government's failure to regulate applicable rates violates this constitutional provision. That is not, however, the only constitutional defect related to Brazil's current highway system.

Another specific example of Brazil's failure to regulate toll roads can be seen in the government's failure to specify rights of highway users based on vehicle classification. For example, there are presently no regulations differentiating the rates or rights applicable to emergency vehicles, transport companies or "ordinary" commuter traffic. Such regulation is common in other jurisdictions (discussed below), and seems intuitively necessary, either under the constitutional requirement to establish "rate policy" or the similar constitutional requirement to establish "rights of users". Unfortunately, the government of Brazil has utterly failed to pass legislation explaining or expressing the rights or tolls applicable with respect to different vehicle classes. This stands in stark contrasts to the regulatory regimes of other countries, where regulation by reference to vehicle class is a matter of course.

One good example of regulation can be found at the Office of Highway Policy Information<sup>152</sup> in the Federal Highway Administration – FHWA of United States of America. They have a series of detailed regulations and policies governing the ways in

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<sup>152</sup> The Office of Highway Policy Information – OHPI of Federal Highway Administration – FHWA of United States of America is the body that serves as a national source for surface transportation data, development, implementation of decisions, policies, legislation, programs and performance goals. Available online: <<http://www.fhwa.dot.gov/policyinformation/aboutus.cfm>> (Accessed on 24 April 2013)

which rights and rates vary by reference to vehicle classification, summarized in the following policy:<sup>153</sup>

The classification scheme is separated into categories depending on whether the vehicle carries passengers or commodities. Non-passenger vehicles are further subdivided by number of axles and number of units, including both power and trailer units. Note that the addition of a light trailer to a vehicle does not change the classification of the vehicle.

Automatic vehicle classifiers need an algorithm to interpret axle spacing information to correctly classify vehicles into these categories. The algorithm most commonly used is based on the "Scheme F" developed by Maine DOT in the mid-1980s. The FHWA does not endorse "Scheme F" or any other classification algorithm. Axle spacing characteristics for specific vehicle types are known to change from State to State. As a result, no single algorithm is best for all cases. It is up to each agency to develop, test, and refine an algorithm that meets its own needs.

#### FHWA Vehicle Classes with Definitions

*Motorcycles* -- All two or three-wheeled motorized vehicles. Typical vehicles in this category have saddle type seats and are steered by handlebars rather than steering wheels. This category includes motorcycles, motor scooters, mopeds, motor-powered bicycles, and three-wheel motorcycles.

*Passenger Cars* -- All sedans, coupes, and station wagons manufactured primarily for the purpose of carrying passengers and including those passenger cars pulling recreational or other light trailers.

*Other Two-Axle, Four-Tire Single Unit Vehicles* -- All two-axle, four-tire, vehicles, other than passenger cars. Included in this classification are pickups, panels, vans, and other vehicles such as campers, motor homes, ambulances, hearses, carryalls, and minibuses. Other two-axle, four-tire single-unit vehicles pulling recreational or other light trailers are included in this classification. Because automatic vehicle classifiers have difficulty distinguishing class 3 from class 2, these two classes may be combined into class 2.

*Buses* -- All vehicles manufactured as traditional passenger-carrying buses with two axles and six tires or three or more axles. This category includes only traditional buses (including school buses) functioning as passenger-carrying vehicles. Modified buses should be considered to be a truck and should be appropriately classified.

NOTE: In reporting information on trucks the following criteria should be used:

Truck tractor units traveling without a trailer will be considered single-unit trucks.

A truck tractor unit pulling other such units in a "saddle mount" configuration will be considered one single-unit truck and will be defined only by the axles on the pulling unit.

Vehicles are defined by the number of axles in contact with the Road. Therefore, "floating" axles are counted only when in the down position.

The term "trailer" includes both semi- and full trailers.

*Two-Axle, Six-Tire, Single-Unit Trucks* -- All vehicles on a single frame including trucks, camping and recreational vehicles, motor homes, etc., with two axles and dual rear wheels.

*Three-Axle Single-Unit Trucks* -- All vehicles on a single frame including trucks, camping and recreational vehicles, motor homes, etc., with three axles.

*Four or More Axle Single-Unit Trucks* -- All trucks on a single frame with four or more axles.

*Four or Fewer Axle Single-Trailer Trucks* -- All vehicles with four or fewer axles consisting of two units, one of which is a tractor or straight truck power unit.

*Five-Axle Single-Trailer Trucks* -- All five-axle vehicles consisting of two units, one of which is a tractor or straight truck power unit.

*Six or More Axle Single-Trailer Trucks* -- All vehicles with six or more axles consisting of two units, one of which is a tractor or straight truck power unit.

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<sup>153</sup>See the Federal Highway Administration – FHWA Vehicles Classification. Available online: <<http://www.fhwa.dot.gov/policy/ohpi/vehclass.htm>> (Accessed on 10 April 2012)

*Five or fewer Axle Multi-Trailer Trucks* -- All vehicles with five or fewer axles consisting of three or more units, one of which is a tractor or straight truck power unit.

*Six-Axle Multi-Trailer Trucks* -- All six-axle vehicles consisting of three or more units, one of which is a tractor or straight truck power unit.

*Seven or More Axle Multi-Trailer Trucks* -- All vehicles with seven or more axles consisting of three or more units, one of which is a tractor or straight truck power unit.

Depending upon the classification into which a vehicle falls, the rights, tolls and rules applicable to that vehicle vary greatly. This is an example of the detailed regulation of highway traffic.

While the notion of vehicle classification is not unknown to Brazilian law, it is not used in the context of toll concessions. Laws concerning the classification of vehicles can be found in the Brazilian Traffic Code<sup>154</sup>, for example, where classification is used for driver's licenses purposes.<sup>155</sup> Furthermore, Ordinance number 1,207<sup>156</sup> of 15

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<sup>154</sup>Law 9,503 of 23 September of 1997.

“Article 96. The vehicles are classified:

I – by traction:

a) propelled; b) electric; c) human propulsion; d) animal traction; e) semi-trailer or trailer;

II - on the species:

a) by passenger:

1 - bicycle; 2 - moped; 3 - scooter; 4 - motorcycle; 5 - tricycle; 6 – All-terrain vehicle – ATV; 7 - car; 8 - minibuses; 9 - bus; 10 - tram; 11 - trailer or semi-trailer; 12 – horse cart;

b) by load:

1 - scooter; 2 - motorcycle; 3 - tricycle; 4 - All-terrain vehicle – ATV; 5 – pickup truck; 6 - truck; 7 - trailer or semi-trailer; 8 – horse cart; 9 - handcart;

c) mixed:

1 - Coach; 2 - utility; 3 - other;

d) competition;

e) traction:

1 - truck-tractor; 2 - tractor; 3 - crawler tractor; 4 – mixed tractor;

f) special;

g) collection;

III – by category:

a) official;

b) of diplomatic representation from consular offices or international organizations accredited by the Brazilian government;

c) private;

d) rental vehicles;

e) learning vehicles;

<sup>155</sup> The vehicles classifications at the Brazilian Traffic Code and at the Ordinance 1,207 of 2010 are not used for toll fees purposes.



December 2010 of the National Department of Traffic (Departamento Nacional de Trânsito - DENATRAN) has a detailed classification of vehicles. However, this classification is also not applied to highway concessions. To the extent that vehicle classification has been used in the context of governing toll road usage, vehicle classification rules can be found only in contracts: not in public law instruments capable of fulfilling the government's constitutional obligations. For example, Clause 16.2.6 of the contract<sup>157</sup> of the Highway BR-101 in the States of Bahia and Espírito Santo of the National Agency of Ground Transportation – ANTT (Concessionaire Rodovia da Vitória) has the following wording:

16.2.6 The toll fees are classified based on vehicle category and on the number of axles.

The classification of the vehicles can be found in the table below, which also is part of the contract. There is a multiplier factor<sup>158</sup> that must be used (multiplying by the basic toll fee)<sup>159</sup> depending upon the type of vehicle:

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<sup>156</sup>See the ordinance 1,207 of 2010 online – only in Portuguese: <[http://www.denatran.gov.br/download/Portarias/2010/PORTARIA\\_DENATRAN\\_1207\\_10.pdf](http://www.denatran.gov.br/download/Portarias/2010/PORTARIA_DENATRAN_1207_10.pdf)> (Accessed on 10 April 2012)

<sup>157</sup>Original contract in Portuguese: “16.2.6 As tarifas de pedágio são diferenciadas por categoria de veículos e em razão do número de eixos”. See the contract online – only in Portuguese – page 23: <[http://br101esba.antt.gov.br/upd\\_blob/0000/639.pdf](http://br101esba.antt.gov.br/upd_blob/0000/639.pdf)> (Accessed on 10 April 2012)

<sup>158</sup>Just multiply the factor of the table by the basic toll fee. For example: If you are riding a motorcycle and the basic toll fee is CAD 5.00, just multiply by 0.5 and the fee will be CAD 2.50, If you are riding a passenger car with a semi-trailer and the basic toll fee is CAD 5.00, just multiply by 1.5 and the fee will be CAD 7.50.

<sup>159</sup>“Basic toll fee” is the basic charge of highways tolls. This “basic toll fee”, as a multiplier factor, is often used as a specific clause at concessions contracts.

Table 9- Toll Charges by Vehicles Classes from the National Agency of Ground Transportation (ANTT)

Category	Vehicle type	Number of axles	Multiplier factor
1	Passenger car, pickup truck and van	2	1.0
2	Light truck, bus, semi-trailer truck and van	2	2.0
<b>3</b>	<b>Passenger car and pickup truck with semi-trailer</b>	<b>3</b>	<b>1.5</b>
4	Truck, truck tractor, semi-trailer truck with semi-trailer and bus	3	3.0
5	Automobile and truck with full trailer	4	2.0
6	Truck with full trailer, truck tractor with semi-trailer	4	4.0
7	Truck with full trailer, truck tractor with semi-trailer	5	5.0
8	Truck with full trailer, truck tractor with semi-trailer	6	6.0
9	Motorcycles, scooters and motorized bicycles	2	0.5
10	Official vehicles <sup>160</sup> and vehicles of the Diplomatic Corps	-	-

Clause 4.3 of the contract<sup>161</sup> of the Autoban Concessionaire<sup>162</sup> of the Regulatory agency of delegated public services of transportation of the State of São Paulo (Agência reguladora de serviços públicos delegados de transporte do Estado de São Paulo - ARTESP) has similar wording in its contract, with the same multiplier factor:

<sup>160</sup>Generally speaking, the vehicles are classified as “official” vehicles and that would include ambulances, police and enforcement forces, military forces and public authorities’ vehicles.

<sup>161</sup>Original contract in Portuguese: “16.2.6 As tarifas de pedágio são diferenciadas por categoria de veículos e em razão do número de eixos”. See the contract online – only in Portuguese – page 23: <[http://br101esba.antt.gov.br/upd\\_blob/0000/639.pdf](http://br101esba.antt.gov.br/upd_blob/0000/639.pdf)> (Accessed on 10 April 2012)

<sup>162</sup>Original contract in Portuguese: “4.3 As tarifas de pedágio deverão ser diferenciadas por categoria de veículos”. See the contract online – only in Portuguese – page 6 of 8 of annex 4: <[http://www.artesp.sp.gov.br/download/editais/edital\\_01\\_autoban.pdf](http://www.artesp.sp.gov.br/download/editais/edital_01_autoban.pdf)> (Accessed on 10 April 2012)

Table 10 – Toll Charges by Vehicles classes from the Regulatory Agency of Delegated Public Services of Transportation of the State of São Paulo (ARTESP)

4.3 The toll fees are classified based on vehicle category.

<i>Category</i>	<i>Vehicle type</i>	<i>Number of axles</i>	<i>Multiplier factor</i>
1	Passenger car, pickup truck and van	2	1
2	Light truck, bus, semi-trailer truck and van	2	2
3	truck tractor, semi-trailer truck with semi-trailer and bus	3	3
4	Truck with full trailer, truck tractor with semi-trailer	4	4
5	Truck with full trailer, truck tractor with semi-trailer	5	5
6	Truck with full trailer, truck tractor with semi-trailer	6	6
7	<b>Passenger car and pickup truck with semi-trailer</b>	<b>3</b>	<b>3</b>
8	Passenger car and pickup truck with full trailer	4	4
<b>9</b>	<b>Motorcycles, scooters and motorized bicycles</b>	-	-
10	Armed Forces <sup>163</sup> and Military Police	-	-

The most obvious difference between both cases<sup>164</sup> (Autoban and Rodovia da Vitória concessionaires) is the fact that at the Autoban contract, drivers of motorcycles, scooters and motorized bicycles are exempt from tolls,<sup>165</sup> *i.e.*, they are not required to pay a toll at all. The classification of the vehicles and multiplier factor are slightly different in both contracts. The passenger car and pickup truck with semi-trailer multiplier factor (line number 3 – three axles) at the Rodovia da Vitória contract is 1.5, while in the Autoban contract (line number 7 – three axles) is 3.

