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Offset contracts: international contracts and obstacles of Brazilian legislation in the bidding process

Offset contracts: international contracts and Brazilian legislation constraints in the bidding process

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Summary

The theme of this article is: Contracts in offset: international contracts and the obstacles of the Brazilian legislation in the bidding process. The following problem was investigated: Does the Brazilian State have an agenda to mitigate contractual obstacles between the international actors involved in Offset agreements? The following hypothesis was considered: Is there specific legislation designed to monitor the compensation clauses throughout the Offset project? The overall objective is: To identify the historical background of international legislative evolution up to the present day. The specific objectives are: Entering historical creation points; how it was adapted to the national territory. This work is important for an operator of Law, for society and science as a whole, since the lack of specific legislation designed to accompany the compensation clauses throughout the Offset project means that the international legislative equivalence exceeds the policy budget allocated to the State. This is a theoretical qualitative research lasting five months. As a result of the research carried out, it is concluded that the Offset is an instrument of political and strategic influence that should not be contained to the military area, the Offset can assist technological and industrial progress as a whole, in terms of the dynamics of each contractual agreement internationally, it becomes impracticable to develop a suitable legislative context for the reception of a rigid execution linked to the Offset agreement.

Abstract

The theme of this article is: Offset contracts: international contracts and the obstacles of Brazilian legislation in the bidding process. The following problem was investigated: Does the Brazilian State have an agenda to mitigate contractual barriers between the international actors involved in the Offset agreements? The following hypothesis was considered: Is there specific legislation designed to accompany the compensation clauses throughout the Offset project? The general objective is: To identify the historical background of the international legislative evolution up to the present. The specific objectives are: To enter the historical points of creation; how it was adapted to the national territory. This work is important for an operator of the Law, for society and science as a whole, because the lack of specific legislation designed to accompany the compensation clauses throughout the Offset project makes the international legislative equalization go beyond the policy budgetary authority conferred on the State . This is a qualitative theoretical research lasting five months. As a result of the research conducted, it is concluded that the Offset is an instrument of political and strategic influence that should not be contained in the military area, the Offset can assist technological and industrial progress as a whole, in the case of the dynamics of each contractual agreement. International practice, it is impracticable to develop a suitable legislative context for the reception of a rigid execution linked to the Offset agreement.

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1. Introduction

Compensation or Offset is a common practice in the industrial environment of the aerospace and defense areas for the importation of goods or services. According to the established declaration, the compensation is: Any and all practices agreed upon by the parties, according to the circumstances for the acquisition or contracting of goods, services or knowledge, simultaneously with the purpose of producing benefits of a technological, industrial or commercial nature.

Brazil has been inserting itself more and more in procedures with compensatory practices, which requires the establishment of an agenda of studies and debates on the Offset theme, involving the Government, the productive sector, universities and other international actors. The advantage of mastering this tool well, the contract carried out in Offset, allows the country purchasing the product to make real gains when it becomes involved in a large-scale purchase, as was the case with the acquisition of new fighter jets for the Brazilian Air Force recently. Added to a business of these proportions, Brazil can reach technologies never dreamed of until then, and which would take decades, if not more than a century, to reach the level of knowledge already dominated by developed countries.

This article proposes to answer the following problem: Does the Brazilian State have an agenda to mitigate contractual obstacles between the international actors involved in Offset agreements with Brazil? According to the understanding of Barbosa and Yang (2000, p.51), the Offset institute tends to be determined according to an arrangement of contractual context of commercial compensation against which an exporting enterprise undertakes to offer knowledge, obtain components in the importing country or provide other forms of subsidy or compensation to the business or country purchasing.

The technologies offered to other countries are purchased based on the commercial and technological compensation contract, the Offset, which allows the buyer to dictate the rules when closing a deal. This high value-added knowledge received from the contracted country can be taken to the technology parks of the contracting country and naturally be added to other projects of the national industry, already developed in the native soil. In addition to earning internal gains for the nation and the entire population, it also creates the opportunity for external projection on the international scene, as a competitive country in the area of cutting-edge technology.

The hypothesis raised in view of the problem in question was, is there specific legislation designed to monitor the compensation clauses throughout the Offset project? The Brazilian State needs to be more incisive when it comes to reformulating, modifying and even creating laws that guide this type of negotiation, in order to provide the full clearance of issues related to internal legislation, sometimes in conflict with external interests, which make matters related to high value-added contracts too unviable. The path taken so far has been commendable, but additional efforts are needed to ensure Brazil's success in international relations, at the speed the world demands.

The contractual or obligatory institute, often called international composition of offset, tends to be generically translated as complement or reimbursement, however in a more technical way defined by scholars, it is usually composed to report arrangements in commercial transactions of intensive goods in certain capital and knowledge. . The concept of Offset is a result of the economic sciences and is a condition of the species in counterparts that, according to

UNCITRAL - United Nations Commission on International Trade Law: *United Nations Commission on International Trade Law* are agreements in which one of the parties provides the other with goods, services and rights and, in the opposite direction, contracts with the latter to provide goods, services or rights. Taking this context, the Offset institute would be a component, or a negotiator or a good that counterbalances the combination or through an agreement resulting from any and all nature.

The General Objective of this work is to identify the historical retrospect of the evolution of Brazilian legislation in relation to Offset in the international scope, and to glimpse how far it has managed to evolve. Barbosa and Yang (2000. p.53) agree that the result of Offset contracts demanded from the end of the Second World War together with the elaboration of agreements for the coproduction of war material, mainly through the United States and the allied forces. According to Modesti (2004, p.25), these powers met at the Conference called *Bretton Woods* , held in New Hampshire, United States, in 1944, with the aim of guaranteeing economic resources and the legitimate outline that would enable the restoration of world order for the postwar period. At this conference, the World Bank - World Bank, the International Monetary Fund - IMF and the instrument called Offset were debated and created, which made it possible to regulate the combination made between supply and demand in counterparts, with the United States and other countries , explaining some form of compensation that benefits key sectors of the most affected areas in that period.

