



# The Role of Brazil's Federal Court of Accounts in Managing Social and Environmental Risks for Federal Railway and Highway Concessions

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## LIST OF ABBREVIATIONS

**ANTT** National Land Transport Agency (*Agência Nacional de Transportes Terrestres*)

**BNDES** Brazilian Development Bank (*Banco Nacional de Desenvolvimento Econômico e Social*)

**CND** National Privatization Council (*Conselho Nacional de Desestatização*)

**CPI/PUC-Rio** Climate Policy Initiative/Pontifical Catholic University of Rio de Janeiro  
(*Climate Policy Initiative/Pontifícia Universidade Católica do Rio de Janeiro*)

**CPOR** Permanent Commission on Highway Concessions (*Comissão Permanente de Outorgas Rodoviárias*)

**EIAs** Environmental Impact Assessments (*Estudos de Impacto Ambiental*)

**EPL** Planning and Logistics Company (*Empresa de Planejamento e Logística*)

**EVTEA** Technical, Economical and Environmental Feasibility Studies (*Estudos de Viabilidade Técnica, Econômica e Ambiental*)

**FND** National Privatization Fund (*Fundo Nacional de Desestatização*)

**FNSTC** North-South Railway, Central Segment (*Ferrovias Norte-Sul, Tramo Central*)

**LP** Preliminary License (*Licença Prévia*)

**LI** Installation License (*Licença de Instalação*)

**MINFRA** Ministry of Infrastructure (*Ministério da Infraestrutura*)

**MPF** Federal Prosecutor's Office (*Ministério Público Federal*)

**MPTCU** Prosecutor's Office within the TCU (*Ministério Público junto ao TCU*)

**MT** Ministry of Transport (*Ministério dos Transportes*)

**MTPAC** Ministry of Transport, Ports and Civil Aviation (*Ministério dos Transportes, Portos e Aviação Civil*)

**PMI** Expression of Interest Procedures (*Procedimentos de Manifestação de Interesse*)

**PPI** Investment Partnership Program (*Programa de Parcerias de Investimentos*)

**PPP** Public-Private Partnerships (*Parcerias Público-Privadas*)

**RIS** South Integration Highway (*Rodovia de Integração do Sul*)

**STF** Brazilian Supreme Court (*Supremo Tribunal Federal*)

**TCU** Brazil's Federal Court of Accounts (*Tribunal de Contas da União*)

**VALEC** VALEC Engenharia, Construções e Ferrovias S.A.

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# INTRODUCTION

In Brazil, news about infrastructure projects that cause more negative impacts than expected has become too common - nearly 30,000 construction projects have either been interrupted or abandoned (TCU 2021b). The assumption that these problems are caused in part by the poor quality of the projects' Technical, Economical and Environmental Feasibility Studies (*Estudos de Viabilidade Técnica, Econômica e Ambiental* - EVTEA) is gaining ground. EVTEA are the first studies throughout the life cycle of an infrastructure project that determine whether a project is, in fact, feasible and at what cost (Chiavari et al. 2020).

The lack of the government's review of the EVTEA to attest to the soundness of the studies at the beginning of the project's life cycle weakens the viability phase of infrastructure projects, especially in the case of federal railway and highway concessions in the Amazon (Cozendey and Chiavari 2021b). The lack of such a decision also leads to another governance problem: the Brazil's Federal Court of Accounts (*Tribunal de Contas da União* - TCU) becomes the main entity responsible for the approval of the feasibility studies.

In a previous study, researchers from Climate Policy Initiative/Pontifical Catholic University of Rio de Janeiro (CPI/PUC-Rio) identified the TCU's interference in land transport infrastructure concessions under the Federal Government's Investment Partnership Program (*Programa de Parcerias de Investimentos* - PPI) (Chiavari, Antonaccio and Cozendey forthcoming). Analysts identified that the TCU analyzes PPI projects immediately before they are tendered (PPI 2016, Art. 16).<sup>1,2</sup> This line of action is in step with a diagnosis of the national legal literature that courts of accounts, in addition to exercising their original functions of correcting financial, budgetary, accounting, and patrimonial irregularities, are also establishing themselves as entities in charge of risk management and preventive audits for bidding processes. For the purposes of this report, these risk management and preventive audit functions will be jointly referred to as preventive audit or prior oversight.

**This publication takes a step further from CPI/PUC-Rio's previous study and analyzes the prior oversight by the TCU of federal railway and highway concessions, focusing on how the court has assessed the socio-environmental aspects of the projects, with the aim of mitigating risks.** This report is based on a survey of all 108 judgments from the two chambers and plenary of the TCU, published through April 2021, that could be related to federal railway and highway concessions,<sup>3</sup> as well as on the identification, in these judgements, of a total of nine TCU decisions that could specifically impact the socio-environmental viability of the projects. These nine decisions were delivered at the end of the viability phase and immediately before the start of bidding procedures by the PPI.

Based on this analysis, this report highlights the judgments whose guidelines seem to outline what the TCU's prior oversight role could be regarding federal railway and highway concessions. Given the limited universe of decisions analyzed, it is not yet possible to say

1 As manager of the National Privatization Fund (FND), the National Bank for Economic and Social Development (BNDES) has a similar obligation (Decree No. 2,594, Art. 24, VIII).

