

Aspects regarding the legal regime of natural resources

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Abstract

In colonized countries the right of exploitation belonged to the companies of the suzerain states. Invoking national interest, dispute over natural resources has increased in direct proportion to the increasing importance of these resources and inversely proportional to the decrease in quantity. A dull but intense battle at this point characterizes natural resources, especially of oil and mining of precious metals. Therefore, we can say that the power exerted on natural resources determines the ranking of countries of the world economic power and living standards of the population. Use of natural resources as an effective weapon in the economic consolidation became state policy and the expansion of exploration and exploitation in foreign lands required the development of complex regulations. Therefore, this study aims at presenting an analytic perspective of foreign law - specific states with relevant impact on the exploitation of natural resources - and the presentation of some features of international law.

Keywords: *concession, international, oil, mining, exploitation.*

1. Introduction.

Beyond the legal nature of concession, often disputed in doctrine, this type of contract gained the reputation of the most used method of operation of the public domain by the Administration, by sending private exclusive rights in this regard.

Given the complexity of the institution of concession, the fluctuations that the legal framework have been suffered, and a poor bending comparative literature on the area of concession contracts on natural resources, we believe that the relevance of a comprehensive approach is undeniable. Thus, making a presentation to the laws of states with experience in concessions, with relevant impact in the oil and mining concessions, and a comparative analysis is necessary for a more objective determination of the essential features that should define this field. For a wide coverage as the features of this contract, the study is not limited to the European space and it shows also a derivative contract of concession - Production Sharing Agreement - which is more commonly used in Middle and Far East.

The study captures the involvement of general interest, as well as specific criteria of oil and mining concessions and emphasizes the need to fulfill this criterion. The theory of general interest had a role in strengthening the identity of the concession right

in terms of necessity and its legal nature. Thus, concession is distinct from ownership and it was born from the need to simplify the operation of economic utilities and natural resources considered as a collective wealth. Stealing private ownership category of goods which are intended for the use of the entire population is a concern that has acquired a historical dimension, starting from Roman law until now. The study also select issues that have formed in certain states and in the approach to the exploitation through concession, successful recipes that become models for other states regarding implementation of natural resource concessions.

The paper is divided into four main sections, namely : 1. "The legal regime of natural resources worldwide" 2. "Main features of oil and mining concession agreements in foreign countries" 3. "Production Sharing Agreements" 4. Conclusion.

2. The legal regime of natural resources worldwide.

Peoples' right to use and exploit their natural resources was recognized by resolution 626 (VII) of 21 December 1952 the United Nations (UN) General Assembly. Subsequently, XVII General Assembly Resolution 1803 of the UN on 14 December 1962 acknowledged that the right of people to permanent sovereignty over natural resources must be exercised in the national interest.

Recognising the right of countries, particularly those in developing countries, to secure and increase participation in the management of enterprises with foreign capital was mentioned by Resolution nr.2158 (XXI) of 1966 and the Charter of Economic Law and State requirements to was developed by Resolution no.3281 (XXIX) of 12 December 1974 issued by the same UN General Assembly.

Regarding oil and gas resources, article 1 par. (1) of the Act no.238/2004 provides that oil petroleum resources located in the basement of the country and the Romanian Black Sea continental shelf, defined under international law and international conventions which Romania is a party, shall be exclusively public property belonging to the Romanian state. According to the same article, the fuel oil is defined as those mineral substances consisting of mixtures of natural oil accumulated in the earth's crust which, in the frame of surface conditions, are present in the gaseous state, in the form of gas or liquid as crude oil and condensate.

The trends that have developed internationally were: ownership of natural resources belong to the landowner; property natural resources belong to the state or other public authorities where resources are located.

The United States are found in the first situation. The owner of the surface is also the owner of the oil that is located under the surface oil. In some jurisdictions, property of oil in situ is not recognized and it is claimed that the property appears only when the oil is produced and brought to possession, when it is extracted and becomes a movable property [1].

Moreover, in Texas it is recognized the "catch rule" according to that the oil belongs to the owner when drilling oil field which is found under his land. So if oil moves from one place to another under the bark, it will belong to a person or the other depending on the hazard of oil movement. In California and Indiana there is a property theory according to that the land owner has no title of in situ oil because oil can be extracted and belongs to whom extract (of course, on his land). The exploration and exploitation rights are granted by lease / lease / concession (lease) mines [2].

Natural resources belonging to the state has origins in Roman law, becoming the property of the sovereign political authority. Under this system whereby the king granted licenses for exploration and exploitation, soil mastery (dominium directum) returned either Crown or feudal lords and was separated from the title of ownership (dominium utile) of which represent the right to use and obtain profit field. Consequently, states have mineral resources and land owners have only been entitled to compensation for loss of land ownership (expropriation).

In Nigeria, the Supreme Court [3] ruled that only the state is the owner of natural resources, not local governments [4].

The Canadian Constitution explicitly assigns ownership of all land, mines, minerals and royalties to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick. Section 92A of the Constitution (1867) completed in 1982, now gives the provinces exclusive jurisdiction to legislate with respect to exploration, development, conservation and management of non-renewable mineral resources such as oil.

