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CONSTITUTIONAL AMENDMENT BILL N. 65 OF 2012: IS IT A REQUIEM FOR THE ENVIRONMENTAL LICENSING?

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ABSTRACT

This article is a legislative note that, based on the historical-evolutionary method, provides an analysis of Constitutional Amendment Bill n. 65 from December 12, 2012, aimed at altering the licensing procedure of projects that can potentially cause a significant impact, in order to make it faster. The opening section will be dedicated to an analysis of environmental licensing as an instrument of the National Environmental Policy, looking into the rationale that permeates the three-stage procedure, without prejudice to the analysis of the specific proceeding conferred to enterprises that can potentially cause a significant environmental impact. Then, we will deal with the processing of the Bill at the Legislative Houses, to finally talk about the effects that would result from the approval of the bill, namely, the breach of the three-stage rationale of environmental licensing, as well as the violation of the principles of polluter pays and popular participation.

Keywords: Environmental Impact Report (RIMA); Environmental Impact Study (EIA); environmental license; polluter pays principle; principle of participation.

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PROPOSTA DE EMENDA À CONSTITUIÇÃO N. 65 DE 2012: RÉQUIEM AO LICENCIAMENTO AMBIENTAL?

RESUMO

O presente artigo é uma nota legislativa, que a partir do método histórico-evolutivo, promove a análise da Proposta de Emenda Constitucional n. 65, de 12 de dezembro de 2012, que visa promover alterações ao procedimento de licenciamento de empreendimentos potencialmente causadores de significativo impacto, no sentido de torná-lo mais célere. A seção inaugural será dedicada à análise do licenciamento ambiental, enquanto instrumento da Política Nacional do Meio Ambiente, perquirindo a logicidade que permeia o procedimento trifásico, sem prejuízo da análise do rito especial conferido aos empreendimentos potencialmente causadores de significativo impacto ambiental. Em seguida, será relatada a tramitação da Proposta nas Casas Legislativas para, por fim, registrar fundamentadamente os efeitos que adviriam da eventual aprovação, a ruptura à lógica trifásica do licenciamento ambiental, além da violação aos princípios do poluidor-pagador e participação popular.

Palavras-chave: *Estudo de Impacto Ambiental (EIA); licença ambiental; princípio da participação; princípio do poluidor-pagador; Relatório de Impacto Ambiental (RIMA).*

FOREWORD

Environmental licensing is undoubtedly a subject that raises close discussions between the numerous social players directly or indirectly involved in the quarrels associated with the economic growth/safeguarding pair of environmental resources.

On the one hand, there rage arguments saying that the three-stage administrative procedure, which is indeed complex, time-consuming costly, and damage the economic activities responsible for the country's development. On the other hand, we hear the echo of accusations about the issuing of licenses and other authoritative acts in a thoughtless way, based on purely formal analyzes of biased studies – because they are carried out by the interested party – that take no account of the actual protection of the environmental asset.

In the context of the debates about the need to improve environmental legislation, the Federal Senate filed for Constitutional Amendment 65 from 2012, dated December 12, 2012. This bill was drafted by Senator Acir Marcos Gurgacz and others[3], and it intends to alter the environmental licensing procedure for enterprises with the potential of causing significant environmental impact, in order to make it faster.

The congress representatives who were signatories of the aforementioned proposal intended to amend the Federal Constitution to incorporate a seventh paragraph in its art. 225, as follows: "The presentation of a prior environmental impact study is required for granting authorization for the execution of the works, which cannot be suspended or canceled for the same reasons, except in the face of a supervening fact" (GURGACZ *et al.*, 2012).

As the rationale in the initial text argues the need to speed up the execution of public works, it is conjectured that the amendment, if approved, would, in reality, render the process of environmental licensing of public or private enterprises and/or activities useless.