2 Prior oversight of PPI projects by the TCU is already regulated by a court rule (2018 TCUB).

3 Research terms used on the TCU website: a) *rodovia ou rodoviário ou ferrovia ou ferroviário*; b) refine (1): *programa adj de adj parcerias adj de adj investimentos ou PPI ou CPPI*; c) refine (2): *ambiente ou ambiental*.

whether the conclusions of this report reflect a clear and uniform guidance from the TCU for infrastructure concessions in general. However, **the detailed analysis of these judgments allows for two orders of findings and recommendations** related to the court's duties in socio-environmental matters for railway and highway concessions and to the life cycle of these concessions and the TCU's guidance in this context, particularly regarding feasibility studies.

**First, with respect to the institutional role played by the court, it is noteworthy that the TCU analyzes aspects that are relevant to projects' socio-environmental viability including contractual responsibilities for environmental requirements and makes recommendations to enhance this viability.** For example, in the concession of the BR-163/230/MT/PA highway, the TCU recommended that the distribution of responsibility for compliance with pending environmental requirements - budgeted at more than R\$ 350 million - should be made in such a way as to enhance not only the economic viability, but also the socio-environmental viability of the project.

**Given the evidence of the TCU's relevance for a more comprehensive analysis of the socio-environmental viability of projects, it is essential to increase the capacity of the court to act in the risk management and preventive audit of concession procedures.** The decision-making flow for infrastructure concessions is improving and the TCU is a key player in this process. As the court builds its capacity, it will be prepared to address crucial aspects of the projects and systematize more general solutions that can prevent case-by-case legal disputes, hence increasing the legal and financial security of potential investors. This would be a major contribution to the infrastructure sector in Brazil.

**Second, in relation to the life cycle of federal railway and highway concessions, it is noteworthy that the TCU has become the main body for the analysis of feasibility studies. This analysis, however, comes too late, because all the documents of a concession will have already been produced by the time the court is called into action.** Its decisions may even trigger the need to redo feasibility studies and, consequently, bidding notice drafts and drafts of concession contracts, for example, thus delaying project implementation and leading to the unequivocal waste of public resources, as seen in the concession of the South Integration Highway (*Rodovia de Integração do Sul* - RIS).

**This finding results in the need to improve feasibility studies, so that projects can go through preventive audit by the TCU more quickly, and safely advance to the bidding stage.** The role of the court is one of external control, that is, the TCU should be responsible for analyzing, according to its competencies, the assessment and approval of EVTEA, which should have been done by an Executive Branch body at the beginning of the viability phase, rather than being the first and main entity in charge of assessing these studies. Thus, proposed improvements include measures such as: (i) ensuring that EVTEA are assessed in a motivated and transparent manner, at the beginning of the viability phase and before the preparation of Environmental Impact Assessments (*Estudos de Impacto Ambiental* - EIAs); (ii) publicizing the acts of motivated approval of EVTEA (Cozendey and Chiavari 2021b); (iii) introducing the pre-feasibility analysis in infrastructure projects (Chiavari et al. 2020; Cozendey and Chiavari 2021a); and (iv) significantly improving the procurement process via Expression of Interest Procedures (*Procedimentos de Manifestação de Interesse* - PMI) for the preparation of EVTEA. The case of Ferrogrão, as well as that of RIS, show how inconsistencies in the preparation of EVTEA can have relevant impacts on the progress of projects.

## WHAT IS THE ROLE OF COURTS OF ACCOUNTS?

Courts of accounts, including the TCU, serve as auxiliary bodies of the Legislative Branch and are responsible for the external control of the Executive Branch (Constituição, Art. 71). Although they are auxiliary bodies, they have their own responsibilities, such as auditing the accounts of public administrators and imposing the applicable sanctions (Sundfeld and Câmara 2020, 20). They are also competent to carry out the so-called operational control of the Public Administration, which entails collecting data and making recommendations to promote the efficient performance of the State (Tristão 2020). However, these duties do not mean that the courts of accounts are the “general supervisors of the Administration.” Although the object of the TCU’s inspections is an examination of all administrative acts and the court uses parameters that go beyond the law, its power of command is restricted to correcting irregularities in financial, budgetary, accounting, and patrimonial matters (Sundfeld and Câmara 2020, 21 and 23).

