Oil and Gas Regulation in Brazil

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1 Introduction

A large part of the economic activities relating to the exploitation and production of oil and natural gas in Brazil constitutes a public monopoly, imposed by article 25, 2\textsuperscript{nd} paragraph, and article 177 of the Federal Constitution.

The wording of the provisions, as of the Constitutional Amendments n. 5 and n. 9 and at the point in which they stipulate the monopoly, is as follows:

Article 25. The states are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution. (…)
§2 The states shall have the power to operate, directly or by means of concession, the local services of piped gas, as provided for by law, it being forbidden to issue any provisional measure for its regulation.
Article 177. The following are the monopoly of the Union: (…)
I - prospecting and exploitation of deposits of oil and natural gas and of other hydrocarbon fluids;
II - refining of domestic or foreign oil;
III - import and export of the products and basic by-products resulting from the activities foreseen in the preceding items;
IV - ocean transportation of crude oil of domestic origin or of basic oil by-products produced in the country, as well as pipeline transportation of crude oil, its by-products and natural gas of any origin; (...)

§1 The Union may contract with state-owned or with private enterprises for the execution of the activities provided for in items I through IV of this article, with due regard for the conditions set forth by law.

The constitutional choice reflects the relevance of the sector for the country’s development, especially when in light of the fact that direct exploitation of an economic activity by the State, in Brazil, is restricted to certain cases.

In this sense, and with the exception of other necessarily constitutional provisions, article 173 of the Federal Constitution provides that “the direct exploitation of an economic activity by the State shall only be allowed when necessary for national security requirements or for a relevant collective interest, as defined by law”. That is, the State may only act directly in the economic domain, taking on the exploitation of an economic activity, when there is a reason relating to comprehensive concepts (they may be referred to as indeterminate) of national security and of relevant collective interest.

In addition, article 174 of the Federal Constitution provides that the States shall exercise, in the manner set forth by law and as a normative and regulating agent of the economic activity, the functions of monitoring, incentive and planning, “being binding for the public sector and indicative for the private sector”. It means that the extent of the State’s intervention on the economic domain is predominantly regulatory (or indirect). The State shall intervene directly (through monopoly exploitation or provision of public service) only in limited cases.

Incidentally, the exploitation of economic activity by the State is done under the private law regime. Such assertion may be difficult to understand in the context of systems in which there is no differentiation between regimes — or better still, in which there is no public law regime, linked to the fulfillment of public interest, which grants extraordinary prerogatives to the State and in which the proceedings are subject to more formal strictness. But there is no reason to consider that the definition of private law is
complex, since this is the common regime to procurements in which the principles of free will and equality of parties are in force.4

It means the State exploits the activities related to the production of oil and natural gas under equal conditions to the other agents of the market, with the peculiarity of constituting a monopolistic exploiter in the sector, for the reasons provided by article 174 of the Federal Constitution.

The fundamental instrument of the State for the exercise of this monopoly is the government-controlled corporation Petróleo Brasileiro S.A. [Brazilian Petroleum J.S.C.] and the ensemble of the companies it controls — in a word, Petrobras. In the specific scope of the exploitation of oil and gas in what is called the pre-salt layer and in areas defined by the President of Brazil as strategic, there is also the operation of the public company Pré-Sal Petróleo S.A. – PPSA [Pre-Salt Petroleum J.S.C.], whose creation was authorized by Law n. 12.304, of 2010. The creation of the PPSA was one of the measures adopted by the Brazilian government to govern in a specific manner the exploitation of oil reserves of the pre-salt layer and other special areas.5

The monopoly in question emerged through various initiatives adopted from 1938 (creation of the National Petroleum Council and the beginning of the nationalization of the oil sector) onwards, which culminated, in 1953, in the creation of

4 For an exposition on regime differentiation, see the article titled “Government Contracts in Brazilian Law”, contributed by Aline Lícia Klein, Guilherme Fredherico Dias Reisdorfer and Karlin Olbertz, inserted in this book.

Petrobras and the establishment of its monopoly in oil activities in Brazil, with the exception of the distribution of fuels and other by-products (Law n. 2.004). In the 1990s, this monopoly faced a process of changes in the structuring of the sector and, with the issuance of Constitutional Amendments n. 5 and n. 9, was made flexible. Consequently, since 1997, there can be the concession or the contracting with private parties of the exploitation of activities related to the production of oil and natural gas — without, however, the State declining its ownership and the respective monopoly.

In this sense, the sector was opened. This has allowed the exploitation by private agents of certain activities related to the production of oil and natural gas.

For the regulation of this alteration and the configuration of the new sectional framework, Law n. 9.478/1997 appeared — known as the current Petroleum Law. This legislation piece structured a new institutional organization, both in what concerns oil and natural gas regulation and in what regards the instruments for the practice of the respective monopoly. It also governed various aspect of the exploitation and of activities related to it and created a specific regulatory entity (the National Agency of Petroleum – ANP). More recently, laws n. 12.304, 12.276 and 12.351 created the normative framework that regulates the exploitation of oil and gas in pre-salt and other areas defined as strategic.

2 Organizations involved in the regulation of oil and natural gas

2.1 The Ministry of Mines and Energy (MME)

The Ministry of Mines and Energy was initially created by Law n. 3.782/1960, but extinguished in 1990 (when its duties were transferred to the Ministry of Infrastructure). The re-creation of the Ministry occurred with Law n. 8.422/1992.

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6 For an English version of Law n. 9.478 adopted by ANP, see: <http://www.anp.gov.br/?id=2306>, access on July 25th 2011. The transcriptions of Law n. 9.478 used here follow as closely as possible the ANP translation. ANP also offers a variety of publications in English concerning several aspects of oil and gas regulation in Brazil (<http://www.anp.gov.br/?id=660>, access on July 25th 2011). The 2011 annual report issued by Análise (<http://www.analise.com.br>) titled “Análise Energia” contains practical information in English about energy regulation in general in Brazil. It comprises several articles relating to oil, pre-salt and gas in Brazil.
Currently, Law n. 10.683/2003 governs the organization of the Ministries and of the Office of the President of the Republic.

In accordance to article 27, item XVI of Law n. 10.683/2003, the subjects that fall under the competence of the Ministry of Mines and Energy are the following: geology; mineral and energy resources; use of hydraulic energy; mining and metallurgy; and oil, fuels and electric power, including nuclear.

Federal Decree n. 5.267/2004 approved the regimental structure of the Ministry, which began to rely on the offices of Energy Planning and Development; of Electric Power; of Petroleum; of Natural Gas and Renewable Fuels; and of Geology, Mining and Mineral Processing. The duties of the Office of Petroleum, Natural Gas and Renewable Fuels are listed under article 17 of the Decree and involve, in short, the proposal of public policies, the monitoring of the sector, the linkage with other bodies and the coordination and promotion of compensation systems and deeds aiming at attracting investments and business for the development of the sector.

The Ministry of Mines and Energy is linked to independent governmental agencies that are responsible for the regulation in the sector (the National Agency of Petroleum, Natural Gas and Biofuels – ANP, the National Electricity Agency – ANEEL and the National Department of Mineral Production – DNPM). It is also linked to companies such as the Energy Research Company – EPE, Eletrobras (which operates in the electricity sector), the Brazilian Petroleum J.S.C. – Petrobras (which is the vehicle for practicing the federal government monopoly in this sector) and the Brazilian Company of Administration of Petroleum and Natural Gás J.S.C. – Pre-Salt Petroleum J.S.C. (PPSA) (administers PSCs and manages the commercialization of the federal government’s petroleum from the pre-salt and strategic areas).

In the scope of pre-salt, article 10 of Law n. 12.351 establishes various specific competences for the Ministry, many which are practiced jointly with the CNPE (see below). Thus, is it up to the Ministry, amongst other competences, to propose to the CNPE the definition of blocks for concession or production sharing (item II), to establish the guidelines for the ANP in biddings and production sharing agreements and to approve the drafts of the respective calls for bids and contracts (items IV and V). A fundamental competence of the Ministry is to propose to the CNPE the technical and economic parameters of the production sharing agreements.
According to article 31 of Law n. 12.351, it also falls within the Ministry’s competence to previously and expressly authorize assignments of rights and obligations relative to the production sharing contract, observing the conditions established in the provision.

