THE GOVERNMENT TAKE IN THE BRAZILIAN OIL INDUSTRY UNDER THE MEMBER-STATE VIEW: ECONOMIC IMPORTANCE, LEGAL STRUCTURE AND POSSIBILITY OF DIRECT OVERSIGHT

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ABSTRACT

The government take, introduced by the Brazilian Constitution in its article 20, paragraph 1º, is legally treated as financial compensation for the exploration and production of oil, due to the serious environmental impacts associated with the activity and given the nature of oil as a finite resource. In this context, this article aims to analyze the distribution amongst States of all levels of Government take maintained by the Law nº 9.478/97 (Oil Law). It is each member States' responsibility to directly audit its share of the Government take, and this does not imply a necessary collision with ANP's regulatory role. In fact, ANP's and States' activities should be harmonious and complementary.

KEYWORDS

governmet take; brazilian oil industry; oil legislation development in Brazil; legal nature. economic relevance; Brazlian Oil Agency

INTRODUCTION

The legal framework of the Brazilian oil industry[1] *has undergone significant changes over the last decades.With a view to attracting investments, a new legislative model was outlined to follow the economic development of the sector.*

From the very beginning of the effective oil exploration in Brazil, by drilling the first economically feasible wells in Bahia in the 1930s, to the self-sufficiency achieved in 2006,[2] *after the startup of FPSO (Floating Production Storage Offloading) P-50 Albacora Leste Field in the north area of Campos Basin (RJ), the oil & natural gas sector was under the auspices of different legal disciplines.*

Two of them stand out in particular: the state monopoly over the main activities of the industry, held by Petróleo Brasileiro S.A. — Petrobras,[3] *which "acted isolated from the market";*[4] *and the possibility of participation of the private capital, under regulatory regime,*

which resulted from the total incapacity of the public entities to tackle the substantial investments that the development of the industry started to demand.

From the establishment of Petrobras, by Law no. 2.004, dated October 3rd, 1953, the Brazilian market started to be influenced by one single agent, in a monopolistic intervention that survived two major post-1960 oil crises, received constitutional status with the 1967 Constitution[5] and lasted until the enactment of Constitutional Amendment no. 09/95 by Law no. 9.478, on August 6th, 1997.[6]

The flexibilization of the monopoly,[7] in turn, allowed the allocation of private funds in one sector, whose economic feasibility for growth was limited due to insufficient public funds, and enabled the development of oil exploration and production activities (upstream), towards the sustainable self-sufficiency of one of the most important industries of the domestic infrastructure sector, a milestone which is still missing as far as natural gas is concerned.

The participation of private companies in upstream activities was regulated[8] through a model of concession, identified by the international law as sui generis[9] *because, despite this misleading name, neither the principles regarding the administrative agreements, nor the provisions of Law no. 8.987/95, apply to the oil & gas concession agreement.[10]*

Instead, the oil & natural gas concession agreement has a hybrid legal nature: it is ruled by private law, but has a public law profile, as it complies with constitutional measures and their infralegal reflections.[11] It is ruled by private law, with intervention of the State as an economic agent (business entity) and has an economic rather than an administrative nature,[12] but it has some inputs from public law rules.[13]

Through this model, the State keeps dominion over the mineral reserves, transferring to the concessionaires the right to explore, develop and produce oil & natural gas, and defines the energy policy, through the National Council for Energy Policy — CNPE, and performs regulatory functions through the Brazilian Agency of Petroleum, Natural Gas and Biofuels — ANP.

The concessionaire, in turn, is entitled to perform oil exploration and production activities on its own account, using its own equipment and facilities, and keeping property rights on the oil and gas after drilling.

An important aspect of the model then adopted, also due to the high economic amounts dealt with by the industry, is the means of compensation to be imposed upon the concessionaires (the government take). And, in this aspect in particular, the Brazilian legal structure has not innovated much in relation to what is practiced in other countries, by demanding payment of taxes and government takes (Royalty / Tax — R/T) from the concessionaires.

The government take is exactly the main object of this study. More precisely, the way these revenues are inspected, whose importance goes beyond revenue-earning barriers, as it is a financial compensation for the exploration of finite resources and for being an industry that produces serious environmental waste.

Considering the economic importance that such revenues reached with the strong development of the industry in the last decade, strengthened by heavy private investments, and its legal evolution after Law no. 9.478/97 took effect, referenced as the beginning of the 4th phase of

the Brazilian Petroleum legislation and its regulatory framework,[14] *we will focus on the role of the Member-state in the participation and oversight of such revenues and the relationships between such oversight and the performance of the ANP, as the sector's regulatory agent.*

By analyzing the legal structure of the financial compensations, introduced by § 1 of Article 20 of the 1988 Constitution, this study will try to show that the direct oversight, by the member-state, of its own governmental take, does not collide with the ANP's regulatory role — it is, on the contrary, harmonious and complementary.

However, this issue raises serious divergences in the scientific literature, and even of a political nature, as it involves at least four characters involved with one of the most relevant industries in the world: on the one hand, the State and the ANP's regulatory role; on the other, the states, the Federal District and cities and their dependence upon the funds originated from such financial compensations; and, finally, the companies that explore such activities, among which Petrobras itself, which abandons the regulatory obligations and starts to abide by the general rules of Business Corporation Law and to act under the free competition regime against other private companies that are to explore the sector.

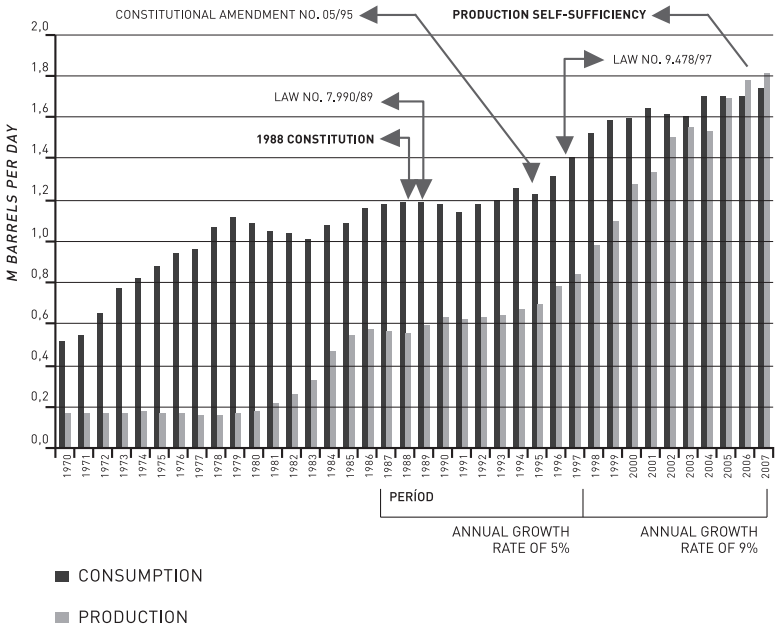
Due to the complexity of this topic and for didactic purposes, this study will be subdivided in the items below.