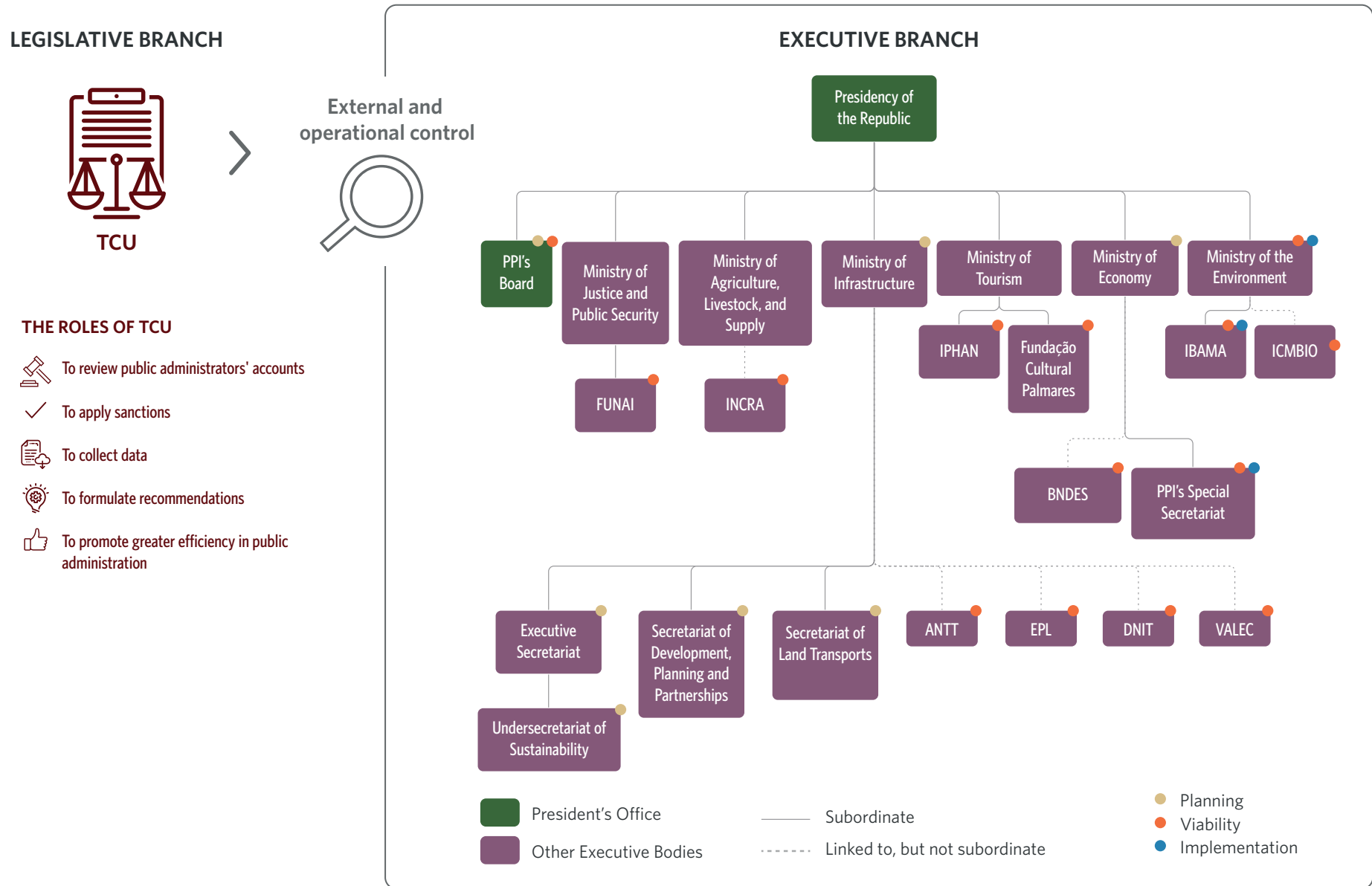
The courts of accounts are establishing themselves as entities in charge of risk management and preventive audit for bidding processes. The New Bidding Law contains express provisions in this regard (Law No. 14,133, Art. 169, II). Although the law does not provide details on how these powers should be exercised, the involvement of TCU is not new in the context of the governance of infrastructure projects. PPI projects, for example, were already subject to prior oversight by the TCU (PPI 2016, Art. 16).<sup>4,5</sup>

Nevertheless, this line of action is not without controversy. There is no explicit constitutional authorization for the courts of accounts to exercise this type of control – what part of the legal literature refers to as an “eloquent silence”: unless specifically provided for in the Constitution, the courts of accounts may not exercise the prior oversight (Jordão 2020, 345). On the other hand, the TCU justifies its preventive actions with practical reasons, such as the need to improve the bidding processes or avoid project interruptions. These actions are also justified by the existence of implicit powers needed for the court to operate effectively (Jordão 2020, 353 and 357).

