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The International Comparative Legal Guide to:  
**Gas Regulation 2009**

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# Brazil

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## 1 Overview of Natural Gas Sector

**1.1 A brief outline of the country's natural gas sector, including a general description of: natural gas reserves; natural gas production including the extent to which production is associated or non-associated natural gas; importation and exportation of natural gas, including liquefied natural gas (LNG) liquefaction and export facilities, and/or receiving and re-gasification facilities ("LNG facilities"); natural gas pipeline transportation and distribution/transmission network; natural gas storage; and commodity sales and trading.**

In Brazil, until 1960, gas was basically considered as an oil by-product derived from its production and was usually discarded, up-front, through the process of flare. However, with the possibility of the importation of natural gas from Bolivia, the market turned its attention to the gas sector. The gas market is divided in energetic usage (in which gas is used as fuel) and non-energetic usage (in which gas is used as a component of the production process). For energetic usage, the most important gases used are the natural gas and the LPG which are used in several economic sectors such as residential, commercial, industrial, transportation and power generation. For non-energetic usage, gas is mostly used as a component of the production process for the petrochemical and fertilizers industry.

Since the creation of the Brazilian oil company, *Petróleo Brasileiro S/A - Petrobras* (1953), the oil and gas industry has been led by one sole vertical industry, which performed its activities in a monopolistic environment supported by law. Petrobras' legal monopoly was lifted by Constitutional Amendment No. 09, of 1995 and Federal Law 9478/97. Federal Law 9478 allowed private parties to explore, produce, import and transport natural gas by means of a concession or an authorisation, as the case may be, granted by the federal government.

The National Petroleum Agency (*Agência Nacional de Petróleo, Gás Natural e Biocombustíveis - ANP*) was created by Federal Law 9478/97 and is the agency in charge of regulating the oil and gas and biofuels industry. The commercialisation of gas is allowed, exclusively, to gas producers and importers, which shall have a license from ANP to operate. Both, producer and importer are entrusted to transport the gas subject to required standards, to the transporters city-gates. While the federal government has power to grant concessions or authorisations, as the case may be, for the production, importation, and transportation, each of the federal states has power to grant concessions for the distribution (i.e., supply to end-customers) of natural gas (article 25, paragraph 2 of the Federal Constitution of 1988).

The distribution of piped gas is defined by Federal Law 9,478/97, as being the "local services of sale of piped gas to the final consumers, which services are rendered by the States on an exclusive basis, directly or by means of concession, in accordance with paragraph 2 of Article 25 of the Brazilian Federal Constitution".

According to ANP, Brazilian total proven reserves are of approximately 275.5 million m<sup>3</sup> and with an estimate total of 370 million m<sup>3</sup> (as updated by the ANP on February 15, 2008), concentrated in the States of Rio de Janeiro, Espírito Santo, São Paulo and Amazonas.

Currently the country has two main systems to transport natural gas: one transporting national gas and the other transporting imported gas from Bolivia, totalising 5,893 km, with a transportation capacity of 76.5 million m<sup>3</sup>/day.

Brazil has three LNG facilities. The first of them was implemented in 2005 at Paulínia, State of São Paulo, and liquefies the natural gas produced at Paulínia and offers to distributors and final consumers without access to the pipelines and access points, especially to the States of São Paulo, Minas Gerais, Goiás (including Brasília) and Paraná, specially providing LPG. The remaining facilities, one at Pecém, State of Ceará, and Guanabara Bay, State of Rio de Janeiro, are re-gasification docking facilities developed to receive imported LNG in replacement to the imported gas from Bolívia. Both facilities have not started operation yet, and PETROBRAS is expecting to perform commissioning tests by the end of the year 2008.

### 1.2 To what extent are the country's energy requirements met using natural gas (including LNG)?

Natural gas currently accounts for 9.3% of the Brazilian energetic matrix. The natural gas already represents 17.35% of the domestic market offer of non-renewable energy sources and 7.2% of the overall energy consumption in Brazil. The import has grown on a 5.6% rate. The use of the natural gas on production activities, such as the re-injection and its consumption for production related activities, has shown a growth of 2.5% and 10.2%, respectively. The flare related to the production activities has presented a small growth of 5.2%. (source: *Empresa de Pesquisas Energéticas - EPE*.)

### 1.3 To what extent are the country's natural gas requirements met through domestic natural gas production?

Approximately 51% of the country's natural gas requirements are met through domestic natural gas production (source: ANP's website).

#### 1.4 To what extent is the country's natural gas production exported (pipeline or LNG)?

Brazilian gas production is not being exported at this time

## 2 Development of Natural Gas

### 2.1 Outline broadly the legal/statutory and organisational framework for the exploration and production ("development") of natural gas reserves including: principal legislation; in whom the State's mineral rights to natural gas are vested; Government authority or authorities responsible for the regulation of natural gas development; and current major initiatives or policies of the Government (if any) in relation to natural gas development.