2.2 The National Energy Policy Council (CNPE)

Article 2 of the Petroleum Law created the National Energy Policy Council (CNPE), linked to the Office of the President of the Republic and presided by the Ministry of Mines and Energy. The competence to regulate the CNPE was awarded to the President of the Republic (article 2, 2nd paragraph), and has been exercised through the issuance of federal decrees n. 2.457/1998, 3.520/2000 and 5.793/2006.

The duties of the CNPE are, to a high degree, to propose guidelines, public policies and measures that are intended for the development of the sector. Such duties have in mind the various aspects of exploitation of oil and natural gas, amongst other elements.

Thus, and in short, it is within the CNPE’s competence to establish guidelines for specific programs of energy use, such as programs for the use of energy produced by alternative sources (item IV); guidelines for the import and exploitation of oil and its by-products, as well as of natural gas and biofuels (energy source introduced in the Law by Provisional Measure n. 532/2011, in force until the end of September, 2011).  

In regard to public policies, it falls within the CNPE’s competence to suggest measures to meet the national demand of electricity, since the reliability on the Electric System is directly linked to the need of stocking fuels, especially for provisions for thermoelectric plants, falling also under the CNPE’s competence to indicate enterprises whose implementation must be given priority, in view of its character, which is strategic and of public interest (item VI); to establish guidelines for the use of natural gas as

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7 The Provisional Measure is a normative act produced by the President of the Republic “in case of relevance and emergency” (article 62 of the Federal Constitution) and whose effectiveness is temporarily limited) If the Provisional Measure is not converted into Law within sixty days from its issuance (extendable once, for an equal period), will lose its validity, in the terms of article 62, 3rd paragraph, of the Federal Constitution. In the case of Provisional Measure n. 532/2011, there was an extension of the term, through Act n. 26/2011 by the President of the Board of the National Congress.
input in industrial processes (item VII, included by Federal Law n. 11.909/2009); to define oil blocks that are to be the object of concession of production sharing (item VIII, included by Federal Law n. 12.351/2010); and to define the strategy and policy of economic and technological development of the industry of oil, natural gas, other hydrocarbon fluids and biofuels (once more included by Provisional Measure n. 532/2011), as well as of its supply chain (item IX).

Finally, it falls under the competence of the CNPE to carry out measures intended to promote the rational use of energy resources of the country (item I), to guarantee the energy supply to areas that are remote or of difficult access, considering the regional characteristics, including through the periodical review of the energy networks applicable to each region (item II and III), and to induce the increment of minimal indexes of local content of goods and services, to be observed in biddings and contracts of concession and production sharing, in accordance with the established strategy and development policy (item X).

For the exercise of all these duties, article 2, 1st paragraph, of the Petroleum Law determines that the CNPE will rely on the technical support “of regulatory bodies”. It is worth noting that the provision does not speak of “other regulatory bodies”, excluding the CNPE from such characterization.

Indeed, the CNPE takes the form of an eminently consulting body. Its propositions are not binding on the sector, but only indicative to the bodies responsible for public decision-making (in this case, to Office of the President of the Republic), who will have the competence to decide for or against its adoption, through regulation.

However, the relevance of including the CNPE in the institutional organization for the regulation of the sector is undeniable, since the CNPE is an instrument that aims exactly at producing information and guidance for such regulation. In spite of the CNPE usually being classified as a consulting body, there must be the recognition that it has some regulatory competence, translated, for example, into the duty of defining concession blocks. But on this point the discussion might take another direction, linked to the legitimacy of CNPE’s possible actions made without clear statutory grounds. A common discussion under Brazilian administrative law regards the boundaries for regulation (a presidential Decree based on CPNE guidelines), in comparison to what is expressly provided for by statute. This issue could be raised with regard to CNPE’s more substantial actions.
The competences of the CNPE were expanded by article 9 of Law n. 12.351, which created a specific regime for the “exploitation and production of oil, natural gas and other hydrocarbon fluids in the pre-salt area and in strategic areas”. In such cases, as it will be detailed below, what is applied is not the regime of concession of exploitation blocks, but the production sharing contracting according to pre-determined conditions. The fundamental difference is that, in the first regime, the concessionaire acquires full ownership of the exploited oil or gas; in the second, the Brazilian state entities retain partial ownership of this material, in accordance to the rules stipulated in the contracting.

According to article 9 of Law n. 12.351, in the scope of pre-salt and strategic areas, it is up to the CNPE to propose to the President of the Republic the rhythm of contracting of blocks under the production sharing regime (item I), the identification of blocks that will be directly contracted with Petrobras and those that will be auctioned (items II and III), the technical and economic parameters of production sharing agreements (item IV), the demarcation of other areas that must be classified as pre-salt or as strategic according to the evolution of technical knowledge (item V), the commercialization policy of oil and natural gas under the ownership of the Union (items VI and VII).

2.3 The National Agency of Petroleum, Natural Gas and Biofuels (ANP)

Article 7 of the Petroleum Law set up the National Agency of Petroleum, Natural Gas and Biofuels (ANP) — nomenclature given by Law n. 11.097/2005. It is a special independent governmental agency (a regulatory agency)\(^8\) which is part of the Indirect Federal Administration, linked to the Ministry of Mines and Energy, which takes the form of the main regulatory entity of the industry of oil, natural gas, by-products and biofuels, because of the expansion of competences that were attributed to it.

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\(^8\) For an account of the subject of regulatory agencies in Brazil, please refer to the articles: “Control of the Independent Regulatory Agencies”, contributed by Alexandre Wagner Nester; “Administrative Procedure and the Independent Regulatory Agencies”, contributed by André Guskow Cardoso; and “Rulemaking Power of Independent Regulatory Agencies in Brazil”, contributed by Diogo Albaneze Gomes Ribeiro, which comprise this book.
The various items of article 8 of the Petroleum Law establish some specific duties of the agency, for the attainment of its objectives of regulation, contracting and monitoring of the sector’s economic activities. Amongst such duties, the following can be cited as examples: the implementation of the national policy of oil, natural gas and biofuels (item I); the promotion of studies aiming at the demarcation of petroleum blocks (item II — a duty that is related to the definition of blocks, held by the CNPE); the development of calls for bids and the promotion of the respective biddings and grants of exploitation, development and production of oil and natural gas, including its monitoring and, in the case of natural gas, its transportation and storage, and the authorization of its commercialization (items IV, XXIV, XXVI); the application of legal, regulatory or contractual administrative sanctions (item VII); and the regulation and authorization of activities related to the national supply of fuels, being possible for there to be the establishment of agreements with other bodies for the monitoring (item XV).

Considering the guarantee of national supply of fuels in an economic sustainable basis, it was established by Law n. 12.490/2011 that the ANP shall demand from the regulated agents the maintenance of a minimum supply of fuels and biofuels (item I, sole paragraph), and guarantees and proof of capacity to serve the market of fuels and biofuels, by means of presenting, among other instruments, contracts of supply between regulated agents (item II, sole paragraph).

The enactment of Federal Law n. 11.909/2009 (the aforementioned Gas Law) added, to the Petroleum Law, article 8-A, which stipulates other duties of the ANP, specifically related to the traffic of natural gas in the transportation network. That law still awards to the ANP the position of coordinator of situations characterized as contingent.

Moreover, because the implementation of the ANP gave rise to the extinguishment of the National Department of Fuels – DNC (article 78 of the Petroleum Law), the ANP had to take charge of the exercise of the duties that up to that point were carried out by that body, related to activities of distribution and reselling of oil and alcohol by-products (article 9 of the Petroleum Law).

Article 11 of Law n. 12.351 adapts the competences of the ANP to the regime suited to pre-salt exploitation. The ANP shall promote technical studies to subsidize the MME in the demarcation of blocks that will be subject to a production sharing contract;
elaborate and submit to the MME the bidding documents for the concessions; promote the bidding procedures; ensure compliance with the best practices in the petroleum industry; analyze and approve the plans of exploitation, appraisal, and production development, as well as annual work programs and production related to production sharing contracts. It is also up to the ANP to regulate and supervise the activities carried out under a production sharing regime in accordance with article 8, item VII of Petroleum Law.