4 As manager of the National Privatization Fund (FND), BNDES has a similar obligation (Decree No. 2,594, Art. 24, VIII).

5 Prior oversight of PPI projects by the TCU has already been regulated by a court rule (TCU 2018b).

**Figure 1.** TCU's Relationship with the Executive Branch



Source: CPI/PUC-Rio, 2021



## TCU'S TIMING OF INVOLVEMENT

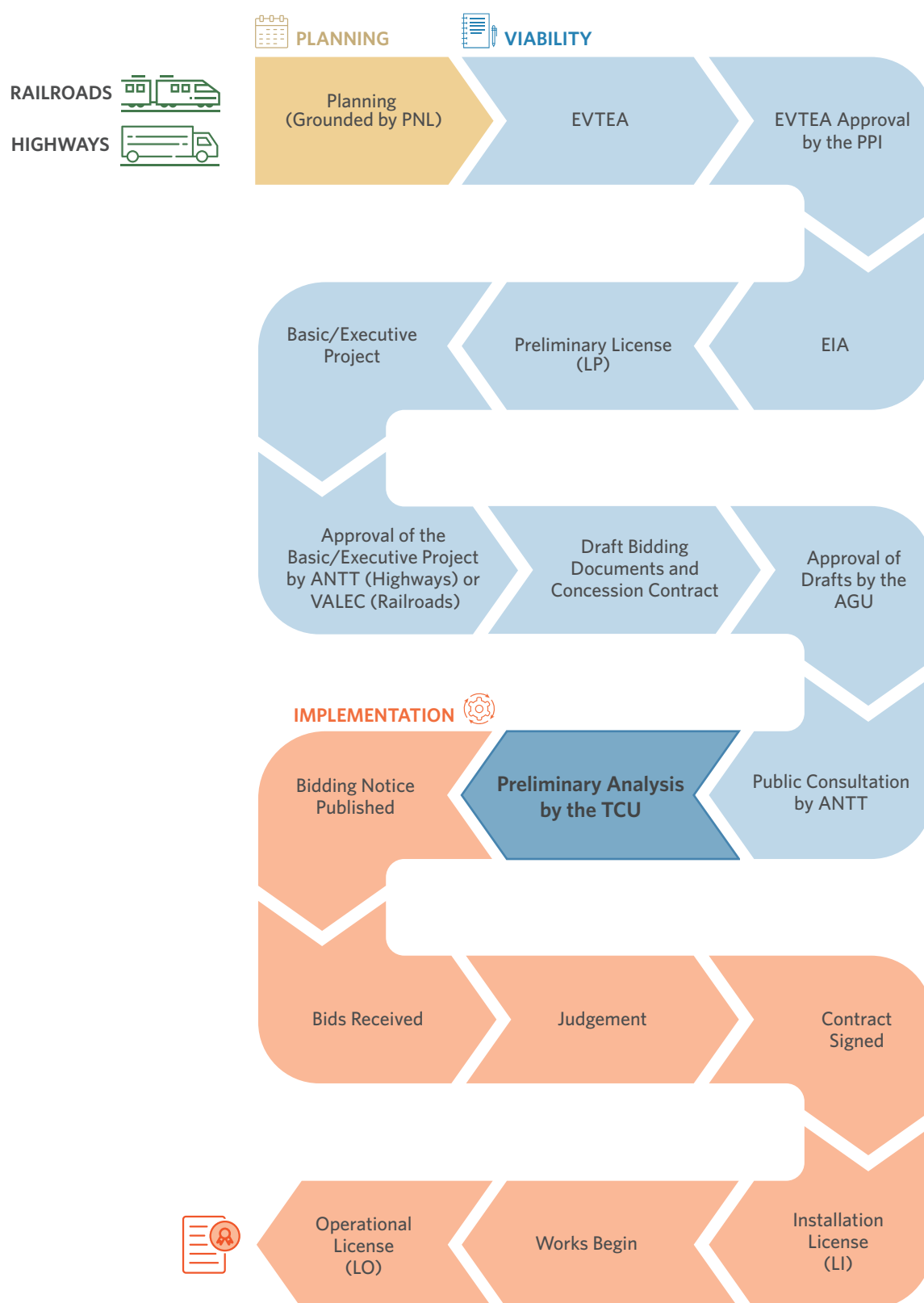
Federal railroad and highway concessions<sup>6</sup> under the PPI can be organized into three general phases. In the **planning** phase, as detailed in a CPI/PUC-Rio publication (Chiavari et al. 2020), the government diagnoses the national infrastructure scenario, identifies flaws and challenges, and determines which projects will be implemented. In the **viability** phase, EVTEA are produced and the environmental licensing process begins with the production of EIAs and, ideally, the issuance of the Preliminary License (*Licença Prévia* - LP). The TCU enters the scene after the mandatory public hearing, when all project documents, including EVTEA, are submitted to the court's scrutiny. The approval by the TCU is followed by the **implementation** phase, in which the railroad or highway is granted in concession to the private sector through a bidding process. Figure 2 below illustrates the stages of these three phases.

Below, four exemplary cases of the court's preventive audits of federal railroad and highway concessions are presented, highlighting the TCU's functions and the timing of its involvement in the life cycle.

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<sup>6</sup> The Concessions Law (Law No. 8,987/1995) defines them as public services concessions and public services concessions preceded by construction works. The former delegate only the management of a public service to the private sector and the latter, in addition to management, delegate the duty to build or improve the infrastructure used to provide the services.

**Figure 2.** Life Cycle of Federal Railroad and Highway Concessions under the PPI



**Source:** CPI/PUC-Rio, 2021

# CONTRACTUAL RESPONSIBILITY FOR COMPLIANCE WITH ENVIRONMENTAL REQUIREMENTS AND THE CONCESSION OF BR-163/230/MT/PA

Environmental licensing leads licensing bodies or entities to determine compliance with the so-called environmental requirements. They consist of impact mitigation and compensation measures for which implementation is, in theory, indispensable for the license to be valid (CONAMA 1997). In concessions of land transport infrastructure, contractual responsibility for compliance with these requirements must be clearly defined. These measures can prevent legal disputes and allow environmental requirements to be met in a timely manner, thus contributing to the socio-environmental viability of the projects. It was in this sense, for example, that the TCU analyzed aspects relevant to the viability of the concession of the BR-163/230/MT/PA highway and made recommendations to enhance this viability.

According to the TCU's plenary in Judgment No. 4037/2020 (TCU 2020), EVTEA related to the future concession under the PPI considered that the feasibility of the project would depend, among other factors, on the concessionaire's being responsible for meeting the 37 pending environmental requirements estimated at more than R\$ 350 million. The requirements regarded paving works that were completed by the Federal Government before the concession, most of them related to obtaining the respective Installation License (*Licença de Instalação* - LI).