<sup>163</sup> Army, Navy and Air Force.

<sup>164</sup> Based on the contracts.

<sup>165</sup> See the one classified at category 9.

In the Rodovia da Vitória contract, official vehicles and vehicles of the diplomatic corps are exempt (line number 10), while in the Autoban contract, only the armed forces and military police vehicles are exempt (line number 10).

These clauses of concession contracts are samples of potentially appropriate forms of regulation, but they are not enshrined in any law. The legislation of Brazil offers no guidelines at all, and different (and contradictory) quasi-regulatory arrangements have been spelled out in hundreds of contracts all over the country. This leads to different rules and different consumer/user rights from road to road, with no reference to any regulatory policy laid out in legislation. A driver can determine his or her rights only by examining a contract, and the contracts have not been incorporated by reference into legislation. As noted above, in a Civil Law jurisdiction, regulation via contract is insufficient: only by the passage of valid legislation can the government discharge its constitutional obligations. Since rights with respect to vehicle classifications (a component of “user rights” for the purposes of Article 175 of the Constitution) are regulated only via contract, the government of Brazil has failed to comply with the Lawfulness Principle as expressed in Article 175. There is, in effect, no lawfully authorized pattern or guideline as rights and obligations flowing from vehicle classifications.

The Federal Government’s failure to regulate rates has led to the unfortunate result that toll road rates vary widely – and impermissibly – across the country. Instead of fulfilling its Constitutional obligations by establishing or regulating rates, the government has conferred unfettered discretion on State and Federal Departments or regulatory agencies, effectively allowing them to set rates without meaningful government (or legislative) oversight. The government cannot discharge its

Constitutional obligations by failing to oversee or control the way in which delegated powers are exercised.

The Federal government has failed in its Constitutional obligations by actually giving discretion<sup>166</sup> to State and Federal governmental and transportation bodies. The Federal government has violated the Constitution by (in essence) abdicating regulatory responsibility, and allowing State and Federal governmental and transportation bodies to govern a public resource in accordance with their whims. The State and Federal transportation bodies are merely exercising discretion through contractual provisions.

David Mullan<sup>167</sup> has written about the legal limits of governmental discretion. He makes it clear that discretion must have a legal limit, especially when the exercise of discretion affects the rights and interests of individuals:

The following four observations indicate that it is misleading to attempt to draw too sharp a distinction between law and discretion as administration tools, a point now accepted by the Supreme Court of Canada in *Baker*. First, the terms of an agency's enabling statute frequently do not yield a clear meaning that identifies the "correct" answer to a specific problem. Because many situations are not foreseen at the time of enactment, statutory provisions require interpretation by officials. The process of filling the silences and resolving the ambiguities in statutory language that interpretation so often involves can be described as the exercise of an implicit discretion to elaborate unclear or incomplete legislative instructions. Second, even the most detailed and precise regulatory codes are not self-enforcing; typically officials are left with ample and unstated discretion about the circumstances in which they will actually be enforced against individuals.

Third, just as rules contain grants of implicit discretion (both of interpretation and enforcement) so all express grants of discretion to public officials are subject to some legal limits at least when their exercise affects the rights and interests of individuals. The courts have normally asserted that

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<sup>166</sup> By the Lawfulness principle – the public administration must act based on an existing law (statute) as a general regulation and no "discretion" must be used by the grantor power. "Discretion" here is not the "core" of the argument. The "core" argument is the requirement of regulation due to the Constitutional principle.

<sup>167</sup> J.M. Evans, H.N. Janisch, David J. Mullan, and R.C.B. Risk. *Administrative Law: Cases, Text, and Materials* (2003) Toronto: Emond Montgomery, 5th ed. Page 950.

in our system of Constitutional government there are no legally unlimited public powers, regardless of whether they are claimed by an independent administrative agency, a municipality, a minister of the Crown or the governor (or lieutenant governor) in council. It is an essential function of the courts to determine what those limits are by reference to the terms of an the enabling statute, common law principles, the Constitution Acts 1867-1982 (including the Charter) and now, on occasion, the underlying principles of the Canadian Constitution.

In this case, we have (a) the impermissible grant of unfettered discretion to State and Federal governmental and transportation bodies where we should have regulations, and (b) the apparent abdication of the Federal government's Constitutional responsibilities to the private actors who entered concession contracts.

The result of the Government's failure to regulate the issue has been chaos. Private concessionaires have wildly different contractual arrangements<sup>168</sup> in each State when levying tolls. Some concessionaires charge tolls in single carriageways,<sup>169</sup> others in multilane highways;<sup>170</sup> private concessionaires increase toll rates using different official price indices<sup>171</sup> - some States' contracts use more than one price index<sup>172</sup> depending on the contract; in some States and as seen above, motorcycles are exempt from paying tolls

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<sup>168</sup> In this case the concessionaires act differently and the contracts vary. It is not the case where private concessionaires break the law and breach contracts by imposing whatever rates and rules they like. It is a matter of lack of rules – especially by imposing a clear rate for example – by the government.

<sup>169</sup> See contract clauses above at footnotes 158 and 163. Some private concessionaires charge tolls in single carriageways as the States of Rio Grande do Sul and Paraná;

<sup>170</sup> Some private concessionaires charge tolls in multilane highways, mostly in the State of São Paulo;

<sup>171</sup> as the Highway Castelo Branco – Highway SP–280 in São Paulo;

<sup>172</sup> as the case of São Paulo. See Q&A – Toll rates rise – in the State of São Paulo (only in Portuguese) by the governmental body and department of transportation of the State known as the The Regulatory Transportation Agency of the State of São Paulo – ARTESP. Online: <<http://www.artesp.sp.gov.br/tarifas2011/Q&A-pedagio.pdf>> (Accessed on 29 November of 2011).

“3. What criteria to raise toll rates?”

For the concessions between 1998 and 2000 it was used the IGP-M Index - general market prices index, published by the Getúlio Vargas Foundation, between June of the previous year and may of the current year, and it is applied every July, the 1st. On the highways whose concession contracts were signed between 2008 and 2009, it was used the IPCA Index - national index of general consumer prices, calculated by Brazilian Institute of Geography and Statistics – IBGE (Instituto Brasileiro de Geografia e Estatística).

on some highways<sup>173</sup> and not in others; the price per kilometer is different for each highway concession; there are concessions of the same highway shared between three different concessionaires;<sup>174</sup> on the other hand, there are two or more highways granted to the same private corporation in the same concession.<sup>175</sup>

All the above situations are examples of “non-ruled” procedures. It is important to point out that these variations are a result of contractual provisions, and not as a result of any law or statute, simply because there are no laws, neither at State nor Federal levels.

An important contribution in this matter is given by Mullan:<sup>176</sup>

Fourth, it is sometimes assumed that while a rule bound solution to a dispute requires the decision maker to base it on precedent and general legal principles, those exercising discretion need to consult only their own preferences. Discretionary decisions must be made by reference not only to the statutory purposes and other legal limits of the power but they should also be informed by any policy objectives formulated by the agency, guidelines that it has issued, and its past practice. Arbitrariness is as much the antithesis of the effective exercise of discretion as the mechanical application of rules is of the just administration of the law. The differences between discretionary and rule-based decisions are of degree, not kind.

The overall argument is that (a) there is no legislation providing guidelines for the content of contractual terms<sup>177</sup> and as a result, (b) the terms of contracts vary widely, and

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<sup>173</sup>It must be pointed out, that there are still no rules in this regard. If you are driving in United States in one State (let’s say Michigan), there are no tolls there. If you cross the border to Ohio – or to Indiana and to Illinois – there are tolls everywhere. In Brazil, a motorcycle rider does not need to pay the toll in Santa Catarina, while at the other side of the border, in the State of Rio Grande do Sul, the payment of toll by motorcycle riders is required because motorcycles are not exempt. This is a discretionary choice by the public administration (transportation body or agency) at the bidding procedure of concession. See the website of Brita Rodovias online: <<http://www.britarodovias.com.br/index.php?pg=categorias>> (Accessed on 26 March 2012). Motorcycles are exempt in the highways conceded to Brita Rodovias Concessionaire.

<sup>174</sup>as the concessionaires Viaeste, Rodovia das Colinas and SPVias that share stretches of the State Highway Castelo Branco (SP-280) in the State of São Paulo;

<sup>175</sup>as the concessionaire CART – Concessionária Auto Raposo Tavares which manages three different stretches of doubled and multilane highways with different lengths in the State of São Paulo – Highway João Baptista Cabral Rennó – SP-225, Highway Orlando Quagliato – SP-327 and Highway Raposo Tavares – SP-270.

<sup>176</sup>J.M. Evans, H.N. Janisch, David J. Mullan, and R.C.B. Risk. Op. Cit. Page 950.

(c) the terms of contracts cannot, without specific legislation that mandates the terms of contracts, count as “laws” laid down by the State. They cannot, therefore constitute compliance with the Lawfulness principle.

The final outcome of the lack of regulation – in the case of Brazilian toll highway concessions – is that there are no apparent limits to the variability of concession contracts. All of this violates the Constitution, both by a failure to comply with the Lawfulness Principle and failure to adhere to the terms of Article 175.

### **3.4 Example of Regulations in Brazil – Telephony**

What level of concession regulation is required in order to achieve compliance with the Lawfulness Principle? A useful example is provided by the regulation of telecommunications in Brazil. Although telephony is not regulated by the General Law of Concessions,<sup>178</sup> an examination of the regulation of telecommunications in Brazil provides a helpful example of the appropriate (and Constitutional) regulation of rates for services in Brazil.

The area of telecommunications provides an example of the government’s ability to discharge its Constitutional duty by carefully regulating the rates that apply to a public service. With respect to telecommunications services, the government has promulgated

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<sup>177</sup>See the quote of Savaris above.

<sup>178</sup> Article 210 of the General Law of Telecommunications states that telecommunications are ruled only by this law, and the General Law of Concessions – Law 8,987 of 13 February 1995 - among others, does not apply.

“Article 210. The concessions, permits and authorizations for the service telecommunications and use of radiofrequency and their tenders are governed exclusively by this Law, and the Laws 8,666 of 21 June 1993, 8,987 of 13 February 1995 and 9,074 of 7 July 1995 and its amendments, do not apply.”

Original in Portuguese: “Art 210. As concessões, permissões e autorizações de serviço de telecomunicações e de uso de radiofrequência e as respectivas licitações regem-se exclusivamente por esta Lei, a elas não se aplicando as Leis nº 8.666, de 21 de junho de 1993, nº 8.987, de 13 de fevereiro de 1995, nº 9.074, de 7 de julho de 1995, e suas alterações.



detailed regulations governing telephony.<sup>179</sup> These regulations cover matters as detailed as rules for land lines and mobile telephones, rules governing the regulatory body

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<sup>179</sup> An array of statutes on telecommunications in Brazil (in English) can be found online: <[http://www.teleco.com.br/en/en\\_legis.asp](http://www.teleco.com.br/en/en_legis.asp)> (Accessed on 5 March 2012).

The General Law on Telecommunications is the General Law of Telecommunications. This law provides rules for the organization of telecommunications services, the creation and operation of a regulatory body and other institutional aspects.

The General Law of Telecommunications above also created the National Telecommunications Agency – ANATEL.

There are at least 3 additional and important laws regarding telecommunications in Brazil, among others:

a) Law number 4,117 of 27 August 1962, establishing the Brazilian Telecommunications Code (CBT).

b) Law number 9,998 of 17 August 2000 establishing the Universal Fund for Access to Telecommunications Services (Fust).

c) Law number 10,052 of 28 November 2000 establishing the Fund for the Technological Development of Telecommunications (Funttel).

Along with the laws above, there are several Decrees approving regulations and specific rules on telecommunications concerning mobile telephony, landline telephony and also internet and communications issues.

a) Decree number 2,338 of 7 October 1997 approves the regulation of the National Telecommunications Agency (Anatel).

b) Decree number 3,624 of 5 October 2000 provides for the regulation of the universal access to telecommunications services fund (Fust).

c) Decree number 3,737 of 30 January 2001 provides the regulation of the technological development of telecommunications fund (Funttel).

d) Decree number 4,149 of 1st March 2002 changes and adds provisions to the Decree Number 3,737 of 30 January 2001, which provides for the regulation of the technological development of the telecommunications fund (Funttel).

e) Decree number 4,733 of 10 June 2003 provides public policies for telecommunications.

f) Decree number 4,769 of 27 June 2003 approves the general target plan to universalize landline telephony services rendered by the public regime.

There are also some regulations issued by the national agency of telecommunications – ANATEL (Agência Nacional de Telecomunicações) as the telephone number portability on landlines and mobiles. It is a regulation of the service of telephony allowing consumers to transfer either an existing fixed-line or mobile telephone number assigned by a carrier and reassign it to another carrier, as a measure to improve competitiveness between carriers.