Despite the arguments in the rationale published by the proponents, from reading the proposed normative instrument, it can be inferred there are discrepancies between the founding claims and the existing legal

3 Other Senators who signed on the proposal: Antônio Carlos Valadares, Armando Monteiro, Casildo Maldaner, Cássio Cunha Lima, Cidinho Santos, Clésio Andrade, Cristovam Buarque, Cyro Miranda, Eduardo Amorim, Eduardo Lopes, Eunicio Oliveira, Gim Argello, Humberto Costa, Inácio Arruda, Jayme Campos, João Vicente Claudino, Lobão Filho, Marco Antônio Costa, Mário Couto, Paulo Bauer, Romero Jucá, Sérgio "Petecão", Sérgio Souza, Vital do Rêgo, Waldemir Moka, Walter Pinheiro, Wellington Dias and Wilder Morais.

framework regarding environmental licensing, especially on the need to comply with the three-stage procedure and adherence to the principles of prevention, polluter pays and popular participation.

The opening topic of this article will be devoted to environmental licensing as an instrument of the National Environmental Policy. To this end, we will make opening considerations about environmental externalities, and a brief examination of the foundations of polluter pays and prevention principles.

Next, we will analyze the three-stage environmental licensing procedure, in an attempt to understand its rationale, focusing on the essential requirements and legal effects of the issuance of each of the three cumulative licenses required for the operation of the enterprise/activity.

Further on, we will carry out a study of the peculiarities inherent to environmental licensing in enterprises with the potential of causing significant environmental impact, those which the Federal Constitution of 1988 was mindful of demanding a special administrative procedure for, by requiring the execution of a Preliminary Environmental Impact Study and subsequently allowing for levels of popular statements about the results.

Finally, considering that these enterprises were the immediate object of the proposed constitutional changes, we will analyze PEC 65/2012 and, to provide historical support, we will also analyze the processing of the Bill in the Legislative Houses and the effects that would result from its approval. At that point, we will seek to clarify the inconsistencies noticed between the arguments advanced by the signatory congressmen in order to justify the intended amendment and the actual legal meaning/effect inscribed in the provision to be incorporated into the constitutional law.

1 ENVIRONMENTAL LICENSING

In order to better understand the legal context that permeates the proposition of PEC 65/2012, it will be useful do make an overview of the assumptions for environmental licensing, which is why some essential information about the administrative procedure in question will be presented below.

1.1 Underlying principles of environmental licensing

Insofar as the Constitution of the Federative Republic of Brazil elevated the ecologically balanced environment to the condition of

value to be protected, the same charter, in its art. 170, also establishes free enterprise among the foundations of the Brazilian economic order, ensuring the exercise of productive activity in the country.

As an often unavoidable consequence of productive and consumer activity, there are losses ascribed to outsiders the existing economic relationship between producer/service provider and consumer/beneficiary. These outsiders are characterized by not providing compensation for those harmed by these activities (ARAGÃO, 2014).

Such harmful effects, considered as external to markets, as they are not accounted for in the costs and decisions of those who produce them, represent "zero price", and are thus, negative externalities.[4]

Alexandra Aragão (2014) illustrates the mentioned concept using the act of purchasing a car: the existing relationship between consumer and supplier of the good will certainly provide benefits to the parties of the deal. However, the circulation of a new vehicle may lead to increased traffic jams, thus impacting other drivers.

Note that, in the light of this example, the author points out the occurrence of a social externality, because in the same scenario it is also possible to glimpse an environmental externality, as traffic jams will help increase atmospheric pollution, due to greenhouse gas emissions. Another enlightening example is that of a plant that, due to its production process, causes high levels of water and air pollution, lowering their quality for the enjoyment of the population.

The issue of negative externalities becomes alarming when it repeatedly affects the environment and may eventually deplete it, as illustrated in Garrett Hardin's classic *The Tragedy of the Commons* (1968).

The problem described by Hardin involves a group of shepherds who use a common pasture area for their herds, where each shepherd is aware of the costs and benefits associated with adding an animal to the common pasture area.