According to the original text of Article 177 of the Federal Constitution of 1988, the Brazilian Government was prohibited from assigning or granting any type of participation - in kind or in money - in the exploration and production of crude oil and natural gas to any private company. At that time, PETROBRAS, created by Law No. 2,004, of October 3, 1953 ("Law No. 2,004/53"), was the company in charge of performing these activities, on an exclusive basis.

To attract private investors to the Brazilian oil & gas industry, on November 9, 1995, the Brazilian Congress enacted Constitutional Amendment No. 9 ("Amendment No. 9/95"), which amended Article 177, allowing the Brazilian Government to contract private or public companies to perform the activities comprised within the government monopoly in accordance with a law to be enacted.

The enactment of Amendment No. 9/95 was the turning point from which a variety of changes were introduced in the Brazilian oil & gas industry, the most important of which occurred on August 6, 1997, when the Brazilian Congress regulated the aforementioned Amendment No. 9/95, by enacting Law No. 9,478 (also known as the "Petroleum Law").

The Petroleum Law established the Brazilian energy policy, regulated activities related to the oil & gas monopoly, created the National Council for Energy Policy ("CNPE") and ANP. The CNPE is directly subordinated to the President of Brazil and chaired by the Minister of Mines and Energy, whose responsibilities include the advice to the Brazilian President on the national policy for energy. In turn, ANP works in coordination with the Brazilian Ministry of Mines and Energy, whose responsibilities involve regulating and inspecting the Brazilian oil & gas industry.

The Petroleum Law revoked Law No. 2,004/53, which created PETROBRAS. PETROBRAS is now governed by the Petroleum Law (and by its by-laws), which provides that PETROBRAS shall now perform its activities on a free-competition basis, meaning that its position in the oil & gas market shall be levelled to the position of new private investors interested in such market (the only exception to such rule is provided for in Article 42 of the Petroleum Law (Article 42: in case of a tied bid, the concession shall be awarded to PETROBRAS, provided it is not bidding in consortium with other companies)).

The Petroleum Law confirms the Brazilian Government's exclusive rights over crude oil, natural gas and other fluid hydrocarbon materials existing in Brazil, and further states that the activities listed in Article 177 of the Brazilian Constitution, as amended by Amendment No. 9/95, may be carried out - upon concessions or authorisations - by companies incorporated under the Brazilian law, with head-office and administration in Brazil. There is no legal restriction whatsoever as to the nationality of the shareholders of these companies, meaning that foreign companies are free to

establish subsidiaries in Brazil to engage in oil & gas activities.

The Petroleum Law confirms the Brazilian Government's exclusive rights over monopoly over the following activities, listed in Article 177 of the Brazilian Constitution: (i) crude oil, natural gas and other fluid hydrocarbon; (ii) refining of national or foreign oil; (iii) import and export of basic products and derivatives from hereinabove activities; and (iv) maritime transport of crude oil of national origin or derived from basic oil produced in the country, as well as the transportation of crude oil, its derivatives and natural gas from all sources.

As to the natural gas development, Brazil has recently announced the Growth Acceleration Plan (known as the *Plano de Aceleração do Crescimento - PAC*), which aims at implementing government measures to foster and develop infra-structure, energy and social programmes. One of them is the enactment of a Natural Gas Statute, still under discussions at the Brazilian Congress. Such statute aims at regulating, among other things, the transport and storage of the natural gas produced in Brazil.

Furthermore, one of PAC's principal goals is to enable the country to achieve the self-sufficiency on natural gas by the year 2010. As to the ownership of the rights over the natural gas, please refer to question 2.4 below.

### 2.2 How are the State's mineral rights to develop natural gas reserves transferred to investors or companies ("participants") (e.g. license, concession, service contract, contractual rights under Production Sharing agreement?) and what is the legal status of those rights or interests under domestic law?

Companies willing to explore, develop and produce crude oil and natural gas in Brazil must undergo a public bidding process, whose rules are defined in the Petroleum Law, the relevant regulation and the applicable bid invitation.

The bid invitations shall provide for the following information:

- description of the blocks being offered, the estimated exploration period, the investments and the minimum exploratory programmes;
- requirements to be fulfilled by the interested companies and the conditions for their qualification;
- minimum government and land owner takes;
- list of documents required and criteria adopted by ANP to verify the applicant's technical capacity, credibility and good standing;
- express warning that the concessionaire shall be responsible for any indemnity for expropriation or rights of way required for the fulfilment of the concessionaire's obligations under the concession agreement; and
- deadline, place and the time at which ANP will provide the interested companies with the studies and basis that will enable them to tender their bids.

The bidding process usually involves the following steps: (a) delivery of an "expression of interest"; (b) payment of a "participation fee"; (c) receipt of a "data package" containing some seismic data for early evaluation; (d) legal, technical and financial qualification; (e) presentation of bid bonds; (f) tender of bids; (g) awarding of bids; (h) confirmation of the awarding; and (i) execution of the concession agreement.