1 THE ECONOMIC IMPORTANCE OF THE GOVERNMENT TAKE FROM THE EVOLUTION OF THE INDUSTRY'S LEGAL MODEL

The economic context has become a determining factor for the definition of the legal profile of the oil industry in our country, especially after the flexibilization of the monopoly, in which the main activities of the sector started to be subject to free competition and to cope with the economy's own dynamism, thus demanding a fast and efficient regulatory response.[15]

The statement above is easily demonstrable by observing the relationship between the evolution of oil production and consumption in Brazil and the legal modifications in the industry since the 1970s and its global crises, until the current times and the productive self-sufficiency, as seen in the chart below:

EVOLUTION OF PRODUCTION AND CONSUMPTION OF PETROLEUM IN BRAZIL



SOURCE: PETROBRAS AND BEN (NATIONAL ENERGY BALANCE)/FIPE

Recent discoveries in the pre-salt layer, together with an international economic context in which the oil prices display a free ascending curve, thus allowing the exploration of deposits which were then regarded as economically unfeasible, will probably impose new legal changes to the sector. There are already discussions about the possibility of, along with the traditional concession model, other options being adopted aiming at reducing both capital and operational risks and costs (capex and opex).[16]

Therefore, it is noticeable that the perspective of the Brazilian oil industry in the current economic scenario is to get even closer to private investments.[17] *In this context, the government takes tend to become more important, thus constituting an indispensible portion of the public revenues.*

The government take in the oil industry has constitutional basis in § 1 of Article 20, which provides the states, the Federal District and the Cities and State public management entities with "participation in the result from exploration" of natural resources, a category yet to be regulated, "or financial compensation for such exploration", pursuant to the law, in this case, the Law no. 9.478/97 mentioned above.

With calculation and collection criteria regulated by Decree no. 2.705/98, the government take referred to may be of four types: (i) signature bonus *(Article 46 of Law no. 9.478/97); (ii)* royalties *(Article 47 of Law no. 9.478/97); (iii) special take (Article 50 of*

Law no. 9.478/97); and (iv) payment for area occupancy or retention *(Article 51 of Law no. 9.478/97).*

The signature bonus *is the payment for the amount derived from being awarded the bidding process promoted by the ANP, for the production and exploration of oil & natural gas, whose minimum amount is provided in the tender protocol and must be paid in one single installment at the moment the concession agreement is executed.*

Therefore, there is a minimum amount established in the ANP's tender protocol, and part of its destination is to constitute ANP's own revenue, according to its operational needs defined in a previously approved budget, as provided in item II of Article 15 of Law no. 9.478/97, regulated by Article 10 of Decree no. 2.705/98.[18]

These are the legal definition and destination. There is no explicit provision in the law or in criteria for the participation of other federal entities in the oil & gas revenues. The law does not provide, for example, for the case where there are amounts paid in excess, as the tender protocol establishes only a minimum amount, with technical discretion parameters defined by the ANP, due to the specific characteristics of the blocks and with a view to promoting a previous selection of the financial capacity of the companies that will enter into the concession agreements.[19]

As the signature bonus is included in the legal category of government take that, in turn, is part of the constitutional concept of financial compensation for the exploration of mineral resources,[20] *the amounts from this revenue paid in excess, that is, those that were higher than the minimum amount set forth in the tender protocol and, furthermore, are higher than the ANP's budget needs, must be divided pursuant to § 1 of Article 20 of the Constitution.*

This apparent legal omission — contrary to what has been practiced since the first bidding round promoted by the ANP — is not sufficient to swerve the participation of the states, Federal District and Cities from the resulting proceeds of the said financial compensation.[21]

And the amounts are not negligible. On the contrary, according to data from the ANP,[22] *the revenues deriving from the signature bonus, comprising the nine bidding rounds for exploratory blocks and the two bidding rounds for inactive marginal accumulation areas, from 1999 to 2007, totaling five billion three hundred seventy-one million BRL Reais (R$ 5,371,000,000) and, in 2007 alone, it totaled two billion one hundred one million BRL Reais (R$ 2,101,000,000).*

The royalties levied on the oil industry, in turn, constitute financial compensation due by the oil & gas exploration and production concessionaires, and will be paid on a monthly basis for each field, from the month when the respective date of beginning of production occurs, in which case any deductions do not applied.[23]

The criteria for calculation of the amount due are set forth in Decree no. 2.705/98 and take technical concepts into account, such as product specifications, location of the fields and oil or natural gas reference market prices, with basic rate at ten percent (10%), and the ANP may reduce it to a minimum of five percent (5%) due to geological risks, production expectations and other factors. The method for sharing among the federal entities varies according to the rate applied and the location of the exploration (continental shelf or onshore).

Its economic importance, from the flexibilization of the monopoly of upstream activities, has raised significantly,[24] *reaching, according to ANP data,*[25] *the amount of thirty-nine billion four hundred million BRL Reais (R$ 39,400,000,000) in this period, that is, from 1997 to 2007.*

The special take *is the extraordinary compensation due by the oil or natural gas E&P concessionaires, in the event of large production volumes or high returns.*

Its calculation is on a quarterly basis and is levied on the gross revenue of production, after deduction of royalties, investments in exploration, operational expenditures, depreciation and the taxes set forth in law. The rates adopted are progressive according to the exploration site, number of years of production and volume of production inspected in the quarter.

From the amount collected, the Federal Government holds 50%; the state where the onshore or offshore production occurs holds 40%; and the city where the onshore or offshore production occurs will receive 10% of these revenues.

The significant amounts earned are currently close to those derived from royalties.[26] *According to the ANP,*[27] *from 2000 to 2007, a total of thirty-eight billion five hundred million BRL Reais (R$ 38,500,000,000) was earned, and two billion, one hundred sixty-six million, five hundred twenty-nine thousand, nine hundred fifteen BRL Reais and thirteen cents (R$ 2,166,529,915.13) were earned in February 2008 alone, for special take purposes, regarding the accrual period of the 4*th *quarter of 2007.*

The payment for area occupation or retention, *pursuant to Article 51 of Law no. 9.478/97, is made on an annual basis and its amount is established per square kilometer or portion of block surface in the tender protocol and the agreement.*

Once more, as in the case of the signature bonus, there is no legal criteria for the federal entities to share these proceeds, which constitutes an explicit violation of § 1 of Article 20 of the Constitution. On the contrary, Article 16 of Law no. 9.478/97 sets forth that the revenues due to this government take will be used exclusively to finance ANP's expenses during the exercise of its activities, with disregard for the constitutional provision of sharing among the other entities.[28]

Once again, the amounts are not negligible: according to data from the ANP,[29] *the total revenues earned between 1998 and 2007 corresponds to one billion one hundred twenty-one BRL Reais (R$ 1,121,000,000), and when such revenue started to be produced, in 1998, the amount was around twenty-eight million, nine hundred fifty-seven thousand, three hundred fifteen BRL Reais(R$ 28,957,315) whereas, in 2007, the revenues soared to one hundred forty-two million, four hundred sixty-five thousand, eight hundred seventy-nine BRL Reais and forty-four cents (R$ 142,465,879.44).*

The economic and financial importance of the government take is revealed not only by the amounts involved, but also for playing an outstanding role in the formation of the government take, which thus become one of the critical factors to allocate private investments,[30] *and constitutes a significant portion of the public revenue of the federal entities.*[31]

In this context, the federal entities, pursuant to the Constitution, have mandatory participation in the revenues of all legal types of government takes. In addition, its calculation and collection criteria are provided by national law, and all entities must exercise direct financial

oversight on the inflow of such funds, without prejudice to the regulatory activities performed by the ANP, as we will see below.