The profit a shepherd will make from the new animal will entail costs and consequences from maintaining the animal in the area, such as a decrease in the amount and quality of available pasture; these effects will be shared among all shepherds. It follows that, if all the shepherds do so, after a while the common area will surely be destroyed (1968).

4 In simple terms, an externality means an impact caused by the actions of a particular individual or group to nearby third parties, who do not, directly or indirectly, participate in the action that generates the result. They can be positive, when the result to the third party is beneficial, or negative, in which case that third party will continue to suffer a loss (usually a devaluation of their assets, whether tangible or intangible) (HOWDEN, 2013).

The Hardinian hypothesis is applicable to environmental assets, provided they are for the common use of the people are freely accessible to the population. The individuals who least exploit natural resources end up taking on costs produced by those who use them on a larger scale (MACHADO, 2015).

Alexandra Aragão explains that common property and free access to environmental assets eventually lead to the development of economic activities that do not include the proper reckoning of social costs, including externalities, since only production costs are taken into account (ARAGÃO, 2014).

The inadequate internalization of negative externalities corroborates not only the exposure of natural resources to the risk of severe degradation, but also creates social injustices.

In order to correct this scenario, a government response is imperative. The State must preventively handle the public policy instruments at its disposal in order to prevent the occurrence of socio-environmental externalities.

Thus, to guide the conduct of the government to induce the internalization of negative externalities resulting from activities that causes environmental degradation, the polluter pays principle came about with the publication of Recommendation C (72) 128, issued in 1972 by the Organization for Economic Co-operation and Development (OECD), aimed at protecting the environment by harmonizing production costs and avoiding product price distortions in the international market[5].

Implemented as a legal principle – although economic in nature – applicable to European environmental policy outlining the theme of prevention and restoration costs related to polluting activities, the mandate was incorporated into the Rio Declaration on the Environment and Development (Principle 16), as product of the United Nations Conference on Environment and Development, held in Brazil in 1992.

The rationale that permeates the polluter pays principle is therefore

5 "[…] Environmental resources are in general limited and their use in production and consumption activities may lead to their deterioration. When the cost of this deterioration is not adequately taken into account in the price system, the market fails to reflect the scarcity of such resources both at the national and international levels. The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter-Pays Principle'. This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption" (PIMENTA; GORDILHO, 2018, p. 365).

an economic rationale, as it does not talk about a preeminently repressive and sanctioning mandate, since countless activities/enterprises cause negative impacts to the environment and yet, as a corollary of sustainable development, they are regularly licensed by the government, but in a dismaying guideline of a preventive nature.

Incorporating this principle into the legal framework avoids the privatization of profits and socialization of losses, by imposing on the polluter the costs necessary to mitigate and/or eliminate social losses arising from production activity (LEITE, 2015).

A principle, however, once encompassed by the legal system as a mandate to optimize conducts, depends on specific instruments aimed at its effective operationalization. In this way, the polluter pays principle seeks to limit the discretion of the government, as it prevents the government from allowing those who have not participated in the action that resulted in the pollution to suffer from the damages resulting from the harmful action.

The precautionary and preventive principles are the two underlying principles that give rise to the polluter pays principle: precaution, when the activity is likely to lead to environmental contamination and requires exceptional care in its implementation, and prevention in the strict sense, when there is certainty of damage to be caused by a certain type of activity, thus requiring the adoption of mitigating measures (PIMENTA; GORDILHO, 2018).

Environmental licensing and the related possibility of imposing constraints come up as instruments for making the principle of prevention operational, insofar as it prescribes – either to the government or those it legislates upon, the adoption of interventions to prevent the occurrence of minimally-predictable environmental damage.

To the extent that the environmental agency imposes on the entrepreneur, as a *sine qua non* condition for the issuance of an environmental license, for example, the obligation to install a certain filter in the chimneys of their industrial plant, that agency is performing a prophylactic intervention in order to avoid emission of pollutant gases at harmful levels.