From the Offset contract, there was the possibility of full or partial insertion, in the importing country, of military resources mainly, due to the generalized environment in the post-war period and the fear of the future, the great exporting powers of war technology by the United States, which minimized responsibility for the costs of acquiring these artifacts, and made value transfers more attractive to the Governments of those manufacturing powers. Given the circumstances, which it is worth remembering, the United States created, the practice was a way for the United States to act on the initiative and take advantage of its importance over the countries of the West and precisely to add its geopolitical strategic authority ahead of the countries of Eastern Europe, led by the then Union of Soviet Socialist Republics – USSR (Strizzi & Kindra , 1998, p.9).

The Specific Objectives of this work are: Insert the reader into the historical advent that gave rise to the creation of the Offset Contract; how the contract originated and was used within the national territory and contemporaneously in a customary way it has been adapting. Analyze the consequences that form the characteristics of Brazilian legislation, highlighting the scarcity of adequate instruments in relation to the subject under investigation, analyzing the dynamics of each contract, since it is due to the peculiarities that form the Offset contract and as an effective instrument for the event of negotiations with other regions of the globe,

Offsets are commercial practices with broad and varied objectives, described in the *legal guide* (1993. p.2) as being compensations that normally involve the supply of high value products or high technological sophistication, including the transfer of technology and know-how -how, as well as promoting investments and facilitating access to a given market. With regard to the material and procedural object, Offset agreements are generally formalized apart from the main agreement to which they are accessories and which is called, in abstract, the main agreement.

Despite being often entered into as autonomous contractual instruments, Offsets have the main contract as a condition of existence, without which the compensation obligations would be extinct. (Oliveira, 2005, p.6, Vieira & Álvares, 2019, p.129).

The subject is important, as Brazil still does not have a clear policy guideline for the use of agreements involving compensation in relation to the international community. In this sense, it is up to the Brazilian State to adapt its existing laws, which need to be revamped, to better regulate and reduce bureaucracy in the process of negotiation and acquisition of knowledge in favor of the joint development of all areas that involve technology in the country, in synergy with all the nations that participate in business involving practices with some kind of technological compensation. The need arises to promote the industrial development of the country with a convenient policy, at the governmental level, and a greater awareness of the Brazilian export sector of goods and services, in relation to the competitive advantages that the concession of Offset, through cooperation modalities international industry, may bring in terms of access to markets, technologies and capital.

The compensation measure consists of an additional benefit that the Public Administration requires as a requirement for hiring. If the bidder refuses to comply with the compensation measure, the proposal will be disqualified. Likewise, if, during the execution of the contract, failure to comply with the compensation measures constitutes default of the contract, it is up to the Administration to adopt the appropriate measures (Garcia, 2018, p.117).

To insert the State in this context, it is necessary to have a better understanding of the importance of the theme and its scope with all layers of society. The final objective of this work will be to identify which are the main obstacles of the National legislation that impact the effective participation of Brazil in the world scenario of compensation agreements with Offset.

For the elaboration of this article, the type of research used was the descriptive bibliographical one, having as a research method the treatment of qualitative data of a secondary nature, using as a research instrument books, doctrine and jurisprudence, articles and theses defended from the keywords: Tax law; International right; Contracts; International Contracts and Offset. Being made the analysis regarding the historical point of view of contracts in Offset; where the term originates from; the definition of legislation that establishes strategies and actions that converge with the interests of the State, with the productive system, with Academia and all related sectors, thus extending its effects throughout society; How Brazilian legislation covers Offset agreements in international contracts with technology transfer; Identify the main obstacles in Brazilian legislation that impact Brazil's effective participation in the world scenario of Offset compensation agreements, and investigate the need for Brazil to engage in the creation of more specific laws to systematically regulate businesses with counterparts in Offset contracts.

This literature review research has an estimated time of five months. In the first and second month, a survey of the theoretical framework was carried out; in the third and fourth month, the literature review; in the fifth month, the elaboration of the pre -textual and post-textual elements that make up the entire work.

As stated by Gonçalves (2019a), the literature review consists of the perspective of bringing public bibliographic data as an instrument of reflection on a subject that is intended to be debated or dialogued. A qualitative research treats the

collected information with analysis of all the nuances allowed therein (Gonçalves, 2019b).

Offset contracts: in international contracts and the barriers of Brazilian legislation in the bidding process

Due to actual events, the globe would be fragmented into two blocks with the end of the Second World War: the capitalist grouping led by the USA and the socialist grouping, led by the USSR. Opening season of the so-called Cold War, an unspoken combat between the superpowers, which began to resort to outbreaks of agitation spread across the globe to add their respective spheres of importance to the geopolitical scenario (Squeff , 2014, p.2; Corrêa, 2005 , p.11).

In view of this panel, for Barbosa and Yang (2000. p.53), the historical inspection of operations with the Offset Contract reveals that these businesses contributed not only to the consolidation of American hegemony, but also to the reconstruction of the fragile European and in turn, the Europeans faced the Japanese in the 1950s. Consequently, as the export markets for equipment produced in North American industrial centers expanded , across co-production agreements, the unit costs of weapons purchased were reduced even by the army of that country.

Based on the understanding of Modesti (2004. p.27), with the development of negotiations along with the Offset or negotiations with counterpart, in the middle of that same decade, the administration of the United States approved the *Defense Production Act* , whose purpose was to inspect requests arising from the export of defense materials. As there was a notable expansion of these agreements in the 1960s, the American Department of Defense - DoD , was responsible for more rigorous inspection of Offset orders in the context of military purchases, due to the growing requests for technological knowledge from US export companies. To get a logistical sense, over the period 1947 to 1980, 44 weapons systems were produced by twenty countries under manufacturing concessions granted by US manufacturers. Of these, 28 corresponded to aircraft, missiles and rotors. Until the mid-1970s, the co-production agreements demanded never provided for the transfer of information about the total programming of these systems. In most cases, understandings were limited to the simple assembly, in importing countries, of packages of components manufactured in the United States (Ferreira & Ferreira, 2014, p.1524; Ferraro , 2009, p.281) .