In this context, according to the TCU, there would be a possible discrepancy between the recommendations of EVTEA and some clauses of the future concession contract on the allocation of risks between the government and the concessionaire. For the Court of Accounts, the clauses were ambiguous and gave rise to the interpretation that the State could be responsible for meeting the pending requirements. At first, one might think that it would be safer for bidders to adopt a more conservative interpretation of the contractual clauses in question, in the sense that, when in doubt, they should consider that the responsibility for the pending requirements, according to EVTEA, would be theirs. This would avoid surprises for financial planning and prevent legal disputes with the government.

However, there are at least two strong incentives for bidders to take financial and legal risks and disregard the cost of meeting pending requirements when calculating the tolls they intend to charge highway users, since toll prices are the criteria used by the Government to review the bids.<sup>7</sup>

According to the first incentive, disregarding the cost of the requirements would make a bidder more competitive. When in doubt about the meaning of the clauses, bidders tend to disregard this cost lest their bid may be higher when compared to that of any of the other bidders who do so. The second incentive consists in that the winning bidder would, in theory, have the right to increase the tolls if it were required to take responsibility for the pending requirements during the execution of the contract. The ambiguity of the clauses would allow

<sup>7</sup> According to the notice, "the criterion for selecting the best economic proposal will be the lowest value of the Basic Toll Fare to be charged from users of the Highway System" (ANTT n.d.).

the future concessionaire to plead that it would have to bear a cost for which it was not contractually liable, upon requesting the toll adjustment from the National Land Transport Agency (*Agência Nacional de Transportes Terrestres* - ANTT). This is what is called a request for economic and financial rebalancing of the concession contract.

However, there is a risk that the same ambiguity will encourage the Government to adopt a different interpretation, in the sense that the concessionaire must bear the costs of the pending requirements without increasing tolls. Even so, many – if not all – bidders may consider that it is better to take the risk of the Government adopting this interpretation than to lose the tender, because the legal disputes regarding the responsibility for the pending requirements could drag on for years, resulting in a suspension of compliance with the obligations discussed. These disputes would lead to considerable delays in the implementation of mitigation and impact compensation measures and undermine the socio-environmental viability of the concession. This is particularly important in the case of BR-163/230/MT/PA. The stretch selected for the concession crosses the states of Mato Grosso and Pará, between Sinop/Mato Grosso and Itaituba/Pará, and cuts through a large area of the Amazon biome, which includes Indigenous lands and environmental conservation units.

### **TCU'S DECISION ON THE CONCESSION OF BR-163/230/MT/PA**

TCU's plenary did not decide on who should implement the mitigation and compensation measures but determined, for this specific case, that ANTT should include clear and objective rules on the future concessionaire's responsibility for pending and future requirements in the contract. The objectives of this determination, as stated by the TCU in the decision, are to avoid contractual breaches, increase the legal certainty of the concession, and prevent disputes between the Government and the concessionaire. This is a fundamental step to avoid delays in the implementation of mitigation and compensation measures and to ensure the project's socio-environmental viability.

The TCU concluded the prior audit in December 2020. The bidding notice was published on March 31, 2021 (ANTT n.d.). Comparison between the draft contract attached to the notice (ANTT n.d.) and the draft contract submitted to public consultation before it was sent to the Court of Accounts (ANTT 2019) shows a greater detailing of the concessionaire's responsibilities regarding compliance with environmental requirements.<sup>8</sup> However, on July 1, 2021, in the ruling of a petition by the Federal Prosecutor's Office within the TCU (*Ministério Público junto ao TCU* - MPTCU), the court suspended the highway auction scheduled for July 8, based on the need to better assess whether ANTT had complied with the court's determinations (TCU 2021a). A similar decision that also suspended the auction was issued by the Federal Court of Altamira/Pará, with the justification that it would be necessary to not only better define the responsibilities for mitigation measures, but to also carry out consultations with the Indigenous populations potentially affected by the project (Carneiro 2021).

Nevertheless, before the date scheduled for the auction, the decisions of both the TCU and the Federal Court were reviewed by the TCU itself and the Federal Appellate Court, respectively, considering that there would not be sufficient evidence of irregularities to justify the suspension and that the Judiciary and the TCU had no power to interfere in the Executive Branch's freedom to conduct its public policies (TCU 2021a; Carneiro 2021). The BR-

<sup>8</sup> Clauses 5.2, 8.4.7, 19.1.4 and 19.2.8 of the draft attached to the notice.



163/230/MT/PA auction was held on July 8, 2021, and the concession was awarded to Via Brasil Consortium, the only one to submit a bid (G1 2021). The concession contract is slated to be signed in the first quarter of 2022 (ANTT n.d.).

The existence of a discussion about the distribution of the socio-environmental costs of the projects that are already in an advanced stage of the pipeline can be seen as a cause of insecurity for the decision-making process on infrastructure investments, thus posing a financial risk for potential investors. However, the court's solution for the case of BR-163/230/MT/PA shows that the decision-making flow is improving, and the TCU is a key player in this process. There even seems to be an opportunity for the Court of Accounts to address crucial aspects of the projects and systematize a more general solution to prevent project-by-project disputes. This would be a major contribution to the infrastructure sector in the country.

## LIMITS OF TCU'S INTERFERENCE IN THE EXECUTIVE BRANCH AND THE SUBCONCESSION OF THE NORTH-SOUTH RAILWAY, CENTRAL SEGMENT (FNSTC)

Before the case discussed above, the TCU had already taken a position in the sense that it is the Executive Branch that should decide, as it sees fit, who will be responsible for environmental obligations (or "environmental liabilities") and how these obligations will be distributed between the Granting Authority and the concessionaire. This position was demonstrated by the court's audit of the FNSTC sub-concession.