Somehow, the 79 articles of the general rules of portability brings to the user and the carriers the definitions, features of portability, rights and duties of the users and the carriers, the prices to be charged, the types of portability, the operational procedures, the service itself, the procedures to request the service, the conditions of refusal and cancellation, the terms and timing of contracts and applicable sanctions.

Another source of regulation of the national agency of telecommunications – ANATEL (Agência Nacional de Telecomunicações) is the annex to the resolution number 477 of 7 August 2007 approving the regulation of personal mobile service – SMP, ruled by the Law 9,472 of 16 July 1997, General Law of Telecommunications (Lei Geral de Telecomunicações – LGT). It is a sample of mobile telephony regulation which deals in details with definitions, rights and duties of the users and concessionaires, rules of the rendered services of mobile telephony, rates policy, contract terms, pre- and post paid policies, the services basic plan, dispute resolution, debit complaints and among others rules.

It is quite clear that there are laws, decrees and even administrative regulations issued by the legislative power and by different governmental bodies, including the national agency of telecommunications – ANATEL, ruling telecommunications services in Brazil.

(National Telecommunications Agency - ANATEL), several regulations on funding sources in the development of telecommunications and public policies, clearly demonstrating the government's ability to turn its mind to the minutiae that must be addressed when regulating a public service. No similar attempt has been made to regulate toll roads or the rates that apply on toll roads, notwithstanding clear Constitutional requirements. As we have seen, the government has made no such attempt to carefully regulate the rates that apply to toll roads, notwithstanding the fact that the same Constitutional requirement (*i.e.*, to establish and regulate rates) applies in both contexts. If the government of Brazil wishes to ensure the constitutionality of its (thus far illegal) concession of toll roads, it should be guided by the example of the telecommunications sector: it must regulate the detailed application of the policy, such that users are able by know – by reference to statutory authority – how the rates for the use of conceded public resources will be charged.<sup>180</sup>

### **3.5 Laws on Tolls – Ontario**

#### **3.5.1 Statutes for Highway 407 in Canada**

The Canadian experience with respect to privately run toll highways relates to Highway 407<sup>181</sup> managed by 407 International Inc. (“407 ETR”). Highway 407 runs north and west of the Greater Toronto area, beginning at Burlington. This highway extends 108

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<sup>180</sup>It would be unfeasible for the service of telecommunications, either mobile or landline, to be rendered without rules to govern important matters as the rates policy, the concession procedures, the duties and rights of the users and the service providers, the competitiveness among telephony operators and telephony consumers rights (in spite of the existence of the Consumer's Protection Act) along with other disciplines. It would be impractical, for example, different mobile operators freely charging different prices, selling cell phones or issuing distinctive contracts without any regulation or rules. This is the case on highway tolls. The sole legal base to implement tolls by the government is the General Law of Concessions. Apart from that, there are no laws or regulation and the Government and regulatory bodies issue bidding processes with different arrangements.

<sup>181</sup> See ETR 407 online: <<http://www.407etr.com/>> (accessed on 30 June 2009)

kilometers east–west just north of Toronto. Tolls on this highway are based on the number of kilometers travelled by each vehicle, with the assessment of “kilometers travelled” based on photographic evidence (from cameras on the highway) or transponders.

The 407 ETR has its own statutory provisions – the Highway 407 Act<sup>182</sup> – that specifies procedures applicable to the highway. The legislation also specifies important issues such as the designation of Highway 407,<sup>183</sup> liability for maintenance and repair, the obligation to pay the toll, the powers of the owner, methods for the payment of tolls, liability for failure to pay the toll, the resolution of disputes, etc. At the end of the Act there is a requirement of regulation by the Lieutenant Governor in Council “defining any words or expressions” used at the Highway 407 Act, together with any other necessary regulations:

Regulations

65. The Lieutenant Governor in Council may make regulations,

(a) defining any word or expression used in this Act but not defined in this Act;

(b) respecting additional procedures to be used by the owner for enforcing payment of tolls on Highway 407;

(c) prescribing matters for the purposes of section 24;

(d) prescribing greater penalties for the purposes of sections 32 and 35;

(e) prescribing any other thing that may be prescribed under this Act. 1998, c. 28, s. 65.

66., 67. Omitted (amends or repeals other Acts). 1998, c. 28, ss. 66, 67.

68. Omitted (provides for coming into force of provisions of this Act). 1998, c. 28, s. 68.

69. Omitted (enacts short title of this Act). 1998, c. 28, s. 69.

Unlike the situation in Brazil, the provincial government in Ontario has promulgated specific rules and regulations governing toll rates and the rights of the users.

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<sup>182</sup>Highway 407 Act, 1998 – S.O. 1998, Chapter 28. Highway 407 Act online: <[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_98h28\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98h28_e.htm)> (accessed on 12 March 2010)

<sup>183</sup> One of the authors of the Highway 407 Act is Professor Randal Graham, supervisor of the author of this work. He is Goodmans LLP Fellow in Legal Ethics; LL.B. (Osgoode Hall ) 1995, D.Jur (Osgoode Hall) 1999, called to the Bar of Ontario in 1997; Professor and Director of Graduate Programs of the Faculty of Law of Western University.

Using this “Ontario model” would allow public Brazil’s government (at Federal and State levels) to comply with the Lawfulness Principle.

### 3.6 Attempts to Regulate

It is important to note that the lack of regulation of highway tolls in Brazil has given rise to public dissent. A group that opposes the current tolling system – the National Forum Against Tolls<sup>184</sup> – began to collect signatures in support of bill of popular initiative in 2009. Through this bill, the group aims to convince the government to do its constitutional duty by regulating tolls in the country. Article 61, paragraph 2 of the Federal Constitution<sup>185</sup> authorizes the creation of bills of popular initiative, which are regulated by Articles 13 and 14 of Law 9,709 of 18 November 1998. The collection of signatures started in the State of Paraná and the campaign is now spread throughout the country. The goal is to collect 1.9 million signees as required by the Constitution.

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<sup>184</sup> Entity – “Forum Popular Contra o Pedágio” [National Forum against tolls]. Available online only in portuguese: <<http://www.pedagio.org/>> (accessed on 2 December 2009)

<sup>185</sup> In Brazil the Constitution authorizes people to present Bills at the Legislative House. The subscription of at least 1% of Brazilian voters is required (which would be more than 1.9 million signatures) from at least 5 different States with no less than 0.3% in each State. In brief, 0.3% subscription of the voters of 5 States, at a minimum, totalling the 1.5% required by the Federal Constitution and the Law.

The 2nd paragraph of the article 61 of the Constitution reads:

“Article 61 - ...

...

2<sup>nd</sup> Paragraph – Public initiative bill may be exercised by presentation, to the House of Representatives, of a bill of law subscribed by, at least, one percent of Brazilian voters, distributed throughout, at least, five States, with no less than three tenths percent of the voters of each of these States.”

Article 61, paragraph 2 translated by the author:

“Artigo 61 - ...

...

§ 2º - A iniciativa popular pode ser exercida pela apresentação à Câmara dos Deputados de projeto de lei subscrito por, no mínimo, um por cento do eleitorado nacional, distribuído pelo menos por cinco Estados, com não menos de três décimos por cento dos eleitores de cada um deles.”

In brief, the proposed bill<sup>186</sup>, which will not be evaluated in detail in this work, remains unclear because it does not regulate any “rate policy” or “rights of the users” – it mainly authorizes tolls on privately-constructed highways and prohibits tolls on publicly-constructed roads. As a result, while the bill appears to be better than the complete legal vacuum currently surrounding Brazil’s toll highways, the bill would still (if passed) fail to provide the level of detail constitutionally<sup>187</sup> required through the Lawfulness Principle.

Despite its shortcomings, this initiative represents an attempt to mobilize people and to call the attention of the citizenry to the increased numbers of highways being conceded to private actors in the country, the inefficiency of the current regime and the lack of regulation. At a minimum, this may enhance the highway-funding debate across Brazil.

A second group of concerned citizens has tried to draw attention to the government’s failure to regulate toll highways. This group, which is named The Participatory Citizenship Commission<sup>188</sup> of Indaiatuba<sup>189</sup>, is a social movement of city leaders, State representatives, mayors and associations against the current policies of highway concessions in the State of São Paulo.

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<sup>186</sup> The proposed bill of popular initiative is available online – only in Portuguese: <<http://projetodelei.com.br/>> at the hyperlink “Projeto de Lei Para Regular o Pedágio no Brasil” (Bill to regulate tolls in Brazil). (accessed 2<sup>nd</sup> December 2009)

<sup>187</sup> The direct action of unconstitutionality is filed against legal provisions that are contrary to the Constitution.

<sup>188</sup> participatory citizenship commission is “Comissão Cidadania Participativa de Indaiatuba”.

<sup>189</sup> Indaiatuba is a municipality in the State of São Paulo in Brazil, with 181,124 inhabitants (2006) and has an area is 311.34 km<sup>2</sup>. It is surrounded by tolls.

This group invited people to attend the second meeting<sup>190</sup> of the movement against abusive tolls in State of Sao Paulo and to discuss the actions and proposals for a new policy of transportation and highway concessions to be implemented by the State Government. The creation of such groups demonstrates how Brazilian citizens are dissatisfied with the abuses associated with the complete lack of rules and regulations of tolls in Brazil.

The Congress itself has several proposed bills on tolls. Only 2 out of 72<sup>191</sup> proposed bills regarding toll policies<sup>192</sup> are ready to be voted on by the parliament. The other 70 bills are still in process.

The first one is Bill 3,062 of 2008 presented on 19 March 2008 and sponsored by the legislator federal deputy Angela Amin of Progressist Party (PP) of the State of Santa Catarina. It amends the Law 9,277 of 10 May 1996 granting exemption of payment of the charge/fee to the owner of a vehicle that resides in the county where a toll plaza is located.

The second one is Bill 4,251 of 2001 presented on 13 March 2001 and sponsored by the federal deputy Luiz Bittencourt, member of Brazilian Democratic Movement Party (PMDB) of the State of Goiás. It modifies the Decree-Law 791 of 1969 granting exemption of payment of tolls for motor vehicles owned by people with physical disabilities.

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<sup>190</sup> It was held at the city of Campinas on 23rd March 2010.

<sup>191</sup> Research made at the National Congress of Brazil. Online at <<http://www2.camara.gov.br/proposicoes>> (accessed on 5 April 2010).

<sup>192</sup> Which would include rates policies, users' rights, exemptions, regulation and amendments of the General Law of Concessions.

Nevertheless, none of the 72 proposed bills in process aim to modify or regulate in general the tolls on highways in Brazil. They are merely statutory provisions proposed generally to create exemptions for different classes of drivers and highway users.

## CONCLUSION

The need for investment in and maintenance of Brazil's logistical network, coupled with the public administration's failure to prioritize such investments, have recently led to a spree of concessions of highways. More than 200 toll gates<sup>193</sup> have been created on highways in the past 14 years in Brazil. The revenue collected with tolls in the first 10 months in 2012, only in the State of São Paulo, has surpassed \$2,5 billion USD.<sup>194</sup>

However, the development of the toll industry industry has not followed legal requirements. While the toll road system in Brazil is an important tool of public policy, it is (as currently implemented) illegal. The objection is not to the advisability or usefulness of toll roads, but to the manner in which they have been implemented by the Brazilian government, i.e., in violation of the Lawfulness Principle.

The Federal Government's failure to regulate toll highways has led to the unfortunate result that toll road rates vary widely – and impermissibly – across the country. Instead of fulfilling its Constitutional obligations by establishing or regulating rates and other aspects of toll highways, the government has conferred unfettered discretion on State and Federal governmental and transportation bodies (State and Federal departments or regulatory agencies), effectively allowing them to set rates – always through contracts and not by statute or regulation – without meaningful government oversight. All in all, there is no effective regulation of toll roads in Brazil.

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<sup>193</sup> Toll booths.

<sup>194</sup> See the estimator *pedagiômetro* (toll-ometer) at <<http://pedagiometro.com.br/>> (Accessed on 22 October 2012). This is 14.12% of the total budget costs of the Province of Ontario for 2012, estimated in \$17.7 billion USD. See <<http://news.ontario.ca/mof/en/2012/03/strong-action-for-ontario.html>> (Accessed on 22 October 2012).