In Papua New Guinea, although the communities have no such rights, they receive certain rights to the obtained benefits, rights that are entitled "royalty" benefits.

The Law of capture [5] shapes the legal regime of natural resources in the United States, although its recognition nowadays is considered anachronistic. This right has been regulated by the laws of other countries including Romania, as shown in the 1865 Civil Code which does not strictly copied the provisions of Art.552 of the French Civil Code 1807. The same thing happened in Ukraine, Great Britain and Russia.

In Latin America and the Middle East, the situation has been different. Thus, under The Spanish Ores Order (1783) and according to the Islamic Law regulating ores, as the state had control of these riches, very large concession areas were allowed

Gradually, with the exception of the United States, other countries have waived this right in legislation and allowed the public interest to justify taking over the basement of the state. Romania followed the same trend. Nationalization of natural resources led to Romania existence concession contract which replaced such private nature contracts [6].

3. The judicial nature of the exploitation right

At present it is deemed, considering the exorbitant regime, derogatory from common law [7], to which public property [8] is subjected, that wealth “of any kind” of the underground is the exclusive object of private property, as stipulated also by art.135 par.(3) of the Constitution of Romania, republished.

Subsequently to the revision of the Romanian Constitution, art.136 par. (3) defines the judicial regime of „public interest” wealth, so that this category of goods suffers a restriction concerning the range of public property right. Per a contrario, the underground can be object of private or public property, so that the owner of that ground and respective underground can alienate part of the underground. Thus the underground belongs to the owner „in its entire depth, to the centre of the Earth” [9].

Also signalled is the necessity of legislating a clear delimitation between wealth of national and wealth of local interest, a distinction not made by the phrase „wealth of public interest”, which, as observed, was not necessary in the past. The Mining Law of 1924 for example attributed all underground wealth exclusively to the state, regardless of their nature or destination.

Relevant is also the distinction between the property right of the state or of the territorial-administrative units over the ground and underground in question and the property right over underground wealth on one hand, and the distinction between the latter and the exploitation right of the underground on the other. In this sense the state or territorial-administrative unit can exercise this in rem right as a public right [10].

According to art.L132-8 of the New Mining Code of France [11], the institution of concession creates an in rem right distinctive from the property of the surface, a right that cannot be mortgaged. As required by the exploitation, the concessionaire has the right to dispose of the non-assignable substances inevitably occurring in the works. The owner of the ground can claim the disposal of those substances that could not be used under these circumstances, by paying the mine operator an indemnification corresponding to the expenditure incurred by direct extraction.

4. Main features of oil and mining concession agreements in foreign countries.

United States of America.

It is proposed [12] that concession regulation in the United States of America (hereinafter, U.S.) to be similar to Directive 2004/17/EC given the development of the legal framework for Public Private Partnerships (hereinafter, PPP) in order to establish regulatory areas called "monopoly" and principles [13]. The difficulty of taking over European specificity is that the U.S. does not recognize the state's right over natural resources, operating the "catch rule" according to that the property owner is focused on the person of the soil and extract oil from both the basement and the basement has other neighboring owners.

According to point 71 from the United States Code (2011), any U.S. citizen over the age of 21 or any legal person created on American soil has the right to register the ownership of any tracts of land containing coal which are not appropriated by the state, no more than 160 acres / person or 320 acres / person in return for payment of not less than \$ 10 / acre for an area of 15 miles or 20 dollars / acre for an area of to 15 miles [14].

Contrary to European law, in the U.S., PPP is regarded as a kind of concession agreement - so it is subsumed to concession, in which public project is carried out by

private funds. This view results from the history concession since the twentieth century when the first time the government granted monopoly in certain areas benefit in change of the private financing of public projects.

Transfer of acquired lands containing oil is not restricted if it is before oil exploration and discovery.

Norway

According to Article 77 (1) of the Act Sea Convention, the coastal state exercises absolute rights on the mainland coast for exploration and exploitation of natural resources [15]. But these provisions do not relate directly to the property of natural resources. According to the Petroleum Law No. 72 of 29 November 1996, the Norwegian State claimed ownership of oil deposits in the sea.

The Norwegian State has established a licensing system in which private companies participate as licensed together with the state. The aim was to attract competent technology and oil companies to explore deep waters in harsh weather conditions. This system was introduced in 1965 and still exists, containing three licenses: exploration and production, installation and operation of installations.

But the state does not need a license to carry out activities under the Petroleum Law and its activities consist primarily of seismic monitoring potential exploitation of natural resources.

A Norwegian licensing system feature is the strong participation of the state in this system. This was achieved by the so-called Statoil - initially 100 % state company established in 1972 through which the state holds 50 % shares in all licensed groups.

From the 1st of January 1985, state ownership was reorganized. Following an arrangement established between Statoil and state, Statoil participation split in the state's economy and the Statoil's one. The first was entitled State Direct Financial Interest (SDFI) [16]. This means that the Norwegian State participates directly in the Norwegian petroleum sector as an investor. SDFI has a direct financial interest in 146 production licenses and 13 joint ventures for onshore facilities and oil pipelines.

With the implementation of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations

for the prospection, exploration and production of hydrocarbons, the state lost its importance and became a commercial entity excluded of privileges.

In 2001 there is a reform that differentiates between the role of the owner and the resource manager. Thus, although there was a tendency on the privatization of the national oil companies including Statoil, the state remains the majority shareholder [17].

Subsequently reform Statoil retained responsibility for the marketing and sale of state-owned oil and gas through SDFI with Petora watching on establishing a fair price [18].

Statoil will remain under state control due to the importance of oil and to the fact that it is central to the economy [19].

Brazil

Initially the exploration and exploitation of oil in Brazil has been a state monopoly for 40 years until 1995 when Act No.9 of completion of the Federal Constitution of 1988 changed the legal structure of the state monopoly.

Thus, Law of Oil and Natural Gas no.9478/1997 allows private companies to pursue available through concession contracts and payment of taxes and government surcharges.

The discovery of new oil resources in deep waters of Brazil, rising oil prices and the global crisis have resumed discussions to return to the forefront of state involvement in the oil industry [20].

But lack of investment and rising inflation were reasons born for eliminating the monopoly of the state. Therefore, by Article 177 (1) of the Licensing Act nr.9/1995, private companies have been allowed to be licenced in the domaine.

There are three legal instruments to explore a public good in Brazil by a private entity: concession, permission or authorization. Authorization is a unilateral administrative, discretionary act, a temporary license that the licensee is allowed to use public property without prior auction. These are typical for oil transport and may be revoked at any time by the Government on the grounds of public interest.

Concession is another type of administrative license with the following characteristics: it is bilateral contractual, dependent on prior bidding. Concession cover activities of production and operation, and the risk belongs solely to the licensee.

The discovery of new oil deposits at 7,000 m deep in the ocean caused the need for large investments (\$ 1 trillion) and adopt a new type of contract - PSA , and the concession was only preserved for onshore natural resources, Petrobras - the national oil company being entitled to have exclusive exploitation rights.

Regarding the administration of the petroleum field, the strategy was based upon the typology of the unilateral administrative acts which include: administrative power decisions legally binding, unilateral, administrative and information management contracts normative acts.

Like Petrobras, Statoil is frequently considered a state-controlled company, similar to more international oil companies. Statoil has expanded production to other countries such as Angola, Azerbaijan, Venezuela and became a model of efficiency. Governmental strategy was to control the oil through two ways: by holding ownership of natural resources and the establishment of a national state oil companies .

Venezuela

With the arrival of Hugo Chavez to lead the country, nationalization was imposed as a result of the idea that some international oil companies have exploited Venezuela and weakened state. It was felt that a national oil company under state control would lead to greater confidence than in the private sector. The founded company was entitled Pétroleas de Venezuela SA (PDVSA) [21].

Through Hydrocarbon Law (2001), the fee was determined at 30 % , becoming the largest source of revenue - \$ 20 billion for the year 2007 and for 2008. But PDVSA performance declined after the 2003 campaign Chavez administration [22].

5. Conclusions

Invoking national interest, dispute over natural resources has increased in direct proportion to the increasing importance of these resources and inversely proportional to the decrease in quantity. A dull but intense battle at this point characterizes natural resources, especially of oil and mining of precious metals. Therefore, the power exerted on natural resources determines the ranking of countries of the world economic power and living standards of the population. Use of natural resources as an effective weapon in the economic consolidation became state policy and the expansion of exploration and exploitation in foreign lands required the development of complex regulations.

Within the framework of the complex natural resources field, the concession contract remains the main tool of obtaining benefits through their exploitation. On the other hand, exploiting implies also the protection of public interest.

These reasons provoked the need of a comparative analysis among the legislations of different countries regarding the oil and mining concession agreements. The purpose of the present research is to underline the importance of knowing how the institution of concession is regulated in different countries around the world and how the property of the natural resources – such oil and minerals – is understood within their legislation. This aim is achieved through presenting relevant aspects regarding the above mentioned issues, including a similar type of contract, which is used in some parts of the world: production sharing agreement.

Moreover, we reiterate the necessity of a comprehensive European legislative initiative meaning to include all administrative contracts, in order to prevent further confusion existing between different types of contracts, whether we refer to concessions, procurement or PPP.

We appreciate that the selection of the adequate tools in elaborating this legislation lead or not to the preservation of the natural resources in every state that owns them. And this preservation is the final and the most important aim that a state should follow, in the interest of its people and the future generations. This is the reason why the public interest should be a common criteria that must be taken into account in order for the Administration to decide upon the opportunity of operating the state's natural resources through concession agreements, in what terms and how to ensure the state control over the execution of contract. Therefore, the aim of the study is to shape an objective approach regarding the regulation of the institution of concession and its procedural aspects referring to the protection of public interest and to the special status of the natural resources. Modern legislation and fair clauses within a concession contract would not be possible without the knowledge of what is happening around the world.

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