Sub-concession is the concession of infrastructure that is already granted under concession. It is not an unusual operation for the railway sector, for example, where railways were granted to a public company in the past, but later the government decided to delegate management to the private sector. This was the case with the FNSTC, which was initially granted in concession to *VALEC Engenharia, Construções e Ferrovias S.A.* (VALEC) and later was the object of a sub-concession arrangement to Rumo Multimodal under the PPI. In this case, in judgment No. 2195/2018 (TCU 2018c), TCU's plenary understood that there was a discrepancy between clauses in the draft of the sub-concession contract, which raised the question of which entity would be responsible for environmental liabilities: the sub-grantor (VALEC) or the sub-concessionaire.

Given this discrepancy, the MPTCU argued that the sub-concessionaire should be fully responsible for the obligations in question. It is worth remembering that in the case of highway BR-163/230/MT/PA, the TCU did not decide on who should comply with the environmental requirements, merely determining that the Executive Branch should clearly define the responsibilities. In the case currently under review, according to the MPTCU, the court should determine who should be responsible for the environmental obligations. The solution advocated by the Prosecutor's Office is controversial because it refers to the discussion of whether courts of accounts - which, as noted, are auxiliary bodies of the Legislative Branch - can restrict the scope of the Executive Branch's decision-making freedom. In more technical terms, what is under discussion is whether the courts of accounts can restrict the Public Administration's discretionary power.

According to the MPTCU, the attribution of full responsibility to the sub-concessionaire would further clarify the risks of the project, and this clarity would attract greater interest in the sub-concession, thus increasing competition in the bidding process. Also, according to the Prosecutor's Office, this would be the only possible choice for the Executive Branch, because it would not be lawful for the government to define responsibilities to the detriment of the competitiveness of the bidding process. The Brazilian Federal Court of Accounts, however, did not share this understanding.

## TCU'S DECISION ON THE SUB-CONCESSION OF THE FNSTC

According to the TCU, the distribution of environmental responsibilities is a discretionary decision; that is, it is the Executive Branch that should decide, as it sees fit, who will be responsible for environmental liabilities and how these liabilities will be distributed. Finally, the court considered that the attribution of full liability to the sub-concessionaire would be priced by the market, which could generate disadvantageous proposals for both the State and society. Therefore, there should be a balance between competitiveness and toll prices, at the discretion of the Executive Branch.

As a result, the TCU determined that ANTT should adjust the clauses of the sub-concession contract, so that there would be no doubt as to the responsibility for environmental liabilities. It was also recommended - rather than determined by the court - that the agency, "in accordance with its judgment of convenience and opportunity", should assign full responsibility for these obligations to the future sub-concessionaire. The FNSTC was granted under a sub-concession contract to Rumo Multimodal in July 2019 (PPI n.d.a). The court's rulings do not appear to have been fully effective in this case. Although the sub-concession contract establishes that pending and future environmental liabilities will not give cause for economic and financial rebalancing and determines that the sub-concessionaire is responsible for settling these liabilities, it also provides that the sub-grantor will be responsible for pending environmental liabilities.<sup>9,10</sup>

There still seems to be doubts, therefore, as to the responsibility for the FNSTC's environmental liabilities. The same considerations as above hold true here, regarding the untimely discussion about the distribution of social and environmental costs being a cause of insecurity and financial risk for potential investors.

<sup>9</sup> Clauses 3.1.ix, 12.2.ii.h and 12.3.ii.ff (ANTT 2001).

<sup>10</sup> The clauses referred to by the TCU do not correspond to the clauses of the draft contract submitted to the public hearing, which may have been amended before it was sent to the court, as a result of the contributions received (ANTT 2017a).

## THE TCU AS THE MAIN BODY RESPONSIBLE FOR THE MOTIVATED AND TRANSPARENT - BUT LATE - APPROVAL OF EVTEA AND THE CONCESSION OF RIS

The TCU is the main body responsible for the transparent and motivated - but late - approval of EVTEA. Although EVTEA are produced at the beginning of the viability phase, they end up having their contents assessed only at the end of this phase, precisely by the TCU. While necessary, this assessment should complement the appropriate, motivated, and transparent assessment that the PPI Council should carry out at the beginning of the viability phase, for two main reasons. The first is that an in-depth assessment of EVTEA only at the end of the viability phase causes these studies to reach the TCU with many inconsistencies. The second reason is that the role of the Court of Accounts, as seen above, is one of external control, that is, the TCU would be responsible for analyzing, according to its competencies, the assessment and approval that should have been carried out previously by the PPI Council, rather than being the main body responsible for the assessment of these studies.<sup>11,12</sup>

However, according to data from CPI/PUC-Rio (Chiavari, Antonaccio and Cozendey forthcoming, 37-40), if the PPI has been approving the feasibility studies of its projects, no act of motivated approval - not even *per relationem* (through a third party)<sup>13</sup> - is accessible, for example, with regard to federal railway and highway concessions in the Legal Amazon, despite repeated requests through the Access to Information Law (Chiavari, Antonaccio and Cozendey, forthcoming, annex 2). This reinforces the perception that the in-depth analysis of EVTEA - which serve as input to the preparation of basic projects (Law No. 8,666, Art. 6, IX) and should also inform EIAs and environmental licensing (Cozendey and Chiavari 2021a) - is untimely being carried out by the TCU at the end of the viability phase.