To summarize, despite the benefits of toll highways and concessions, toll arrangements in Brazil<sup>195</sup> currently constitute a violation of the Lawfulness Principle. The lack of regulation of the toll highway industry and the lack of legislative authorization for divestiture of public assets and highway concessions are the main weaknesses of the current system. As we have seen, the government has made no attempt to carefully regulate toll rates (or other important issues relating to toll roads), notwithstanding the fact that Constitutional requirements demand such regulation. If the government of Brazil wishes to ensure the constitutionality of its (thus far illegal) concession of toll roads, it should be guided by the example of the telecommunications sector: it must regulate the detailed application of the conceded public resource, such that users are able to know – by reference to statutory authority – how the rates for the use of conceded public resources will be charged. Only by passing such legislation, can the government of Brazil correct the grave Constitutional defect that currently exists with respect to the concession of public highways. Only through the passage of legislation governing rates and rights of users, among other relevant issues concerning toll highway concessions, can the government ensure that toll highways – a phenomenon impacting the lives of virtually all Brazilian citizens – comply with the requirement of Brazil's Constitution.

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<sup>195</sup> So far.

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## APPENDIX A

## GENERAL LAW OF CONCESSIONS – TRANSLATED

Law number 8,987 of 13 February 1995.

Regulates the concession and permission of the provision of public services provided in Art. 175 of the Federal Constitution, and provides other provisions.

THE PRESIDENT OF THE REPUBLIC makes public that the Congress decrees and I sanction the following Act:

## CHAPTER I

## PRELIMINARY PROVISIONS

Article 1 - The concessions of public services and works and utilities permits will be governed by the terms of Article 175 of the Federal Constitution, by this Act, the rules and the concerning statutes and required clauses of the contracts.

Single paragraph. The Union, the States, the Federal District and the municipalities shall promote the review and the necessary adaptations of its legislation with the provisions of this Act, seeking to meet the peculiarities of the various modalities of their services.

Article 2 - For the purposes of this Act, shall be deemed:

I - grantor: the Union, the State, the Federal District or the municipality in whose jurisdiction lies the public service, preceded or not by the execution of public works, the object of concession or permit;

II - public service concession: delegation of the render by the grantor, through bidding process, in the form of competition to legal entity or consortium of companies that demonstrate capacity to perform, at its own risk and for a specified period;

III – public service concession preceded by the execution of public works: construction, total or partial, conservation, refurbishment, expansion or improvement of any works of public interest, delegated by the grantor, through bidding process, in the form of competition, to corporate or consortium of companies that demonstrate capacity to carry them out, at their own risk, so that the concessionaire's investment is paid and amortized through the exploitation of the work or service for a specified period;

IV – permission of public service: delegation, on a temporary basis, through a bidding process, the provision of public services, made by the grantor to a person or entity that demonstrates the ability to perform, at own risk.

Article 3 The concessions and permits will be subject to supervision by the regulatory body responsible for the delegation, with the cooperation of users.

Article 4 The concession of public service, preceded or not by the execution of public works, shall be formalized by contract, which shall observe the terms of this Act, the relevant rules and at the invitation to bid.

Article 5 The grantor shall publish, prior to the bidding process, the invitation to bid, the justification of the convenience of concession or permission, featuring its object, area and term.

## Chapter II

## THE APPROPRIATE SERVICE

Art 6 – Every concession or permission requires the provision of adequate service to fully serve the users, as provided in this Act, at the rules and at the contract.

1st Paragraph - Adequate service is the one that satisfies the conditions of regularity, continuity, efficiency, safety, modernity, generality, politeness on its rendering and moderateness of the rates.

2nd Paragraph – The modernity comprises modern techniques, equipment and facilities and their conservation, as well as the improvement and expansion of service.

3rd Paragraph – It is not regarded discontinuity of the service, its interruption on an emergency or after prior notice, when:

I - motivated by technical reasons or safety of the facilities and,

II - by non-compliance<sup>196</sup> by the users, considering the collectivity's interest.

### Chapter III

#### RIGHTS AND OBLIGATIONS OF USERS

Article 7. Notwithstanding the provisions of Law 8,078 of 11 September 1990, the rights and obligations of users are:

I - receive adequate service;

II - receive from the grantor Power and from the concessionaire, information for the defense of individual and collective interests;

III - obtain and use the service, with freedom of choice between different service providers, as applicable, subject to the rules of the grantor Power.

IV - to inform the government and the concessionaire about deviations that may have knowledge, regarding the service provided;

V – inform the competent authorities the illegal acts practiced by the concessionaire while providing the service;

VI - contribute to remain the good conditions of public assets through which services are rendered to them.

Article 7-A. The concessionaires of public services, public and private, in the States and at the Federal District, are required to offer to the consumer and to the user, within the due month, a minimum of six optional due dates for the payment of debts.

Single paragraph. (Vetoed) (Included by Law 9,791 of 1999)

#### RATE POLICY

Article 8 (Vetoed)

Article 9 The rate of public service granted shall be determined by the price of the winning bid of the bidding procedure and retained by standard guidelines provided in this Act, at the invitation to bid and at the contract.

1<sup>st</sup> Paragraph - The rate will not be subject to prior specific legislation and only in the cases expressly specified by law, the collection may be subject to the existence of free and alternative public service provided to the user.

2nd Paragraph - The contracts may provide mechanisms for review of rates in order to keep the economic and financial balance.

3<sup>rd</sup> Paragraph - Except the income taxes, the creation, modification or termination of any taxes or legal charges, after the submission of the proposal, when a downturn<sup>197</sup> is proven, will lead to the revision of the rates, increasing or decreasing it, as appropriate.

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<sup>196</sup> to the rules.

4<sup>th</sup> Paragraph – By having a unilateral amendment of the contract that affects the initial economic and financial balance, the grantor power must restore it, concomitantly with the amendment.

Article 10 - Whenever the terms of the contract are met, it is regarded that the economic and financial balance has been maintained.

Article 11 - In compliance with the peculiarities of each public service, the grantor Power may predict, on behalf of the concessionaire, in the invitation to bid, the possibility of alternative sources of revenue, complementary, ancillary or from associated projects, with or without exclusivity, with the intend to promote the reasonability of rates<sup>198</sup>, subject to the provisions of Article 17 of this Law.

Single paragraph. The sources of revenue mentioned at this Article shall be taken into account to the initial measurement of financial-economic balance of the contract.

Article 12 - (Vetoed)

Article 13 - The rates may vary according to the technical characteristics and specific costs from the service to different segments of users.

#### BIDDING PROCEDURE

Article 14 - Every concession of public service, preceded or not by the execution of public works, will be subject to prior bidding procedure, under the proper legislation and in compliance with the Principles of legality, morality, publicity, balance, judgment by objective criteria and the bindability to the invitation to bid.

Article 15 - At the decision of the bidding procedure, it will be considered one of the following criteria:

I - the lowest rate of public service to be rendered;

III - the combination, two by two, of the criteria described in Items I, II and VII;

IV – the best technical proposal, with prices determined in the invitation to bid;

V – the best proposal on the grounds of by the combination of the criteria of the lowest rate of public service to be rendered with the best technique; (Included by Law 9,648 of 1998)

VI - best proposal on the grounds of the combination of the criteria of highest offer for the concession granted with the best technique, or (Included by Law 9,648 of 1998)

VII - best offer of payment for the concession granted after the qualification of the technical proposals. (Included by Law 9,648 of 1998)

1<sup>st</sup> Paragraph - The use of the criteria laid down in paragraph III shall be permitted only when previously established in the invitation to bid, including rules and precise formulas for economic and financial evaluation.

2<sup>nd</sup> Paragraph - For the purposes of using the provisions of sections IV, V, VI and VII, the invitation to bid will enclose parameters and requirements for the formulation of technical proposals.

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<sup>197</sup> The General Law of concession uses the term impact – as a financial and economic impact. “when an impact is proven”. We’ve replaced for “downturn which is more appropriate.

<sup>198</sup> In Brazil, there is a principle where the rates are required to be reasonable, i.e., may not be expensive or abusive. It is called principle of the reasonability of rates, which is expressed in this provision.

3<sup>rd</sup> Paragraph - The grantor power will refuse financially unfeasible proposals manifestly incompatible with the aims of the bidding procedure.

4<sup>th</sup> Paragraph – On equal terms, preference will be given to the proposal made by a Brazilian company.

Article 16 - The granting of concessions or permits will not have an exclusive feature, except in the case of technical or economic infeasibility justified in the act referred by the 5<sup>th</sup> Article of this Law.

Article 17 - It will regarded disqualified, the proposal that, for its feasibility, requires subsidies or benefits not previously authorized by law and available to all competitors.

1<sup>st</sup> Paragraph - It will regarded disqualified as well, the proposal of State entity<sup>199</sup> unrelated to the political-administrative sphere of the grantor Power that, for its feasibility, requires benefits or subsidies by the government that controls the referred entity. (Renumbered by the sole paragraph by Law 9,648 of 1998)

2<sup>nd</sup> Paragraph – It is included among the benefits and allowances mentioned in this Article, any special tax treatment, though in consequence of the nature of the competitor, which may compromise the fiscal equality that should prevail among all competitors. (Included by Law 9,648 of 1998)

Article 18. The invitation to bid will be prepared by the grantor Power, subject, where applicable, the criteria and general rules of specific legislation about tenders and contracts and shall contain, in particular:

I - the object, goal and term of the concession;

II - the description of the conditions required to provide adequate service;

III - the deadline for the bids, the bidding award and contract signing;

IV - place, date and time that will be provided to interested parties, data, studies and required projects for the preparation of budgets and submission of tenders;

V - the criteria and the list of documents required for the measurement of technical capacity, financial capacity and the legal and tax regularity of the tenders;

VI - the possible sources of alternatives revenue, complementary or accessory, as well as those from associated projects;

VII - the rights and obligations of the grantor Power and the concessionaire in relation to changes and expansions to be undertaken in the future, in order to ensure continuity of service rendered;

VIII - the criteria of adjustment and review of the rates;

IX - the criteria, price indexes, formulas and parameters to be used at the technical and economical-financial proposal;

X - a statement of the reversible assets<sup>200</sup>;

XI - the features of the reversible assets and the conditions under which they will be made available, where a prior grant have been extinguished;

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<sup>199</sup> Public State entity.

<sup>200</sup> Assets that may return back (reverse) to the grantor Power after the end of the term of the concession/contract.

XII - the explicit indication of the responsible for condemnations required for the implementation of the service or public work, or for the establishment of public easements;

XIII - the leading conditions of the liable company, in the event that is allowed the participation of a consortium of companies;

XIV – in the case of concession, the draft of the contract, which shall contain the essential clauses referred to in Article 23 of this Law, when applicable;

XV - in cases of concession of public service preceded by the execution of public works, the data relating to the public work, among which the basic design elements that enable its full identification, as well as the required warranty for this specific part of the contract, appropriate to each case and limited to the cost of the public work;

XVI – in the cases of permission, the terms of the adhesion contract to be signed.

Article 18-A. The invitation to bid may provide the reversion of the order of the phases of license and award, in which case:

I - closed the classification round of tenders or bids, the envelope will be open with the documents enabling the highest-ranked bidder, to verify the compliance of the conditions set out in the invitation to bid;

II - verification of compliance with the requirements of the tender, the bidder will be declared the winner;

III – if the top-ranked bidder is disqualified, the license documents of the second place bidder will be examined, and so on until a qualified bidder meets the conditions set in the invitation to bid;

IV - declared the final result of the tender, the object will be awarded to the winner in the technical and economic conditions offered.

Article 19. When allowed in the bidding procedure, the participation of companies in the consortium will observe the following rules:

I - evidence of commitment, public or private, of formation of consortium, signed by the consortium;

II - indication of the main company, responsible for the consortium;

III - submission of documents required in sections V and XIII of the preceding Article, by each consortium member;

IV – it is forbidden the participation of consortium companies in the same bidding procedure, through more than one consortium or separately.

1st Paragraph - The successful bidder is required to promote, before signing the contract, the constitution and registration of the consortium, under the subsection I referred in this Article.

2nd Paragraph - The leading company of the consortium is responsible for compliance with the grantor Power of the concession contract, without prejudice to the joint liability of the other consortium members.

Article 20. It is optional to the grantor Power, if provided in the invitation to bid, in the interest of the service to be provided, determine to the successful bidder in case of consortium, to register the company before the contract is signed.

Article 21. The studies, investigations, surveys, designs, works and expenditures or investments already made, bounded to the concession, useful for the bidding procedure, conducted by the grantor power or with its permission, will be available to interested

parties, when the winning bidder must reimburse the related expenditures specified in the invitation to bid.

Article 22. It is assured to any person, to obtain a certificate of acts, contracts, decisions or legal opinions regarding the bidding procedure or concessions.