Once it meets the technical, legal and financial qualification requirements, the bidder may elect to offer bids individually or jointly with other qualified companies, in which case the group of companies must undertake to form a consortium (i.e., a non-incorporated joint-venture) if they are awarded the concession. The

consortium agreement, which governs the consortium, must observe the provisions of Articles 278 and 279 of Law No. 6,404/1976, as amended (the “Corporation Law”), as well as the applicable provisions of the Petroleum Law. Pursuant to the Petroleum Law, consortium members are jointly and severally liable for all obligations set forth under the concession agreement (Article 38, II).

Foreign companies may also qualify for the bidding process. However, if a foreign company is awarded a concession, it must incorporate a Brazilian company, with head-office and administration in Brazil, prior to executing the respective concession agreement.

ANP will select the most advantageous bid according to objective criteria established in the relevant bid invitation, which is subject to the constitutional principles of legality, impersonality, morality, publicity, and equality among the bidders.

The bids are selected pursuant to a computation of points/weights. During the past bidding rounds, the formula used by ANP for such evaluation took into account three (3) factors: (i) highest signature bonus offered; (ii) bidder’s commitment to acquire local goods and services (“Local Content”); and (iii) investment in a minimum exploration programme.

In the rules defined by ANP for Round 10 - similar to those adopted for Rounds 5 through 9 - the weights attributed to each factor are (i) 40% for the signature bonus; (ii) 20% for the Local Content (of which 5% refer to the exploration phase and 15% to the development phase); and (iii) 40% for the minimum exploration programme, based on a work unit defined by ANP.

The concessionaire’s rights to explore and produce oil and natural gas from the Brazilian sedimentary basins stem from the concession agreement, having therefore a contractual nature.

The concession agreement has the status of an administrative contract. As such, its main clauses are set forth under the Petroleum Law and others statutes regulating contracts executed with the government.

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**2.3 If different authorisations are issued in respect of different stages of development (e.g., exploration or production arrangements), please specify those authorisations and briefly summarise the most important (standard) terms (such as term/duration, scope of rights, expenditure obligations).**

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The concession agreement is divided into two phases: exploration; and development/production. The exploration phase may last three to eight years, while the development/production phase may last 27 years (subject to a maximum extension for the same period if requested by the concessionaire and agreed by ANP).

Concessions for the exploration, development and production of oil and gas imply the concessionaire’s obligation to explore oil and gas, at its own account and risk and, in the event of success, to produce crude oil or natural gas from the respective block. The ownership of these products will be conferred to the concessionaire, after their extraction, along with all charges relating to the payment of taxes due (including royalties) and the statutory or contractual participations.

Before starting the development/production phase, the concessionaires must issue certain notices and undergo some specific procedures with the ANP. The most important are: the Evaluation of Oil and Natural Gas Discoveries Plan and the Development Plan.

The Evaluation of Oil and Gas Discoveries Plan describes the methodology and the results of any discovery during the exploration phase. According to the latest draft concession agreement, the concessionaire must declare a commercial discovery

only after the plan is approved by ANP. According to ANP Ordinance 259/2000, ANP has 60 days to approve it, and the concessionaire will have 90 days to present a final report of discoveries or the commercial discovery notice (if the latter occurs before the presentation of the final report).

The Development Plan demonstrates to the ANP that the development and production of oil and natural gas will observe industry’s best practices, will follow safety standards and will preserve the environment. It must include the work plan and the investment plan necessary for the development and production of the commercial discovery. The Development Plan must be presented to ANP within 180 days as from the notification of commercial discovery, and ANP has 180 days to approve it. If ANP does not respond within such 180-day period, the plan is considered automatically approved.

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**2.4 To what extent, if any, does the State have an ownership interest, or seek to participate, in the development of natural gas reserves (whether as a matter of law or policy)?**

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Brazilian Constitution provides that the activity of exploration of petroleum and its derivatives is a federal monopoly, and as such they shall be carried out by the government directly or by means of a concession granted to third parties. As a matter of fact, the oil and gas reserves are owned solely by the government, as well as the oil and gas *in situ*. The concessionaire acquires the title over the crude oil and natural gas, only after the hydrocarbon passes through the measure point set forth by the concession agreement. This volume shall be considered as reference for the calculation of the applicable government participations.

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**2.5 How does the State derive value from natural gas development (e.g. royalty, share of production, taxes)?**

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The governmental takes are regulated by the Petroleum Law and by Decree No. 2,705, of August 3, 1998 (“Decree”) and include: (i) signature bonus; (ii) royalties; (iii) special participation; and (iv) payment for area occupation or retention.

The signature bonus, which represents the actual amount offered by the interested company in its bid for the concession, has its minimum value established in the bid invitation, and must be paid prior to the signature of the concession agreement.

Royalties are paid monthly and in the amount varying from 5% to 10% of the oil and natural gas production.

The special participation will depend on the volume of production or earnings under the concession agreement.

The President of Brazil shall also issue a decree in order to regulate the annual payment for occupation or retention of the area, which shall be established by square kilometre or fraction thereof of the block’s surface.

At ANP’s criteria, a portion of the payments listed above and a percentage varying from 0.5% to 1.0% of the oil or natural gas production shall be paid to the surface owner.