The precautionary character is made evident in that it imposes to the polluter the adoption of measures aimed at the mitigation and containment of damages – and costs – that would be absorbed by the society in the form of externalities, if the remedial measures were not required.

It also seeks to discourage the socially uninteresting conduct of the entrepreneur by the imputation of the need to absorb costs with actions

aimed at the prevention of environmental damage, which implies raising the final value of the product or service (ROCHA, 2013).

At the same time, as costs are passed on to the end consumer, social justice is favored, as those who actually benefit from the product or service are encumbered, and the community does not suffer from the costs, whether financial or social, of pollution.

Only in the course of the environmental licensing procedure, when the diagnosis of possible damages and externalities are performed based on an analysis of environmental impact studies, it is possible for the public authorities to establish the conditions for the authorization of the activity or enterprise.

1.2 Three-stage Environmental Licensing Procedure

Environmental licensing comes up in the Brazilian legal system with Law 6,938/81, which established the National Environmental Policy (PNMA), which elected it as one of its most prominent instruments (BRAZIL, 1981, art. 9).

This is an administrative procedure whereby the competent environmental agency authorizes the construction, deployment, expansion and operation of activities and/or undertakings that use environmental resources, are actually or potentially polluting, or may cause environmental degradation.

The dynamics of environmental licensing as a necessarily three-stage procedure was regulated by Decree 99,274 from June 6, 1990, which, in regulating PNMA, took care of assigning to the alleged entrepreneur the obligation to obtain three distinct licenses that are cumulative and successively granted, namely: Preliminary License (LP), Installation License (LI) and Operating License (LO) (BRAZIL, 1990, art. 19).

Obtaining the first of these, the LP, does not import in an authorization to perform the activity or for the entrepreneur to start to carry out the works necessary for the actual deployment of their establishment. It solely symbolizes the approval by the government of the location and design of the project, which should be deployed by the stakeholder only after an analysis and discussion of the environmental studies undertaken by the licensing body's technical staff, aiming to confirm to its environmental feasibility (CONAMA, 1986, art. 8).

When the LP is issued, the constraints will be detailed, which are control measures and actions necessary for the absolute correction or, at least, mitigation of the negative environmental impacts to be generated by the enterprise, and whose incorporation in the detailed engineering design will prove indispensable for obtaining the subsequent license (BECHARA, 2007).

Thus, after expressing an interest in undertaking a particular venture and obtaining the LP, the entrepreneur is responsible for making adjustments to the project in order to incorporate the stipulated guidelines and conditions, and then, once again, to take to the licensing body the Detailed Engineering Design has been carefully prepared. This design must include, among other things, the details of the processes to be adopted during the deployment and technologies to be used to mitigate the negative environmental impacts, in order to request the authorization to start deployment, with the issuance of the LI.

After the infrastructure of the project has been built as provided for in the LI, the entrepreneur is not yet authorized to start the activities. A final check by the environmental agency is required to verify the actual compliance with the conditions and parameters assigned, an assessment that will finally allow for the obtaining of the LO (CONAMA, 1986, art. 8).

The multiplicity of stages in the environmental licensing procedure is justified by the need to make the necessary adjustments to the project in order to make the economic activity compatible with the protection of the environment.

According to Maria Luiza Granzinera (2014, p. 421):

> […] the environmental licensing is not intended to make the deployment of a project unfeasible. Its primary function is to seek all possible means for such deployment, unless the risks of damage indicate a lack of certainty as to the future effects of the venture.

Thus, after realizing the aspirations of the entrepreneur, and given the characteristics of the activity to be developed, as well as the diagnosis of the environment (from an ecological and social perspective), the technical body will have two opportunities to determine the necessary adjustments to the project, so as to allow it to be used after the fragile aspects are corrected by the stakeholder.