The most relevant point on the abovementioned subject, however, regards certain competences established for the PPSA by articles 2 and 4 of Law n. 12.304. The provisions give to the PPSA functions of management of production sharing agreements, including ensuring compliance with the contractual requirements relative to the local content in the production sharing agreements and monitoring and inspecting the execution of projects and the costs and investments related to the contracts. Although article 4, “f”, of Law n. 12.304 foresees that the PPSA will provide to the ANP the necessary information for the performance of its regulatory functions, there could be an overlap of competences between the ANP and the PPSA on this point. It is relevant to highlight, however, that the PPSA is not an independent regulatory agency, but it explicitly represents the interests of the Union (article 4 of Law n. 12.304).

In view of the limited scope of the present article, it is inadequate to consider the organizational structure of the agency, and other related aspects, which can be directly extracted by reading the Petroleum Law (articles 11, 14, 15 e 16).

What still needs to be highlighted is that it falls within ANP’s competence to obey, in the course of its decision-making process, the principles of legality, impersonality, morality and publicity. This determination is provided in article 17 of the Petroleum Law, whose wording reiterates the main clause of article 37 of the Federal Constitution, which imposes the compliance with these principles, and with the principle of efficiency, on all the bodies and entities of the Public Administration.

Incidentally, in concert with the principle of publicity, article 18 of the Petroleum Law establishes that the deliberative sessions of the Executive Board of the ANP, to resolve loose ends between economic agents, consumers and users, shall be public; and article 19 determines that the initiatives of bills or of amendments to administrative rules that affect a right of one of those agents shall be preceded by a public hearing.
The internal government of the ANP, approved by Ordinance n. 215/1998 of the Ministry of Mines and Energy and regulated by Ordinance n. 160/2004 of the agency itself, brings rules regarding deliberative sessions and the carrying out of public hearings, in addition to reaffirming the duty, imposed by article 20 of the Petroleum Law, for the ANP to give preference, in conflict resolution, to settlement and arbitration (article 33 et seq. of the Ordinance of the MME, and article 36 et seq. of the Ordinance of the ANP).

It must be stressed that the ANP must also obey, in regard to the decision-making process, Federal Law n. 9.784/1999, which provides for the administrative process in the scope of the federal Public Administration. In it, other principles that affect the agency’s activity and general rules about procedure are provided.

Finally, the imposition of penalties to violators of provisions and terms of concession contracts, of calls for bids and of the applicable legislation, is regulated by Ordinance n. 234/203 of the ANP.

2.4 The National Energy Research Company (EPE)

Yet again, and just as the CNPE, it is an organization (in this case, a business organization) that is not exactly an institution for the regulation of the oil and gas sector, but an instrument that makes such regulation feasible. It should be considered as part of the government bodies that are involved in the sector regulation.

The creation of the Energy Research Company (EPE) was authorized by Provisional Measure n. 145/2003, converted into Federal Law n. 10.847/2004, and given effect by Federal Decree n. 5.184/2004, which approved its charter. The EPE was created with the purpose of introducing a new instrument in the institutional organization of the energy sector, specifically geared towards carrying out studies requested by government bodies. Notice that the EPE is an autonomous entity, since it is structured as a corporation, linked to the Ministry of Mines and Energy. In this context, it meets not only the demand for studies in the specific sector of oil and natural gas, but it is also geared towards subsidizing studies in the field of other energy sources.

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9 On this subject, especially refer to heading 4.2 of the article titled “Administrative Procedure and the Independent Regulatory Agencies”, contributed by André Guskow Cardoso, which is part of this collective work.
There is a provision in this sense, by article 2 of Law n. 10.847/2004, whose wording was reproduced in the charter, that the EPE “has the objective of providing services in the area of studies and researches intended to subsidize the planning of the energy sector, such as electricity, oil and natural gas and its by-products, coal, renewable energy sources and energy efficiency, among others”.

2.5 The state regulatory agencies

In view of the provision of specific competence of the States in regard to local services of piped gas, provided in article 25, 2nd paragraph, of the Federal Constitution, it is also necessary to consider the existence of state regulatory agencies operating in the sector. The following can be cited as examples: Regulatory Agency of Sanitation and Energy of the State of São Paulo (ARSESP), the Regulatory Agency of Energy and Basic Sanitation of the State Rio de Janeiro (AGENERSA), the State Regulatory Agency of Public Services of Energy, Transportation and Communications of Bahia (AGERBA), among others.

3 Organizations involved in the exercise of the government monopoly of oil and natural gas

3.1 Petrobras

The Brazilian Petroleum J.S.C. – Petrobras is a corporation, established by Law n. 2.004/1953 as a mixed-capital company — that is, as a company, necessarily a partnership with share capital (in the terms of Federal Law n. 6.404/1976), which is in majority under public ownership, in at least 50% plus one.10

Currently, the definition and the object of Petrobras are included in article 61 of the Petroleum Law, worded as follows:

Brazilian Petroleum J.S.C. – Petrobras is a mixed-capital company linked to the Ministry of Mines and Energy, which has as its object the research, mining, refining, treatment, commerce and transportation of petroleum from wells, of schist or other rocks, of its by-products, of natural gas and of other hydrocarbon fluids, as well as any other correlative activities or related subjects, in accordance to how they are defined by law.

10 In the case of Petrobras, article 62 of the Petroleum Law provided that “the Union shall keep the share control of Petrobras with ownership and possession of, at least, fifty percent of the shares, plus one share, of the voting capital”.
To practice the monopoly, Petrobras had the competence of creating subsidiaries. It must be noted that the Petroleum Law itself determined the creation of one of them, “with the specific duties of operating and building its ducts, maritime terminals and vessels for the transportation of oil, its by-products and natural gas”. In compliance with this resolve, Transportation Petrobras J.S.C. – Transpetro was created. In addition to Transpetro, the main subsidiaries of the group are the companies Distributor Petrobras, Chemistry Petrobras J.S.C. – Petrosquisa, Biofuel Petrobras and Gas Petrobras J.S.C. – Gaspetro.

It is relevant to say that Petrobras holds the legal authorization for the exercise, outside of the national territory, associated or not to third parties, of activities which are part of its corporate objective (article 61, 2nd paragraph, of the Petroleum Law). The legislator’s concern with the operation of Petrobras in an international context and with the importance of this experience for the development of its activities is reflected in article 63 of the Petroleum Law, which authorizes Petrobras and its subsidiaries to form “consortia with national or foreign companies, whether or not under the condition that the leading company, aiming at expanding activities, regroup technologies and amplify investments applied in the oil industry”.

In view of the autonomy given to Petrobras, as a corporation, it is also necessary to highlight that the list of activities that may be exploited by it is not restricted to those that are the object of a monopoly; they also encompass any other economic activity that comes to be inserted in article 173 of the Federal Constitution (remember the rules of national security and of relevant collective interest).

In this case, there must only be attention given to the provision of article 3 of the Charter of the company, which demarcates its corporate purpose:

The Company has as its object the research, mining, refining, treatment, commerce and transportation of petroleum from wells, of schist or of other rocks, of its by-products, of natural gas and of other hydrocarbon fluids, in addition to activities linked to energy, being allowed to promote the research, development, production, transportation, distribution and

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11 The creation of subsidiaries was expressly authorized by article 64 of the Petroleum Law, in the following terms: “For the strict compliance with activities of its corporate objective that integrate the oil industry, PETROBRAS is authorized to create subsidiaries, which may associate themselves, in majority or minority, to other companies”.
commercialization of every form of energy, as well as any other correlative activities or related subjects.

Finally, from its creation until 1997, with the issuance of the Petroleum Law, Petrobras had the full exercise of state monopoly over activities related to the production of oil and natural gas (except the state monopoly of local distribution of piped gas, which is owned by the states in the aforementioned terms of article 25, 2nd paragraph, of the Federal Constitution). The Petroleum Law altered this configuration when it regulated the flexibility of the monopoly, created by Constitutional Amendments n. 5 and n. 9.