The Brazilian Government also imposes taxation over transactions involved in natural gas development. The concessionaires are subject to corporate income taxes at a general 34% combined rate over net profits. Gross revenue taxes (PIS and COFINS) and Value Added Taxes are also imposed at a rate of 0.65% or 1.65% and 3% or 7.6%, respectively, according to the case. Brazilian Law provides for a number of tax relief provisions on specific cases.

## 2.6 Are there any restrictions on the export of production?

Any company or consortium of companies which are incorporated under the Brazilian law, with headquarters and administration in Brazil, may receive authorisation from ANP to carry out activities of import and export of petroleum and its by-products, natural and condensed gas.

The exportation of crude oil and its by-products, condensed and natural gas, shall: (i) never jeopardise the domestic supply; (ii) observe the principles of transparency and compliance with the law; (iii) provide the public authorities with all information and data related to the exportation; and (iv) impose the same conditions for both the domestic and foreign markets.

Currently Brazil still imports natural gas in order to meet the internal demand for such product and the industry players have not yet faced the situation of exporting natural gas.

## 2.7 Are there any currency exchange restrictions, or restrictions on the transfer of funds derived from production out of the jurisdiction?

Brazil has general rules regulating the inflow and outflow of funds in the country. Law No. 4,131 of 1962, as amended, regulates foreign investments in Brazil. This law requires that foreign investments be registered with the Central Bank of Brazil ("Central Bank") to entitle the foreign investor to receive dividends and funds and to repatriate capital. The law also establishes rules governing the reinvestment of profits and the payment of royalties and technical assistance fees abroad. Also, other general foreign currency exchange control rules may apply. There are no particular restrictions imposed on inflow and outflow of funds associated with gas production.

## 2.8 What restrictions (if any) apply to the transfer or disposal of natural gas development rights or interests?

The transfer or disposal of natural gas development rights or interests by a concessionaire is subject to the prior approval by ANP. The approval process is regulated by the concession agreement, and these rules slightly vary from contract to contract. Any transfer of undivided participation interests in concession agreement shall only be effective after the ANP's formal authorisation.

Moreover, any indirect transfer of control shall have prior authorisation by ANP under the penalty of the transfer be considered null and void, of the concessionaire's liability and even the termination of the concession agreement.

## 2.9 Are participants obliged to provide any security or guarantees in relation to natural gas development?

Participants must offer to the ANP, during the bid procedures, a bid bond which vary from round to round. This guarantee aims at assuring that the bidder will execute the concession agreement in case it is the winner and the concession agreement is awarded accordingly.

Also, Brazilian law provides that the concession grantor may, upon the execution the concession agreement, require the concessionaire to post a performance or execution bond or guarantee. The concession agreements in the oil and gas industry usually provide that the concession holder shall present guarantees for the compliance of the agreement and for the compliance with the investments established in the contract.

## 2.10 Can rights to develop natural gas reserves granted to a participant be pledged for security, or booked for accounting purposes under domestic law?

Normally, shareholders of oil and gas concessionaires pledge their rights to develop oil and gas by means of granting a pledge over the shares of the concessionaire entity that has entered into the concession agreement. Whilst this is a common procedure for any entity seeking finance, any enforcement of the share pledge agreement and, consequently, the transfer of the shares from the original shareholder to a new shareholder will be dependent upon ANP's prior authorisation as per question 2.8 above.

## 2.11 In addition to those rights/authorisations required to explore for and produce natural gas, what other principal Government authorisations are required to develop natural gas reserves (e.g. environmental, occupational health and safety) and from whom are these authorisations to be obtained?

According to the Brazilian legislation, activities that may potentially cause damages or pollute the environment must obtain an environmental license. Environmental licenses are usually valid for definite periods of time. They may be reviewed periodically, and may also be suspended, cancelled, or even be made subject to new conditions.

CONAMA's Resolution No. 23 of December 07, 1994 and CONAMA's Resolution No. 237 of December 19, 1997 regulate and establish special procedures to the environmental licenses regarding the exploration, drilling and production of crude oil and natural gas. These resolutions also list types of activities that require environmental licenses.

Also, according to CONAMA Resolution No. 350 of July 06, 2004, activities related with the acquisition of maritime seismic data and activities performed in transition zones, which may comprise both offshore and onshore areas, also require an environmental license, known as Seismic Research License (*Licença de Pesquisa Sísmica - LPS*), to be issued by IBAMA, after hearing the competent environmental State agencies, if applicable.

Such environmental licenses include the following:

- (i) Operating License for Seismic Activities;
- (ii) Pre-Drilling License;
- (iii) Pre-Research Production License;
- (iv) Installation License; and
- (v) Operating License.

The above-mentioned CONAMA's Resolutions apply to offshore and onshore upstream activities, when the related activity may impact more than one state. State licensing legislation applies to onshore upstream activities to the extent they may impact the territory of only one state.