2 THE LEGAL STRUCTURE OF THE GOVERNMENT TAKE

An issue that has raised fierce debates since the establishment of the Constitution of 1988, the legal structure of the government take is also a key point of this study as regards the definition of how the federal entities may exercise direct oversight of its portion in these revenues without mitigating the regulatory function attributed to the ANP.

The core of the controversy goes a little beyond the boundaries of the oil industry and the government take pertaining to it, and refers to the interpretation of § 1 of Article 20 of the Constitution concerning the exploration of all mineral resources and both options set forth in it for the infra-constitutional choice, that is, both a share in the revenues*, yet to be regulated, and the* financial compensations*, of which the government take in the oil industry is part.*

Firstly, there is an attempt to define whether the two kinds of public revenues for the exploration of mineral resources, set forth in the Constitution, have a taxable nature.

The tax nature is supported by the alleged appropriateness of the constitutional concepts of share in the revenues *from exploration and* financial compensation*, with the legal parameters set forth in Article 3 of the Brazilian Tax Code.*

In this sense, Alberto Xavier defends that three main characteristics arise out of § 1 of Article 20 of the Constitution, despite the fluidity and hybridism of the wording: the fact that they are mandatory equity installments *and* necessarily established by federal law*. Therefore, from such profile, "one can hereby deduce the* taxable nature *of the installments concerned, as its fundamental outline is entirely subsumed under the tax category given by Article 3 of the Brazilian Tax Code",*[32] *having the exploration of mineral resources as a taxable event and, as a result, pursuant to Article 4 of the CTN, the tax nature.*[33]

In fact, the enforceability is a fundamental characteristic for the concept of tax. However, it does not seem to us that there is enforceability in the payment of funds for the exploration of public ownership,[34] *through the delegation of economic activities monopolized by the State, being generally ruled by private law rules, despite the fact that the law or the agreement itself establishes obligations or public law powers.*[35] *That is, the consideration due by the concessionaires is the way it is because it has freely entered an agreement, in an activity that is subject to free competition and free enterprise.*[36]

This does not concern outstanding revenues by limitations imposed to the economy in particular, but by the direct exploration of public equity. Therefore, they are original revenues, in both their identifying elements, aligned with accuracy by Aliomar Baleeiro:[37] *the political-legal (no need for the State to exercise the enforcing power*[38]*) and the economic (the source of the funds is in the public sector itself).*

The Supreme Federal Court also understood this way, from the judgment of Extraordinary Appeal no. 228.800-5/DF, in relation to the financial compensation for the exploration of

mineral resources (CFEM), established by Law no. 7.990/89 and, specifically in relation to the government take set forth by Law no. 9.478/97, through the judgment of Writ of Mandamus no. 24.312-1 DF. Most of the specialized scientific literature also shares this understanding, of the non-taxable nature of the financial compensations.[39]

The financial nature of original revenue seems obvious,[40] *as clarified by part of the opinion rendered by Justice Gilmar Mendes in the judgment of the Internal Interlocutory Appeal to the Interlocutory Appeal no. 453.025-1/DF, summarizing the Court's opinion, adopted in the precedents mentioned above:*

> *Now, WM 24.312 unmistakably recorded the nature of 'financial compensation', set forth in § 1 of art. 20 of the FC,* ***as constitutional revenue originated from federal entities better off, which*** **per se** ***rules out its definition as taxable*** *— or subject to discipline from the constitutional tax system. (…) Such precedent was also recorded in opinions by Justice Sepúlveda Pertence (also initially invoking the decision by the 1st Panel in RE 228.800) and Justice Nelson Jobim (subsequently), whose bases were incorporated by the Reporting Judge and by the entire Court, that* ***the reason for the compensation is not the ownership of the asset, which belongs to the Federal Government, but its exploration of and the damage caused by it****. (our emphasis)*

The right to economically explore the mineral resources that, pursuant to the Constitution, belong to the Federal Government (Articles 176 and 177 of the Constitution) are part of the public equity, and its concession to third parties, generates a counterpart that, as it enters the public accounts, it constitutes a financial inflow.

This inflow that, by force of § 1 of Article 20 of the Constitution, may be a share in the revenues *from exploration or a* financial compensation *from such exploration, must be divided among the states, the Federal District, Cities and the State's public management entities, and it is a revenue derived from each political entity mentioned above and it holds, according to Ricardo Lobo Torres, a public price nature*[41] *for the use of mineral resources located in their territories, thus being justified as a compensation for the financial impact that the companies that explore these resources cause to public authorities.*[42]

The government take *in the oil industry, as a kind of* financial compensation*, are revenues arising out of each public constitutionally benefitted by such funds, whose valuation must take the economic expression of the explored mineral resource into account, as well as the impacts on the State infrastructure imposed by the industry and environmental criteria in view of the polluter-payer principle, explicitly set forth in § 3 of Article 225 of the Constitution.*

The legal structure of original revenues from each entity benefitted will be a crucial guideline for the possibility of direct oversight by the member-state in their revenues, as it will be developed in the next item.

3 THE PARTICIPATION CRITERIA FOR THE MEMBER-STATES IN THE GOVERNMENT TAKE REVENUES AND THE POSSIBILITY OF DIRECT OVERSIGHT OF SUCH REVENUES: MECHANISMS COPING HARMONICALLY WITH THE ANP'S REGULATORY ROLE

As seen above, the participation of the states, Federal District and Cities in the government take revenues derives from an explicit constitutional imperative and is guaranteed pursuant to the law, according to § 1 of Article 20 of the Constitution.

This law referred to by the constitutional provision has a clear financial *nature and* national *reach, as it establishes general rules that are equally applied to the Federal Government, states, Federal District, Cities and Territories.*[43]

In his comment to the said constitutional paragraph, Ives Gandra da Silva Martins,[44] *presents a similar opinion as for the* national *nature, with a very solid basis:*

> *The paragraph determines that such take or compensation will be established by the law. I believe that the law should be supplementary, although the constitution does not mention this type of legal rule. About being more permanent, the supplementary law is a national law, where the Federal Government only offers its legislative apparatus to produce a regulatory order binding the Federal Government, states, Federal District and Cities. (…) Now, as the constitution aimed at granting takes and compensations for a decentralized federation, which is the objective intended in the new Constitution, the definition of the terms and percentages for such take or compensation should not be the federal legislator's responsibility, as there is the risk of the other federal entities receiving a little amount.*

It is obvious that any rule to govern this provision shall reach different political entities, thus revealing a national *reach, as it occurs with the legal provisions for the financial compensations, set forth by Law no. 7.990/89 and by Law no. 9.478/97. The recommended need to adopt a supplementary law, however, must be reserved only for the cases where the Constitution explicitly requires so, and it is a matter of constitutional competence rather than the application of the principle of hierarchy.*

The government takes in the oil industry are, therefore, provided by the law in national *character and Law no. 9.478/97 must be construed in this sense. If there are no criteria for the participation of political entities in the revenues of any governmental take, there will be clear offense to the* national *character constitutionally enforced to the regulating law.*

In addition, the national *character as an interpretative vector denotes that the sharing criteria among the political entities must be reasonable, proportional and suitable for the effective participation of such entities in the exploration revenues. Therefore, there must be no criteria that unreasonably benefits one state to the detriment of others. On the contrary, the legal criteria must reflect the correct distribution of funds through a system that measures the*

exact proportion of the importance of the states in the government take revenues, through a systematic interpretation of the States and its fundamental principles (Articles. 1 and 18 of the CRFB).[45]

And, in this particular case, Law no. 9.478/97 fails, mainly because it reserves the revenues of two out of four kinds of governmental takes exclusively to the Federal Government, as it occurs with the signature bonus and the payment for area occupancy or retention, as shown above.