#### THE CONCESSION AGREEMENT

Article 23. The essential clauses of the concession contract are the one regarding:

I - the object, the area and term of the concession;

II - the mode, manner and conditions of service provision;

III – the criteria, price index, formulas and parameters defining the quality of service;

IV - the price of the service and the criteria and procedures for the review and adjustment of rated;

V - rights, warranties and obligations of the grantor power and the concessionaire, including those related to expected needs of future change and service expansion and consequent modernization, improvement and expansion of equipment and facilities;

VI - the rights and duties of users to obtain and use the service;

VII - the form of inspection of facilities, equipment, methods and practices for implementing the service, as well as identifying the bodies competent to exercise it;

VIII – the contractual and administrative sanctions to which the concessionaire is subject and its enforcement;

IX - to cases of termination of the concession;

X - the reversible assets;

XI - the criteria for the calculation and payment of compensation due to the concessionaire, if applicable;

XII - the conditions for extension of the contract;

XIII - the requirement, form and periodicity of accountability of the concessionaire to the grantor Power;

XIV - the requirement of publication of periodic financial statements of the concessionaire, and

XV - the jurisdiction and the friendly solution of contractual disagreements.

Single paragraph. Contracts for the provision of public service, preceded by the execution of public works shall additionally:

I - stipulate physical and financial timelines for the execution of works related to the concession, and

II - require warranty to the faithful compliance, by the concessionaire, of the duties relating to the public works bounded to the concession.

Article 23-A. The concession contract may provide for the use of private mechanisms for resolving disputes, arised from or related to the contract, including the arbitration, to be held in Brazil and in Portuguese, under the Law 9,307 of 23 September 1996.

Article 24. (Vetoed)

Article 25. It is the duty of the concessionaire the execution of the service granted, and it is liable for all damages caused to the grantor Power, users or third parties, and the supervision exercised by the competent may not waive or mitigate that liability.

1<sup>st</sup> paragraph - Without prejudice to the liability referred to in this Article, the concessionaire may contract third parties for the development of activities related,

ancillary or complementary to the service rendered, as well as the implementation of associated projects.

Article 26. The sub-concession is allowed, pursuant to the concession contract, if of expressly authorized by the grantor Power.

1<sup>st</sup> Paragraph - The granting of sub-concession will always be preceded by competition.

2<sup>nd</sup> Paragraph – the sub-concessionaire shall sub-rogate all rights and duties of sub-grantor within the limits of the sub-concession.

Article 27. The transfer of concession of corporate control of the concessionaire without prior consent of the grantor Power lead to the forfeiture of the concession.

1<sup>st</sup> Paragraph - For the purposes of obtaining the consent<sup>201</sup>, mentioned in this Article, the concessionaire must:

I - meet the requirements of technical, financial probity and legal and tax regularity required to undertake the service, and

II - comply with all the terms of the existing contract.

2<sup>nd</sup> Paragraph - Subject to the conditions in the concession contract, the grantor Power shall authorize the corporate control transfer by the grantee<sup>202</sup> and by its funders to promote its financial restructuring and ensure continuity of the service provision.

3<sup>rd</sup> Paragraph - In the case mentioned in the second paragraph of this Article, the grantor Power will require funders that meet the requirements of legality and tax regularity, being able<sup>203</sup> to amend or waive other requirements of 1<sup>st</sup> Paragraph, subsection I of this Article.

4<sup>th</sup> Paragraph - The corporate control transfer authorized in accordance with 2<sup>nd</sup> paragraph of this Article will not change the duties of the concessionaire and its controllers before the grantor Power.

Article 28. On finance contracts, the concessionaires can offer as collateral, the concession emerging rights, to the extent that does not compromise the operation and continuity of service provision.

Article 28-A. To secure long-term loan agreements for investment related to concession contracts in any modality, concessionaires may assign to the lender, on a fiduciary basis, part of its future operating credits, subject to the following conditions:

I - the contract of assignment of credit shall be registered in the Registry of Deeds and Documents to be effective against third parties;

II - without prejudice to subsection I of this Article, the assignment of credit will have no effect in relation to the grantor Power, only when this is formally notified;

III - future credits assigned under this Article shall be made under the ownership of the lender, regardless of any additional formality;

IV - the lender may refer the financial institution to perform the billing and receiving payments of credits assigned or allow the concessionaire to do so, as the representative and trustee;

V – in cases where a financial institution has been referred, as provided in section IV of this Article, the concessionaire is required to submit the credits for billing;

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<sup>201</sup> Of the grantor Power.

<sup>202</sup> Concessionaire.

<sup>203</sup> the grantor Power.

VI - the payments of the loans assigned shall be deposited by the concessionaire or by the institution in charge of collecting, at bank account bounded with the loan agreement;

VII - the depository financial institution shall transfer the amounts received to the lender, as the loan contract obligations become due, and

VIII - the assignment agreement shall provide for the return of excess funds to the concessionaire, being forbidden to withhold the full balance, after the full compliance of the contract.

Single paragraph. For purposes of this Article, shall be considered long-term contracts those whose bonds have an average due date of more than five (5) years.

#### Grantor Power Duties

Article 29. The duties of the Grantor Power are:

I - permanently regulate and supervise the service granted and its provision;

II - implement regulatory and contractual penalties;

III – intervene at the service rendered, in the cases and conditions provided by law;

IV - terminate the concession, as provided in this Act and in the manner provided in the contract;

V - approve adjustments and revise the rates in the terms of this Act, the pertinent rules and the contract;

VI - respect and enforce the regulations of the service and the contractual terms of the concession;

VII - ensure the good quality of service, receive, investigate and resolve complaints and claims by users, who will be informed, within thirty days of the measures taken;

VIII - declare of public utility, the necessary assets for the implementation of public work or service, promoting condemnations, directly or by granting powers to the concessionaire, in which case will be in charge for compensation measures;

IX - declare of need or public interest, for purposes of imposition of easements, the required assets for the execution of service or public work, promoting it directly or by granting authority to the concessionaire, in which case this will be in charge for the appropriate compensation;

X – stimulate quality and productivity increase, environment preservation and conservation;

XI – foster competitiveness, and

XII – stimulate the formation of users associations to advocacy for the rights concerning the service rendered.

Article 30. When exercising the supervision, the grantor Power will have access to data concerning the administration, accounting, technical resources, economic and financial aspects of the concessionaire.

Single paragraph. The supervision of the service shall be made by the technical body of the grantor Power or by convened authority and, periodically, as set forth by regulation, by commission composed of representatives of the grantor Power, by the concessionaire and by the users.

#### Duties of the Concessionaire

Article 31. Duties of the concessionaire:

I - provide adequate service, as provided in this Act, at the technical regulations and at the contract;



- II - update the inventory and records of the assets bounded to the concession;
  - III – render accountability of the management of the service to the grantor Power and users, as defined in the contract;
  - IV - to respect and enforce the rules of the service and contractual terms of the concession;
  - V - allow free access at any time to people in charge of supervision of the public works, equipment and facilities of the service, as well as its accounting records;
  - VI - promote the condemnations and easements authorized by the granting authority, as provided in the invitation to bid and at the contract;
  - VII - protect the integrity of the assets bounded to the service rendered, as well as secure them properly, and
  - VIII - collect, invest and manage the financial resources necessary to provide the service.
- Single paragraph. Hired workers, including labor-power<sup>204</sup>, by the concessionaire shall be governed by the provisions of private law and by labor law, do not constitute employment relationship between the hired workers by the concessionaire and the grantor Power.

#### INTERVENTION

Article 32. The granting authority may intervene in the concession, in order to ensure the adequate provision of the service, and the faithful fulfillment of the contract terms, regulations and pertinent laws.

Single paragraph. The intervention will be implemented by decree of the grantor Power, which will comprise the name of the intervener, the term of the intervention and the goals and limits of the measure.

Article 33. Declared the intervention, the grantor Power shall, within thirty days, start administrative proceedings to testify the determinants of the measure and investigate liability, guaranteed the right of legal defense.

1st Paragraph - If it is proved that the intervention did not observe the legal parameters and regulations, it will be declared a nullity, the service shall be immediately returned to the concessionaire, without prejudice to the right to compensation.

2nd Paragraph - The administrative procedure referred to in the heading of this Article shall be completed within one hundred and eighty days, otherwise the intervention it will be invalid.

Article 34. Ceased the intervention, if not extinct the concession, the service administration will be returned to the concessionaire, preceded by account by the intervener, who liable for acts during his tenure.

#### Chapter X

##### Extinction of the Concession

Article 35. The concession can be extinguished by:

- I – the end of the contract term;
- II - condemnation;
- III - forfeiture;

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<sup>204</sup> The beginning of the sentence of the single paragraph “Hired workers, including labor-power...” seems redundant. Which worker is not a labor-force?

IV - rescission<sup>205</sup>;

V - annulment, and

VI - bankruptcy or dissolution of the company, and death or incapacity of the holder, in the case of sole proprietorship.

1<sup>st</sup> Paragraph - Extinguished the concession, all reversible assets, rights and privileges transferred to the concessionaire shall return to the grantor Power, as provided in the invitation to bid and settled in the contract.

2<sup>nd</sup> Paragraph - Extinguished the concession, the grantor Power will be taken in charge of the service immediately by the grantor Power, proceeded by to surveys, evaluations and liquidations required.

3<sup>rd</sup> Paragraph – Taking the charge of the service, authorizes the occupancy of the premises and use of all reversible assets by the grantor Power.

4<sup>th</sup> Paragraph - In the cases of subsections I and II of this Article, the grantor Power, anticipating the termination of the concession, shall conduct surveys and assessments necessary to determine the amount of compensation that is owed to the concessionaire, in the form of Articles 36 and 37 of this Law.

Article 38. The total or partial non-fulfillment of the contract shall result, at the discretion of the grantor Power, the declaration of forfeiture of the concession or the application of contractual penalties, subject to the provisions of this Article, Article 27, and the rules agreed between the parties.

1<sup>st</sup> Paragraph - The forfeiture of the concession may be declared by the grantor Power when:

I - the service is being rendered improperly or sparingly, based on the standards, criteria, indicators and parameters that define the quality of the service;

II - the concessionaire fails to comply with contractual, legal or regulatory provisions concerning the concession;

III – the concessionaire paralyze the service or concur for it, except if caused by fortuitous event or force majeure;

IV - the concessionaire loses economic, technical or operational conditions to maintain the adequate rendered service granted;

V - the concessionaire fails to comply with the penalties imposed for violations in appropriate deadlines;

VI - the concessionaire does not answer the legal notice of the grantor Power in order to regularize the service rendered, and

VII - the concessionaire does not answer the legal notice to the grantor Power for, in 180 (one hundred eighty) days, submit documentation regarding the tax compliance, during grant, pursuant to Article 29 of Law number 8,666 of 21 June 1993. (Amended by Law number 12,767 of 2012).

2<sup>nd</sup> Paragraph - The declaration of forfeiture of the concession must be preceded by verification of non compliance by the concessionaire in an administrative proceeding, guaranteed the right to legal defense.

3<sup>rd</sup> Paragraph – It will not be established administrative proceedings about non compliance before reported to the concessionaire, in detail, the contractual breaches

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<sup>205</sup> of contract.

referred to in 1st Paragraph of this Article, giving to the concessionaire a deadline to correct the flaws and transgressions pointed, and for the legal framework under the contract.

4<sup>th</sup> Paragraph - Initiated the administrative process and proven the non compliance<sup>206</sup>, the forfeiture shall be declared by decree of the grantor Power, regardless of prior indemnity, calculated during the procedure.

5<sup>th</sup> Paragraph - The compensation mentioned in the preceding paragraph, shall be payable in the form of Article 36 of this Act and the contract, disregarding the amount of the contractual fines and damages caused by the concessionaire.

6<sup>th</sup> Paragraph - Declared to forfeiture, it will not result to the grantor Power any kind of liability for the charges, liens, bonds or commitments with third parties or employees of the concessionaire.

Article 39. The concession agreement may be terminated at the initiative of the concessionaire, in case of breach of contract rules by the grantor Power, through lawsuit filed especially for this purpose.

Single paragraph. In the case referred to in this Article, the services rendered by the concessionaire shall not be interrupted or discontinued until the final court decision.

## Chapter XI

### The Permits

Article 40. The permits of public service shall be formalized by an adhesion contract, which may comply with the terms of this Law, the other relevant rules and at the invitation to bid, including the precariousness<sup>207</sup> and unilateral termination of the contract by the grantor Power.

## Chapter XII

### FINAL AND TRANSITIONAL PROVISIONS

Article 41. The provisions of this Law does not apply to concessions, permission and authorization for the broadcast service of sounds and images.

Article 42. The public service concessions granted prior to the entry into force of this Act, shall be deemed to be valid for the period specified in the contract or deed of grant, subject to the provisions of Article 43 of this Law (See Law number 9,074 of 1995)

1st Paragraph – Expired the term mentioned in the contract or deed of grant, the service may be provided by agency or entity of the grantor Power, or delegated to others through new contract.

2nd Paragraph – The concessions have a *precarious* feature, and the ones with expired term and in effect with indeterminate term, even under previous legislation, shall remain valid for the necessary time to fulfill the required surveys and assessments for the

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<sup>206</sup> by the concessionaire.