Companies applying for environmental licenses must always present to the competent authority an environmental study of the area where the oil & gas activity will take place. The complexity of these studies may vary, depending on where the oil & gas activities will be performed. For instance, activities performed close to an environmental reserve may require a more complex investigation. The more complex the investigation is, the longer it will take the competent environmental authority to review the application and issue the environmental license.

The most common studies required for the performance of oil & gas activities are: (i) the Preliminary Environmental Impact Study (*Estudo Prévio de Impacto Ambiental - EIA*); (ii) the Impact on the Environment Report (*Relatório de Impacto sobre o Meio Ambiente*)

- RIMA); and (iii) the Environmental Evaluation Report (*Relatório de Avaliação Ambiental - RAA*).

**2.12 Is there any legislation or framework relating to the abandonment or decommissioning of physical structures used in natural gas development? If so, what are the principal features/requirements of the legislation?**

When abandoning or decommissioning physical structures, especially wells, the concessionaire shall comply with the rules provided under ANP Ordinances No. 25, of March 6, 2002, and No. 27, of October 18, 2006, which set forth several technical requirements for preparation and completion of abandoned wells and also for decommissioning facilities and assets used during the production phase. All assets, either movable or fixed, belonging to the concession area, which costs are deductible according to the rules established by the ANP from the special participation, and that, at ANP's discretion, are considered as necessary to the continuity of the operations, or are able to be used by governmental purposes, may have its ownership reverted to ANP.

### 3 Importation / Exportation

**3.1 Outline any regulatory requirements, or specific terms, limitations or rules applying in respect of cross-border sales or deliveries of natural gas (including LNG).**

Law No. 9,478/97 provides that in order to be authorised to import natural gas into Brazil, private investors shall organise a special purpose legal entity under the Brazilian law and with head offices and administration in Brazil. Moreover, according to the ANP Ordinance 43, of April 15, 1998, (which also applies for the importation of LNG) the private company must submit an application to ANP indicating: (i) the company's name, address, taxpayer registration number and evidence that it is organised under Brazilian Law and with head-offices and administration in Brazil; (ii) volume of natural gas to be imported and country of origin; (iii) anticipated date to start importation; (iv) potential market to be supplied; (v) way of transport to be used to import natural gas; (vi) delivery point in the country, and, in the event the gas to be imported is in its liquid state, the indication of the port and gas steam station; and (vii) gas specifications in compliance with ANP regulations.

ANP may impose fines on those who do not comply with the information provided to ANP in connection with the importation of gas (volume, specifications, destination etc.).

The import authorisation shall be revoked in case of: (i) bankruptcy, winding up, judicial or extra-judicial recovery or judicial or extra-judicial termination of the company; (ii) as per request of the authorised company; and (iii) when any of the conditions established by ANP is not complied with by the authorised party.

In addition, natural gas is subject to a quality control established under ANP Ordinance No. 16 of December June 17, 2008 which regulates the natural gas and LNG commercialised in the domestic market.

All transporters and distributors of natural gas and LNG must comply with the specification of the product set forth on Ordinance 16/2008 through a certificate issued by the inspection agency, which must be registered at the ANP. ANP allows the parties to negotiate natural gas and LNG with different specification since it is in compliance with environmental standards and all parties involved in such delivery are in agreement to such specification.

### 4 Transportation

**4.1 Outline broadly the ownership, organisational and regulatory framework in relation to transportation pipelines and associated infrastructure (such as natural gas processing and storage facilities).**

Natural gas transportation services in Brazil are governed by Law 9,478/97 and regulated by ANP. ANP has the attributions of: (i) granting authorisations to transporters to build and operate pipelines and any relevant expansion of the facilities; (ii) establishing the criteria for calculation of transportation tariff; (iii) establishing rules for the open access to pipelines; (iv) solving any dispute among the parties with respect to the transportation tariff; (v) inspecting the quality of the gas that is being transported; and (vi) inspecting transportation facilities.

The transportation of gas can only be carried forward by companies that do not commercialise the product. Such companies are responsible for the delivery of gas at the respective delivery points.

Currently seven companies carry out the transportation of natural gas in Brazil and PETROBRAS has participation in six of such companies.

According to ANP's data, Brazil has 7.720,5 KM of pipelines, being approximately 71% of such infrastructure dedicated to transport pipelines and the remainder to transfer pipelines. There are currently plans to integrate the transport pipelines of the Northeast of Brazil with the ones at the Southeast and with the Brazil-Bolivia pipelines.

**4.2 What Governmental authorisations (including any applicable environmental authorisations) are required to construct and operate natural gas transportation pipelines and associated infrastructure?**

According to ANP Ordinance 170/1998, the construction and operation of gas (including LNG) pipelines involves a two-fold licensing process: (i) ANP first grants a Construction License ("AC") - upon the issuance of the environmental construction license by the environmental authorities, and presentation of developer's tax and financial good standing certificates; which is then followed by (ii) the issuance of an operation license ("AO") upon the presentation by the developer of the relevant commissioning certificate and the related environmental operation license.