On the other hand, the Constitution establishes, as common competence of the Federal Government, the states, the Federal District and Cities "to record, monitor and inspect the concessions for the rights to research and explore water and mineral resources in their territories", as set forth in item XI of Article 23.

Therefore, the joint interpretation of § 1 of Article 20 and item XI of Article 23 of the Constitution derives from the possibility of direct oversight, by the member-state, of government take revenues due to them, arising out of oil exploration activities.

As it is a common competence, the Federal Government does not have a private competence, as Régis Fernandes de Oliveira says,[46] *and the solution is the application of the principle of predominance of interest.*

The member-state, being legitimately interested in these proceeds, must not be a passive spectator waiting for the regulating entity and the Federal Government to check, respectively, the accurate collection of the government take and its transfer to the federal entities, as if it was a voluntary transfer of funds. On the contrary, this is not related to funds referred to in item VI of Article 71 of the Constitution, but "revenues originated from the federal entity that supports the exploration".[47]

In the judgment of WM no. 24.312/DF, the en banc Supreme Federal Court assertively decided that "although the natural resources from the continental shelf and the mineral resources belong to the Federal Government (FC, art. 20, V and IX), the take or compensation to the states, Federal District and Cities on the revenues from oil, oil shale and natural gas exploration are revenues derived from the former federal entities (CF, art. 20, § 1)".

Also, as it is original revenue, the member-state holds not only the competence to inspect, but also all the acts inherent in such inspection, including the imposition of penalties and enactment of laws to set the procedures for this inspection system,[48] *which will clearly have a financial law nature, as it provides a kind of financial input, thus attracting the competing legislative competence established in item I of Article 24 of the Constitution*[49] *and compliance with general financial law rules, pursuant to Law no. 4.320, dated March 17th, 1964.*

Based on this understanding, the states have been passing laws to inspect non-taxable revenues deriving from the exploration of water and mineral resources,[50] *through the exercise of an oversight competence which is consistent with the provisions of § 1 of Article 20 and item XI of article 23 of the Constitution and does not mitigate the ANP's regulating power.*

By setting up the ANP, Law no. 9.478/97 assigned it duties of a regulatory entity for the industry of oil, natural gas and their byproducts and biofuels (Article 7), with powers to regulate,

contract and oversee the economic activities related to the oil, natural gas and biofuels industry (article 8).

The duties established in Article 8 do not include the inspection of government take revenues due to member-states — and it could not include that, due to the constitutional system exposed.

The exercise of such oversight by the ANP is defended from a mistaken interpretation of item IV of Article 8 of Law no. 9.478/97. In this sense, the argument is that "as regards the government take provided in art. 45 of the Petroleum Law, among which we highlight the royalties*, it is the ANP's duty to inspect whether these takes are duly collected by the concessionaires, once such obligations imply the existence of a concession agreement, whose execution must be inspected by the ANP (*ex vi *art. 8, IV of the Petroleum Law)".*[51]

However, this interpretation leads such provision to clash with§ 1 of Article 20 and item XI of Article 23 of the Constitution, thus requiring its respective interpretation, in order to safeguard the constitutional competence of the federal entities and ANP's legal duty.[52]

It is admitted that the ANP may and must inspect the execution of the concession agreements, in a concerted effort with the federal entities with respect to its legal duty,[53] *while the latter will be primarily responsible for controlling, inspecting and sanctioning,*[54] *as regards its interest in the government take.*[55]

Another interpretation would generate what Marçal Justen Filho,[56] *evoking David Marquand, calls* democratic deficit *in the regulatory practice, without the necessary* legitimacy by the procedure;[57] *on the contrary, with an arbitrary exercise by the regulating power,*[58] *once there would not be the participation of direct interested parties — political entities benefitted by § 1 of Article 20 of the Constitution — in the decision-making procedures of the regulatory entity, whose members are discretionarily appointed by the Brazilian President and may not by discharged* ad nutum.[59]

In this context, the centralized payment of government takes to the Brazilian National Treasury — STN, provided for by Article 27 of Decree no. 2.705/98, in single account regime of the Federal Government (Article 29), is just one of the types of control that can be adopted by the federal entities. Nothing prevents the payment from being made directly to the recipient member-state, as long as it is explicitly provided by a state law, for example, pursuant to item I of Article 24 of the Constitution.[60]

Due to its constitutional nature, the direct oversight, by the member-states, of their revenues originated from the government take in the oil industry, is not solely a possibility, but an imposed duty, and laws may be issued to provide structure to this practice, which by no means represents a clash with the ANP's duty; it is, on the contrary, harmonious and complementary within the current legislative framework of the oil industry.

CONCLUSION

As a conclusion of the ideas developed along this study, we may summarize the main points as follows:

1) After the flexibilization of the monopoly by Petrobras, it is noticeable that the perspective of the Brazilian oil industry in the current economic scenario is to get even closer to private investments, so that the government takes tend to become more important in economic terms, both with respect to the financial inflows in the public revenue of the states benefitted, and for representing a financial compensation for the exploration of finite resources with serious environmental impacts;

2) The adoption of the concession model from the regulation of Amendment 09/95 by Law no. 9.478/97 started the regulatory stage of the legal structuring of the Brazilian oil industry, where the Federal Government keeps equity ownership on the mineral reserves, the CNPE — National Council for Energy Policy — defines the energy policy, and the ANP — Brazilian National Agency of Petroleum, Natural Gas and Biofuels — executes it, in the limit of its legal duties, exercising regulatory activities;

3) The government take in the oil industry is a kind of financial compensation established in § 1 of Article 20 of the Constitution, and has the legal nature of revenue arising out of each federal entity constitutionally benefitted;

4) Law no. 9.478/97, which regulates § 1 of Article 20 of the Constitution, has a national *character, so that if there are no criteria provided for the participation of political entities in the revenues of any governmental take, there will be clear offense to the* national *character constitutionally enforced to the regulating law.*

5) Therefore, Law no. 9.478/97 could not reserve the revenues of two out of four kinds of governmental takes exclusively *to the Federal Government, as it occurs with the signature bonus and the payment for area occupancy or retention, due to its direct violation of the said constitutional provision and, upon a systematic interpretation, for violating the federative form of the States and their basic principles (Articles. 1 and 18 of the CRFB); and*

6) The oversight, by the member-states, of their original revenues deriving from the government takes in the oil industry, pursuant to § 1 of Article 20 and item XI of Article 23 of the Constitution, due to its constitutional nature, is not solely a possibility, but an imposed duty, and laws may be issued to provide structure to this practice (item I of article 24 of the Constitution), which by no means represents a clash with the ANP's duty; it is, on the contrary, harmonious and complementary within the current legislative framework of the oil industry.