1.3 Licensing of ventures with potentially significant impacts – extraordinary procedure: EIA/RIMA as a constitutional requirement

Notwithstanding the necessary compliance with the three-stage environmental licensing procedure, the constituent legislator took care of assigning the obligation of preparing a preliminary Environmental Impact Study (EIA) for projects with the potential to cause large environmental impacts, imposing on the public authorities the obligation to "demand, according to the law, for deployment of the works or activity with the potential of causing significant degradation of the environment, a prior environmental impact study, which will be made public" (BRAZIL, 1988, art. 225, § 1, IV).

EIA is the most robust tool associated with environmental licensing, as it includes data from the most diverse fields and areas for a careful analysis of the environmental impacts to the base scenario arising from a given activity.

From the edition of the first normative act of mining of the National Council of the Environment (CONAMA), the Resolution n. 001, of January 23, 1986, defined the EIA as a technical study to be carried out by a duly qualified multidisciplinary team, aiming to, among other guidelines, systematically identify and evaluate the environmental impacts generated in the project implementation and operation phases proposed by the alleged entrepreneur, including the elaboration of technological and localization alternatives (CONAMA, 1986, arts. 5 and 7).

In simple terms, it is a complex study to be carried out by a team composed of professionals from the most diverse areas, such as biologists, agronomists, and even anthropologists, among others, to support the analysis and decision of the licensing body about the authorization for deployment and subsequent operation of the activity and/or undertaking.

The Federal Constitution established the need for wide dissemination of EIA contents to society, in order to gather questions and suggestions. And, as it is a preeminently technical document, the EIA must be accompanied by a synthetic document with accessible wording summing up the conclusions of the study, which is the Environmental Impact Report (RIMA).[6]

Regarding the procedure, once the entrepreneur's interest in performing

6 This is explained by Paulo Afonso Leme Machado as follows: "The study is broader than the report and encompasses it in itself. The EPIA includes a survey of relevant scientific and legal literature, fieldworks, laboratory analysis, and the preparation of the report itself (MACHADO, 2015, p. 277).

a certain activity considered as having the potential of causing significant environmental degradation has been stated, and after the EIA/RIMA have been prepared according to the parameters laid down by the environmental agency, it is time to allow for the participation of society.

To this end, upon receipt of said study, the licensing body shall notify society of its existence, as well as the possibility of scheduling public hearings to clarify its material content and receive suggestions. Paulo Afonso Leme Machado (2015, p. 299) called this time a "comment phase". It is based on the publication of specific notices in a local communication vehicle assigning a minimum interval of 45 days for stakeholders to state their views (CONAMA, 1987, art. 1).

Public hearings may be scheduled via official letter by the licensing body itself, but also by the Public Prosecutor's Office or any legally established civil entity, or even by a group of 50 or more citizens. Such is the importance given to public hearings that failure to do so against a previous request by any of the legitimate parties will result in the license being voided (CONAMA, 1987, art. 2).

And more, copies of the EIA/RIMA must be included in the licensing body's documentation, and any stakeholder must be granted access to them even before the public hearings are held. Otherwise, the commentary stage may be invalidated and, as a consequence, the subsequently-issued environmental license may be voided, as that violates the provisions of art. 25, § 1, IV of CF (Brazilian Federal Constitution). (MACHADO, 2015).

1.3.1 EIA and the principle of popular participation

Stakeholder participation in the commentary stage represents the operationalization of the principle of social participation, which is Principle 10 of the Rio de Janeiro Declaration on the Environment and Development, which stresses the need for sharing decisions between the public authorities and society (UN, 1992).

For the full implementation of the principle of popular participation, the State must provide access to information and mechanisms for controlling and mitigating the impacts of decisions made regarding public policies.

Public participation, access to information and access to justice[7] must

7 Public participation, access to information and access to justice, moreover, match the Aarhus Tripod resulting from the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, held in Aarhus, Denmark, on 25 June 1998. Although

be examined together, as stratified aspects of a State duty aimed at ensuring the realization of the fundamental right to an ecologically balanced environment, in accordance with the provisions in the heading of art. 225 of CF.