### TCU'S DECISION ON THE RIS CONCESSION

The RIS concession goes from the municipality of Torres, in the state of Rio Grande do Sul, on the border with the state of Santa Catarina, to Passo Fundo, also in Rio Grande do Sul, crossing the state capital. TCU's audit of the concession (TCU 2018a) shows that the respective EVTEA, after numerous revisions and adjustments by the then Ministry of Transport, Ports and Civil Aviation (*Ministério dos Transportes, Portos e Aviação Civil* - MTPAC), currently Ministry of Infrastructure (*Ministério da Infraestrutura* - MINFRA), the

11 Resolution No. 1/2016 of the PPI Council determines that EVTEA will be submitted to the Council (Art. 14). Furthermore, the Council's internal regulations establish that it is incumbent upon Council members to "assess and vote on matters subject to examination" (Art. 5, II). Article 14 of PPI Resolution No. 1/2016 was recently amended in April 2021 by PPI Resolution No. 185/2021. Apparently, the change means that the obligation to submit EVTEA to the Council is restricted to cases of concessions falling under the category of Public-Private Partnerships (PPP). The change also affects the second paragraph of Article 16 of the same Resolution No. 1/2016, to exempt the TCU from analyzing EVTEA in some cases, based on the criteria of the project's size and management entity, but does not specify what size and which entities it refers to.

12 "604. In addition, several inconsistencies were observed in the feasibility studies throughout the process, some of which have already been corrected by the managers. On the subject, also noteworthy is the poor quality of the feasibility studies presented. The number of inaccuracies proved to be significant, to the point of overburdening the Technical Unit in the activity of 'reviewing' the studies, which transcends the role of external control" (TCU 2018a).

13 Assuming that the Permanent Commission on Highway Concessions (*Comissão Permanente de Outorgas Rodoviárias* - CPOR), for example, would have submitted to the PPI Council its opinion on the approval or rejection of the studies, and the Council would have decided to approve or reject them pursuant to the CPOR's opinion, which should accompany the decision to be published. For the composition and competencies of the CPOR see paragraphs below.



PPI, and the Planning and Logistics Company (*Empresa de Planejamento e Logística* - EPL), were sent to the TCU with several errata, which accompanied each volume of the studies. At the TCU, the studies still had to undergo new rounds of improvements, this time with the participation of ANTT as well, which resulted in the need to rewrite the EVTEA and the drafts of the bidding notice and the concession contract, before finally exhausting the issue in the court. The MTPAC, PPI, EPL and ANTT were members of the Permanent Commission on Highway Concessions (*Comissão Permanente de Outorgas Rodoviárias* - CPOR) created by Interministerial Ordinance No. 2/2017, which was responsible for recommending the approval or rejection of EVTEA (MTPAC 2017); however, the Commission was extinguished less than two years later by Federal Decree No. 9759/2019.<sup>14</sup>

The case of RIS, besides evidencing the role of the TCU as the main body responsible for the late approval of EVTEA – causing, at the limit, the need to re-prepare studies, notices and contracts at an advanced stage of the project, thus generating an undeniable waste of public resources – also raises another important question: how to solve the problem of adequate, transparent and motivated assessment of EVTEA at the beginning of the viability phase, if not even a technically qualified commission like the defunct CPOR was able to assist the PPI in developing robust feasibility studies? This is a problem whose cause seems to be less the lack of technical qualification and more a question of governance and procedural clarity.

The New Bidding Law seems to provide an opportunity for solving the problem by regulating the so-called preliminary technical studies. According to a publication by CPI/PUC-Rio, the regulation could introduce pre-feasibility analysis in infrastructure projects, with the immediate objectives of anticipating the assessment of socio-environmental aspects of the projects, ensuring that EVTEA are properly approved at the beginning of the viability phase and coordinating preliminary technical studies, EVTEA, basic projects, EIAs, and environmental licensing (Cozendey and Chiavari 2021a). The main objectives of this proposal are to strengthen planning, ensure the implementation of higher quality projects, improve the chances of obtaining environmental licenses, reduce project interruptions, and prevent non-feasible or low-viability projects from reaching the bidding stage to then be abandoned, either by government decision or as a result of empty bids.

<sup>14</sup> The ordinance is clear in the sense that the CPOR was intended to assist the PPI. The PPI was created by Federal Law No. 13,334/2016. The PPI Council is composed of the main Ministers of State, who have voting rights, to exercise the functions assigned to the National Privatization Council (CND). The competencies of the CND include “deliberating on the privatization of public companies or services”, approving the operational modality to be applied to each privatization, approving “the conditions applicable to privatization”, approving the procurement of specialized opinions or studies necessary for privatization, etc.

## THE PROPER, MOTIVATED AND TRANSPARENT ASSESSMENT OF EVTEA AND THE CONCESSION OF FERROGRÃO

The case of Ferrogrão, as well as that of RIS as described above, demonstrate the importance of infrastructure projects being developed with a robust viability phase, so that they can quickly and safely advance to the bidding stage.