**4.3 In general, how does an entity obtain the necessary land (or other) rights to construct natural gas transportation pipelines or associated infrastructure? Do Government authorities have any powers of compulsory acquisition to facilitate land access?**

Upon request of the pipeline developer, the federal government issues an expropriation (or compulsory right of use) decree relating to the land and/or right-of-use to be used for the construction of the transportation pipeline, after which the developer may initiate the expropriation process. The pipeline developer shall indemnify the owner of the expropriated land or the compulsory right-of-use. In the first case the pipe owner shall acquire the land used, and in the second case the pipe owner shall pay to the land owner a toll.

**4.4 How is access to natural gas transportation pipelines and associated infrastructure organised?**

Pursuant to article 58 of Law 9478/97, any interested party has free access to natural gas transportation pipelines and associated

infrastructure, by means of payment of a compensation to the pipeline owner. Ordinance No. 27, 28 and 29/2005 establish rules regarding the access, the assignment of capacity and the criteria for the calculation of tariffs, respectively. According to such rules, transporters must offer the access to its lines (including facilities) on a non-discriminatory basis.

In order to have a firm supply of natural gas with access to any lines, a public procedure of offering and allocation of capacity (*Concurso Público de Alocação de Capacidade - CPAC*) must be provided.

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**4.5 To what degree are natural gas transportation pipelines integrated or interconnected, and how is co-operation between different transportation systems established and regulated?**

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Since there is no interconnected system at this point, there are very few rules on the subject except perhaps for the general statutory principles set forth by the Petroleum Law. Please refer to question 4.1.

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**4.6 Outline any third-party access regime/rights in respect of natural gas transportation and associated infrastructure. For example, can the regulator or a new customer wishing to transport natural gas compel or require the operator/owner of a natural gas transportation pipeline or associated infrastructure to grant capacity or expand its facilities in order to accommodate the new customer? If so, how are the costs (including costs of interconnection, capacity reservation or facility expansions) allocated?**

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Please refer to question 4.4.

In case the demand verified at the CPAC exceeds the capacity of the transporter, according to Ordinance 27/2005, transporters must reassess their pipelines and recalculate the tariffs for access in order to encompass the new capacity.

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**4.7 Are parties free to agree the terms upon which natural gas is to be transported or are the terms (including costs/tariffs which may be charged) regulated?**

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Costs and tariffs must observe the rules established under Ordinance 29/2005, and the terms of the agreements to be celebrated with interested parties must comply with Ordinance 27/2005 and be previously submitted (60 days prior to its effectiveness) to the ANP.

## 5 Transmission / Distribution

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**5.1 Outline broadly the ownership, organisational and regulatory framework in relation to the natural gas transmission/distribution network.**

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While the federal government has the power to grant concessions or authorisations, as the case may be, for the production, importation, and transportation, each of the federal states has the power to grant concessions for the distribution (i.e., supply to end-customers) of piped gas (article 25, paragraph 2 of the federal Constitution).

The distribution of natural gas should be regulated by State (local) laws and also by regulations issued by the local regulatory agencies. The distribution of piped gas is defined by federal Law 9,478/97, as being the “local services of sale of piped gas to the final consumers, the services of which are rendered by the State on an exclusive basis, directly or by means of concession, in accordance with paragraph 2 of Article 25 of the federal Constitution”. Several states have already

organised their own gas distribution companies as well as their local regulatory agencies. However, not all states have issued a comprehensive regulatory framework on the distribution of gas.

Brazil has 25 gas distribution companies. Petrobras, through its subsidiary Gaspetro, participates in 17. Only a few companies are controlled by private investors, all of them located in the States of São Paulo and Rio de Janeiro.

Because the distribution of gas is regulated by each federal state individually, the following questions shall be answered based on general rules applicable to all Brazilian states.

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**5.2 What Governmental authorisations (including any applicable environmental authorisations) are required to operate a distribution network?**

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To delegate powers to private parties to operate a distribution network, the state government shall issue a bidding procedure and grant a concession to explore the distribution of gas. After such right to explore is granted, the concession holder shall obtain the right to use the land necessary to pass the distribution pipelines, by means of a decree issued by the state government expropriating such land or imposing a right of way. The concessionaire shall indemnify the land owner for such expropriation.

Once the land is expropriated or the right of way is granted, the concession holder shall obtain the proper environmental authorisation to implement the project. In summary, two main licenses must be obtained: the installation license (for construction); and the operating license.

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**5.3 How is access to the natural gas distribution network organised?**

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As a general rule, gas distribution is a public service and therefore any interested party shall have access to natural gas distribution network, subject to payment of compensation to the distribution company.

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**5.4 Can the regulator require a distributor to grant capacity or expand its system in order to accommodate new customers?**

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Yes. The State of São Paulo, for instance, establishes in its concession agreements that the concession holder must expand its system in order to accommodate new customers, subject to economic viability of the expansion.

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**5.5 What fees are charged for accessing the distribution network, and are these fees regulated?**

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To access the distribution network, the customer shall pay the cost of connection with the network. Such costs are freely negotiated between the parties.