As a result, co-participation agreements began to envisage the local manufacture of parts and subsystems to be incorporated into the acquired result. As a result, these agreements vigorously boosted the productive predisposition of the allied countries and, from the 1970s onwards, European and Japanese companies, dissatisfied with the level of delegation of knowledge provided by licensed assembly schemes, began to express their willingness to acquire a dynamic obligation in the ongoing creation and development of systems (Garcia, 2018, p.126).

Barbosa and Yang (2000, p.54) state that from then on, the Offset Agreements began to gradually change the co-production agreements, that is, joint manufacturing, typical of the adjacent post-war period. According to Taborda (2001 p.7), military material became more valuable and more sophisticated as a result of the opening of that same decade, making it difficult to obtain manufacturing licenses and limiting the number of entities capable of fully producing them. During the course, it was in the interest of importing countries to demonstrate to their

taxpayers that there were forms of reimbursement associated with the waste of large amounts of public funds, both in final products and in technology.

The new concept of agreements started to introduce growth activities and jointly manufactures under the concession, in the importing country, of acquired systems. At the same time, the practice of Offset spread to other industrial sectors, although together linked to schemes with more restricted intent than those applied in the military domain.

Modesti (2004, p.27) cites the eventuality of an excess demand for negotiations with Offset in the 70s and 80s, in such a way in the civil scope, as in the military, that he made with the American Department of Defense - DoD , to elaborate a chain of measures to stimulate assistance in the field of defense together with the North Atlantic Treaty Organization - NATO , as a way of moderating the wave of Counterparty Agreements, reducing the range of possibilities of the international congregation, with considerations of *Rationalization , Standardization & Interoperability* - RSI. Ancelmo Modesti finally clarifies that the DoD negotiated the *Memoranda of understanding* – MOU, with NATO countries and other allies, including Brazil, as another way to block or exclude Offset requests with the United States.

Taborda (2001, p.9) emphasizes that in 1972, only 15 countries required counterpart trades, corresponding especially to nations with concentrated planning economies. By joining countries from Central and South America, this number is increased to 27 in 1979. In 1983, the list included 67 countries.

Despite the idea being streamlined and interpreted by scholars and doctrinaires who agree with a certain political idea or form of government, often, according to deals signed with or between underdeveloped countries, Hennart (1990, p.243) presented data at the beginning of the 90s where, among the 444 agreements it identified, 313 involved developed countries and only 13 of them, developing countries. This inclination is reinforced through the consolidation records verified in the defense and aeronautics industry, which clarifies, nowadays, the practice of business with counterparts in large acquisitions of civil or military scope.

However, today, factors arising from the scarcity of currency and access to essential goods such as oil and food products, have led many countries to appeal to counterpart agreements, especially in their form of direct exchange. This is the case, by reference, of Russia where, proportionally to data published through the Russian State Statistics Committee, direct trade represented 11.5% of the country's representative exports in 1993, compared to 8.3% in the previous year. Strizzi and Kindra (1998, p.29) defend the specific case of deals signed with the Asia/Pacific region, as this type of tool is observed as an instrument that tends to accept greater importance in situations of exchange rate decline and increase of a country's debt level.

From the perspective of business strategies, Dana and Oldfield (1999, p.291) verify an expansion in the use of countervailing procedures. This approximation aims not only to overcome barriers such as those resulting from the lack of financial resources or those arising from convertible currency, but also to combine the exploration of activities of profitable operational and strategic interest, such as the expansion of sales, introduction of new markets, propagation of new products and services and gain graduation savings.

An Offset Agreement may encompass elements of either direct or indirect compensation practices. There are three types arising from contractual arrangements demanded from Offset; Direct Offset: if part of compensatory transactions involving goods and services exactly related together with the purpose of the obligation to import military and/or civil goods and services; Indirect Offset: if part of a transaction that involves, by archetype, compensation in the aerospace area, but not directly related to the object of the contract. An enterprise that, in exchange for the acquisition of its products, agrees to displace science and know-how how from other related areas to the importing country; Unrelated offset: compensatory transactions involving goods resulting from services unrelated to the purpose of the contract. This distribution was created by the then Ministry of Aeronautics, which concerns other areas of the economy, different from the aerospace sector, while an enterprise agrees to involve soy, for example, in return for a contract for the acquisition of aerospace products (Oliveira, 2005).

For Modesti (2004, p.28), the central characteristic arising from the practice of Offset to be subdivided in the 1990s, Governments have sought to arrange increasingly complex compensations, in a mixture of Direct, Indirect and Unrelated Offset. Among other factors linked to this trend is the acceptance of internal needs for compliance with national policies, specific to each country, as well as the inference of increased competition, not only between the US and the European Union, but also convenient for the emergence of new countries on the scene, in addition to the large mergers and incorporations of industries in the field of defense and research

More and more countries incorporate the compensatory practices resulting from the negotiations with the intention of obtaining knowledge, training and improvement, investments in science and technology, demanded by the strategic areas of each country. The US Department of Commerce, in an annual report to Congress, documents that between 1993 and 1999 US companies signed 32 new agreements with 10 different countries, for a total value of US$1.45 billion, representing 72% of the total value of export contracts, of US$2.01 billion. In the period 1993-1999, 307 Offset agreements were documented with 34 countries, involving export contracts worth US$ 40.2 billion; with values of US$22.3 billion in Offset agreements signed, 55% of the value of the export contract (Modesti , 2004, p.28).

The beginning of the 1950s triggered in Brazil what can be considered the first negotiation in Offset, in the form of *Barter* or simply exchange in Portuguese, when the Brazilian Air Force acquired from England, *Gloster Meteor* TF-7 and F-8 planes, and provided an equal amount of cotton in return. In the early 1970s, operations with Offset had their perspective expanded through the then Ministry of Aeronautics, across the Aerospace Technical Center - CTA, for the acquisition of knowledge aimed at the country, together with the objectives of national manufacturing of parts and components (Corrêa , 2005, p.16).

In 1974, the Ministry of Aeronautics acquired model F-5E fighter planes from the American company *Northrop* , where the production and assembly of aircraft parts by Embraer was negotiated. a great scientific technological leap and the eventuality of leading to the technological siege associated with high segment aircraft (Garcia, 2018, p.161).