Ferrogrão is intended to connect the municipality of Sinop, in the state of Mato Grosso, to the river port of Miritituba, in the state of Pará (PPI n.d.b). It runs almost parallel to BR-163/230/MT/PA and therefore also cuts across a large area of the Amazon biome, where indigenous lands and environmental conservation units are located. The project was submitted for analysis to the TCU in July 2020 (PPI n.d.b), but inconsistencies in its viability phase prevented it from advancing to the bidding stage.

The Federal Prosecutor's Office (*Ministério Público Federal* - MPF) filed a complaint in the TCU questioning the lack of consultation with the indigenous peoples affected by the project (MPF 2020b). It also filed a public civil action in the Federal Court of Pará questioning flaws in the consultation with these peoples, which should occur in the environmental licensing process as well (MPF 2020a). Finally, the MPTCU filed another complaint, with the aim of ensuring that the court will only analyze the project after consultations with indigenous peoples and once the first environmental license for the project has been regularly issued (Rittner 2021).

The aforementioned MPF complaint to the TCU, in addition to closely addressing the indigenous issue, listed several weaknesses in Ferrogrão's EVTEA, such as the lack of on-site assessment of socio-environmental issues, the disregard for potentially affected traditional communities and the lack of depth in the survey of technical data in general - most of the data presented was apparently taken from Google Earth -, as well as in the survey of information obtained from other projects - for example, previous environmental assessments related to the construction of hydroelectric plants in the same region seem to have been used, but the differences between the impacts of hydroelectric plants and railways were not properly analyzed. A proper assessment of EVTEA at the beginning of the viability phase could prevent such obvious inconsistencies.

Currently the entire procedure, including TCU's audit, is suspended by a decision of the Brazilian Supreme Court (*Supremo Tribunal Federal* - STF), due to the elimination of a conservation unit area to give way to the railway line.

Another issue that apparently contributes to the poor quality of feasibility studies, according to the court, seems to be its preparation through PMI, a modality that was used in the case of both RIS and Ferrogrão (MT 2014). In general, in this type of contract, as detailed in a study by CPI/PUC-Rio (Chiavari, Antonaccio and Barros 2021), the bidding notice describes a project still in the planning phase, for private sector entities to submit projects, surveys, investigations or studies. Of these, what actually gets to be implemented will have its production cost reimbursed, but only after the concession of the project (Decree No. 8,428).

In the audit of the RIS concession, for example, the TCU understood that the respective EVTEA were of a poor quality and that this was due, at least in part, to the commissioning of studies through PMI (TCU 2018a).

The analysis of PMI from the perspective of the economy has already found that the uncertainty as to whether there will be remuneration and whether it will be sufficient to at least cover the costs of preparing the studies<sup>15</sup> discourages the participation of interested parties other than potential concessionaires, who would already invest, anyway, in the in-depth analysis of the project (Camacho and Rodrigues 2015). In addition, according to the TCU, potential concessionaires are also more interested in the preparation of studies because this tends to put them in a position of knowing more about the projects than the Public Administration itself, leading them to omit strategic information in EVTEA to benefit from them later on, should they be awarded the concession (TCU 2018a). According to the court, solving these problems “requires substantially improving the analysis of EVTEA and projects carried out by ANTT<sup>16</sup> (or ultimately assign it to another government agent)” (TCU 2018a).

<sup>15</sup> The remuneration cannot exceed 2.5 percent of the total investment foreseen for implementation of the project (Decree No. 8,428, Art. 4, § 5, II).

<sup>16</sup> ANTT’s competencies, with respect to the development of EVTEA, consist in submitting draft notices and concession contracts and their annexes, including EVTEA, to a prior public hearing and to produce a report stating their position on the contributions received. This report must be approved by the Agency’s Collegiate Board. After that, the project documents are forwarded to the court of accounts (Law No. 10,233; ANTT 2017b; PPI 2016, Art. 14, § 2, Art. 15 and Art. 16).

## CONCLUSION

The TCU's power of command is intended to correct irregularities in financial, budgetary, accounting, and patrimonial matters. However, the court is establishing itself as an entity in charge of risk management and preventive audit of bidding processes. In this context, despite the cost that the lack of a rite of assessment of EVTEA at the beginning of the projects generates for both the Public Administration and society, the TCU has played an important role.

This publication analyzed prior oversight by the court of federal railway and highway concessions under the PPI, focusing on how it assessed the socio-environmental aspects of the projects, with the aim of mitigating risks. The narrow universe of analyzed decisions does not allow us to affirm whether the highlighted judgments reflect the courts clear and uniform guidance. However, they seem to address, in a convergent way, fundamental issues for the assessment of socio-environmental aspects of land transport infrastructure projects.

In fact, prior oversight by the TCU of federal railway and highway concessions shows that the court analyzes aspects that are relevant to the socio-environmental viability of the projects and makes recommendations to improve this viability, but still seeks not to interfere in the discretionary power of the Public Administration. Therefore, it is necessary to invest in increasing the capacity of the court in risk management and preventive audit of projects, given its importance for a more comprehensive viability analysis.

In addition, the TCU is the main entity responsible for the transparent and motivated – but late – approval of EVTEA, which affects the quality of the studies and the timeliness of the concessions. When EVTEA are not assessed in a proper, motivated, and transparent manner at the beginning of the viability phase, the projects are prevented from quickly and safely advancing to the bidding stage. Therefore, it is also necessary to improve the preparation of EVTEA, including when commissioned via PMI, for the projects to undergo prior oversight by the TCU more quickly and safely advance to the bidding stage.



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