<sup>207</sup> In the Brazilian Legal System, a contract with the public administration, in the case of permits, can be regarded as a “precarious” contract, which means the possibility of one party – usually the public party, unilaterally terminate the contract at any time, without the requirement of indemnification to the other part. The article 40 says that both situations, precariousness and unilateral termination can be clauses of the contract and be at the invitation to bid as well.

implementation of the <sup>208</sup>bidding procedure that will precede the <sup>209</sup>concession that will replace<sup>210</sup>, time that shall not be less than 24 (twenty four) months.

3rd Paragraph - The concessions referred to in 2<sup>nd</sup> Paragraph of this Article, including those without contract that formalizes it or with clause providing for its extension, shall have a maximum validity until 31 December 2010, provided that, until the 30 June 2009, have been fulfilled, cumulatively, the following conditions:

I – Broader and most retroactive possible survey of the physical elements, components of the reversible infrastructure assets and financial, accounting and business data concerning the provision of services, in a required dimension and enough to perform the calculation of any indemnity related to investments still not repaid by arising revenues from the concession, subject to legal and contractual provisions regulating the service or applicable to it in twenty (20) years prior to the publication of this Law;

II – implementation of an agreement between the grantor Power and the concessionaire about the criteria and form of compensation for any remaining credits for investments not yet amortized or depreciated, calculated from the surveys referred to in 1<sup>st</sup> subsection of this paragraph and audited by specialized institution chosen by agreement between the parties, and

III - publication in the official press of a formal act of the grantor authority, authorizing the provision of precarious services for a period of six (6) months, renewable until 31 December 2008, upon proof of compliance with the provisions of sections I and II of this paragraph.

4th Paragraph – If the agreement referred to in subsection II, 3<sup>rd</sup> paragraph of this Article fails, the calculation of compensation for investments shall be made based on the criteria set out in the instrument of concession signed before or, in omission thereof, by assessing its economic value or asset revaluation, depreciation and amortization of fixed assets defined by tax and corporate laws, performed by independent auditing company selected by mutual agreement of the parties.

5th Paragraph - In the case of the 4th Paragraph of this Article, the payment of any compensation shall be performed by collateral security, through four (4) equal, successive and annual installments, of the part still not amortized of investments and other indemnification related to the provision of services, conducted with own equity of the concessionaire or its controller, or originated from funding operations, or obtained through the issue of shares, debentures and other securities, with the first installment paid until the last day of the financial year in which occurs reversal.

6th Paragraph - If there is agreement, the indemnity mentioned at the 5th Paragraph of this Article shall be paid by revenues of new contract that will govern the provision of service.

Article 44. The concessionaires who have public works that are delayed, at the date of publication of this Law, shall submit to the grantor Power, within one hundred and eighty days, an effective plan of completion<sup>211</sup>. (See Law No. 9,074 of 1995)

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<sup>208</sup> (New)

<sup>209</sup> (New)

<sup>210</sup> The old and revoked/terminated concession.

Single paragraph. If the concessionaire fails to submit the plan referred to in this Article or if this plan does not provide effective conditions for completion of the public work, the grantor Power may declare terminated the concession concerning this public work.

Article 45. In the cases of the Articles 43 and 44 of this Act, the grantor Power shall indemnify the public works and services performed, only in the case and with the resources of a rebidding procedure.

Single paragraph. The bidding procedure of the head of this Article shall mandatorily take into account, for evaluation purposes, the stage of the public works stalled or delayed, to allow the use of the judgment criteria set out in subsection III of Article 15 of this Law.

Article 46. This Law shall enter into force on the date of its publication.

Article 47. The opposite provisions are revoked.

Brasília, 13 February 1995; 174th of Independence and 107th of the Republic.

Fernando Henrique Cardoso

Nelson Jobim

This does not replace the text published in the official newspaper of 14 February 1995 and republished in the official newspaper of 28 September 1998

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<sup>211</sup> Of the public work(s).

## GENERAL LAW OF CONCESSIONS - ORIGINAL IN PORTUGUESE

Lei número 8.987 de 13 de fevereiro de 1995.

Dispõe sobre o regime de concessão e permissão da prestação de serviços públicos previsto no art. 175 da Constituição Federal, e dá outras providências.

O PRESIDENTE DA REPÚBLICA Faço saber que o Congresso Nacional decreta e eu sanciono a seguinte Lei:

Capítulo I

DAS DISPOSIÇÕES PRELIMINARES

Art. 1º As concessões de serviços públicos e de obras públicas e as permissões de serviços públicos reger-se-ão pelos termos do art. 175 da Constituição Federal, por esta Lei, pelas normas legais pertinentes e pelas cláusulas dos indispensáveis contratos.

Parágrafo único. A União, os Estados, o Distrito Federal e os Municípios promoverão a revisão e as adaptações necessárias de sua legislação às prescrições desta Lei, buscando atender as peculiaridades das diversas modalidades dos seus serviços.

Art. 2º Para os fins do disposto nesta Lei, considera-se:

I - poder concedente: a União, o Estado, o Distrito Federal ou o Município, em cuja competência se encontre o serviço público, precedido ou não da execução de obra pública, objeto de concessão ou permissão;

II - concessão de serviço público: a delegação de sua prestação, feita pelo poder concedente, mediante licitação, na modalidade de concorrência, à pessoa jurídica ou consórcio de empresas que demonstre capacidade para seu desempenho, por sua conta e risco e por prazo determinado;

III - concessão de serviço público precedida da execução de obra pública: a construção, total ou parcial, conservação, reforma, ampliação ou melhoramento de quaisquer obras de interesse público, delegada pelo poder concedente, mediante licitação, na modalidade de concorrência, à pessoa jurídica ou consórcio de empresas que demonstre capacidade para a sua realização, por sua conta e risco, de forma que o investimento da concessionária seja remunerado e amortizado mediante a exploração do serviço ou da obra por prazo determinado;

IV - permissão de serviço público: a delegação, a título precário, mediante licitação, da prestação de serviços públicos, feita pelo poder concedente à pessoa física ou jurídica que demonstre capacidade para seu desempenho, por sua conta e risco.

Art. 3º As concessões e permissões sujeitar-se-ão à fiscalização pelo poder concedente responsável pela delegação, com a cooperação dos usuários.

Art. 4º A concessão de serviço público, precedida ou não da execução de obra pública, será formalizada mediante contrato, que deverá observar os termos desta Lei, das normas pertinentes e do edital de licitação.

Art. 5º O poder concedente publicará, previamente ao edital de licitação, ato justificando a conveniência da outorga de concessão ou permissão, caracterizando seu objeto, área e prazo.

Capítulo II

DO SERVIÇO ADEQUADO

Art. 6º Toda concessão ou permissão pressupõe a prestação de serviço adequado ao pleno atendimento dos usuários, conforme estabelecido nesta Lei, nas normas pertinentes e no respectivo contrato.

§ 1º Serviço adequado é o que satisfaz as condições de regularidade, continuidade, eficiência, segurança, atualidade, generalidade, cortesia na sua prestação e modicidade das tarifas.

§ 2º A atualidade compreende a modernidade das técnicas, do equipamento e das instalações e a sua conservação, bem como a melhoria e expansão do serviço.

§ 3º Não se caracteriza como descontinuidade do serviço a sua interrupção em situação de emergência ou após prévio aviso, quando:

I - motivada por razões de ordem técnica ou de segurança das instalações; e,

II - por inadimplemento do usuário, considerado o interesse da coletividade.

### Capítulo III

#### DOS DIREITOS E OBRIGAÇÕES DOS USUÁRIOS

Art. 7º. Sem prejuízo do disposto na Lei nº 8.078, de 11 de setembro de 1990, são direitos e obrigações dos usuários:

I - receber serviço adequado;

II - receber do poder concedente e da concessionária informações para a defesa de interesses individuais ou coletivos;

III - obter e utilizar o serviço, com liberdade de escolha entre vários prestadores de serviços, quando for o caso, observadas as normas do poder concedente.

IV - levar ao conhecimento do poder público e da concessionária as irregularidades de que tenham conhecimento, referentes ao serviço prestado;

V - comunicar às autoridades competentes os atos ilícitos praticados pela concessionária na prestação do serviço;

VI - contribuir para a permanência das boas condições dos bens públicos através dos quais lhes são prestados os serviços.

Art. 7º-A. As concessionárias de serviços públicos, de direito público e privado, nos Estados e no Distrito Federal, são obrigadas a oferecer ao consumidor e ao usuário, dentro do mês de vencimento, o mínimo de seis datas opcionais para escolherem os dias de vencimento de seus débitos.

Parágrafo único. (VETADO) (Incluído pela Lei nº 9.791, de 1999)

### Capítulo IV

#### DA POLÍTICA TARIFÁRIA

Art. 8º (VETADO)

Art. 9º A tarifa do serviço público concedido será fixada pelo preço da proposta vencedora da licitação e preservada pelas regras de revisão previstas nesta Lei, no edital e no contrato.

§ 1º A tarifa não será subordinada à legislação específica anterior e somente nos casos expressamente previstos em lei, sua cobrança poderá ser condicionada à existência de serviço público alternativo e gratuito para o usuário.

§ 2º Os contratos poderão prever mecanismos de revisão das tarifas, a fim de manter-se o equilíbrio econômico-financeiro.

§ 3º Ressalvados os impostos sobre a renda, a criação, alteração ou extinção de quaisquer tributos ou encargos legais, após a apresentação da proposta, quando comprovado seu impacto, implicará a revisão da tarifa, para mais ou para menos, conforme o caso.

§ 4º Em havendo alteração unilateral do contrato que afete o seu inicial equilíbrio econômico-financeiro, o poder concedente deverá restabelecê-lo, concomitantemente à alteração.

Art. 10. Sempre que forem atendidas as condições do contrato, considera-se mantido seu equilíbrio econômico-financeiro.

Art. 11. No atendimento às peculiaridades de cada serviço público, poderá o poder concedente prever, em favor da concessionária, no edital de licitação, a possibilidade de outras fontes provenientes de receitas alternativas, complementares, acessórias ou de projetos associados, com ou sem exclusividade, com vistas a favorecer a modicidade das tarifas, observado o disposto no art. 17 desta Lei.

Parágrafo único. As fontes de receita previstas neste artigo serão obrigatoriamente consideradas para a aferição do inicial equilíbrio econômico-financeiro do contrato.

Art. 12. (VETADO)

Art. 13. As tarifas poderão ser diferenciadas em função das características técnicas e dos custos específicos provenientes do atendimento aos distintos segmentos de usuários.

Capítulo V

#### DA LICITAÇÃO

Art. 14. Toda concessão de serviço público, precedida ou não da execução de obra pública, será objeto de prévia licitação, nos termos da legislação própria e com observância dos princípios da legalidade, moralidade, publicidade, igualdade, do julgamento por critérios objetivos e da vinculação ao instrumento convocatório.

Art. 15. No julgamento da licitação será considerado um dos seguintes critérios:

I - o menor valor da tarifa do serviço público a ser prestado;

II - a maior oferta, nos casos de pagamento ao poder concedente pela outorga da concessão;

III - a combinação, dois a dois, dos critérios referidos nos incisos I, II e VII;

IV - melhor proposta técnica, com preço fixado no edital;

V - melhor proposta em razão da combinação dos critérios de menor valor da tarifa do serviço público a ser prestado com o de melhor técnica; (Incluído pela Lei nº 9.648, de 1998)

VI - melhor proposta em razão da combinação dos critérios de maior oferta pela outorga da concessão com o de melhor técnica; ou (Incluído pela Lei nº 9.648, de 1998)

VII - melhor oferta de pagamento pela outorga após qualificação de propostas técnicas. (Incluído pela Lei nº 9.648, de 1998)

§ 1º A aplicação do critério previsto no inciso III só será admitida quando previamente estabelecida no edital de licitação, inclusive com regras e fórmulas precisas para avaliação econômico-financeira.

§ 2º Para fins de aplicação do disposto nos incisos IV, V, VI e VII, o edital de licitação conterá parâmetros e exigências para formulação de propostas técnicas.

§ 3º O poder concedente recusará propostas manifestamente inexequíveis ou financeiramente incompatíveis com os objetivos da licitação.



§ 4º Em igualdade de condições, será dada preferência à proposta apresentada por empresa brasileira.

Art. 16. A outorga de concessão ou permissão não terá caráter de exclusividade, salvo no caso de inviabilidade técnica ou econômica justificada no ato a que se refere o art. 5º desta Lei.

Art. 17. Considerar-se-á desclassificada a proposta que, para sua viabilização, necessite de vantagens ou subsídios que não estejam previamente autorizados em lei e à disposição de todos os concorrentes.