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NOTES

1 *Law no. 9.478, dated 06.08.97, in article 6, item XIX, defines* oil industry *as "the set of economic activities related to exploration, development, production, refining, processing, transportation, import and export of oil, natural gas and other fluid hydrocarbons and its products". The legal concept will be adopted along this study.*

2 *As some experts stated, based on the deficit presented by the oil trade balance in the last years, achieving the self-sufficiency in oil production is not the same as keeping the self-sufficiency supported by the product, mainly due to the need to import oil qualitatively superior to that produced in Brazil and, therefore, with higher prices. This article, however, is not the proper venue to develop this complex issue, and this is why we will refer to the term as a historical milestone only.*

3 *For marketing reasons, the company's abbreviation had its diacritic removed as of 1994.*

4 *"As proof, all of the decisions, including those regarding prices and expenditures, used to be defined from the perspective of a major market player, but which did not have the possibility of confirming its internal policy enforcing decisions". JOBIM, Nelson. "Aspectos jurídicos da abertura do mercado de petróleo", in* Estudos e pareceres — direito do petróleo e gás. *Marilda Rosado de Sá Ribeiro (org.), Rio de Janeiro: Renovar, 2005, p. 395.*

5 *In 1976, as a reflex of the 1973 oil crisis and the lack of investments in the E&P sector, Brazil started to adopt the risk contracts that "were established as adhesion contracts, upon which companies or Brazilian or foreign consortia provided oil exploration services to Petrobras, which was the executor of the State monopoly of petroleum, pursuant to Law 2.004/53. The contracts provided that, in the production phase, the operation would be on Petrobras' account and the companies would have a share in the results" (BUCHEB, José Alberto.* Direito do Petróleo: a Regulação das Atividades de Exploração e Produção de Petróleo e Gás Natural no Brasil. *Rio de Janeiro: Lumen Juris, 2007, pages 3-4). Such model, which did not mitigate Petrobras' monopoly (it remained as the sole executor in the production phase, and the procurement of services would be permitted only for the phase of exploratory studies), was explicitly forbidden by the original wording of §1 of Article 177 of the 1988 Constitution, except for contracts already entered into to that date, pursuant to the sole paragraph of article 45 of the ADCT.*

6 *The enactment of Constitution Amendment no. 09/95 outweighed heated political debates, mainly because it focused one industry that held the defense of sovereignty and the strategic protectionism as a nationalist cause to be defended over decades. By all, all that remained was Monteiro Lobato's fine irony that, as a critic of the then oil policy, writes,* O Escândalo do Petróleo e do Ferro *in 1936 and attacks, in the introduction: "The trusts know it all and smile at each other. They know that, from 1930 on, the Brazilian people makes less and less use of the brain to think, unlike all the other peoples. They know that our current politicians positively think using organs other than the brain — the heel, the elbow, certain dingle dangles — rarely with the grey matter (…)".* in *LOBATO, José Bento Monteiro.* O escândalo do petróleo e do ferro. *São Paulo: Brasiliense, 1979, p. 11.*

7 *The flexibilization of the oil monopoly was attacked by the Governor of the state of Paraná, by proposing a direct action for the declaration of unconstitutionality (ADI) 3273-9 DF, which advocated, in general lines, that the transfer of hydrocarbons after prospection to the concessionaire, as provided for in Article 26 of Law no. 9.478/97, would go against the articles 20 and 177 of the Constitution. That proposal was denied by the Supreme Federal Court, by majority vote, mainly because "the difference between activity and ownership allows that the ownership of the proceeds from the extraction of oil, natural gas and other fluid hydrocarbons deposits may be attributed to third parties by the Federal Government, without any offense to the reserve of monopoly [Art. 177 of the BC/88]", as affirmed by Justice Eros Grau in his conducting vote, and who, in that same occasion, also denied ADI 3366 — which was proposed by the Democratic Labor Party (PDT) under similar basis, considering that "the consequences of a possible declaration of unconstitutionality of Article 26,* caput, *of Law no. 9.478/97 be catastrophic for the national economy."*

8 *Article 23 of Law no. 9.478/98.*

9 *SOUTO. Marcos Juruena Villela.* Direito Administrativo das Concessões. *Rio de Janeiro: Lumen Juris, 2004, pages 84/85.*

10 *In the same sense, Carlos Ari Sundfeld says: "The so-called Concession Law(…) does not apply to the Petroleum Law, as it is not the* concession *of public services, but another kind of privilege. The Petroleum Law thoroughly addresses the concession of oil production exploration, so as to exclude the application of the Concession Law". "Regime jurídico do setor petrolífero",* in Direito Administrativo Econômico. *Carlos Ari Sundfeld (coord.), São Paulo: Malheiros, 2002, p. 393.*

11 *The legal nature of the said contract causes a major controversy in Brazil, with negative reflexes in the safety of private investments, as well observed by Marilda Rosado de Sá Ribeiro: "As regards the debate on the legal nature of the concession agreement*

for the exploration and production of oil & gas, the position of the oil industry may be summarized in the arguments of attorney Sílvio Rodrigues, as coordinator for the IBP's Legal Subcommittee; in his opinion, the position defended by Toshio Mukai is more interesting, in the sense that the Brazilian concession agreement must be classified in the Private Law category, instead of an administrative contract, as the ANP acts at an economic activity level. On the other hand, the issue is controversial because, if on the one hand the principle of the supremacy of public interest governs the administrative contracts, on the other hand one may ask whether it would be possible for the State — represented by the ANP — to unilaterally change the rules that govern the contract or yet inform it, also unilaterally. From such grounds, it is noticeable that the classification of the concession agreement under the Administrative Law category may be sensitive for the investors, as they seek some stability in their investments". RIBEIRO. Marilda Rosado de Sá. Direito do Petróleo. *Rio de Janeiro: Renovar, 2003, p. 340. Check also: ARAGÃO. Alexandre Santos de. "As Concessões e Autorizações Petrolíferas e o Poder Normativo da ANP",* in Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro. *Marcos Juruena Villela Souto (coord.), Rio de Janeiro: Lumen Juris, 2002, pages 33-63; MUKAI. Toshio Mukai. "Contrato de Concessão Formulado pela Agência Nacional do Petróleo — Comentários e Sugestões",* in RTDP *25/82-93; OLIVEIRA. Regis Fernandes de.* Curso de Direito Financeiro. *São Paulo: Revistas dos Tribunais, 2006.*