The existence of a fundamental right to a balanced environment imposes a related duty on the State to ensure the effectiveness of this right by the implementation of a procedural apparatus combining positive and negative actions.

In considering the right to participate in environmental decision-making as a fundamental guarantee, any failure by the State to promote access to information – *in casu*, by not making the EIA/RIMA available for review and commentary – or not substantially enabling the participation of the population in the administrative procedures that will lead to a decision-making process, such as not holding public hearings or holding them in places that the stakeholders find it difficult to reach, can be considered an encumbering to the exercise of a right or even elimination of a legal standing.

The principle of participation is a logical consequence of the democratic principle, the structuring principle of the Democratic Rule of Law that, in addition to including procedural rules, requires the public authorities to adopt measures to ensure citizens' participation in environmental decision-making processes (SARLET; FENSTERSEIFER, 2014).

Frank Fischer (2000) notes the importance of establishing instances of direct citizen participation in public choices involving the environment, suggesting that the model of representative democracy – where policymakers are given the prerogative of converting public opinion into effective decision-making – implies an elitist view of democracy, as even the most liberal representatives[8] usually have a distorted view of the yearnings of society.

Thus, the *animus* of the constituent legislator was manifest in submitting the licensing of ventures and activities with the potential of causing significant environmental degradation to discussion and social control, precisely because of the magnitude of the impacts to be caused.

Only after popular manifestation is allowed, the licensing agency will be able conclude the preliminary phase of the assessment of the impacts arising from the execution of the project and weigh socio-environmental advantages and harms.

Brazil is not among its signatories, as it is an event held within the framework of the European Union, it is a beacon for state action at the international level (CONSELHO DA UNIÃO EUROPEIA, 2015).

8 The term seems to be used by the author in the sense of adherents to popular participation.

2 CONSTITUTIONAL AMENDMENT BILL N. 65/2012

Based on the foregoing premises, we can now go into an analysis of the implications that may arise from the approval of Constitutional Amendment Bill n. 65 from 2012.

2.1 Brief summary of the bill processing

As pointed out in the introductory notes, the Bill under discussion was aimed at causing changes to the environmental licensing procedure in projects that potentially may cause significant environmental impacts, aiming at speeding it up.

It was filed in the Federal Senate on December 13, 2012, and was immediately referred to the Constitution, Justice and Citizenship Committee (CCJ). Via filing on 04.Feb.2013, it was sent to Senator Armando Monteiro, who on 04.Feb.2014, for reasons undisclosed, returned the project to the CCJ Secretariat without further analysis for further filing.

On October 1, 2015, after one year and seven months without processing, by order of CCJ Chairman Senator Waldir Maranhão, the matter was sent to then Senator Blairo Maggi for analysis and preparation of the preliminary report.[9]

On March 7, 2016, after reviewing the formal and material requirements necessary to move on with the case, Senator Blairo Maggi forwarded his report to the Committee, giving his vote in favor of approving the Bill: "[…] I decide for the constitutionality, legality and good legislative technique of Constitutional Amendment Bill 65, 2012, and vote, based on its merits, for its approval" (GURGACZ, 2012).

Following the release of the Rapporteur's vote, the matter was included in the agenda for consideration by the other members of the Committee, so that, on April 27, 2016, after deliberation by that body, the aforementioned Report was adopted as Opinion 469 of 2016 of the CCJ (SENADO FEDERAL, 2016), approving the continuation of PEC 65/12 processing, which was sent to the Senate Plenary for voting.

On May 18, 2016, Senator Randolfe Rodrigues filed requirement 358/2016 requesting the return of PEC 65/12 for joint processing with PEC 153/15, still under review in the CCJ. The latter was issued with the

9 Case pending process available at: https://www25.senado.leg.br/web/atividade/materias/-/materia/109736. Access on: 14 jul. 2016.

purpose of amending art. 225 of the Federal Constitution to include, among the tasks of public authorities, the promotion and adoption of sustainability practices and criteria in their plans, programs, projects and work processes, as they are antagonistic proposals of related matters (RODRIGUES, 2016a).