§ 1º Considerar-se-á, também, desclassificada a proposta de entidade estatal alheia à esfera político-administrativa do poder concedente que, para sua viabilização, necessite de vantagens ou subsídios do poder público controlador da referida entidade. (Renumerado do parágrafo único pela Lei nº 9.648, de 1998)

§ 2º Inclui-se nas vantagens ou subsídios de que trata este artigo, qualquer tipo de tratamento tributário diferenciado, ainda que em consequência da natureza jurídica do licitante, que comprometa a isonomia fiscal que deve prevalecer entre todos os concorrentes. (Incluído pela Lei nº 9.648, de 1998)

Art. 18. O edital de licitação será elaborado pelo poder concedente, observados, no que couber, os critérios e as normas gerais da legislação própria sobre licitações e contratos e conterà, especialmente:

I - o objeto, metas e prazo da concessão;

II - a descrição das condições necessárias à prestação adequada do serviço;

III - os prazos para recebimento das propostas, julgamento da licitação e assinatura do contrato;

IV - prazo, local e horário em que serão fornecidos, aos interessados, os dados, estudos e projetos necessários à elaboração dos orçamentos e apresentação das propostas;

V - os critérios e a relação dos documentos exigidos para a aferição da capacidade técnica, da idoneidade financeira e da regularidade jurídica e fiscal;

VI - as possíveis fontes de receitas alternativas, complementares ou acessórias, bem como as provenientes de projetos associados;

VII - os direitos e obrigações do poder concedente e da concessionária em relação a alterações e expansões a serem realizadas no futuro, para garantir a continuidade da prestação do serviço;

VIII - os critérios de reajuste e revisão da tarifa;

IX - os critérios, indicadores, fórmulas e parâmetros a serem utilizados no julgamento técnico e econômico-financeiro da proposta;

X - a indicação dos bens reversíveis;

XI - as características dos bens reversíveis e as condições em que estes serão postos à disposição, nos casos em que houver sido extinta a concessão anterior;

XII - a expressa indicação do responsável pelo ônus das desapropriações necessárias à execução do serviço ou da obra pública, ou para a instituição de servidão administrativa;

XIII - as condições de liderança da empresa responsável, na hipótese em que for permitida a participação de empresas em consórcio;

XIV - nos casos de concessão, a minuta do respectivo contrato, que conterà as cláusulas essenciais referidas no art. 23 desta Lei, quando aplicáveis;

XV - nos casos de concessão de serviços públicos precedida da execução de obra pública, os dados relativos à obra, dentre os quais os elementos do projeto básico que permitam sua plena caracterização, bem assim as garantias exigidas para essa parte específica do contrato, adequadas a cada caso e limitadas ao valor da obra;

XVI - nos casos de permissão, os termos do contrato de adesão a ser firmado.

Art. 18-A. O edital poderá prever a inversão da ordem das fases de habilitação e julgamento, hipótese em que:

I - encerrada a fase de classificação das propostas ou o oferecimento de lances, será aberto o invólucro com os documentos de habilitação do licitante mais bem classificado, para verificação do atendimento das condições fixadas no edital;

II - verificado o atendimento das exigências do edital, o licitante será declarado vencedor;

III - inabilitado o licitante melhor classificado, serão analisados os documentos habilitatórios do licitante com a proposta classificada em segundo lugar, e assim sucessivamente, até que um licitante classificado atenda às condições fixadas no edital;

IV - proclamado o resultado final do certame, o objeto será adjudicado ao vencedor nas condições técnicas e econômicas por ele ofertadas.

Art. 19. Quando permitida, na licitação, a participação de empresas em consórcio, observar-se-ão as seguintes normas:

I - comprovação de compromisso, público ou particular, de constituição de consórcio, subscrito pelas consorciadas;

II - indicação da empresa responsável pelo consórcio;

III - apresentação dos documentos exigidos nos incisos V e XIII do artigo anterior, por parte de cada consorciada;

IV - impedimento de participação de empresas consorciadas na mesma licitação, por intermédio de mais de um consórcio ou isoladamente.

§ 1º O licitante vencedor fica obrigado a promover, antes da celebração do contrato, a constituição e registro do consórcio, nos termos do compromisso referido no inciso I deste artigo.

§ 2º A empresa líder do consórcio é a responsável perante o poder concedente pelo cumprimento do contrato de concessão, sem prejuízo da responsabilidade solidária das demais consorciadas.

Art. 20. É facultado ao poder concedente, desde que previsto no edital, no interesse do serviço a ser concedido, determinar que o licitante vencedor, no caso de consórcio, se constitua em empresa antes da celebração do contrato.

Art. 21. Os estudos, investigações, levantamentos, projetos, obras e despesas ou investimentos já efetuados, vinculados à concessão, de utilidade para a licitação, realizados pelo poder concedente ou com a sua autorização, estarão à disposição dos interessados, devendo o vencedor da licitação ressarcir os dispêndios correspondentes, especificados no edital.

Art. 22. É assegurada a qualquer pessoa a obtenção de certidão sobre atos, contratos, decisões ou pareceres relativos à licitação ou às próprias concessões.

Capítulo VI

DO CONTRATO DE CONCESSÃO

Art. 23. São cláusulas essenciais do contrato de concessão as relativas:

- I - ao objeto, à área e ao prazo da concessão;
- II - ao modo, forma e condições de prestação do serviço;
- III - aos critérios, indicadores, fórmulas e parâmetros definidores da qualidade do serviço;
- IV - ao preço do serviço e aos critérios e procedimentos para o reajuste e a revisão das tarifas;
- V - aos direitos, garantias e obrigações do poder concedente e da concessionária, inclusive os relacionados às previsíveis necessidades de futura alteração e expansão do serviço e conseqüente modernização, aperfeiçoamento e ampliação dos equipamentos e das instalações;
- VI - aos direitos e deveres dos usuários para obtenção e utilização do serviço;
- VII - à forma de fiscalização das instalações, dos equipamentos, dos métodos e práticas de execução do serviço, bem como a indicação dos órgãos competentes para exercê-la;
- VIII - às penalidades contratuais e administrativas a que se sujeita a concessionária e sua forma de aplicação;
- IX - aos casos de extinção da concessão;
- X - aos bens reversíveis;
- XI - aos critérios para o cálculo e a forma de pagamento das indenizações devidas à concessionária, quando for o caso;
- XII - às condições para prorrogação do contrato;
- XIII - à obrigatoriedade, forma e periodicidade da prestação de contas da concessionária ao poder concedente;
- XIV - à exigência da publicação de demonstrações financeiras periódicas da concessionária; e
- XV - ao foro e ao modo amigável de solução das divergências contratuais.

Parágrafo único. Os contratos relativos à concessão de serviço público precedido da execução de obra pública deverão, adicionalmente:

- I - estipular os cronogramas físico-financeiros de execução das obras vinculadas à concessão; e
- II - exigir garantia do fiel cumprimento, pela concessionária, das obrigações relativas às obras vinculadas à concessão.

Art. 23-A. O contrato de concessão poderá prever o emprego de mecanismos privados para resolução de disputas decorrentes ou relacionadas ao contrato, inclusive a arbitragem, a ser realizada no Brasil e em língua portuguesa, nos termos da Lei nº 9.307, de 23 de setembro de 1996.

Art. 24. (VETADO)

Art. 25. Incumbe à concessionária a execução do serviço concedido, cabendo-lhe responder por todos os prejuízos causados ao poder concedente, aos usuários ou a terceiros, sem que a fiscalização exercida pelo órgão competente exclua ou atenua essa responsabilidade.

§ 1º Sem prejuízo da responsabilidade a que se refere este artigo, a concessionária poderá contratar com terceiros o desenvolvimento de atividades inerentes, acessórias ou complementares ao serviço concedido, bem como a implementação de projetos associados.

§ 2º Os contratos celebrados entre a concessionária e os terceiros a que se refere o parágrafo anterior reger-se-ão pelo direito privado, não se estabelecendo qualquer relação jurídica entre os terceiros e o poder concedente.

§ 3º A execução das atividades contratadas com terceiros pressupõe o cumprimento das normas regulamentares da modalidade do serviço concedido.

Art. 26. É admitida a subconcessão, nos termos previstos no contrato de concessão, desde que expressamente autorizada pelo poder concedente.

§ 1º A outorga de subconcessão será sempre precedida de concorrência.

§ 2º O subconcessionário se sub-rogará todos os direitos e obrigações da subconcedente dentro dos limites da subconcessão.

Art. 27. A transferência de concessão ou do controle societário da concessionária sem prévia anuência do poder concedente implicará a caducidade da concessão.

§ 1º Para fins de obtenção da anuência de que trata o caput deste artigo, o pretendente deverá:

I - atender às exigências de capacidade técnica, idoneidade financeira e regularidade jurídica e fiscal necessárias à assunção do serviço; e

II - comprometer-se a cumprir todas as cláusulas do contrato em vigor.

§ 2º Nas condições estabelecidas no contrato de concessão, o poder concedente autorizará a assunção do controle da concessionária por seus financiadores para promover sua reestruturação financeira e assegurar a continuidade da prestação dos serviços.

§ 3º Na hipótese prevista no § 2º deste artigo, o poder concedente exigirá dos financiadores que atendam às exigências de regularidade jurídica e fiscal, podendo alterar ou dispensar os demais requisitos previstos no § 1º, inciso I deste artigo.

§ 4º A assunção do controle autorizada na forma do § 2º deste artigo não alterará as obrigações da concessionária e de seus controladores ante ao poder concedente.

Art. 28. Nos contratos de financiamento, as concessionárias poderão oferecer em garantia os direitos emergentes da concessão, até o limite que não comprometa a operacionalização e a continuidade da prestação do serviço.

Art. 28-A. Para garantir contratos de mútuo de longo prazo, destinados a investimentos relacionados a contratos de concessão, em qualquer de suas modalidades, as concessionárias poderão ceder ao mutuante, em caráter fiduciário, parcela de seus créditos operacionais futuros, observadas as seguintes condições:

I - o contrato de cessão dos créditos deverá ser registrado em Cartório de Títulos e Documentos para ter eficácia perante terceiros;

II - sem prejuízo do disposto no inciso I do caput deste artigo, a cessão do crédito não terá eficácia em relação ao Poder Público concedente senão quando for este formalmente notificado;

III - os créditos futuros cedidos nos termos deste artigo serão constituídos sob a titularidade do mutuante, independentemente de qualquer formalidade adicional;

IV - o mutuante poderá indicar instituição financeira para efetuar a cobrança e receber os pagamentos dos créditos cedidos ou permitir que a concessionária o faça, na qualidade de representante e depositária;

V - na hipótese de ter sido indicada instituição financeira, conforme previsto no inciso IV do caput deste artigo, fica a concessionária obrigada a apresentar a essa os créditos para cobrança;

VI - os pagamentos dos créditos cedidos deverão ser depositados pela concessionária ou pela instituição encarregada da cobrança em conta corrente bancária vinculada ao contrato de mútuo;

VII - a instituição financeira depositária deverá transferir os valores recebidos ao mutuante à medida que as obrigações do contrato de mútuo tornarem-se exigíveis; e

VIII - o contrato de cessão disporá sobre a devolução à concessionária dos recursos excedentes, sendo vedada a retenção do saldo após o adimplemento integral do contrato.

Parágrafo único. Para os fins deste artigo, serão considerados contratos de longo prazo aqueles cujas obrigações tenham prazo médio de vencimento superior a 5 (cinco) anos.

## Capítulo VII

### DOS ENCARGOS DO PODER CONCEDENTE

Art. 29. Incumbe ao poder concedente:

I - regulamentar o serviço concedido e fiscalizar permanentemente a sua prestação;

II - aplicar as penalidades regulamentares e contratuais;

III - intervir na prestação do serviço, nos casos e condições previstos em lei;

IV - extinguir a concessão, nos casos previstos nesta Lei e na forma prevista no contrato;

V - homologar reajustes e proceder à revisão das tarifas na forma desta Lei, das normas pertinentes e do contrato;

VI - cumprir e fazer cumprir as disposições regulamentares do serviço e as cláusulas contratuais da concessão;

VII - zelar pela boa qualidade do serviço, receber, apurar e solucionar queixas e reclamações dos usuários, que serão cientificados, em até trinta dias, das providências tomadas;

VIII - declarar de utilidade pública os bens necessários à execução do serviço ou obra pública, promovendo as desapropriações, diretamente ou mediante outorga de poderes à concessionária, caso em que será desta a responsabilidade pelas indenizações cabíveis;

IX - declarar de necessidade ou utilidade pública, para fins de instituição de servidão administrativa, os bens necessários à execução de serviço ou obra pública, promovendo-a diretamente ou mediante outorga de poderes à concessionária, caso em que será desta a responsabilidade pelas indenizações cabíveis;

X - estimular o aumento da qualidade, produtividade, preservação do meio-ambiente e conservação;

XI - incentivar a competitividade; e

XII - estimular a formação de associações de usuários para defesa de interesses relativos ao serviço.

Art. 30. No exercício da fiscalização, o poder concedente terá acesso aos dados relativos à administração, contabilidade, recursos técnicos, econômicos e financeiros da concessionária.