Another representation of a contract in Offset, but already in National territory, occurred when the Ministry of Aeronautics negotiated and made the

counterpart of 41 aircraft of the Xingu model to the French Air Force in order to obtain the Thomson company's radar systems, which would then integrate the Defense Center Air and Air Traffic Control – CINDACTA I, located in the federal capital, in the 1990s. (Oliveira, 2005. p.21).

From the outset, a close imminence through the negotiation tool and the Brazilian aeronautics starting from the post-war period. The Air Force, represented until 1999 by the then Ministry of the Air Force and today through the Air Force Command – subject to the Ministry of Defense - MD, has stifled a large addition of budgetary resources in the growth of the large areas of representation. These areas, as a whole, constitute the so-called Brazilian Aerospace Power and are also called: Civil Aviation; Scientific-Technological Complex; Brazilian Air Force - FAB; Aerospace Infrastructure; and Aerospace Industry. The results of each of the referred components of the Brazilian aerospace power did not demand enough capacity to favor the complete reception of the technological needs of the inherent country. It is only today that the need to import products and components stands out, which, in addition to deliberating the introduction of foreign currency abroad, deeply encouraged research, development and strengthening of the domestic industrial park and its suppliers (Modesti , 2004 , p .30).

In accordance with the guidelines and case law, a Contract within the administrative scope, and in correspondence with Law 8666 of 1993, any and all adjustments formalized through the agreement of wills of the organs or entities of the Public Administration and to individuals, through which binds for composition of connection and stipulation of reciprocal obligations. Contracts are governed by the respective clauses, by the rules of the Bidding Law and by the precepts of public law, since in the absence of provisions, it will be governed by the principles of the general theory of contracts and by the provisions of private law. After completing the bidding process or the waiver or waiver of bidding procedures, the Administration will adopt the necessary measures to enter into the corresponding contract (Vieira, Leonel & Aranha, 2019, p.11).

According to Tartuce (2014, p.38), in a classic or modern view, the contract can be conceptualized as a bilateral or plurilateral legal transaction that aims at the creation, modification or extinction of rights and duties with patrimonial content. This classic concept is very close to that of the Italian Civil Code which, in its article 1.321, in free translation stipulates that: the contract is an agreement of two or more parties, to constitute, regulate or extinguish between them a patrimonial legal relationship.

Technology is based on an ordered set of knowledge and information. It is a good that will potentially be subject to rights and obligations, which will be subject to legal protection. Such protection will be conferred as long as there is a legitimate interest, moral or economic, in the preservation, in the exclusive use or not, in the exclusive disclosure or not of such information.

In contracts with technological compensation there is a concession from one party to the other to use a patent or to have access to protected technological information (know-how). In these legal transactions, the value is represented by the royalties that the assignee undertakes to pay (Venosa, 2006, p.544).

In the modalities of this type of contract, despite the different purposes, there are some clauses in common: the nature of the assignment or the information to be accessed; determinations on obligations of the assignor and assignee; method of payment of royalties; indication of fiscal responsibility regarding the taxes that

burden the business; duration; the temporal nature of the assignment; designation of the competent court or arbitral tribunal. Furthermore, the new Industrial Property Law, Law 9.279/96, determines that contracts involving technology transfer must be registered with the National Institute of Intellectual Property – INPI (Oliveira, 2005. p.36)

Thus, according to the INPI, technology transfer is allowed when: a) the technology does not exist in the country; b) import in order to increase the production capacity of the receiving country; c) the supplier is responsible for the technology; d) there is absorption or autonomy of the receiver; e) that the good transmitted is of an immaterial nature. The license agreement and know-how are the main ones to meet such demands (Venosa, 2006, p.545).

Silvio Venosa (2018, p.595) clarifies that the expression license agreements is the synthesis of license agreements for the use of invention patents, models and the like. This is one of the types of technology transfer contracts and stands out because the licensor or licensor authorizes the licensee to commercially use a patent without transferring ownership, pursuant to art. 61 of Law 9.279/96. The license may involve the entire field of the patent, or be restricted to part of that patent. The licensor will not be responsible for the production or sale of licensed inputs or services, but the licensee may respond to the licensor for misuse of the invention patent assignment, causing damage to the credibility and image of the product or service.

Know-how is a term from the English language, to abbreviate from *know how to do it* , and translates as: how to know how to do something. The objective of this type of contract is to provide information, the result of studies and investigations, for the use of technical knowledge indispensable for obtaining inputs or services. By means of this contract, one party, the transferor, undertakes to provide the transferee with access to a certain type of protected information, which must be kept secret after the transfer, unless there is a contractual provision to the contrary. Otherwise, if the information is already patented, the protection is *ex lege* , by law, according to the law and its undue disclosure will incur a crime. In the case of non-patented information, compensation will only be for damages (Venosa, 2018, p.575).

The State holds legal instruments that act positively in the economic market, acting as a scale in economic relations. When present during contracting, offsets are used in greater numbers and more effectively. In general, Offset policies are applied in the public-private area and basically pursue two objectives (Vieira, Leonel & Aranha, 2019, p.323).

The first objective is related to the acquisition process of certain products with high added value, where the State – as a purchasing entity, demands from the supplier compensation capable of reducing the financial cost, at the same time that it acts for the benefit of the economy itself. , by encouraging research and development.

The second objective is the possibility of Offsets being required by the obligation to access a certain market. For example, through Indirect Offset, an aircraft manufacturer, owner of state-of-the-art technology, offers, as compensation for the purchase of its products, the implementation of an assembly line in the consumer country. In this way, the technology supplier accesses a market in that region and, in turn, stimulated the economy of that particular region.

The adoption of these Offset mechanisms is presented as a public policy resource for the economic development of the State that requires them, maintains the balance of trade, import and export balances, economic, technological and industrial development, causes the attraction of investments , personnel training, obtaining lines of financing and the growth of specific sectors of the economy. The effectiveness of the Offset, however, is quite complex and can last for years in a transaction, and, primarily, the receiving country must be prepared to receive the negotiated technologies (Vieira, Leonel & Aranha, 2019, p.326).