The request made by the Senator from Pernambuco was granted on May 19, 2016, so that the Proposal was returned to the CCJ for further consideration, and on June 2, 2016, by appointment of the Chairman of the Committee, Randolfe Rodrigues was appointed Rapporteur.[10]

Seven days after receiving the document, Senator Rodrigues voted for the unconstitutionality of PEC 65/12, recommending its dismissal, and the constitutionality of PEC 153/15 (RODRIGUES, 2016b).

After presentation of this new Report, while the case remained waited inclusion in the agenda for voting by the other members of the Chamber, the CCJ received statements prepared by various bodies, some questioning the constitutionality of PEC 65/12, others saying it was actually constitutional. This situation culminated in the approval by the Committee on 03.Aug.2016 of the request signed by Senators Randolfe Rodrigues and Acir Gurgacz (2016), to make it possible to withdraw the Bills from the voting agenda, so that specific preparatory public hearings on this stalemate could be held.

On 21.Dec.2018, the proposal was filed, pursuant to § 1 of art. 332 of the Internal Rules of Procedure, that is, in view of the closing of the legislature, although there was no analysis of merit, which allows it to be restarted at any time, at the request of the proposers.[11]

2.2 Practical implications of the Bill approval

From an analysis of the initial document of PEC 65/2012, it can be inferred that the proposed bill has the scope to add a seventh paragraph to art. 225 of the Federal Constitution, with the following wording: "The presentation of a prior environmental impact study is required for granting authorization for the execution of the works, which cannot be suspended or canceled for the same reasons, except in the face of a supervening fact" (GURGACZ *et al.*, 2012).

The reasons stated by the proponents to justify the Amendment include the need to speed up the execution of works carried out by the

10 On 12.May.2016, Senator Blairo Maggi was appointed Minister of Agriculture, Livestock and Supply by the then Acting President of the Republic Michel Temer.

11 At the time this paper was completed, no public hearings had been scheduled.

public authorities, since unfinished or suspended works due to omissions in environmental licensing end up burdening the government machinery, harming the social interest, as well as assigning a negative reputation to the ruler.

According to Gurgacz:

> One of the greatest difficulties of the Brazilian Public Administration, and also one of the main reasons for its lack of prestige, which shows itself to society as a public manifestation of inefficiency, consists of unfinished works or works or actions that begin and are subsequently interrupted by court rulings of a remedial or injunctive nature, often resulting from delaying lawsuits. […] In these procedures, a lot of time is wasted large public resources are wasted, in clear disregard of the will of the population, of popular sovereignty, which had enshrined a government program in their vote, and with it, its works and essential actions. All of this strongly harms not only to the mayor or the city administration, but all the inhabitants of the locality. Moreover, it is known to be costly to maintain a public works at a standstill, and these costs are far more than financial, for even democracy and representation are eroded when faced with such situations. […] Therefore, the bill presented here ensures that a works, once started, after granting the environmental license and other legal requirements, cannot be suspended or canceled, except due to new facts superseding the situation that existed when the studies referred to in the Constitution were prepared and published (GURGACZ *et al.*, 2012).

A simple reading of the justifications presented by PEC 65/12 reveals the incongruity between the bill and the motives underlying it, since the bill does not differentiate between public or private works, claiming that the slowness and interventions in the licensing process go against public interest.

The bill proposes that the environmental licensing for the deployment of any public or private enterprise or activity should result from the simple deposit of the EIA with the environmental agency. It also states a constitutional guarantee that the works for implementing these activities or enterprises cannot be stopped by any divergences from the material content of the presented EIA.

It turns out that the preparation and analysis of the EIA by the environmental agency are steps that necessarily precede the issuance of environmental licenses, and the first of them, the LP, should not only consider the results of previous assessments when the project feasibility is approved, but also take into account the possible conditions and mitigating measures pointed out by the EIA.