Parágrafo único. A fiscalização do serviço será feita por intermédio de órgão técnico do poder concedente ou por entidade com ele conveniada, e, periodicamente, conforme previsto em norma regulamentar, por comissão composta de representantes do poder concedente, da concessionária e dos usuários.

## Capítulo VIII

### DOS ENCARGOS DA CONCESSIONÁRIA

Art. 31. Incumbe à concessionária:

- I - prestar serviço adequado, na forma prevista nesta Lei, nas normas técnicas aplicáveis e no contrato;
- II - manter em dia o inventário e o registro dos bens vinculados à concessão;
- III - prestar contas da gestão do serviço ao poder concedente e aos usuários, nos termos definidos no contrato;
- IV - cumprir e fazer cumprir as normas do serviço e as cláusulas contratuais da concessão;
- V - permitir aos encarregados da fiscalização livre acesso, em qualquer época, às obras, aos equipamentos e às instalações integrantes do serviço, bem como a seus registros contábeis;
- VI - promover as desapropriações e constituir servidões autorizadas pelo poder concedente, conforme previsto no edital e no contrato;
- VII - zelar pela integridade dos bens vinculados à prestação do serviço, bem como segurá-los adequadamente; e
- VIII - captar, aplicar e gerir os recursos financeiros necessários à prestação do serviço.

Parágrafo único. As contratações, inclusive de mão-de-obra, feitas pela concessionária serão regidas pelas disposições de direito privado e pela legislação trabalhista, não se estabelecendo qualquer relação entre os terceiros contratados pela concessionária e o poder concedente.

#### Capítulo IX

#### DA INTERVENÇÃO

Art. 32. O poder concedente poderá intervir na concessão, com o fim de assegurar a adequação na prestação do serviço, bem como o fiel cumprimento das normas contratuais, regulamentares e legais pertinentes.

Parágrafo único. A intervenção far-se-á por decreto do poder concedente, que conterà a designação do interventor, o prazo da intervenção e os objetivos e limites da medida.

Art. 33. Declarada a intervenção, o poder concedente deverá, no prazo de trinta dias, instaurar procedimento administrativo para comprovar as causas determinantes da medida e apurar responsabilidades, assegurado o direito de ampla defesa.

§ 1º Se ficar comprovado que a intervenção não observou os pressupostos legais e regulamentares será declarada sua nulidade, devendo o serviço ser imediatamente devolvido à concessionária, sem prejuízo de seu direito à indenização.

§ 2º O procedimento administrativo a que se refere o caput deste artigo deverá ser concluído no prazo de até cento e oitenta dias, sob pena de considerar-se inválida a intervenção.

Art. 34. Cessada a intervenção, se não for extinta a concessão, a administração do serviço será devolvida à concessionária, precedida de prestação de contas pelo interventor, que responderá pelos atos praticados durante a sua gestão.

#### Capítulo X

#### DA EXTINÇÃO DA CONCESSÃO

Art. 35. Extingue-se a concessão por:

- I - advento do termo contratual;
- II - encampação;
- III - caducidade;
- IV - rescisão;

V - anulação; e

VI - falência ou extinção da empresa concessionária e falecimento ou incapacidade do titular, no caso de empresa individual.

§ 1º Extinta a concessão, retornam ao poder concedente todos os bens reversíveis, direitos e privilégios transferidos ao concessionário conforme previsto no edital e estabelecido no contrato.

§ 2º Extinta a concessão, haverá a imediata assunção do serviço pelo poder concedente, procedendo-se aos levantamentos, avaliações e liquidações necessários.

§ 3º A assunção do serviço autoriza a ocupação das instalações e a utilização, pelo poder concedente, de todos os bens reversíveis.

§ 4º Nos casos previstos nos incisos I e II deste artigo, o poder concedente, antecipando-se à extinção da concessão, procederá aos levantamentos e avaliações necessários à determinação dos montantes da indenização que será devida à concessionária, na forma dos arts. 36 e 37 desta Lei.

Art. 36. A reversão no advento do termo contratual far-se-á com a indenização das parcelas dos investimentos vinculados a bens reversíveis, ainda não amortizados ou depreciados, que tenham sido realizados com o objetivo de garantir a continuidade e atualidade do serviço concedido.

Art. 37. Considera-se encampação a retomada do serviço pelo poder concedente durante o prazo da concessão, por motivo de interesse público, mediante lei autorizativa específica e após prévio pagamento da indenização, na forma do artigo anterior.

Art. 38. A inexecução total ou parcial do contrato acarretará, a critério do poder concedente, a declaração de caducidade da concessão ou a aplicação das sanções contratuais, respeitadas as disposições deste artigo, do art. 27, e as normas convencionadas entre as partes.

§ 1º A caducidade da concessão poderá ser declarada pelo poder concedente quando:

I - o serviço estiver sendo prestado de forma inadequada ou deficiente, tendo por base as normas, critérios, indicadores e parâmetros definidores da qualidade do serviço;

II - a concessionária descumprir cláusulas contratuais ou disposições legais ou regulamentares concernentes à concessão;

III - a concessionária paralisar o serviço ou concorrer para tanto, ressalvadas as hipóteses decorrentes de caso fortuito ou força maior;

IV - a concessionária perder as condições econômicas, técnicas ou operacionais para manter a adequada prestação do serviço concedido;

V - a concessionária não cumprir as penalidades impostas por infrações, nos devidos prazos;

VI - a concessionária não atender a intimação do poder concedente no sentido de regularizar a prestação do serviço; e

VII - a concessionária não atender a intimação do poder concedente para, em 180 (cento e oitenta) dias, apresentar a documentação relativa a regularidade fiscal, no curso da concessão, na forma do art. 29 da Lei nº 8.666, de 21 de junho de 1993. (Redação dada pela Lei nº 12.767, de 2012)

§ 2º A declaração de caducidade da concessão deverá ser precedida da verificação da inadimplência da concessionária em processo administrativo, assegurado o direito de ampla defesa.

§ 3º Não será instaurado processo administrativo de inadimplência antes de comunicados à concessionária, detalhadamente, os descumprimentos contratuais referidos no § 1º deste artigo, dando-lhe um prazo para corrigir as falhas e transgressões apontadas e para o enquadramento, nos termos contratuais.

§ 4º Instaurado o processo administrativo e comprovada a inadimplência, a caducidade será declarada por decreto do poder concedente, independentemente de indenização prévia, calculada no decurso do processo.

§ 5º A indenização de que trata o parágrafo anterior, será devida na forma do art. 36 desta Lei e do contrato, descontado o valor das multas contratuais e dos danos causados pela concessionária.

§ 6º Declarada a caducidade, não resultará para o poder concedente qualquer espécie de responsabilidade em relação aos encargos, ônus, obrigações ou compromissos com terceiros ou com empregados da concessionária.

Art. 39. O contrato de concessão poderá ser rescindido por iniciativa da concessionária, no caso de descumprimento das normas contratuais pelo poder concedente, mediante ação judicial especialmente intentada para esse fim.

Parágrafo único. Na hipótese prevista no caput deste artigo, os serviços prestados pela concessionária não poderão ser interrompidos ou paralisados, até a decisão judicial transitada em julgado.

#### Capítulo XI

#### DAS PERMISSÕES

Art. 40. A permissão de serviço público será formalizada mediante contrato de adesão, que observará os termos desta Lei, das demais normas pertinentes e do edital de licitação, inclusive quanto à precariedade e à revogabilidade unilateral do contrato pelo poder concedente.

Parágrafo único. Aplica-se às permissões o disposto nesta Lei.

#### Capítulo XII

#### DISPOSIÇÕES FINAIS E TRANSITÓRIAS

Art. 41. O disposto nesta Lei não se aplica à concessão, permissão e autorização para o serviço de radiodifusão sonora e de sons e imagens.

Art. 42. As concessões de serviço público outorgadas anteriormente à entrada em vigor desta Lei consideram-se válidas pelo prazo fixado no contrato ou no ato de outorga, observado o disposto no art. 43 desta Lei. (Vide Lei nº 9.074, de 1995)

§ 1º Vencido o prazo mencionado no contrato ou ato de outorga, o serviço poderá ser prestado por órgão ou entidade do poder concedente, ou delegado a terceiros, mediante novo contrato.

§ 2º As concessões em caráter precário, as que estiverem com prazo vencido e as que estiverem em vigor por prazo indeterminado, inclusive por força de legislação anterior, permanecerão válidas pelo prazo necessário à realização dos levantamentos e avaliações indispensáveis à organização das licitações que precederão a outorga das concessões que as substituirão, prazo esse que não será inferior a 24 (vinte e quatro) meses.

§ 3º As concessões a que se refere o § 2º deste artigo, inclusive as que não possuam instrumento que as formalize ou que possuam cláusula que preveja prorrogação, terão validade máxima até o dia 31 de dezembro de 2010, desde que, até o dia 30 de junho de 2009, tenham sido cumpridas, cumulativamente, as seguintes condições:



I - levantamento mais amplo e retroativo possível dos elementos físicos constituintes da infra-estrutura de bens reversíveis e dos dados financeiros, contábeis e comerciais relativos à prestação dos serviços, em dimensão necessária e suficiente para a realização do cálculo de eventual indenização relativa aos investimentos ainda não amortizados pelas receitas emergentes da concessão, observadas as disposições legais e contratuais que regulavam a prestação do serviço ou a ela aplicáveis nos 20 (vinte) anos anteriores ao da publicação desta Lei;

II - celebração de acordo entre o poder concedente e o concessionário sobre os critérios e a forma de indenização de eventuais créditos remanescentes de investimentos ainda não amortizados ou depreciados, apurados a partir dos levantamentos referidos no inciso I deste parágrafo e auditados por instituição especializada escolhida de comum acordo pelas partes; e

III - publicação na imprensa oficial de ato formal de autoridade do poder concedente, autorizando a prestação precária dos serviços por prazo de até 6 (seis) meses, renovável até 31 de dezembro de 2008, mediante comprovação do cumprimento do disposto nos incisos I e II deste parágrafo.

§ 4º Não ocorrendo o acordo previsto no inciso II do § 3º deste artigo, o cálculo da indenização de investimentos será feito com base nos critérios previstos no instrumento de concessão antes celebrado ou, na omissão deste, por avaliação de seu valor econômico ou reavaliação patrimonial, depreciação e amortização de ativos imobilizados definidos pelas legislações fiscal e das sociedades por ações, efetuada por empresa de auditoria independente escolhida de comum acordo pelas partes.

§ 5º No caso do § 4º deste artigo, o pagamento de eventual indenização será realizado, mediante garantia real, por meio de 4 (quatro) parcelas anuais, iguais e sucessivas, da parte ainda não amortizada de investimentos e de outras indenizações relacionadas à prestação dos serviços, realizados com capital próprio do concessionário ou de seu controlador, ou originários de operações de financiamento, ou obtidos mediante emissão de ações, debêntures e outros títulos mobiliários, com a primeira parcela paga até o último dia útil do exercício financeiro em que ocorrer a reversão.

§ 6º Ocorrendo acordo, poderá a indenização de que trata o § 5º deste artigo ser paga mediante receitas de novo contrato que venha a disciplinar a prestação do serviço.

Art. 43. Ficam extintas todas as concessões de serviços públicos outorgadas sem licitação na vigência da Constituição de 1988.(Vide Lei nº 9.074, de 1995)

Parágrafo único. Ficam também extintas todas as concessões outorgadas sem licitação anteriormente à Constituição de 1988, cujas obras ou serviços não tenham sido iniciados ou que se encontrem paralisados quando da entrada em vigor desta Lei.

Art. 44. As concessionárias que tiverem obras que se encontrem atrasadas, na data da publicação desta Lei, apresentarão ao poder concedente, dentro de cento e oitenta dias, plano efetivo de conclusão das obras.(Vide Lei nº 9.074, de 1995)

Parágrafo único. Caso a concessionária não apresente o plano a que se refere este artigo ou se este plano não oferecer condições efetivas para o término da obra, o poder concedente poderá declarar extinta a concessão, relativa a essa obra.

Art. 45. Nas hipóteses de que tratam os arts. 43 e 44 desta Lei, o poder concedente indenizará as obras e serviços realizados somente no caso e com os recursos da nova licitação.

Parágrafo único. A licitação de que trata o caput deste artigo deverá, obrigatoriamente, levar em conta, para fins de avaliação, o estágio das obras paralisadas ou atrasadas, de modo a permitir a utilização do critério de julgamento estabelecido no inciso III do art. 15 desta Lei.

Art. 46. Esta Lei entra em vigor na data de sua publicação.

Art. 47. Revogam-se as disposições em contrário.

Brasília, 13 de fevereiro de 1995; 174<sup>o</sup> da Independência e 107<sup>o</sup> da República.

FERNANDO HENRIQUE CARDOSO

Nelson Jobim

Este texto não substitui o publicado no DOU de 14.2.1995 e republicado no DOU de 28.9.1998

## VITA

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