12 *SOUTO. Marcos Juruena Villela.* op. cit. *pages 84-85.*

13 *OLIVEIRA. Regis Fernandes de.* op. *cit., pages 213-214.*

14 *BARRETO. Celso de Albuquerque. "Geopolítica do petróleo: Tendências mundiais pós guerra do Iraque de 2003. Brasil: situação e marco regulatório",* in Estudos e pareceres — direito do petróleo e gás. *Marilda Rosado de Sá Ribeiro (org.), Rio de Janeiro: Renovar, 2005, p. 17.*

15 *As Alexandre Santos de Aragão affirms, "the economy, especially within a global context that some even name it as post-modern, has dynamism, a mutability that no other sector of the society has. If the Law discipline corresponding to the regulation of the economy did not have such characteristics as well, it would be bound to produce some inefficient and outdated regulation in relation to the facts and activities to be regulated".* In *"Princípios de direito regulatório do petróleo",* in Estudos e pareceres — direito do petróleo e gás. *Marilda Rosado de Sá Ribeiro (org.), Rio de Janeiro: Renovar, 2005, p. 313.*

16 *Especially the production-sharing agreement, which has been defended by the current Petrobras Chairman, as a model that "ensures more safety for the Brazilian State" (*in *PRATES. Jean-Paul. "Brasil pós-pré-sal: partilha não paga royalties, entre outras coisas". Article published on www.oglobo.globo.com/blogs/ petroleo/post.asp?cod_post= 110375. Consultation on 03.07.08). The adoption of this model may generate significant impacts in the government take revenues, because, in its traditional design, the obligation the contracting company has to finance, on its own account, the development of the contracted area is compensated through a net portion of the production (profit oil), after deduction of the production expenditures (cost oil). It is noticeable that, by force of § 1 of Article 20 of the Constitution, the adoption of this model requires a specific regulatory law, and there must be the participation of the federal entities and the State's public management entities in the revenues of* profit oil. *However, this discussion is still developing and the adoption of this new model finds grounded resistance, including within the ANP itself (Cf.: Technical Note no. 021/2007-SCM).*

17 *According to data published by the Brazilian Institute of Petroleum, Natural Gas and Biofuels — IBP — the national oil industry, after 10 years from the effect of Law no. 9.478/97, experienced an extraordinary growth, evolving from roughly 2% to 10% of the GDP, and a great deal of such growth was boosted by Petrobras itself.* In *TEIXEIRA. Álvaro. "Perspectivas do Setor do Petróleo Pós-Descobertas do Pré-Sal". Talk held during the IV Oil & Gas Seminar in Brazil, on April 14th 2008, at the Getulio Vargas Foundation, in Rio de Janeiro.*

18 *The ANP's financial autonomy is not only desirable but also required, as it exercises regulatory activities. However, the financing models, as provided by Law no. 9.478/97, do not find reference in the various activities performed by ANP. In this respect, let us refer to Marcos André Vinhas Catão and Julio Salles Costa Janolio's discourse: "we can see that there is no relationship between the funds provided to the ANP, through articles. 15 and 16 of Law no. 9.478/97, and the relevant expenditures inherent in any of such practices, leading to the conclusion that it is necessary to find a new model to serve as basis to the financing of the activities performed by the ANP".* In *"O financiamento das atividades empreendidas pela Agência Nacional do Petróleo (ANP) e sua respectiva autonomia financeira,* in. Tributação no Setor de Petróleo. *Heleno Taveira Tôrres e Marcos André Vinhas Catão (coord.). São Paulo: Quartier Latin, 2005. p.98.*

19 *In this sense, José Gutman clarifies: "The signature bonus has its minimum amount established in the tender protocol (*ex vi *of art. 46 of the Petroleum Law), and it is certain that, despite the absence of explicit rule, such definition by the ANP is a discretionary act that must be guided by convenience and opportunity, without swerving from the reasonable and proportional amount. Guided by this* rationale, *the ANP has established, since the first Bidding Round, different minimum amounts, envisaging the specific characteristics of the blocks. It is obvious that, to those onshore blocks from mature basins, which may interest only small-sized companies, the minimum*

amount is attributed is smaller than, for example, the deep-water offshore blocks, which may only be operated by companies with experience in that limited technology (that is, companies with 'wide shooting range', capable of investing about 20 million or more in an exploratory well with risk of failure)". In Tributação e Outras Obrigações na Indústria do Petróleo. *Rio de Janeiro: Freitas Bastos: Maria Augusta Delgado, 2007.*

20 *As José Gutman affirms, "the signature bonus, just like the other government takes established by the Petroleum Law, is a* ***financial compensation*** *(...)"* in op. cit. *p. 86.*

21 *As decided by the Supreme Federal Court, in the judgment of WM no. 24.312-RJ — which will be thoroughly analyzed in the next item —, the government takes are financial compensations provided for in § 1 of Article 20 of the Constitution, constituting an original revenue from the federal entities. Therefore, they are not voluntary transfer funds by the Federal Government, and should be shared among the states, the Federal District and Cities. In his opinion, Justice Gilmar Mendes even affirms, "it is a subjective right of the federal entity. It is an original revenue placed directly on the State's trust by the Constitution. It is the Law's duty to discipline this procedure (...) There is no doubt, including for the legislator, that it is not a voluntary transfer (...)"*

22 *Available at www.anp.gov.br/doc/participações_governamentais/consolidado_2007.pdf. Accessed in July 2008.*

23 *SANTOS, Sérgio Honorato.* Royalties do Petróleo à luz do direito positivo. *Rio de Janeiro: Esplanada, 2002, p. 80*

24 *GUTMAN. José.* op. cit., *p. 09*

25 *Available at www.anp.gov.br/doc/participações_governamentais/consolidado_2007.pdf. Accessed in July 2008.*

26 *GUTMAN. José.* op. cit. *p. 55.*

27 *Available at www.anp.gov.br/doc/participações_governamentais/consolidado_2007.pdf. Accessed in July 2008.*

28 *The payment for area occupancy or retention is not a rental contract for assets. It is, on the contrary, an obligation derived from a contract: the concession to exercise economic activity (upstream), whose main aim, as José Gutman affirms, "is to encourage the voluntary abandonment of the concession area by the concessionaire that is not making exploratory efforts or does not have any interest in developing the production"(*in op. cit. *p. 101). Therefore, it is not an amount paid for the rent of a Federal Government capital asset, which could theoretically swerve the participation of the other entities. As Justice Eros Grau affirms in the judgment of ADI no. 3273-9 DF,* "Activities and assets, *one is different from the other. (...) the concept of economic activity [as business activity] does without the ownership of the production assets". And, in José Gutman's words, "the participation by area occupancy or retention, just like the other government takes established by the Petroleum Law, is a financial compensation; therefore, it is not tax revenue.". (*op. cit., *p. 98)*

29 *Available at www.anp.gov.br/doc/participações_governamentais/consolidado_2007.pdf. Accessed in July 2008.*