Economically developed countries see Offset as an excellent opportunity to leverage even more the internal economy and technological progress, with the examination of certain technological areas that, acting alone, would be extremely costly in terms of human, time and financial resources for the production of sensitive knowledge. It is also observed over time that the Offset mechanism allows a better economic use of military acquisitions, as it refers to strategic matters, often very expensive and that do not directly provide any economic return for the acquirer. The technology used in the production of military equipment is top-notch, and in this area technologies are developed that are widely used by the civil industrial sector. In this sense, it is noticeable that the emphasis of Offset policies is restricted to the military area (Flores, 2003, p.66).

In the United States, historically, offsets served important foreign and security policy objectives, such as increasing the industrial potential of allied countries, standardizing military equipment and modernizing allied forces. However, due to the absorption of knowledge by these countries, with the consequent local industrial development in the manufacture of high technology products and added value, competition for the Americans inevitably arose. Currently, in a drastic change of position, the USA allows a much more restricted practice of Offset (Miranda, 2005, p.22).

It is observed, in turn, that although the US understands Offset as harmful on the one hand, they consider it important and current, valuing one of the advantageous aspects, which is the prospecting of new markets. On the other hand, when the tool is used in favor of others, they avoid the practice, as exposed in the final conclusions of the report prepared by the Strategic Analysis Division of the US Department of Commerce (Strizzi & Kindra , 1998 , p.29) .

Japan demonstrates increased demand in terms of Offset contracts with foreign suppliers, after the Japanese government chose to occupy its local industry with the manufacture of aircraft designed abroad. This country has signaled that it intends to increase trade in business on the other hand to reinforce the developed capacity in technology of Japanese industry, both in the military and in the civil environment, with a policy enshrined in law, which establishes ex lege *obligations for* partners suppliers, as well as minimum parameters for using the institute (Vieira, Leonel & Aranha, 2019, p.326).

England has also benefited from the Offset, as it has its own policy, according to the US Department of Commerce (2001. p.40.), allocations to technology transfer compensation, called Industrial Participation , in which it is determined *that any* acquisition from 10 million pounds onwards, 100% compensation is compulsory, directly or indirectly, without distinction. Together with the US, they use Offset both to prospect new markets and to boost the local economy. Russia has a strong Offset policy focused on the two core objectives of the counterparts. As for the objective of conquering new markets, the Russian government welcomes the *buyback* , in which

the original exporter accepts payment in the form of products derived from the initial export (Flores, 2003).

The year 2012 made Brazil take as one of the fundamental axes of its National Defense Strategy - END, arising from Law No. 12,598, which establishes mechanisms to stimulate Brazilian industry in the field of defense. Elaborated through the Ministry of Defense, together with the support of other administrative bodies, the law is an offshoot of the Plano Brasil Maior, bringing to the national territory what stems from a technological race. Law No. 12,598/2012 is a real milestone in the way the country treats the duty of the defense industry. In addition to establishing an exclusive taxation regime for the area, relieving companies of various charges, the law reduces the manufacturing expenditure of companies legally classified as strategic and establishes incentives for the growth of technologies that are indispensable to Brazil.

As a result of the legislation and due incentives, the Ministry of Defense added, in 2013, 26 companies and 26 strategic defense products, which began to define fiscal and tax benefits that will allow the production chain to be released by up to 18%, making them more competitive in domestic and foreign markets. Decree 7970/2013, which regulates provisions of Law 12598/2012, already allows the accreditation of Strategic Defense Companies - EED, homologates the so-called Strategic Defense Products - PED, and maps the domain's production chains. The decree stipulates the aspect of the companies that will be able to subsist accredited in the exclusive statute, according to those that supply equipment for the Ministry of Defense and the armed forces.

Companies that are starting their activity and that do not qualify as potential suppliers due to revenue or billing may also qualify for the program , provided they assume the obligation to reach the minimum percentages established in the Decree. Among the planned benefits is the discontinuation of taxes for the Social Integration platform and the composition of PIS Public Servant Assets. Pasep.e of tribute for the Social Security subsidy - Cofins , in the event of alienation to the domestic market (Miranda, 2005, p.29).

Technology transfer contracts are *intuitu personae legal transactions* that comprise certain categories of typical and atypical contracts, which can be entered into separately, but are usually linked or conjugated. The technology transfer contract can be defined as the one through which a granting company transmits to an acquiring company the property rights over legally protected intangible assets, by imposing certain limits on their exercise (Assafim , 2011) .

Due to the different legal protection of patents, technology transfer contracts can be categorized into: a) contracts for technological goods protected by exclusive rights, involving, for example, licensing or transfer of patents or trademarks. b) contracts for intangible assets not protected by exclusive rights, such as franchising, know-how and technical assistance. The transfer of know-how, then, has a more restricted object than the transfer of technology. (Rossi, 2015. p.107; Venosa , 2018, p.575).

The dichotomy between contracts with or without exclusive rights, however, is not enough to solve practical problems, since even contracts with exclusive rights, as in the case of patent licensing, involve some level of technical assistance, eventually with transmission of industrial secrets. It is a current strategy in the business world to associate means of appropriating intellectual property, so that high technology transfer contracts would hardly be enough to transfer the ability to

produce what one wants with the transfer of technology. In this sense, the flow of know-how is much more important than that of patented technology (Barbosa, 2003. p.32; Miranda, 2005, p.45).

There is no consensus on the legal nature of know-how transfer contracts. Know-how transfer is not a typical contract under Brazilian law. This fact creates some difficulties for the resolution of practical issues involving technology transfer contracts. Brazilian contractual practice, however, ended up using the term know-how licensing, including the payment of royalties. There is some discussion in the doctrinal scope about the nature of know-how transfer contracts (Fekete , 2003, p.39)

According to the understanding of Prado (1997, p.81) presents the following relevant issues in the international technology transfer contract: a) object of the contract, the technology and its transfer and exploitation; b) exclusivity; c) the most favored license; d) remuneration; e) confidentiality; f) the initial term; g) termination and h) applicable law. The first issue related to the object of the contract is the definition or transitoriness of the right to exploit the technology. When dealing with patent licensing, it is simple to understand provisions of this type, since there is an exclusivity right over knowledge, albeit temporary. When there is no transfer of ownership, at the end of the license, the good is returned to the owner, that is, the licensee is obliged to cease the exploitation of the invention. Although ownership is not a sufficient basis to describe the legal relationship that the holder of the secret has with its content, there is no greater difficulty in understanding that the commitment not to exploit a technology is valid, based on private autonomy.