Authorization for the start of the project's deployment works can only

be granted after finding that the mitigating and conditioning measures ordered with the objective of reducing impacts and avoiding social and environmental externalities have been minimally fulfilled, so that the adoption by the stakeholders of the project of the measures stated in the LP constitute a *sine qua non* condition for obtaining the LI.

The sentence "Therefore, the bill presented here ensures that a works, once started, after granting the environmental license and other legal requirements, cannot be suspended or canceled, except due to new facts […]" (GURGACZ *et al.*, 2012) is inconsistent, since it is not possible to talk about granting the environmental license before the beginning of the works. Quite the contrary. Contrary to the rationale and even the argument put forward, the text ensures the possibility of moving forward with the works without the LP and LI.

It is necessary to highlight the arguments that only the analysis of the EIA data projections – such as the placing of constraints and mitigating measures – would be postponed to a time after the beginning of the works, so that the authorization would be provisional, allowing the project to be further adapted.

It does not seem to us that this is the intention of PEC 65/12, since it provides that presentation of the EIA "[…] is required for granting authorization for the execution of the works, which cannot be suspended or canceled for the same reasons, except in the face of a supervening fact" (GURGACZ *et al.*, 2012).

According to Daniel Degenszajn (2010, p. 85):

> A simple definition supervening fact (Lat. *superveniens*) states it is a fact that *occurs after* or that *remains afterwards* (survives). For the case, the modest definition finds correspondence in the fact that occurred after the filing of the complaint, that is, the fact that *followed the filing of the demand*.

If we compare the definition of supervening cause in civil proceedings with the administrative procedure of environmental licensing, we will see that the statement suggests that the works cannot be suspended "for the same reasons", that is, for those reasons already stated in the study presented, even if they have not been analyzed.

Here is the syllogistic structure of the statement:

- **Assumption 1**: Presentation of the EIA is required for authorization for the execution of the works;
- **Assumption 2**: Once the execution of the works has started, it cannot

be suspended or canceled based on data in the EIA;

- **Assumption 3**: Once the execution of the works has started, it can only be suspended or canceled due to a fact supervening the presentation of the EIA.

As a result of a logical-deductive interpretation, it can be inferred that further analysis of the data already listed in the EIA prior to the issuance of the authorization cannot be considered a supervening fact, as they cannot be considered a "new fact".

PEC 65/12 states that the slowness of the environmental licensing procedure is harmful to democracy, since the rulers elected by the people have a prior power of attorney to decide on the desirability and timeliness of public works in the interest of society. A decision made for the benefit of the community would therefore mirror the exercise of indirect representation.

It turns out that deliberative democracy is exercised in direct, intermediate and indirect venues, and in the matter of the environment, the exercise of the most direct form possible is the manifestation of the social body itself at propositional venues, such as the EIA public hearings, a time when the stakeholders can disagree on the project and suggest the imposition of constraints to be adopted during the construction stage.

PEC 65/2012 seems to ignore the importance of the exercise of direct democracy, when it proposes the authorization to build a works that has a significant impact without considering the direct manifestation of affected individuals, thus implying a setback regarding the operationalization of the principle of popular participation.

CONCLUSION

As we have seen, environmental licensing in Brazil is a complex procedure, where the Government requires a series of technical studies aimed at forcing public and private entrepreneurs to internalize negative externalities resulting from activities that cause environmental degradation.

Aiming at simplifying this procedure, PEC 65/12 authorizes the execution of these works from the simple presentation of the EIA, a document that ends up by replacing the Environmental License.

In addition, PEC 65/12 establishes that this license may not be suspended or canceled, except in the event of a supervening fact, so that the claims of the community affected by the environmental degradation arising from the work will not be able to constitute supervening facts, even

if they are reported in the EIA.

Thus, we believe that PEC 65/12, as it stands, violates the polluter pays and popular participation principles, as it suppresses direct participation of the population in environmental decision-making, which will make the internalization of negative externalities arising from the work or activity impossible, most of the time.

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