30 *The influence of the* government take *as one of the factors to allocate private investments — especially those from abroad — in the oil industry, is addressed by Marilda Rosado de Sá Ribeiro: "The oil company has a preliminary concern as regards its activities overseas, that is, to check who has the right to authorize the development of oil resources and, in the different regimes, it is possible to find a variety of players that represent the interests of host countries and contract models that establish different systems to divide the allocation of resources between the government (*government take*) and the private companies".* In *"Introdução à unitização de reservatórios petrolíferos",* in Estudos e pareceres — direito do petróleo e gás. *Marilda Rosado de Sá Ribeiro (org.), Rio de Janeiro: Renovar, 2005, p. 119.*

31 *On the growing importance of the government take for the public sector after the establishment of the Petroleum Law, Haroldo Lima, current president of the ANP affirms that, "from the amendments to Law no. 9.478, dated 1997, the Brazilian Government started to earn really substantial funds for the public sector. The mechanisms introduced by the law allowed the State to collect a qualitative higher portion of funds generated from the petroleum and ensured the distribution of such funds to a high number of Federal Entities".* In Petróleo no Brasil: a situação, o modelo e a política atual. *Rio de Janeiro: Synergia, 2008, pages 39/40.*

32 In *"Natureza Jurídica e Âmbito de Incidência da Compensação Financeira por Exploração de Recursos Minerais",*in Revista Dialética de Direito Tributário. *São Paulo: Dialética, 1998. v. 29, pages 10-25.*

33 *The following authors also defend the tax nature: Roque Antonio Carraza.* Natureza jurídica da compensação financeira pela exploração de recursos minerais. Sua manifesta inconstitucionalidade. *São Paulo: Max Limonad, 1995; and Adriano*

Daleffe. "Ilegalidade da compensação financeira pela exploração de recursos minerais", in Revista Dialética de Direito Tributário. *São Paulo: Dialética, 1998. v. 33, pages 7-15.*

34 *Justice Eros Grau, in his conducting vote for the ADI 3237-9 DF, especially as regards petroleum, had decided that it was public ownership, thus overcoming the controversy that arose along the judgment by Justice Carlos Britto that it would be a public ownership of common use in relation to the Federal Government and of special use in relation to the concessionaires. In the same sense, check: TORRES. Ricardo Lobo.* Curso de Direito Financeiro e Tributário. *Rio de Janeiro: Renovar, 2006, p. 188; and ARAGÃO. Alexandre Santos de. "As Concessões e Autorizações Petrolíferas e o Poder Normativo da ANP",* in Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro. *Marcos Juruena Villela Souto (coord.), Rio de Janeiro: Lumen Juris, 2002, pages 33-63.*

35 *ARAGÃO, Alexandre dos Santos de. "O Contrato de Concessão de Exploração de Petróleo e Gás",* in Revista de Direito Administrativo. *Rio de Janeiro: Renovar, 2005, p. 430.*

36 *As José Marcos Domingues de Oliveira affirms, in a deep study on the matter: "the possibility of minimum manifestation of private will is enough to disqualify the* tax enforceability *. If it is so (as mere adhesion) in terms of public services contracts, whose return is not even established between the parties, but by Management (administrative entities or regulatory agencies) through the so-called* regulating clauses*, what to say about the concession agreement, in which first there is the open bidding and then the right to demand the adjudication of the contract?"* In *"Aspectos tributários do direito do petróleo — natureza jurídica das participações governamentais — government take",* in Estudos e pareceres — direito do petróleo e gás. *Marilda Rosado de Sá Ribeiro (org.). Rio de Janeiro: Renovar, 2005, p. 499.*

37 In: Uma Introdução à Ciência das Finanças. *Rio de Janeiro: Forense, 1994, pages 122-123.*

38 *In the words by Kiyoshi Harada, "between the Federal Government — owner of the assets, and the concessionaires of water or mineral resources there is a relationship of* ***power*** *to legitimate the tax enforcement".* In Direito Financeiro e Tributário. *São Paulo: Atlas, 2006, pages 79-80. (original emphasis).*

39 *Cf. RIBEIRO, Marilda Rosado de Sá.* Direito do Petróleo. As joint ventures na indústria do petróleo. *Rio de Janeiro: Renovar, 2nd ed., 2003, p.184. TORRES, Ricardo Lobo.* Curso de Direito Financeiro e Tributário. *Rio de Janeiro: Renovar, 12th ed., p. 191. SEIXAS FILHO, Aurélio Pitanga.* Natureza Jurídica da Compensação Financeira por Exploração de Recursos Minerais, in Grandes Questões Atuais do Direito Tributário. *São Paulo: Dialética, 1998, v. 2, p. 35. OLIVEIRA, José Marcos Domingues de. "Aspectos tributários do direito do petróleo — natureza jurídica das participações governamentais — government take",* in Estudos e pareceres — direito do petróleo e gás. *Marilda Rosado de Sá Ribeiro (org.). Rio de Janeiro: Renovar, 2005. MANEZELLO, Maria D´Assunção Costa.*Comentários à Lei do Petróleo. *São Paulo: Atlas, 2000. GUTMAN. José.* Tributação e Outras Obrigações na Indústria do Petróleo. *Rio de Janeiro: Freitas Bastos, 2007. OLIVEIRA. Régis Fernandes de.* Curso de Direito Financeiro. *São Paulo: Revistas dos Tribunais, 2006. SANTOS. Sérgio Honorato dos.* Royalties do Petróleo à luz do Direito Positivo. *Rio de Janeiro: Esplanada, 2002. HARADA, Kiyoshi.* Direito Financeiro e Tributário. *São Paulo: Atlas, 2006. SCAFF. Fernando Facury. "Compensação Financeira pela Exploração de Recursos Minerais (CFEM): Natureza Jurídica, Competência Normativa e Prescrição",* in Revista de Direito do Estado. *Rio de Janeiro: Renovar, 2006, vol. 3. TAVEIRA. Heleno Torres. "A Compensação financeira devida pela utilização de recursos hídricos, exploração de recursos minerais ou produção de petróleo, xisto betuminoso e gás natural (art. 20, § 1, FC) — sua natureza jurídica",* in Grandes questões atuais do direito tributário. *Valdir de Oliveira Rocha (coord.). São Paulo: Dialética, 1998. ROSA JR. Luiz Emygdio da.* Curso de Direito Financeiro e Tributário. *Rio de Janeiro: Renovar, 2000.*

40 *The literal interpretation itself of the legal text differentiates the government take from taxes, as seen in article 26 of Law no. 9.478/97: "The concession implies, as for the concessionaire, its obligation to explore, on its own account and, in case of success, produce oil and natural gas in a given block, entitling it to the property of the goods once produced, subject to the relevant charges and relevant legal or contractual participation" (our emphasis).*

41 *The nature of the price of the financial compensations was defended by the Supreme Federal Court, during the judgment of ADI 2.586/DF, rep. Justice Carlos Velloso, DJ 01.08.2003. In contrast, Heleno Taveira Torres understands that there is no legal consented relationship that allows the compensation to be qualified as public price (*in op. cit. *p. 77). Despite the deep study held by Prof. Heleno Torres, this does not seem to be the best position as, despite the insertion of public law rules, as seen in item II, the concession agreement is essentially governed by private law rules; therefore, there is the manifestation of will in the formation of the legal contractual relationship.*

42 Op. cit. *p. 191.*

43 *Cf.: SOUZA. Rubens Gomes de. "Normas gerais de direito financeiro",* in Revista Forense. *Rio de Janeiro: Forense, 1954, v. 155, p. 21.*

44 In: Comentários à Constituição do Brasil: promulgada em 5 de outubro de 1988. *São Paulo: Saraiva, tomo I, 2001, pages 107-108.*

45 *Cf.: COUTO E SILVA. Sandra Maria do; OLIVEIRA. Jorge Rubem Folena de. "Dos royalties do petróleo: o princípio federativo e a competência dos estados editarem leis para sua cobrança e fiscalização". Article yet to be published, which was kindly provided by the authors.*

46 *"Now, if states and Cities may record the concessions granted by the Federal Government, those responsible for the grant may inspect such acts. (…) It would be inadmissible for the federal entity to be creditor of any nontaxable revenue and be unable to inspect its collection or the mineral production or the generation of electricity, to preserve its interest. The Federal Government's public management entities shall have no interest, as they constitute one sole juridical entity. However, states and Cities are federal entities, they are public corporations. Consequently, they are able to exercise their rights in the world of law".* In: Curso de Direito Financeiro. *São Paulo: Revistas dos Tribunais, 2006, pages 221-222.*

47 *Expression used by Justice Ellen Gracie, during the judgment of the RE 253.906-6/MG.*

48 *Cf.: OLIVEIRA. Régis Fernandes de.* op. cit. *p. 223.*

49 *"Art. 24. It is a duty of the Federal Government, the states and the Federal District to concurrently legislate on: I — tax, finance, penitentiary, economic and urban law;"*

50 *From State Law no. 6.710, dated January 14th, 2005, from the State of Pará, the following were issued: State Law no. 6.095, dated December 14th, 2006, from the State of Sergipe, State Law no. 8.501, dated May 10th, 2007, from the State of Espirito Santo and State Law no 5.139, dated November 29th, 2007, from the State of Rio de Janeiro, whose bill we were honored to prepare and whose grounds emphasizes just the fact that such revenues originate from the Federal Government, in the following terms: "As it is original revenue placed directly on the State's trust by the Constitution, and not a mere transfer of funds from the Federal Government, the member-state has the constitutionally granted right to inspect and control the non-taxable revenues originated from the financial compensations and government take derived from the exploration of water and mineral resources, including petroleum and natural gas performed in its territory (art. 23, XI of the CRFB)".*

51 *GUTMAN. José.* op. cit. *pages 10-11.*

52 *The ANP's structure and duties arise out of the law, pursuant to item III of article 177 of the Constitution. As Justice Eros Grau affirms in its conducting vote in the judgment of ADI no. 3273-9/DF, "the ANP may not be, and it is effective not, an autarchy" and, as such, it has its establishment and action subject to specific law.*

53 *As Pedro Dutra affirms, "Law no. 9.478, dated August 6th, 1997, that established the Brazilian Petroleum Agency — ANP — sets forth that* 'the ANP aims at promoting the regulation, contracting and inspection of the economic activities related to the petroleum industry…'. *As a matter of fact, this is the object of Law no. 9.478/97 - the regulation of the petroleum market in the Brazilian territory - and not ANP, an administrative entity that was specially constituted, which the law grants powers to apply it".* In *"Concorrência em Mercado regulado: a ação da ANP",* in Revista de Direito Administrativo. *Rio de Janeiro: Renovar. 2002. 229. p. 348). The expansion through the mistaken interpretation line does not aim at suppress legal omission. On the contrary, it totally misstates the regulatory environment of the economic activity, thus expanding, without constitutional or legal grounds, the scope of action of the regulating entity.*

54 *OLIVEIRA. Regis Fernandes de.* op. cit. *p. 223.*

55 *Also, as Justice Marco Aurélio pronounced his opinion during the judgment of WM no. 24.312-1/DF, he explicitly stated that the product of the collection of government take belongs to the member-state, and he emphasized the governmental autonomy, under the following terms: "I follow Your Excellency's opinion because I establish a difference between the transfer provided for in item VI of article 71 of the Federal Constitution, as I assume it is always a federal resource, and ensured to the states as their own right, in terms of participation. Therefore, the amounts belong to the State, which participates and allocates resources, considering § 1 of article 20 of the Federal Constitution. The view undoubtedly privileges the governmental autonomy, which is as relevant as living in a federal entity".*

56 In: *"Agências Reguladoras e Democracia: Existe um Déficit Democrático na 'Regulação Independente'?",* in O Poder Normativo das Agências Reguladoras. *Alexandre Santos de Aragão (coord.). Rio de Janeiro: Forense, 2006, pages 301-332.*

57 *Marcos Juruena Villela Souto, with respect to the democratic legitimacy of the regulatory agencies, based on Ruy Santacruz, affirms that three theories "tried to give support to that function, namely, the transmission belt model, the expertise model and the procedural model. The first accepts such delegation to the agencies as it is the constitutionally legitimated legislator that establishes the entity and provides it with acting guidelines. The second theory justifies the transference, as such agencies are constituted of technicians specialized in disciplines whose regulation would be unattainable by the Congress. The procedural model, in its turn, legitimates the agencies' action by granting the interested parties the participation in its decision-making process. The latter seems to be the most suitable for the theory of Democracy, to be addressed a further on".* In Direito Administrativo Regulatório. *Rio de Janeiro: Lumen Juris. 2002 p. 235.*

58 *As Marçal Justen Filho affirms, about how to overcome the apparent* democratic deficit *in the independent regulation: "the existence of independent agencies may only be admitted in a Democratic State, to the extent that is structure ensures the expansion of the level of democracy of the system as a whole. When the independent agency is identified as a mechanism to supply external* democratic deficit *, an institutional organization that ensures the execution of the democratic purposes sought is assumed. An independent agency established in a non-democratic way worsens the general democratic* deficit *of the political system concerned and provides more evil than good".* Op. cit. *p. 314.*

59 *Alexandre Santos de Aragão affirms, with respect to legitimating the decision-making process of the regulatory agencies: "(…) one of the mechanisms to legitimate the Public Management that has been most institutionalized in our statute law is the participation of officials and advocates of individual, collective and diffuse interests in the decision-making process that will affect them."* In Agências reguladoras e a evolução do direito administrativo econômico. *Rio de Janeiro: Forense, 2004. Paulo Todescan Lessa Mattos, in his turn concludes, in a deep study dedicated to the matter: "The tension between the establishment of technically specialized bureaucracy equipped with decision autonomy and the demand for legitimacy could, however, be taken under another view that took into account the action of interest groups on the* regulatory agencies *and the legitimating possibilities from institutionalized participation channels and from the effective participation condition would start to matter within the debate on theories of democracy".* In *"Autonomia decisória, discricionariedade administrativa e legitimidade da função reguladora do Estado no debate jurídico brasileiro",* in O Poder Normativo das Agências Reguladoras. *Alexandre Santos de Aragão (coord.). Rio de Janeiro: Forense, 2006, p. 361.*

60 *Cf.: OLIVEIRA. Regis Fernandes de.* op. cit. *p. 223.*

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