The introduction of competition in the sector was made explicit by article 61, 1st paragraph, of the legislation piece, which sets out that the activities that were, until then, engaged in exclusively by Petrobras would begin to be engaged in by it “in a character of free competition with other companies, according to market conditions”.

Petrobras’ role was amplified by the rules relating to the pre-salt, object of Law n. 12.351. Petrobras will be the operator of the contracts in the pre-salt and strategic areas. That means that it will be responsible for conducting and implementing, either directly or indirectly, all activities of exploitation, evaluation, development, production and decommissioning of exploitation and production facilities (article 2, item VI). For this purpose, in accordance with article 4, Petrobras will participate and be entitled to a minimum take in the consortia formed under the production sharing contracts. Petrobras’ minimum take will be fixed by the President of the Republic, having heard the CNPE (article 9, item IV), which shall receive a proposal to this regard by the Ministry of Mines and Energy (article 10, III). According to article 10, III, “c”, the minimum participation by Petrobras in the consortium referred to in article 20 “may not be below 30%”.

Petrobras may be contracted directly, with a waiver of bidding, by the Union through the MME for the production sharing agreements (article 8, I). It is also worth mentioning that prior to contracting under the production sharing regime, the MME, either directly or through the ANP, may promote the evaluation of the potential of pre-salt areas and strategic areas and Petrobras may be contracted directly to perform exploratory studies necessary for the assessment (article 7 and sole paragraph). The other cases of direct award shall be determined by the President of the Republic through a proposal of the CNPE (article 12).
In addition to being awarded directly in these cases and holding minimum participation in all consortia, Petrobras can also participate in biddings with the objective of increasing its participation (article 14). At last, Petrobras may also assign its rights and obligations under a production sharing contract, but only to the extent it acquired in a bidding procedure (article 31, sole paragraph).

3.2 The PPSA

The Brazilian Company of Administration of Petroleum and Natural Gas J.S.C. – Pre-Salt Petroleum J.S.C. (PPSA) is a federal public company, bound to the MME, whose creation was authorized by Law n. 12.304, of 2010. The totality of its social capital is owned by the Union (article 6).

The object of the PPSA is the “management of production sharing agreements entered into by the Ministry of Mines and Energy and the management of contracts for the commercialization of oil, natural gas and other hydrocarbon fluids of the Union” (article 2). The PPSA can be contracted by the Public Administration with waiver of bidding for the carrying out of its activities (article 5).

In the production sharing agreements regarding the pre-salt and strategic areas, the PPSA has the role of representing the interests of the Union.

Among the various competences provided for in article 4 of Law n. 12.304, there is the competence to integrate the consortia for the execution of production sharing agreements and the respective operational committees. In the terms of article 21 of Law n. 12.351, the PPSA will be part of the consortium; however, according to article 8, 2nd paragraph, of Law n. 12.351, the PPSA “shall not take on the risks and shall not be responsible for the costs and investments regarding the activities of exploitation, evaluation, development, production and deactivation of facilities of exploitation and production resulting from production sharing agreements”. This provision must be interpreted in conjunction with those of article 20, 3rd paragraph (“the constitution of the consortium contract shall name PETROBRAS as the one responsible for the execution of the contract, notwithstanding the joint liability of the members of the consortium in regard to the contracting party or to third parties, observing the provision in §2 of article 8 of this Law”), and of article 16, II, which generically provides joint responsibility between members of the consortium.
According to article 22 of Law n. 12.351, the “administration of the consortium will be under the operational committee’s responsibility”. The PPSA has a relevant role in the constitution of this committee, since it appoints half of its members and its chairman (article 23 and sole paragraph, Law n. 12.351). The committee’s chairman, whose competences are relevant and legally defined in article 24 of Law n. 12.351, holds the casting vote and the power of veto (art. 25).

Another competence of the PPSA is of “representing the Union in proceedings of unitization of the production and in the resulting agreements, in cases in which the deposits of the pre-salt area and of strategic areas extend to areas that were not granted or that were not contracted under the production sharing regime” (art. 4, item IV, of Law n. 12.304). The definition of the terms of the production unitization agreement is a competence of the consortium’s operational committee (art. 24, item VII of Law n. 12.351), thus also subject to the strong influence of the PPSA. In certain circumstances, when the adjacent areas have not been granted or shared, the PPSA will represent the Union in such agreements (art. 36 of Law n. 12.351). When the adjacent area is neither pre-salt nor strategic, the representation of the Union will be under the ANP’s responsibility (art. 37).

The creation of a public owned company specialized in pre-salt and strategic areas raised questions such as why the administration of these important energy resources should not be assigned to the competent Ministry, to the regulating body ANP and to Petrobras. However, the best governance practices prevailed. It is of utter relevance that the economic activities or commercial functions of the State should be carried out separately from the regulating bodies so that the chances for conflict are diminished.

3.3 The state companies

Again in respect to the state monopolies regarding the local distribution of piped gas (art. 25, 2nd paragraph, of the Federal Constitution), it is necessary to include in the institutional organization of the sector the state companies responsible for the exploitation of such activity. In this sense, the following can be cited: the Gas Company of São Paulo (COMGÁS), the Gas Company of Bahia (BAHIAGÁS), Paraná’s Gas Company (COMPAGÁS), etc.
3.4 The field for the private sector: concessionaires and companies hired under production sharing agreements

Finally, it is indispensable to include in this point of the institutional organization of the sector, the companies of private enterprise who were granted concessions for the exploitation of activities relating to the production of oil and natural gas — or, within the scope of the pre-salt and strategic areas, with whom the respective production sharing agreement was made. This issue will be analyzed in detail below.

4 Contractual arrangements under the Petroleum Law (Law n. 9.478)

4.1 Legal definitions

Law n. 9.478 created ANP, dealt with the transition from a pure Petrobras monopoly to a more flexible regime and established the contractual arrangements for the private exploitation of the oil and gas production, refining and transport in Brazil.

Article 6 of Law n. 9.478 contains a list of 25 technical definitions applicable to the contractual arrangements involving oil and gas in general. As mentioned above, such regulation is not applicable to the exploitation of oil and gas from the pre-salt layer and from strategic areas. These are regulated by Law n. 12.351.

4.2 The concessions and the respective tendering procedures

The basic concept of Law n. 9.478 is that of a concession (lease) of blocks for the exploitation and subsequent production of oil or gas. A block is defined as “part of a sedimentary basin, formed by a vertical prism of indeterminate depth, with a polygonal surface defined by the geographical coordinates of their vertices, where petroleum and natural gas exploitation and production activities are carried out” (article 6, XIII). According to article 24, the concession contracts will comprise two phases, exploitation and production. The exploitation will encompass appraisal activities (article 24, 1st paragraph), and the production phase will encompass development (article 24, 2nd paragraph). All such definitions are given by article 6.

Under the concession regime, the concessionaire will exploit the block and acquire the ownership of the produced oil or gas. According to article 26, “the concession implies for the concessionaire its obligation to exploit, at its own expense and risk, and in case of success, to produce petroleum or natural gas in a given block, entitling it to the ownership of the goods once produced, subject to the relevant fiscal
burdens and legal or contractual participations”. Therefore, the concessionaire will be subject to all taxes and legal and contractual payments to the various government bodies involved, but it will be given the ownership of the oil or gas.

At the time of enactment of Law n. 9.478, this regime was challenged before the STF in the ADI n. 3.273-9. The action contended that several provisions of Law n. 9.478, including article 26, were unconstitutional, since the government monopoly had not been extinguished, but only made more flexible. It claimed that, although article 176 of the Federal Constitution allowed for the private ownership of minerals in general, article 177 maintained the exceptional government monopoly in oil and gas; assigning ownership to private parties rendered pointless the constitutional monopoly. In a final hearing in March, 2005, a minority vote adopted such reasoning, but the majority of the Court considered Law n. 9.478 to be in accordance with the Federal Constitution and therefore rejected the constitutional challenge.