The second question concerns the description of the technology, its technical and economic peculiarities, patents, material support for the technology and eventually the activity or technical domain to which it applies. The description, the range of items is wide and includes process designs, structural calculations, mass or heat balances, equipment detailing, flowcharts, blueprints, patents, *know -how how* , engineering data, layouts, models, technical standards (Rossi, 2015)

The third issue concerns the ownership of the technical improvements eventually developed by the licensee. Attention should be paid to the fact that Law 9.279/96 - Industrial Property Law, art. 63, provides for the appropriation of technical improvement by the licensee, assuring the licensor the right of preference in its acquisition. There is, however, no precedent on the issue.

In technology transfer, according to Prado (1997, p.86), two models are adopted in contracts: a) obligation of *due means diligence clause* – the parties discriminate information of a confidential nature about the technology to be developed, and the contractor discriminates information about its technical and commercial capabilities, which leads to the conclusion of a non-disclosure *confidentiality agreement agreement ; b) performance clause* result obligation – the parties agree precisely on the results to be obtained with the technological research, and the contractor guarantees the result, without the need for prior information about the technology itself – *black box agreement .* In practice, the two models are often combined.

In technology transfer, it is likely that the model of obligations of means is the most common, since the technology that will be developed is not known, nor is there a realistic estimate of the risks and costs of the process. In any case, the contractual arrangement is possible and can be used as a basis for research (Prado, 1997).

In exploring technology, the first aspect is that of the territory, the geographical delimitation and the receiver's performance outside of it. This type of clause is common, but competition issues can arise. A second aspect concerns sublicensing, a situation that can be considered mutually advantageous, especially if there is no more efficient way to exploit the technology. As it is an *intuitu personae contract* , sublicensing requires a contractual provision. This obligation finds an economic basis in the value of secrecy proportional to its scarcity as information (Rossi, 2015, p.128).

The situation of efficient exploitation may still motivate minimal exploitation, in the form of minimal manufacturing or marketing. Another relevant issue is technical assistance, understood, in this context, as the service provided by the transferor to the recipient, in the execution stage of technology transfer contracts, transmission of information and technical experiences of public knowledge, when not protected by patents or qualified as know-how (Prado, 1997, p.111).

The purpose of technical assistance is to facilitate the exploitation of technology, through the information necessary for its efficient exploitation. As for the other clauses, exclusivity generally serves the interests of the recipient, as it gives it more power over direct competitors. Exclusivity may encompass not only non-licensing to third parties in the receiver's territory, but also non-exploitation of technology by the transferor itself. As competition problems may also arise in this regard, such clauses must be carefully evaluated.

In contract negotiation, non-compliance with performance clauses, such as minimum exploitation, may, for example, cause the recipient to lose exclusivity. The most favored license clause is analogous to the most favored nation clause, and establishes that it is extendable to the recipient, in case the transferor licenses the technology to third parties under better conditions than those originally negotiated, the conditions agreed with the third party (Rossi, 2015 , p.102).

Economically, this fee contributes to a finer adjustment of the value of the technology, which decreases over time and, to a certain extent, is difficult to assess. Some difficulties may arise from this clause, however, as the assessment of the advantage is not subject to category-by-category valuation as a royalty or term value, but globally. The scope of the clause may be limited to certain situations, such as the price of raw materials, for example. Another important aspect concerns the beginning of the most favorable condition. To reduce the risks, the contract can stipulate a precise moment, such as the moment when the third party starts using the technology (Prado, 1997, p.111).

With regard to royalties, the criteria for their determination are generally: a) a percentage of the net or gross sales revenue of goods produced from the transferred technology; b) a fixed amount per unit sold; c) a fixed amount per unit produced or d) a percentage of the profit obtained. The complexity of determining royalties and the forms of inspection by the other party must be taken into account by the parties, as they represent transaction costs. Foreign jurisprudence generally invalidates royalty payment clauses beyond the term of validity of patents (Landes & Posner , 2003, p.13).

There are authors who criticize decisions of this nature, since, at least in theory, the extension of the royalty payment period can be interpreted, as long as it is for a specified period, as a dilution of the consideration over a longer period of time, a factor that can be estimated by the parties and that economically justifies the

clause. Its annulment, in this sense, causes a contractual imbalance that the judge should preserve.

Contracts usually have signature as their initial term, but administrative controls over the transfer of technology may represent a risk when registration or another measure is provided for by law as a condition for the validity or effectiveness of the contract. It is prudent, in these cases, to provide for a suspensive condition, which will serve to equate the risks of state intervention (ROSSI, 2015, p.102).

In Brazil, the registration of technology transfer contracts is not mandatory, but this provision is necessary to produce effects before third parties, according to the Industrial Property Law, art. 211. The registration is carried out under the authority of the National Institute of Industrial Property – INPI and has the additional function of legitimizing remittances abroad and allowing the deduction of income tax in compliance with the norms provided for in specific legislation, especially Law 4,131/62 and Law 8,383 /91 (Taborda, 2001 p.14).

As for the termination of the contract, although it is possible to foresee a contract without a fixed term, the structure of intellectual property does not favor this result. The limited patent term and the depreciation of technological information favor shorter horizons. The extinction of the obligation to remunerate the patent upon its expiration finds a parallel in the extinction when the know-how is in the public domain. Possible controversies regarding the final term can be avoided by clauses that incorporate these rules. The early termination of the contract is usually due to default (Tartuce , 2014, p.38).

Clauses that are also common are those that deal with the responsibility of the transferor to ensure its ownership of patents and the legitimacy of the know-how it holds, and for expenses involving the judicial defense of intellectual property. In the Brazilian case, in this regard, arbitration has restricted application. Some specific laws authorize the application of arbitration in contracts drawn up with the Government, in the case of public-private partnerships Art. 11, Law 11.709/04 and in the concession of public services Art. 23-A, Law 8.987/05. (Rossi, 2015, p.104).

