

# The evolution of ESG clauses in infrastructure concessions

18.06.2024 3 min read

## Authors

Ana Cândida de Mello  
Carvalho

## Related areas

Infrastructure and Regulatory &  
Government Affairs

## Topics

ESG Infrastructure and  
Regulatory & Government Affairs  
Infrastructure BMA Review

Over the last five years, we have seen significant progress in the adoption of environmental, social and governance (ESG) practices in infrastructure projects. Initially restricted to environmental licensing, especially in the form of conditions, ESG practices have gradually gained importance in the context of project financing and have been incorporated into concession contracts.

At first, ESG clauses in concession contracts focused on governance issues, such as compliance programs and policies on transactions with related parties.

More recently, new ESG issues have been included in the tender documents and contracts for concession in different sectors, with a focus on sustainability and decarbonization.

In the highway sector, some contracts already contain provisions requiring the concessionaire to present an annual inventory of the operation's relative carbon emissions, and even to offset those emissions, making the operation carbon neutral.<sup>1</sup>

In the sanitation sector, a number of concession contracts establish investment obligations to reduce river pollution in the area around the project, to reduce and control water loss, and to expand water and sewage systems into the informal settlements known as *favelas*.

In national park projects, various contracts provide that part of the operator's gross operating revenue must be allocated to education, communication, interpretation and environmental monitoring actions; to finance biodiversity research projects; to strengthen the development of regional communities through training and capacity-building actions; and to give broader support to local social and environmental projects.

Various obligations are multi-sector in scope, such as obligations to implement environmental quality management systems, to create structures for natural resources management and energy efficiency, and to adapt infrastructure to make it accessible for people with reduced mobility.

All these provisions have a common feature: they add to concessionaires' obligations by requiring that concession revenues be allocated to ESG investments. Failure to comply with those obligations generates penalties.

This approach, of imposing obligations on a contract-by-contract basis, limits the private partners' initiative. Concessionaires are not encouraged to make their own improvements in ESG practices, or to address new issues that may arise during their project's life cycle.

The National Land Transportation Agency (ANTT – *Agência Nacional de*

*Transportes Terrestres*) has taken a different approach. The ANTT has carried out a Regulatory Impact Analysis and has just published, for public consultation, proposed regulations on a sustainability plan for highway and railroad concessions. With the proposal, the ANTT can establish a new paradigm, regulating the issue at the sector level (and not contract by contract), with an approach based on incentives, and not just obligations.

Thus, although there are initiatives aimed at expanding ESG practices in infrastructure concessions in Brazil, some challenges will have to be faced before they can be fully implemented. Regulations to guide, standardize and encourage ESG practices, with a view to creating a consistent, predictable legal environment, can make a significant contribution to the development of more sustainable infrastructure concessions.

**>>> *This content is part of BMA Review #83. Click here for more.***

#### **NOTE**

<sup>1</sup> Clause 5.1 of the Road Operation Program under the draft contract in call for tenders no. 003/2021.

› PROFESSIONALS

## Professionals who combine legal insight and market perspective



Ana Cândida de Mello Carvalho