The concessions are terminated under the conditions of article 28. The provision expressly excludes any right to compensation in favor of the concessionaire when the areas or facilities are transferred back to the government. Article 27 deals with the resolution of disputes concerning adjoining blocks and article 30 regulates the situation in which other minerals are found together or instead of oil or gas. Article 29 allows for the transfer of the concession, which is “subject to the previous and explicit authorization given by the ANP”.

After the enactment of Law n. 9.478, Petrobras had a period of three years to continue exploitation and development of its current fields. The blocks considered viable by ANP were subject to concession agreements signed with exemption of bidding directly with Petrobras (article 34). The other blocks could be offered to the market. According to article 35, “the blocks not covered by a concession contract made in accordance with the previous article, and those where exploitation proved to have been unsuccessful, or those not contracted with the ANP, in due time, will be the object of a tender by the ANP, aiming at new concession contracts, under the general norms established in the previous Section”.

The bidding procedure (auction) is regulated by articles 36 through 42 of Law n. 9.478. The requirements for the invitation for bids (IFB) are described in article 37. The participation of consortia (joint ventures) is regulated by article 38. Some specific requirements concerning the participation of foreign companies are in article 39:
Art. 39. The invitation for bids must contain the requirement that the foreign company bidding individually or through a consortium, shall submit together with the proposal, and in a separate envelope:

I - evidence of technical capacity, financial good standing and judicial and fiscal regularity, under the terms of the regulation to be issued by the ANP;

II - complete documentation of its corporate acts, and evidence of being organized and functioning regularly under the laws of its home country;

III - appointment of a legal representative before the ANP, duly empowered to carry out acts and assume responsibilities related to the bidding process and the proposal presented;

IV - commitment, if successful, to form an enterprise according to the Brazilian laws, with headquarters and administration in Brazil.

Sole paragraph. The signature of the concession contract must be subject to the effective fulfillment of the commitment undertaken according to the item IV of this article.

The requirements of items III and IV are particularly important. A foreign bidder must undertake to form a Brazilian company to enter into the concession agreement with ANP.

The bidding procedure will be judged according to the criteria set forth in article 41, namely “I - the general work program, the proposed exploitation activities, duration, minimum investment amounts, physical-financial schedules” and “II - the governmental takes as per article 45”.

The concession agreement must contain the aspects described in articles 43 and 44 of Law n. 9.478. Item X of article 43 expressly provides for “the rules for the resolution of disputes relating the contract and its performance, including conciliation and international arbitration”.

4.3 Payments to the Public Administration

According to articles 45, 46, 47, 50 and 51 of Law n. 9.478, the concessionaire is obligated to make payments of several different natures to ANP, for a variety of

12 It is interesting to point out that the corresponding provision in the pre-salt regulation (article 29, XVIII, of Law n. 12.351) does not contain the reference to “international” arbitration. Since the arbitration requirements of Laws n. 8.987 and 11.079 (see the article “Arbitration in Brazil”, contributed by Felipe Scripes Wladeck and Paulo Osternack Amaral, inserted in this book) are not applicable, the mere omission of this language in Law n. 12.351 does not seem sufficient to prevent the parties from agreeing on international arbitration.
purposes. These payments are generally referred to in article 45 as “governmental participations” (government take). Article 45 mentions the following participations: “I - signature bonus; II - royalties; III - special participation; IV - fees for the occupation or retention of area”.

The signature bonus is set according to the bid, according to a minimum amount set forth in the IFB. It must be paid at signature of the concession agreement (article 46).

The royalties are payable monthly from the beginning of commercial production. They correspond to 10% of the oil or gas production (article 47). Under the 1st paragraph of article 47, the IFB may reduce the royalties to not less than 5% in view of special risks, production prospects or other factors. The criteria for calculation of the royalties are set forth in a presidential decree.

In situations of particularly large production or return, article 50 provides for a special participation, which is established in a presidential decree.

Article 51 provides for the payment of compensation relating to the use of surface of the block. This payment is also regulated in a presidential decree.

In addition to the compensation under article 51, the concessionaire must pay an amount equal to 0.5%-1.0% of the oil or gas production, as may be set by ANP, to the owners of the land in the surface of the block. This amount will be allocated to the different owners proportionately to the areas of each property marked in the block surface.

5 Contractual arrangements for the pre-salt and strategic areas (Law n. 12.351)

The discovery mainly after 2007 of large deposits of oil and gas in the pre-salt layer caused Brazil to discuss a new regulation for this sector. At least so far, the new regulation is not applicable to the oil and gas sector in general. According to article 1 of Law n. 12.351, its provisions are applicable only to “the exploitation and production of oil, natural gas and other hydrocarbon fluids in the pre-salts areas and in the strategic areas”. Such areas are defined by the Executive Branch under the criteria set forth in article 2, IV and V, of Law n. 12.351.

5.1 Legal definitions
Article 2 of Law n. 12.351 contains 13 relevant definitions that aid the interpretation of the provisions relating to the pre-salt contractual arrangements. There is a fundamental shift from the general scheme under Law n. 9.478. Instead of concessions with ownership assignment to the private party, Law n. 12.351 provides for production sharing arrangements. Therefore, article 2 defines essential conditions such as “production sharing” (item I), “cost oil” (item II), “exceeding oil” (item III), “pre-salt area” (item IV) and “strategic area” (item V). Other important aspects of the pre-salt regulation defined in article 2 are the “operator” (item VI: as seen above, the operator in the pre-salt and strategic areas is always Petrobras) and the “contractor” (item VII: always Petrobras or a consortium to which Petrobras is a party with a relevant participation). Lastly, a key definition is in item VIII (“local content”): this is essential for the interpretation of provisions requiring domestic content to certain products and services.

5.2 The production sharing agreements and the respective tendering procedures

Similarly to the concession agreements, the production sharing agreements also comprise two phases, exploitation and production. The fundamental difference is that the company or consortium that enters into the agreement with ANP does not acquire the property of all the oil or gas produced under the contract. It will be entitled to own the cost oil (art. 29, IV, of Law n. 12.351) — which is only due if the field becomes commercially viable — and part of the exceeding oil, also called by the doctrine profit oil (art. 29, VII). On the other hand, instead of merely receiving money payment, the Public Administration under a production sharing agreement may acquire a portion of the produced oil and gas. The exceeding oil is divided between the State and such contractor according to the contract. This will enable the Administration to exploit the oil and gas business itself and be associated in the benefits — and, to some extent, the risks — of a variable oil and gas production and international prices.

From the definition of production sharing, it is understood that Law n. 12.351 establishes that the contractor will, at his own risk, exploit, prospect, develop and produce petroleum, natural gas and other hydrocarbon fluids, and in case of any commercial discovery, it will be entitled to the ownership of the cost oil and part of the exceeding oil. Nevertheless, the sole paragraph of article 6 provides that the Federal
Government may participate by investing in the activities listed above, in which case it will take on the risk involved, in accordance with the production sharing contract.

The specific requirements for the production sharing agreement (PSA) are defined in article 29. Some of the essential clauses to the contract are: the definition of the contracted block; the obligation of the contractor in taking all the risks of exploitation, appraisal, development and production; the guarantees indicated by the contractor; the rights to cost oil and parameters to calculate the exceeding oil distribution; the assignments, composition, operation and decision making procedures of the operating committee and dispute resolution procedures; the period of the exploitation phase and conditions for its extension; the criteria for decommissioning the area and the penalties imposed if the contract is breached, amongst others.

A copy of the production sharing contract must be made available together with the bidding invitation, which shall comprise all the items described under article 15.

The period of the production sharing contract must also be provided for in the contract. It is limited to 35 years according to article 29, item XIX. One of the causes for the extinction of the contract is the end of the concession period. Nevertheless, the contract itself may establishes reasons for termination, which shall also happen through an agreement between the parties, after the conclusion of the exploitation phase without a commercial discovery, if the party exercises its option to withdrawal or if it refuses to agree with the unitization agreement after ANP’s approval.

In addition to such requirements, articles 19 through 26 provide for the consortium which will enter into the contract as the private party. As mentioned before, two main features of the consortium are its composition (Petrobras and PPSA will always be a part of the consortium) and its management (PPSA has a key participation in the operating committee, which is charged with managing the consortium).