After the connection with the distribution network, the gas is purchased pursuant to a regulated tariff as approved by the relevant State regulatory agency.

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**5.6 Are there any restrictions or limitations in relation to acquiring an interest in a gas utility, or the transfer of assets forming part of the distribution network (whether directly or indirectly)?**

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As provided by Law 8,987/95, the sale of a controlling stake in such

companies is generally subject to the prior consent (or at least a prior notice) to the relevant granting authority (the State, local government). The entity acquiring control shall meet the same qualification (legal, financial and technical) as required from the selling entity during the bid invitation.

## 6 Natural Gas Trading

**6.1 Outline broadly the ownership, organisational and regulatory framework in relation to natural gas trading. Please include details of current major initiatives or policies of the Government or regulator (if any) relating to natural gas trading.**

The party needs to obtain an authorisation from ANP to trade imported gas. Few rules in this connection exist to date.

**6.2 What range of natural gas commodities can be traded? For example, can only “bundled” products (i.e., the natural gas commodity and the distribution thereof) be traded?**

There is no legal restriction on the trading of unbundled products, even though local regulations may provide restrictions.

## 7 Liquefied Natural Gas

**7.1 Outline broadly the ownership, organisational and regulatory framework in relation to LNG facilities.**

Brazil has already 3 LNG facilities, the first one implemented in 2005, at Paulínia. Please refer to question 1.1.

**7.2 What Governmental authorisations are required to construct and operate LNG facilities?**

Generally, as above mentioned, the construction of any such facility depends on ANP’s authorisation, as well as all environmental licensing deemed necessary in infrastructure project with this complexity.

Ruling No. 118/00 establishes that the company intending to construct a LNG facility shall submit to ANP the following information: by-laws; Federal and State taxpayer’s registration certificates; complete basic project for the facility; financial schedule; environmental installation license (*licença de instalação*) and construction license issued by the State and Municipal entities.

For the operation of the LNG facility, the company shall submit the following documents; environmental operation license (*licença de operação*), commissioning certificate and maintenance plan summary.

**7.3 Is there any regulation of the price or terms of service in the LNG sector?**

There is no regulation of the price or terms of services in LNG sector.

## 8 Competition

**8.1 Which Governmental authority or authorities are responsible for the regulation of competition aspects, or anti-competitive practices, in the natural gas sector?**

ANP is responsible for analysing the technical aspects of an anti-

competitive practice and to promote competition in the supply of natural gas, being a condition of the concession agreements that the concession grantor shall not prevent, restrict or distort competition or abuse any dominant position it may have.

Three administrative agencies share jurisdiction over antitrust issues, all of which are governed by the Brazilian Antitrust Law (federal Law n. 8.884/94). The referred law establishes both preventive and repressive measures aimed at avoiding any actions by companies and individuals that may harm competition, lead to the domination of relevant markets and that may be characterised as abuses of a dominant position.

For merger control, the Brazilian Competition Commission (“CADE”) has the responsibility of issuing final decisions. The Secretariat of Economic Law (“SDE”), a unit within the Ministry of Justice, the Secretariat of Economic Surveillance (“SEAE”), a unit within the Ministry of Finance, CADE’s Attorney General and the federal Attorney’s Office issue advisory opinions to assist CADE in its merger analysis.

On investigations of antitrust violations, SDE is the agency in charge of opening all proceedings, conducting the evidentiary phase of the process and preparing an advisory opinion to CADE. SEAE has the right to issue opinions on investigations, but is not obliged to do so. CADE’s Attorney General and the federal Attorney’s Office also issue opinions on all antitrust investigations. The final decision on all antitrust investigations is taken by CADE, which takes into consideration all advisory opinions that are issued, although it does not have to follow the conclusion on such opinions.

**8.2 To what criteria does the regulator have regard in determining whether conduct is anti-competitive?**

Any practice that may harm competition or that can be characterised as an abusive exercise of a dominant position is considered to be a violation of the Brazilian Antitrust Law. Examples of such conducts include:

- cartel practices;
- exclusivity agreements;
- refusals to deal;
- price discrimination;
- predatory pricing;
- tying arrangements; and
- resale price maintenance policies (minimum, maximum and suggested retail prices).

Fines range from 1% to 30% of gross pre-tax revenues for the year preceding that of the opening of the investigation (or twice as much if the violation is recurring). Fines against individual managers range from 10% to 15% of that amount. Foreign companies may be notified through its Brazilian subsidiary, agency, representative or local office, regardless of power of attorney or statutory dispositions.

**8.3 What power or authority does the regulator have to preclude or take action in relation to anti-competitive practices?**

Law 8,884/94 establishes that the regulatory entities may undertake investigations either of its own initiative or pursuant to a complaint made to it by any person.

If such investigations conclude that an anti-competitive practice has occurred it must apply penalties to the violating party. These penalties may vary from 1% to 30% of the company’s gross income.

In addition, CADE is authorised to impose on companies certain other penalties and remedial measures. These include ineligibility

to participate in public financing or bidding and withholding of patent rights, among others.