Contracts entered into by the Public Administration with individuals or legal entities, including those domiciled abroad, must necessarily contain a clause declaring that the jurisdiction of the seat of the Administration is competent to resolve any contractual issue, except for the provisions of § 6 of art. 32 of Law 8.666/93 (Tartuce , 2014, p.41).

This device has been interpreted by the TCU as generally impeding the arbitration clause by forcing the option for the forum, that is, for the action proposed before the judge. As there is no generic permission on the part of the Arbitration Law Law 9.307/96, this device remains applicable. Exception is made in the case of government-controlled company in which it does not exercise exorbitant powers, that is, restrictively interpreting the term Public Administration, as in MS 11.308 STJ, 2008. (Venosa, 2018, p.601).

The main economic characteristic of the defense sector, which is competitive in nature, is the political-structural arrangement, in which the buyer is, as a rule, the State itself, personified by its Armed Forces or public security institutions, when applicable to the case. Otherwise, the political characteristic of such contracts is evidenced by the power projection of the nation that produces the defense systems on the international stage (Vieira, 2017, p.110).

Thus, the Brazilian State is faced with an issue of extreme relevance for supporting acquisition processes of interest to national defense, which are becoming more demanding and sophisticated every day. Such requirements are not limited to the technological nature of the desired products, but are also legal/procedural, bearing in mind the very complex nature of the intended acquisitions, commonly inserted in large-scale projects (Prado, 1997, p.114; Coelho, 2012, p.13).

Despite the detailing of sectorial public policies that seek to converge technological development and national defense, through contracting processes, these policies have little effectiveness in their regulation, which is mainly justified by the lack of a legal framework that deals with the matter with the proper specificity. The contractual modeling carried out in cases of object endowed with technological complexity in the interest of national defense privileges the realization of a public call, in the form of a Public Notice, aiming at providing broad transparency, in compliance with legal and constitutional precepts. This public call, published in an official news agency, seeks to provide a wide range of participation to those interested in the event. The purpose of this measure is to ask the market for technical and financial information that will better support decision-making about the technical and operational requirements that will make up the object of the contract. This reasoning reflects an internationally recognized contractual methodology widely accepted by the defense industry (Trybus , 2014, p.37).

By carrying out the procedure described above, the Public Administration's intention is to comply with the legal command enshrined in art. 26, sole paragraph, inc. III of the Bidding Law, which is to provide full transparency to the justification of the price. In the specific case of hiring in the defense area, the methodology used when carrying out the aforementioned call is composed of a request for information aimed at subsidizing the composition of the estimated budget schedule and the preparation of the invitation to tender, particularly the requirements of a technical nature. The request for information, although the form of bidding being through the public notice modality, this does not have the ability to bind the Public Administration, as it is a preambular measure to the administrative decision-making of whether or not to carry out the alleged contracting (Squeff , 2014 , p.9; Markowsk & Hall, 1998, p.37).

The next stage starts from the data collected in the answers presented by the companies. Once these are in possession, a proposal or offer request is made, which opens the external phase of the bidding process. Consequently, the supplier is chosen based on the most advantageous proposal for the Administration. Proposals are analyzed in accordance with the established technical criteria and are included in the opinion issued by a commission specially designated to carry out the selection, which confers isonomy and transparency to the process of choosing the supplier, thus providing the necessary legitimacy and relevant legal certainty to this contract negotiation phase (Sousa, 2009. p.17).

In order to attribute the highest possible legitimacy and legality to the alleged result of the contract, the bid requester must substantiate the microsystem of contracting in the interest of defense - Law 12,598 (Brasil, 2012), narrated in the second article, fourth item, by providing that Companies or consortia that simultaneously meet the following requirements may only manifest themselves within the procedure:

> a) To present in the Country the center, of its management and the industrial institution, equivalent to industrial or work provider;
> b) prepare, in the country, proven technological and scientific competence appropriate or complemented by agreed references, proven by a society with a technological and scientific foundation;
> c) certify, based on its constitutive acts or in the acts of its manifested or represented controlling manager, that the block of partners or shareholders and groups of foreign partners or shareholders can never cast in each universal congress the number of votes superior to two thirds of the totality of votes that may remain, exercised by the present shareholders of local nationality;
> d) certify productive perpetuity in the country. It is, consequently, the use resulting from the acquisition authority of the state administration to probe and convince, in the market, an action aligned with the promotional logic of the constitutionally adopted sectoral policy.

It is thus verified that the choice of the best proposal is the result of a multifaceted set of technical, economic and legal elements. In such procedures, the designated committee must carry out strict scrutiny of suppliers and bids in order to ensure the most suitable choice for the contracting Administration. This is because, in procurement processes of this size and specificity, defense technologies, there are numerous cases of proposals that privilege certain technical aspects to the detriment of others, in view of the convenience that bidders are free to present proposals with original technological content (Squeff , 2014, p.14).

Management is not limited to electing one of the proposals presented, it must choose and contract the most complete one to be executed by the supplier that proves to be the most technically able to carry out the choice, carrying out, if it deems necessary, the second round of negotiation of the contract . At this time, the referred commission organizes a reduced list of bidders with the best offers, scored by technical criteria, and negotiates, simultaneously, with a view to achieving the best desired technical condition, at the lowest possible cost. Depending on this technique, the contracting body must adjust the technical and technological and industrial compensation proposals to the public interest. (Prado, 1997, p.134; Gouveia, 2003, p.102).

However, once the incursions on the scope of articles 24, item, XXVIII, and 26 of Law 8.666/1993 have been overcome, the possibility of inserting a contractual clause of total or partial anticipation emerges from contracts of national defense interest and not exclusivity of payment. It is a hypothesis in which, aiming at the development of a solution solely aimed at serving the Public Administration, the contracted company demonstrates the need to acquire inputs to carry out the initial phase of the project, which requires a large expenditure of financial resources (Coelho, 2012, p.29).

The Bidding Law, the main means of the federal system of public procurement, expressly provides, in art. 3, §11, the obligation to incorporate compensation measures into the public contractual logic, through normative, legal or infra-legal provisions of the Federal Public Power. In practice, the compensation institute unequivocally reaches the entire federal sphere, which resizes the parameters of use of the State's purchasing power (Mazzucato, 2014, p.81).

In the case of Brazil, which does not dominate the representative portfolio of technologies, it is expected that such agreements refer to technology transfer and

innovation, preferably targeting dual-use products, that is, those that serve both the military and civilian areas. ; society. In the wake of the legal mandate, the pressing need for normative provisions that strengthen the rationality of compensation agreements, as a legal institute, is better established with the possibilities of standardizing the subject, through a structured discussion for the proposition of legislative matter of the National Policy of Agreements of Compensation PNAC, or National Policy for Commercial Compensation, PNCC. (Gouveia, 2003, p.104).

The National Offsets Compensation Policy, which deals with industrial, technological and commercial compensation in the area of Defense, was launched in the second half of 2017. The document, prepared by Itamaraty and the Ministry of Defense, aims to encourage national industry , through industrial cooperation, since the so-called Offset package is included in all purchase contracts for defense products abroad. It is in this offset package that the buying country is able to negotiate agreements of interest to its industry (Vieira & Álvares, 2017).

On the methodologies for evaluating and effectiveness of technology transfer processes, including legal modeling and institutional articulations, as well as management and control practices, The Federal Court of Auditors TCU, according to the content reported in Judgment 2953/ 2013 in order to establish minimum criteria for selection and insertion of the defense industry in military undertakings involving compensation agreements, without prejudice to the establishment of specific parameters by the Military Commands in each concrete case. In any case, whatever the political-institutional option adopted in the Brazilian State and the respective contractual model, these will not be definitive, since the dynamics imposed by the multiple factors considered in the equation of contracts involving the Offset will require permanent legal-political adaptations (Squeff , 2014).

Final considerations

The theme proposed by the article addressed a delicate topic of the main points, understandings and positions presented by legal practitioners and scholars, offset is not a contemporary practice studied and academically known in Brazil, it is a specific topic arising mainly from the combination of Administrative Law and Tax Law, with regard to the protection area, be it economic or in the military and defense development sector, generating around the theme of the compilation of studies because it is not an area raised by public policies. There must be a restriction on research, development and defense topics, making it impossible to act on the results obtained in general, through research and data collection on the country's development in the case of sensitive data.

Inquiring the proposition of the following research; it is noticeable that the economic superpowers, first world countries, conceive a regulated policy to benefit from the Compensation Agreements, in order to encourage and support in every way the industries of each locality, whether they belong to the state itself, when at a national and own level municipality when in the ambit of local industries, with the exception that they simultaneously suffer the threats arising from these agreements, observing, however, that the Offset is a dynamic one, resulting from the complex characteristics, changing with each new business that presents itself, between people, between the powers consequently, it is difficult to regulate with the possibility of so many variables. For this, a very in-depth, studied and debated insertion of each demand of the dynamics involving the Offset contract is essential.

Governments that believe in the contractual bias of Offset have their own dynamics, intrinsic to their internal policies, focused on the most distinct consequences, research analyzes of a location can take place from the technological deprivation of goals that one wants to achieve arising from the subject of operation, whether for defense and stability, or internal amnesty of the government, as required by the governmental and economic authority, or for the conservation or pursuit of that liquidity that they lack, whether these countries are developed or in the development phase. All this converges to the conjuncture of doubts and uncertainties that surround Offset.

As a result of the clashes, the complexity that Brazil finds in adapting in this context to conduct its governmental events; the reason for understanding merits in negotiations of this aspect, because, if the result of offers have as counterparts demand that they meet their needs, in a different way it requires that the result be properly structured, which in a way will summarize exclusively in costs and losses for the intervening party. The National scenario needs to be incorporated in this purpose, simultaneously through the nations that make use of this structure, taking advantage of the circumstance that the Offset policy precisely as an initial demonstration in the world conjuncture, in terms of its regulation, the cause of collaborating to the structure of the directions that will certainly be emanated to this institute and, from the outset, to promote the National development for other areas of the country around the Offset policies.

Brazil, through the historical context of a peaceful country and framing in a geopolitical context that only has isolated conflicts, but not resulting from compromising its domain and self-determination in the international field, eventually did not prioritize the inquisition of defense and stability in the last two decades . However, essential efforts are made in the search for a superior insertion and projection in the fields of defense, considering that this is one of the best paths for the rise of great technological and economic leaps, the irradiation of the country ahead of the rapid changes that have taken place in contemporary times. geopolitics, it is not only necessary for one branch of the country to be strengthened, but it must prosper as a whole.

It is clear that it is essential to adopt a single language that serves all sectors involved in the context of national growth, in the Offset dispute. By discussing an instrument that precisely does not have as it was pronounced, a standardized regulation developed until the present moment, Brazil should not detract from the circumstances of composing itself as an active member of international policies, in the intervening discussion forums of the matter, arising from the total lack of specialists within the Offset modality internationally and nationally the amount of Brazilian specialists already denounces the aptitude to act in a rigorous way.

In view of the above, this article demonstrates that Brazil has the opportunity to involve the legal, legislative and executive spheres of the country to promote consistent studies and produce laws and efficient mechanisms related to compensation agreements with Offset, together through effective and absolute communication from the administration , armed forces, business sectors, industry unions and universities, since the country faces serious setbacks in bidding procedures with technology transfers in international contracts. In this way, it becomes clear that after adopting specific procedures for the study of Offset at the national level, involving the entire technical-scientific, civil and military community, from the areas of research, development and production, the greater the chances of

becoming make good contracts involving the Offset mechanism, in which decisions can be taken with greater security and in a shorter period of time.

Offset is an instrument of political and strategic action that should not be restricted to the military area, as the dissemination of knowledge involving national companies and universities will certainly contribute to a great technological and industrial leap, both in the military and civilian spheres, and that is urgent for the development and Brazilian projection in the international scenario.

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