At least half of the operating committee will be composed of the representatives of the PPSA, including the chairman, and other consortium members. The operating committee shall define the exploitation plans; define the plan to evaluate a discovery; declare the commercial viability of each discovered deposit and define its development plan; set annual work and production programs; review and approve budgets related to the activities listed in the contract; supervise the operations and approve the accounting of the incurred costs; define the terms of unitization of the production to be executed with the owner of the adjoining area (article 24).
The bidding procedure (auction) is similar to the one provided for in Law n. 9.478. The requirements for the participation of foreign companies are the same. The bids will be judged according to the “criterion of the offer to the federal government of the largest amount of exceeding oil” above the minimum provided for in the IFB.

Another key aspect required by the IFB is the “minimum local content and other criteria relating to the development of the national industry” (art. 15, VIII) which must be complied with. The IFB is bound to require such compliance.

As previously stated, the award of a product sharing contract may be given to Petrobras directly (bidding waiver), or to a private party through an auction bidding procedure. Petrobras shall have at least 30% interest in the consortia, even if it decides not to participate in the bidding procedure. This leaves the following scenario for production sharing contracts: (a) Petrobras is the sole contractor, that is, it holds 100% interest in the venture, or (b) Petrobras is part of consortia with one or more companies and it has 30% stake.

Article 31 deals with the transfer or assignment of the contract. The requirements are similar to those under Law n. 9.478. However, according to the sole paragraph of article 31, Petrobras is allowed to assign its contractual position in the PSA only with regard to the participation acquired by means of biddings, not by force of law. As mentioned above, the IFB will establish a minimum participation of Petrobras in the consortium, but Petrobras may also “participate in the bidding provided for in item II of article 8 to increase its minimum participation as defined in sub-item ‘c’ of item III of article 10” (article 14). Only such additional participation is assignable by Petrobras.

Articles 33 through 41 contain a more detailed regulation — in comparison to that under Law n. 9.478 — regarding the distinction of adjoining areas (the situation that occurs “when it is identified that the field extends beyond the block subject to concession or hired under a production sharing agreement” – article 33).

According to article 33, it is assigned to the concessionaire or contractor to inform ANP that a deposit will be subject to a unitization agreement. Further, the ANP shall establish a period for this agreement to be signed. The procedures and guidelines for the draft of the agreement will be regulated by the ANP. The agreements that will

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13 “Unitization Agreement in an agreement by the owners of a single oil Field which extends into more than one licensed area to develop that field as a single unit” (English, W., Unitization Agreements in Upstream Oil and Gas Agreements – London, United Kingdom: Sweet & Maxwell, 1996).
always be submitted to the ANP for approval (article 39), shall provide for the participation of the parties, as well as the criteria for review, the development plans and the dispute resolution mechanisms (article 34).

This new regulation is applicable both to the pre-salt and strategic areas (subject to PSA) and to the general oil and gas exploitation (subject to concessions under Law n. 9.478). The new regulation distinguishes the roles of the PPSA (article 36) and the ANP (article 37) in carrying out the negotiations and agreements if the fields at hand are respectively in the pre-salt and strategic areas or not. Under article 38, Petrobras may be hired with exemption from bidding “to perform the activities of evaluation of fields as provided for by articles 36 and 37”. In general, according to article 41, development and production will be suspended while the unitization agreement is not approved. On the other hand, if the unitization agreement is approved by the ANP and the parties refuse to agree with it, it may result in the extinction of the production sharing agreements.

5.3 Payments to the Public Administration

According to article 42, the only governmental participations (government take) will be royalties and the signature bonus. Neither can be included in the calculation of the cost oil (1st and 2nd paragraphs of article 42).

Article 43 has a provision similar to that of article 52 of Law n. 9.478 (payment of up to 1% of the value of the produced oil or gas to the surface owners). The specific amount should be defined in the PSA and the ANP is in charge of calculating the allocation of the funds among the various owners, if more than one exists.

Lastly, article 44 establishes that article 50 of Law n. 9.478/1997 (payment of special participation) is not applicable to the production sharing regime.

6 Brief notice on the matter of allocation of public resources from oil exploitation

The discovery of the pre-salt layer gave cause to an intense debate about the partition of the benefits of the oil and gas production among the various regions in the country. Traditionally, under articles 48, 49 and 50 of Law n. 8.478, the royalties and other government participations are allocated mainly to the states and cities in which the production takes place. In accordance with article 20, 1st paragraph, of the Federal Constitution, this is viewed as a compensation for the local public investments needed to make production possible.
However, the prospects of the pre-salt layer prompted the federal government and legislators to discuss a change in this rationale. Even though an actual change in the allocation granted to the states and cities was not made, Law n. 12.351 contains a commitment to use the federal government’s share to “social and regional development” in a variety of socially relevant areas. A public fund styled “Social Fund” was created by article 47 of Law n. 12.351 to receive part of the federal government’s participation (signature bonus and royalties). The use of such funds is regulated by articles 48 through 60.

7 Exploitation of natural gas

As mentioned in the introduction of this article, the 1988 Federal Constitution establishes a monopolistic regime of the exploitation, production and transportation of natural gas. This regime comprises the carrying out of activities of the gas industry both by the Union and by the states, which are assigned the direct exploitation, or exploitation through concession, of local services of piped gas (art. 25, §2 of the 1988 Federal Constitution).

It is worth remembering that with the issuance of Constitutional Amendments n. 5 and 9, the activities in the oil and gas sectors were made more flexible, in the face of the possibility of contracting public and private companies.

Law n. 9.478/1997, which has the general objective of regulating constitutional provisions, outlines the national objectives and guidelines of the energy policy. The national energy policy accompanied Brazil’s development in the sector, a reflection of the economic recovery that triggered the energy demand in Latin America. Aiming the full enjoyment of the sources of energy and the market efficiency, the Petroleum Law set as guidelines the development, in economic terms of the use of natural gas, the attraction of investments in the production of energy and the free promotion of competition, among others listed in its article 1.

The opening of the sector created new markets that changed the industry’s way of operating. As the country makes the performance of new economic agents more flexible, regulates prices and lowers the barriers of entry, it gives way to competition opportunities. The bigger the competition in the sector, the better the economic, social and even environmental benefits are for the national energy industry and for the parties involved.
However, the agents of the sector noticed that the natural gas industry felt the need for a specific legal framework, since in the Petroleum Law, natural gas was treated with less emphasis than oil and that legal framework did not define clear guidelines regarding gas, as well as adequate instruments for the regulation of the activity of transportation, a very important link in the chain of this fuel whose transportation is considered as a network industry. The gas sector, therefore, required the issuance of a Law that could regulate the entry of new participants, especially in the pipeline transportation of natural gas, and that would establish a regulated system of tariffs and conditions of access to the transportation network.

With the enactment of Law n. 11.909, of 2009, known as the Gas Law, important institutional reforms were introduced. Monopolistic characteristics of some segments of the chain were removed to allow a higher participation of agents in this market with the introduction of competition. The definition of the legal framework aimed at the peculiarities of the natural gas industry provides more security to the sector that poses investment risks and creates such a setting that the attraction of private investments becomes, in fact, concrete.

In this context, it is important to highlight that the Company of Energy Research (EPE), responsible for the elaboration of the Ten-Year Plan for Energy Expansion – PDE 2020 indicates that there will be a high growth in the sector of natural gas. In accordance with PDE 2020\textsuperscript{14}, a strong amplification of the national offer of natural gas is envisioned, moving from a level of 58 million m\textsuperscript{3}/day in 2011 to 142 million m\textsuperscript{3}/day in 2020. This internal offer, increased by the imports – 30 million m\textsuperscript{3}/day of Bolivian gas and 21 million m\textsuperscript{3}/day from the GNL\textsuperscript{15} – will increase the total offer to around 109 million m\textsuperscript{3}/ day in 2020. According to the data from EPE, around R$510 billion in investments are envisioned for the activities of E&P (petroleum and natural gas) in Brazil for the period of 2011-2020.