**8.4 Does the regulator (or any other Government authority) have the power to approve/disapprove mergers or other changes in control over businesses in the natural gas sector, or proposed acquisitions of development assets, transportation or associated infrastructure or distribution assets? If so, what criteria and procedures are applied? How long does it typically take to obtain a decision approving or disapproving the transaction?**

The Brazilian Antitrust Law establishes that any transaction that constitutes an “economic concentration”, such as mergers, acquisitions, joint ventures, or other forms of company associations or corporate grouping must be notified when it meets the following criteria:

- the combined companies or group of companies account for more than 20% of a relevant market; or
- one of the parties has worldwide annual gross revenues in excess of R\$ 400 million (the interpretation of the antitrust authorities is that this relates to worldwide revenues of the group, i.e., not only the revenues of the legal entity involved in the transaction).

According to the Brazilian Antitrust Law, the merger notice must be filed within 15 business days after the “realisation of the agreement” (which has been interpreted by CADE as being the “first binding document” between the parties). The current case law is still not clear as to what constitutes a “first binding document”, but indicates that it usually is the execution date of the transaction agreement, provided the parties have not signed preliminary binding documents, such as a binding letter of intent, memorandum of understanding etc.

It is to be noted that approval by CADE is not a condition to closing. However, CADE has the power to issue preliminary orders preventing the parties from closing a transaction or from adopting measures to hinder the viability of the acquired business as an independent concern, should CADE issue a divestiture order at the end of the process.

If CADE considers that the transaction harms competition, and that there are no compensating benefits, it can block the transaction (if closing has not occurred), or determine divestitures. There is no provision for formal negotiations of commitments, although there is nothing to prevent the parties from altering the structure of the transaction and from offering behavioural or structural commitments if they think it necessary to secure an approval.

Non-competitive provisions ancillary to a merger control filing are, subject to certain conditions, permitted under the Brazilian Antitrust Law. Generally they must be limited in terms of territory, specific business and period (normally not more than five years). In specific cases, however, CADE may order the parties to cancel or modify the non-compete clause, as to assure the maintenance of competition in the affected market.

## 9 Foreign Investment and International Obligations

**9.1 Are there any special requirements or limitations on acquisitions of interests in the natural gas sector (whether development, transportation or associated infrastructure, distribution or other) by foreign companies?**

A foreign company must organise a special purpose company under

Brazilian law and with headquarters and administration located in Brazil, which will be granted the relevant concession or authorisation. Sale of the controlling stake of such companies is generally subject to the prior consent (or at least a prior notice) to the relevant granting authority (either the federal or the state government as the case may be).

Also, please refer to question 2.8 regarding the transfer of control of the concessionaire.

**9.2 To what extent is regulatory policy in respect of the natural gas sector influenced or affected by international treaties or other multinational arrangements?**

International treaties or other multinational arrangements are mandatory upon their ratification by the Brazilian Congress.

## 10 Dispute Resolution

**10.1 Provide a brief overview of compulsory dispute resolution procedures (statutory or otherwise) applying to the natural gas sector (if any), including procedures applying in the context of disputes between the applicable Government authority/regulator and: participants in relation to natural gas development; transportation pipeline and associated infrastructure owners or users in relation to the transportation, processing or storage of natural gas; and distribution network owners or users in relation to the distribution/transmission of natural gas.**

There are basically two types of disputes in the gas industry in which the ANP must be involved: (i) development - unitisation agreements, in case the parties are not able to amicably reach an agreement on the terms and conditions of the unitisation agreement to be signed; and (ii) transportation - open access disputes (regulated by Ordinance 254/200).

**10.2 Is the country a signatory to, and has it duly ratified into domestic legislation: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and/or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID”)?**

Brazil has ratified and adopted the New York Convention on the Recognition and Enforcement of Arbitration Awards through Legislative Decree No. 52, of April 25, 2002.

Conversely, Brazil has not signed the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States”, known as the ICSID Convention.

**10.3 Is there any special difficulty (whether as a matter of law or practice) in litigating, or seeking to enforce judgments or awards, against Government authorities or State organs (including any immunity)?**

The Brazilian Supreme Court has already acknowledged that Governmental authorities may be subject to arbitration. However, according to Brazilian arbitration law, an arbitration shall not be related to “non-disposable rights”, which is a term of art referring to public interest matters not regarding economical issues. Some scholars consider that certain matters relating to the oil & gas concessions involve non-disposable rights are, therefore, not subject to arbitration.

**10.4 Have there been instances in the natural gas sector when foreign corporations have successfully obtained judgments or awards against Government authorities or State organs pursuant to litigation before domestic courts?**

We are not aware of specific disputes in that respect.

## 11 Updates

**11.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Gas Regulation Law in Brazil.**

Please refer to question 2.1. Brazil is expecting the enactment of a Natural Gas Statute, still under discussions at the Brazilian

Congress. Such statute aims at regulating, among other things, the transport, and free access to it and storage of the natural gas produced in Brazil. There is no provision as to when such law shall be enacted.

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