8 The legal framework and regulatory organizations

Law n. 11.909/2009 brought various changes as to the natural gas legal framework. Decree n. 7.382, of 2010, regulates and deals with innovations by the Gas Law that changed and complemented some of the provisions of the Petroleum Law.


\textsuperscript{15} Liquefied natural gas
However, it must be noted that the latter will continue to regulate the activities of exploitation, development and production of natural gas.

The Gas Law\textsuperscript{16} concerns the activities relative to the transportation of natural gas through pipelines and the importation and exportation of natural gas, which are dealt with by art. 177 of the Federal Constitution, as well as the activities of treatment, processing, storage, liquefaction, regasification and commercialization of natural gas (art. 1, Law n. 11.909/2009).

Under the Petroleum Law it was not necessary for there to be a bidding procedure for the exploitation of the activity of natural gas transportation, the grant was given through the authorization of the ANP. With the enactment of the Gas Law, this activity, when exploited in gas pipelines of general interest, shall be carried out under the concession regime\textsuperscript{17}, preceded by a public bidding with the selection criteria based on the lowest annual income and/or on the highest payment for the use of public assets.

The carrying out of the biddings for the grant of natural gas transportation concession through the criteria of lowest annual income is a regulatory mechanism whose objective is to introduce competition through the right to exploit this economic activity and to make the entry of new investors possible, ensuring, on the other hand, reduced tariffs to the interested carriers.

On the other hand, the authorization regime, will be exceptionally applicable to gas pipelines of transportation that involves international agreements or a specific interest of a sole final user.

The term of the concessions will be of 30 years, counted from the date of signing the concession agreement, being that it can be extended for, at the most, an equal period

\textsuperscript{16} As in the Petroleum Law, the Gas Law defined concepts whose reading is indispensable for the correct interpretation of the legislation regarding the sector. Thus, the reader is advised to refer to art. 2 of Law n. 11.909/2009 whenever necessary.

\textsuperscript{17} It is important to mention that the concession and authorization regimes to which the natural gas industry are subject, shall not be mistaken with the regimes of concessions, permissions and authorizations for public services regulated by the Law of Concessions of Public Services (Law n. 8.987 of February 13, 1995), as expressly mentioned by the Gas Law itself. While the legal framework surrounding natural gas deals with, among other economic activities, those that are considered by art. 177 of the Federal Constitution as a monopoly of the Union, the Law of Concessions of Public Services regards to provision of public services (art. 175 of the Federal Constitution).
of time. The same term is applicable to authorizations already in force, which were ratified by the Gas Law. Nevertheless, in the case of authorizations, the term of the extension will be counted from the date the Law was published or, for the case of an enterprise under environmental licensing process, the term will be counted from the date of the granting of the authorization (art. 30).

The Gas Law deals with the procedure of public invitation for a hiring of capacity, which shall be conducted by the ANP. The public invitation is brought into effect previous to the authorization grant or to the bidding for the concession of the transportation activity, with the objective of identifying the potential carriers and sizing the demand. The carriers, which shall have an authorization by the ANP, will be subject to entering into an irrevocable and irreversible term of commitment for the purchase of the requested capacity, which shall be part of the invitation for bids (art. 5).

In accordance with article 17, among the main elements that shall be indicated in the invitation for bids are the route of the gas pipeline object of concession, the city gates, as well as the forecasted transport capacity and the criteria used for its sizing (item I). Likewise, the invitation for bids shall point out the maximum annual transport revenue estimated and the criteria used for its calculation, as well as the requirements to be fulfilled by the bidders (items II, III and IV), among other items.

In relation to the agreements, an interesting consideration is that the statute deals expressly with arbitration as a means of dispute resolution in agreements of concession, transportation and commercialization of natural gas.

It is also important to highlight that the Gas Law determined that the activities of transportation, importation and exportation, storage and packaging of natural gas, as well as the construction, expansion of capacity and operation of the processing or treatment units of natural gas shall be carried out by any company or consortia of companies, provided it is constituted pursuant to Brazilian laws, with headquarters and management in this country.

8.1 The Ministry of Mines and Energy (MME)

The Gas Law assigned to the MME the duty of making decisions that outline the gas sector’s sectional policy.

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18 For a thorough examination about arbitration in Brazil, please refer to the specific article by Felipe Scripes Wladeck and Paulo Osternack Amaral included in this book.
According to article 4 of the abovementioned Law, it will be up to the MME to propose the construction and expansion of transportation gas pipelines (item I); to establish directives for the procedure of hiring of transport capacity (item II) and to define the concession of authorization regime (item III).

The directives of the sectional policy on natural gas must be outlined together with the National Energy Policy Council (CNPE), which, as previously appointed, has the duty to determine the strategy and policy of economic and technological development of the industries of petroleum, natural gas and other hydrocarbon fluids, as well as of its supply chain (art. 2, item IX, Law n. 9.478/1997).

By regulating the Gas Law, Decree n. 7.382/2010 established in article 1, §1 that, for bids of construction or expansion of gas pipelines, the MME shall prepare the Ten-Year Plan for Expansion of the Gas Pipeline Transport Network, preferably reviewed annually, based on studies developed by the National Energy Research Company – EPE.

The Ten-Year Plan for Expansion of the Gas Pipeline Transport Network is the main instrument used by MME in its role of formulating public policies. The aforementioned annual Plan contains studies elaborated by the EPE, proposals for routing and compression systems to be installed, as well as for the location of city gates and the estimated investments in gas pipelines.

The MME was also assigned the duty to provide for the guidelines for the public invitation to be carried out by the ANP, intended for the access to a firm transportation service, in the available capacity (art. 33).

The exclusivity term of the first carriers – understood as those whose hiring of transport capacity has made possible or contributed to make possible, the construction of the gas pipeline, in whole or in part – shall be determined by the MME, after the ANP has been heard. These carriers will be entitled to an exclusivity term for the exploitation of the hired capacity of the new gas pipelines. This instrument is indeed important to, in the process of the public invitation, attract new carriers in future biddings of gas pipeline transportation.

In the case of authorizations already in force, the Gas Law establishes an exclusivity term of 10 (ten) years for the first carriers counted from the beginning of the commercial operation of the respective transport gas pipeline, and for enterprises whose environmental licensing is in progress on the date of its entry into force.
The Gas Law also provides that the MME may determine the use of the instrument of Public-Private Partnerships (PPP), as well as resources originating from the Contribution for Intervention in the Economic Domain (CIDE), and from the Energy Development Account (CDE), to make possible the construction of gas pipelines proposed on its initiative and considered of relevant public interest.

8.2 The National Agency of Petroleum, Natural Gas and Biofuels (ANP)

In addition to the powers described in the Petroleum Law, the ANP was given executive powers such as the carrying out of bidding procedures and the entering into concession and authorization agreements.

With the enactment of Decree n. 7.382/2010, which regulated the Gas Law, the ANP bound itself to the process of review of non-statutory acts and to the planning of internal activities that are necessary for the development of new resolutions to pinpoint the themes within the scope of its regulatory competence. An example is the aforementioned procedure of public invitation to identify the capacity of the gas pipeline to be hired. The notice of public invitation shall contain a proposal of a routing of the gas pipeline, the estimation of the maximum fee and way of defining the exclusivity terms fixed by the MME, among other parameters (art. 8).

Other provisions of Decree n. 7.382/2010, which shall be regulated by the ANP are the access of third parties to transport gas pipelines and the operational exchange of gas (swap), which will allow new agents to offer natural gas to the Brazilian market, increasing even further the competition in the sector.

In regards to moving and transporting gas, there are innumerable new duties of the ANP, among which the following stand out: a) inform and promote the process of public invitation for the hiring of capacity with the objective of identifying potential carriers and sizing the effective demand; b) resize, if necessary, the reference gas pipeline facilities, and the end of the process of public invitation, with the advice of the EPE; c) enter into, with the carriers, an agreement of purchase of the requested capacity, at the end of the process of public invitation; d) fix the maximum fee to be applied to the carriers interested in the hiring of transport capacity; e) define the minimum index of local content of the gas pipeline to be included in the invitation for bids; f) promote the bidding for the construction or expansion and operation of the transport pipelines, elaborating the invitation for bids and the concession agreement; g) subsidize the MME.
regarding the conditions of fixing the exclusivity period; h) regulate the operational exchange (swap) of natural gas; i) discipline through by means of regulation, the access of third parties to interruptible and extraordinary transport services; j) define the rules of sharing background transport infrastructure; k) define the applicable procedures for the assets intended for the exploitation of the activity of natural gas transportation, in the case of concession or authorization of gas pipelines.

The Gas Law also gives the ANP the power to declare the public interest, for the purposes of expropriation and establishment of administrative easement of the areas necessary for the implementation of the gas pipelines granted or authorized, as well as their ancillary facilities.

The assets destined to the exploitation of the transport activity and considered bound to the concession agreement or authorization shall be incorporated to the Union’s assets through a declaration of public utility and just and previous compensation in cash. These assets will be under the management of the granting authority after the extinction of the concession or of the authorization, as the case may be. It must be noted that this incorporation of assets also applies to the facilities already in place and under environmental licensing process on the date of publishing of the Gas Law.

In regards to the settlement of gas transport fees in pipelines, such fees will be established by the ANP. The same factor corresponding to the ratio between the annual income established in the bidding procedure and the maximum annual income defined by the invitation for bids, applies to the maximum fee settled in the public invitation process. In the case of authorization, the carrier shall propose the value of the fee to the ANP, according to pre-established criteria. The previous fees and review criteria remain the same.

Attention must be called to the fact that the baseline of the fees must motivate investments in infrastructure, but also avoid the gain of excessive earnings by the carrier. The reference gas pipeline project (article 2, item XX of Decree n. 7.382/2010), to be planned by the EPE, will be the main instrument the ANP will have for the determination of fees and maximum annual income to be considered in the public invitations and in the biddings for concessions.

9 Transport

9.1 Free access to pipeline infrastructure and the assignment of capacity
The free access to natural gas transport pipelines is given through the availability of its idle and available capacities to interested third parties who show they are apt to use them and are willing to pay an adequate remuneration to the owner of such facilities, the gas transportation company.

It was with the enactment of the Petroleum Law, that the right to free access to pipeline transportation of petroleum and natural gas was evidenced. Article 58 of this Law allowed any interested party to use the existing transport pipelines, or those that were to be constructed, by means of providing adequate remuneration to its owner. The free access to pipeline infrastructure increases the possibilities of providing natural gas in Brazil and encourages free competition prescribed by the constitutional economic policy in the sector.

Before the establishment of free access by the Petroleum Law, the whole demand was restricted to a sole agent and the access to third parties occurred in the conditions imposed by the former. Hopefully, the competition in the sector will regulate the market so as to attract investments and guarantee efficient pricing.

In addition to that, the implementation of free access to gas pipelines allows for the optimization of its use, giving them a wide social function. Considering the Petrobras monopoly in the upstream of the gas chain and the flexibilization of the entry of new agents, free access is indispensable, since it is of no use for there to be the presence of other producers if they cannot transport the gas until the city gates to be distributed afterwards. The new agents of the upstream of the gas chain depend on the free access for the offloading of their production. Without regulation it is not possible to make the free access to the gas pipeline transportation capacity feasible. Thus, in the case of natural monopoly of the segment of gas transportation, the policies of regulation of access to gas pipelines are determinant to induce the efficient use of this transport infrastructure and to generate an adequate quantity of entries and access of the gas pipelines.

The free access to the gas pipelines guaranteed to third parties can be given on the available capacity, whenever the portion of the capacity of movement of the gas pipeline was not hired under the firm modality. On the idle capacity, third parties access is made possible whenever the movement capacity of the hired gas pipeline is not in use. These types of access through available and idle capacity represent the actual opening of the pipeline transportation sector to third parties.
In regards to the assignment of capacity, it was authorized by the Gas Law in its article 35. It is understood as the transfer, in whole or in part, of the right to use the transport capacity hired under the firm modality. It will be up to the ANP to regulate the assignment of capacity in such as way as to protect the rights of the carrier.

In sum, the transportation services can be hired with regard to the capacity of the gas pipeline.

10 Imports and Exports

In accordance with article 36 of the Gas Law, the import and export activities of natural gas will depend on the authorization of the MME, as previously stated, granted to any company or consortium of companies, provided they are constituted under Brazilian laws, with headquarters and administration in Brazil. The performance of these activities shall observe the guidelines established by the CNPE.

11 Storage and Packaging

The activity of storing natural gas is subject to the concession regime, preceded by a bidding, or authorization (art. 37). The performance of the activity of storage of natural gas in hydrocarbon reservoirs of the Union, and in other non-producing geological formations shall be object of concession for use, preceded by bidding process under the competition method. The exploitation will be undertaken at the concessionaire’s own risk (art 38).

It will be up to the MME, after the ANP is heard, to set the exclusivity term for the agents whose hiring storage capacity has enabled or contributed to enable the implementation of a storage facility. The Gas Law clarifies that the natural gas, imported or produced and stored in natural geological formations does not constitute property of the Union.

The performance of non-exclusive exploratory activities necessary for the confirmation of suitability of the areas with potential for storage, as well as the storage in facilities such as artificial reservoirs, shall depend on authorization from the ANP.

The packaging of natural gas, understood as the confinement of natural gas in gaseous, liquid or solid form for transport or consumption, will also be subject to authorization. In respect to this, the Gas Law establishes that the ANP will regulate the packaging activity for the transport and commercialization of natural gas to the end
consumer through alternative means to the pipelines - highway, railway and waterways, and will also cooperate with other agencies to adapt the regulation of the transport through such means (art. 42).

12 Gas production offloading pipelines and facilities for processing, treatment, liquefaction, regasification of natural gas

The construction, capacity expansion and operation of natural gas processing or treatment units are subject to the authorization of the ANP (art. 43). The same is true in relation to the construction and operation of natural gas liquefaction and regasification units, as well as transfer and offloading gas pipelines that are not part of the concession for exploitation and production of petroleum and natural gas (art. 44).

In accordance with article 45 of the Gas Law, the free access does not apply to pipelines for production offloading, the natural gas treatment and processing facilities, as well as to liquefaction and regasification terminals.

13 Distribution and commercialization

In regard to commercialization, the Gas Law requires the contracts of purchase and sale of gas to be filed with the ANP. The commercialization shall, nonetheless, observe what is provided in the Federal Constitution regarding the exploitation, whether direct or through concession, of local services for piped gas, by the states (article 25, §2 of the Federal Constitution).

This way, the Gas Law regulates the free consumer, the self-producer and the self-importer, which may directly construct and implement facilities and pipelines for its own specific consumption, in case its needs for movement of natural gas cannot be fulfilled by the state distribution company.

In any case, the state distribution company must necessarily be in charge of the operation and maintenance of the facilities and pipelines. The fees for the operation and maintenance of the facilities and pipelines shall be set by the state regulating body according to the principles of reasonableness, transparency, publicity, and the specific characteristics of each facility, being that they must, in case they were constructed and implemented by the distribution company, also consider the investment costs.

14 Contingency in the supply of natural gas
The Gas Law also includes a chapter (chapter VII) regarding the contingency in the supply of natural gas, situations which are characterized as such upon proposition from the CNPE and Presidential Decree.

In this case, there can be suspension of the activities according to guidelines and policies contained in the Contingency Plan. This issue still depends on better detailing and regulation by the Executive Branch, which will undoubtedly give rise to intense debates between the various agents of the natural gas industry, especially in regard to the determination of priority consumption.

15 Final remarks
It is worth remembering that some provisions set out in the Gas Law or in Decree n. 7.382/2010 must still be regulated by the ANP. However, it is undisputed that the aforementioned Law represents an important step towards the development of the natural gas industry. It is expected that this new legal framework will favor the attraction of investments necessary to its expansion and the effective partnership by private enterprise under conditions of free competition.

Bibliographic information, according to Associação Brasileira de Normas Técnicas – ABNT NBR 6023:2002: