

Dispute Settlement Under the Brazilian Petroleum Agency – ANP: A Case-law Overview Concerning the Open Access to the Bolivia-Brazil Natural Gas Pipeline

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I. Introduction

This paper will focus on four leading cases settled by the Brazilian National Petroleum Agency (ANP) between 2000 and 2001. The first two cases, involving TBG, the company that runs the Bolivia-Brazil Natural Gas Pipeline, GASBOL, and ENERSIL, an Enron group subsidiary, were related to the same contract of interruptible gas transportation.¹ These were the leading cases in Brazil regarding the application of the provision of Article 58 of the Brazilian “Petroleum Act” which imposed the open access regime to the pipelines and offshore terminals of Oil & Gas in Brazil, as well as the leading case regarding interruptible gas transportation services.

The subsequent two cases involved TBG and a company by the name of British Gas do Brasil. The first case regarded an interruptible transportation service contract and was based on the principle of non-discrimination. Additionally, it followed the basic lines traced by the ENERSIL cases. The second one was the first case where the open access regime to gas pipelines was applied concerning firm services.

The following questions are going to be discussed throughout the paper:

1. How the liberal concepts of Oil & Gas markets were interpreted in Brazil, after their recent adoption?
2. Could this interpretation be expected, in accordance to the international standards of Oil & Gas market?
3. What are the possible influences of these cases in the Brazilian/South American Oil & Gas market? Are foreign companies encouraged to make investments in the South American natural gas market?

¹ According to this type of contract, the transportation company is liable to deliver a certain quantity of gas to the contractor provided that there is a surplus after the companies that signed contracts for uninterruptible supply (firm contracts) received the gas quantities they were entitled to. The uninterruptible service contracts are those by which the transportation company is obliged to reserve enough transportation capacity through the pipelines to comply with the contractors demands within the stipulated period.

II. The Bolivia-Brazil Pipeline

The Bolivia-Brazil pipeline is 3,150 kilometers long and connects the cities of Santa Cruz de la Sierra in Bolivia to Porto Alegre in Brazil. It has the capacity to transport 30 million m³ of gas on a daily basis. The pipes are between 16 and 32 inches wide. There are two different routes: the northern route connects Corumba to Guararema and the southern route connects Campinas to Canoas. The operation of the pipeline in the Brazilian territory is made by "Transportadora Brasileira Gasoduto Bolivia-Brasil S.A." – TBG and in the Bolivian territory by Gas Transboliviano S.A. – GTB. Both have the same shareholders, with different stakes in each. In TBG, Petrobras, through its subsidiary Gaspetro, has 51% of the shares; BBPP Holdings has 29% (British Gas, 9,66%; BHP, 9,66% and El Paso Energy, 9,66%); Transredes 12% (Fondos de Pensión Bolivianos, 6%; Shell, 3%; Enron, 3%), Shell 4%, and Enron 4%. At GTB, Transredes has 51% (Fondos de Pensión Bolivianos, 25,5%; Shell, 12,75 % and Enron 12,75%), Enron, 17% Shell, 17% Gaspetro, 9% and BBPP, 6% (British Gas, 2% BHP, 2% and El Paso Energy, 2%). The total amount invested in the pipeline was about US\$ 2.2 billion; US\$ 1.7 billion of which was in Brazil.²

The actual operation and control of the pipeline is made by satellite at TBG's Supervision and Control Center in Rio de Janeiro. The pipeline started to be operated in July 1999. By then, only the northern route was in use. In March 2000, the southern route began its operations. With both routes in operation, there are 26 delivery points in Brazil.³

Argentina used to be the main importer of natural gas from Bolivia. After the drastic increase in Argentinean gas reserves beginning in the late 1970's, the country became self-sufficient. Therefore, Bolivia, which is highly dependent upon gas exportation, focused on the Brazilian market. The demand for gas in the metropolitan areas of the southeast and southern Brazil increased in the late 1980's. In the early 1990's the government approved a report that affirmed the necessity that natural gas had a 12% share in the Brazilian primary energy consumption by 2010. The best alternative to accomplish this goal was to start to import gas from Bolivia.

The pipeline was originally conceived as a means of transporting the gas that would be bought by Petrobras from Yacimientos Petrolíferos Fiscales Bolivianos (YPFB). As of August 1996, Petrobras agreed to buy 8 million m³ of gas a day from YPFB on a *take-or-pay* basis. The *Transportation Capacity Quantity* (TCQ) should reach 16 million m³ a day on the eighth year and keep on this level until the

² Financing structure: World Bank, US\$ 310 million; Inter-American Development Bank, US\$ 240 million; Corporación Andina de Fomentos (CAF), US\$ 165 million; National Economic and Social Development Bank (BNDES), US\$ 760 million; European Investment Bank, US\$ 60 million; Agencies of Credit to Exports, US\$ 360 million.

³ ANP's "Monthly Natural Gas Bulletin", January 2003.

20th year. In the same contract, Petrobras was granted the *right of first refusal* to additional quantities of gas until the limit of 30 million m³ of gas a day, if these quantities were not necessary to supply the Bolivian domestic market.

The contract also contained provisions that created the *Transportation Capacity Option* – TCO. This option was accepted by Petrobras after the construction of the pipeline began. Therefore, Petrobras was granted the right to transport an additional 6 million m³ of gas a day, *supra* the contractual quantities limits, paying only the operational transportation costs and the related necessary investment on infrastructure. The National Social and Economic Development Bank of Brazil (BNDES) took part in the negotiations to finance the payment, which should be made in advance. The Bank financed the payment for this option with the condition that the gas would be supplied for thermoelectric power plants.

TCX (*Transportation Capacity Extra*) is the transportation capacity beyond TCQ (including the options accepted) and TCO, until the limit of 30 million m³ of gas a day. Petrobras contracted this capacity also.

TCY is the capacity beyond the 30 million m³ of gas a day, which can be achieved through new investments in the pipeline.

These contracts were the object of intense discussion in the cases that are going to be considered *infra*.

III. The Brazilian National Petroleum Agency and its role – The Legal Framework used to decide the cases

The Brazilian National Petroleum Agency, ANP, is responsible for regulating Oil & Gas in Brazil. According to its own description of its role⁴, ANP has to ensure that the rules regarding Oil & Gas are clear enough to boost the investors' confidence. Further, it affirms that the goal is to promote free competition in the supply of natural gas from inside or outside the country. Moreover, it has to ensure that the open access principle is respected and to provide the necessary information for the players in order to develop the market. Its most significant role, however, is to administer the transition between a growing market (which was a monopolistic one until very recently) to a developed, mature one characterized by free competition.

The Brazilian Constitution establishes in its Article 25⁵ that the states are responsible for the local development of gas pipelines. Therefore, regulation of the Brazilian gas industry is made by both state and federal governments, according to specific rules of competence.

The fundamental Oil & Gas legal framework in Brazil is the Brazilian Petroleum Act⁶ of 1997. This statute establishes the basic principles that concern

⁴ <http://www.anp.gov.br/gas/index.asp>

⁵ As provided by the Constitutional Amendment number 5 of 15 August 1995.

⁶ Lei 9.478, of 6 August 1997, "Lei do Petróleo"

the Oil & Gas market. Detailed legislation is issued by ANP, which was created by this statute.

Article 58 of the Act introduced the open access principle in the Brazilian Oil & Gas market. This principle was regulated by the Order ANP nº 169/98⁷ during the period between November 1998 and April 2001. This Order was valid during the period in which the cases that are going to be analyzed were decided.

Due to the energy crisis that occurred in Brazil in 2001, a new statute had to be passed in accordance with the "Priority Thermoelectricity Program"⁸. This was Order ANP nº 098/01, a temporary order that introduced just part of the proposed legislation regarding the expansion of the pipeline's capacity. After that, ANP opted to divide the themes regarding the open access regulation. Therefore, five projects were offered for public consultation⁹.

The principles and legal basis used to settle the disputes *infra* are contained by the Brazilian Petroleum Act (Lei nº 9.478) and by Order ANP nº 169/98.

The most important provisions follow.

Brazilian Petroleum Act, Article 1:

"The national policies for the rational use of energy resources will aim at the following objectives:

...

VI - increase, in an economic basis, the use of natural gas;

...

IX - promote free competition;

...

X - attract investment in energy generation;"

Article 58:

"Any interested party will be given the right to use the existing or to be built pipelines and off-shore terminals, if adequate payment is made to the owner.

§1º ANP will set the price and form of payment if the parties do not reach an agreement upon it; it has also the duty to verify if the price agreed is compatible to the market price."

Order ANP nº 169/98, Article 3:

"The transporter will permit non-discriminatory access to any interested third party to the available capacity and to the idle contracted capacity in its gas transport facilities."

⁷ "Portaria ANP nº 169/98"

⁸ "Programa Prioritário de Termoeletrificação".

⁹ Order on open access, Order on the Criteria to define the Tariffs of Natural Gas Transportation, Order on Dispute Resolution, Order on the Information that transporters and marketers have to disclose to ANP, the Market and the Marketers, Order on the cession of natural gas transportation capacity.

- IV. Dispute Settlement
- a. Cases Concerning the Interruptible Gas Transportation Service
- i. ENERSIL v. TBG

ENERSIL and TBG concluded a contract of interruptible gas transportation service on 29 September 2000. According to the contract, a quantity of 1 million m³ of gas a day should be transported by TBG from Bolivia to the pipeline's interconnection with the GASPAL pipeline in Guararema, State of Sao Paulo, Brazil.

This contract was only signed after a dispute resolution proceeding asked for by ENERSIL and conducted by ANP settled the disagreements between ENERSIL and TBG. The issue concerned some contractual clauses on which the parties had not reached an agreement: Price and the service's Terms and General Conditions (TCG). A special commission was created by ANP to settle the dispute. The Commission fixed the price that should be charged by TBG in the interruptible transportation service, based on Article 58 of the Brazilian Petroleum Act.

In 21 November 2000, ENERSIL asked again for ANP's intervention. This time the company was seeking the approval of an amendment to the contract. The amendment was requested by the company the day the original contract was being signed. TBG rejected the terms of the request and ENERSIL sought to resolve the issue by arbitration under ANP. ENERSIL requested the inclusion of another twelve delivery points located between the original reception and delivery points and the inclusion of a clause by which the contract would be automatically renovated every year.

During the proceedings, TBG had to provide information to ANP that explained why it rejected ENERSIL's request. It argued that by accepting the request, it would face legal and financial difficulties. According to TBG, the provisions of the original contract would attenuate these difficulties, since under it, there would be a single delivery point without transportation capacity restrictions and a distance factor close to one would apply.

After efforts made by the parties and technicians of ANP to avoid an arbitration, ANP designated the SCG¹⁰ to settle the dispute.

According to the SCG, the inclusion of new delivery points was totally in accordance to the legal principles that applied to the case. The fact that this would have effects over some of the mechanisms adopted in the Resolution that settled the first dispute between the companies constituted no sufficient basis for the rejection of ENERSIL's request. ANP's approach was rather to adapt such mechanisms in order to conform to the new specificities of the contract, if it was

¹⁰ ANP's Superintendence of Natural Gas Commercialization and Transportation, "Superintendencia de Comercializacao e Movimentacao de Gas Natural".

found necessary. A summary of the issues discussed in the cases involving ENERSIL and TBG is presented *infra*.

1. Distance Factor

This factor was first introduced by the decision made by ANP's special commission in the original dispute between ENERSIL and TBG. It was in accordance with Article 10 of Order ANP nº 169/98, which provided that the price paid for the gas transportation service should reflect the distances between the reception and the delivery points. The concern of TBG here was the all new delivery points were closer to the receipt point than the original one and, therefore, the per unit price paid by ENERSIL would be lower with regard to those in comparison to the unit price paid for gas transported to the original delivery point. The decision was that the distance factor should not be altered.

TBG appealed this decision and proposed a different method of calculating the distance factor. This method would not have the same negative impact over the company's financial situation. According to the appellate body, some premises included by TBG in this method were highly subjective and complex in its application. Therefore, the appellate body decided to maintain SCG's decision.

2. Contract Term

The SCG decided that the clause that provided for the automatic renovation of the contract every year, as required by ENERSIL, should be included in the contract. Nevertheless, a 0.5% annual rate increase should apply. The justification for this was that the interruptible transport price was based on the firm transport price and the latter requires such an annual readjustment.

3. Discount Factor

In the first resolution, the special commission decided to impose a discount factor to the contract between ENERSIL and TBG. This factor would apply to compensate the marketer for any interruption in the transportation of gas. The factor was the division between the number of days in a month with reduction or interruption of service and the total number of days in the month. Therefore, if a certain or even minimal reduction occurred in 12 days in a month of 31 days, the marketer would have approximately a 38% discount. TBG did not agree to such a provision since it could lead to excessive discount. TBG used this to justify their refusal to ENERSIL's contractual amendment request. The SCG agreed to eliminate this factor.

4. Load Factor

This factor typically applies to firm gas transportation contracts. The idea behind it is that the more gas the marketer takes in a determined period until the

limit contracted, the less it will cost for it per unit. ANP decided that it would apply to interruptible contracts because of the improbability that there would not be any interruption in TBG's transportation service, because of lack of demand in the initial stages of the project.¹¹

According to ANP's determination regarding the first dispute settlement between TBG and ENERSIL, this factor would vary between 80% and 100% applied on the base price for firm transportation contracts, according to the take of gas by the marketer in comparison to the quantity of gas contracted to be supplied in an interruptible basis.

The controversy arose when ENERSIL applied for the commencement of arbitration by ANP. As explained *supra*, ENERSIL wanted to include in its interruptible transportation contract with TBG some additional receipt points. If applied in a variable form like explained above, ENERSIL could allocate its contracted gas quantity according to its own will in different receipt points. This would make it very probable that ENERSIL would usually get a 100% load factor, which would be unfair to TBG.

There were two solutions for this: one was to demand contracted quantities for each point of delivery from ENERSIL; the other, to set an *a priori* percentage that would apply to each and every interruptible contract. Due to the technical difficulties and costs that the application of first solution would result in, the second one was picked. Hence, the SCG decided that a 90% tariff would apply, regardless the take made by the marketer.

5. Terms and General Conditions

a. Gas for system use

TBG alleged that the provisions of the contract signed with ENERSIL would expose TBG to commercial loss because it would have to replace the gas for use in the system. Therefore, TBG proposed to ANP that the original marketer, Petrobras, would be responsible for supplying the gas used in the system to transport its contracted quantity and that all other marketers would supply the gas needed to transport their gas in a *pro rata* basis. The SCG decided that this would be discriminatory and that all marketers should pay in a *pro rata basis*, without making any distinction between old and new marketers.

In its appeal, TBG again alleged that if it had to transport gas to ENERSIL as provided in the latter's request, it would bear the risk of not having sufficient gas to run the system, because ENERSIL was not contractually bound to supply it and because TBG was legally forbidden to buy gas. In the appeal, TBG simply

¹¹ The SCG cited a decision National Energy Board of Canada (document RH-3-86), which states that it is unfair that a marketer contracting an interruptible service that receives gas without interruption, pays less than one that contracts a firm service.

stated that should this problem occur, it would request ANP's intervention. The appellate body replied that TBG had the right to buy gas if this problem occurs according to its interpretation of Article 12 of Order ANP 169/98. According to this Article, the transporter has the right to buy gas for its own consumption.

b. Priorities Schedule

TBG alleged that the GASBOL contracts provide that the original marketer should have preference in the allocation of gas quantities. Thus, it proposed that the TCG should reflect that, so that the new marketers would have a lower priority in comparison to the original marketer, even if the service were the same. The SCG decided that this would be discriminatory: the only distinction regarding priorities should be the one between companies that contracted interruptible or firm gas transportation services contracts.

This decision was appealed by TBG. It argued that the provisions of the prior contracts signed with Petrobras were in explicit conflict with the decision. TBG allegedly would have to violate either the decision or the contract provisions in order to comply with one or the other. The appellate body contended that if the financial effects of the decision were such as to make it impossible for the company to comply with the provisions of the prior contracts, than it should negotiate with Petrobras to, accordingly, change these contracts.

ii. BG v. TBG

On 14 December 2000, British Gas do Brasil Ltda. (BG) requested assistance of ANP to solve the dispute that it was having with TBG.

BG had requested TBG's interruptible gas transportation service. It requested the transportation of 0,8 million m³ a day for the period between April and August 2001, and 1,0 million m³ a day for the period between September 2001 and December 2003.

The receipt point should be Corumba and there would be eight delivery points¹².

BG rejected TBG's contract and TCG proposal because it was significantly different from the one concluded between TBG and ENERSIL.

According to BG, TBG's proposal was discriminatory, because it was treating two companies in the same situation differently. Therefore, BG requested ANP's intervention to compel TBG to offer a contract and TCG with the same clauses and in the conditions as the ones concluded between TBG and ENERSIL, which were homologated by ANP. Hence, the same prices and calculation methods should apply.

¹² Itatiba, Guararema, Guararema Interconexao, Americana, Limeira, Sumare, Campinas, and Rio Claro.

ANP's response was that it would compel TBG to offer the same clauses and conditions that would prevail after the settlement of the second dispute between ENERSIL and TBG.

The SCG decided that the same contracts should be offered both to ENERSIL and BG, based on the non-discrimination principle. The original contract between ENERSIL and TBG should be used as a model because both companies eventually requested contracts by which gas should be delivered to many delivery points. Therefore, the case was decided on the same bases as the second one between ENERSIL and TBG. Some brief remarks on the issues regarding this case are presented *infra*.

BG requested that the contract should be valid between April 2001 and December 2003. The SCG decided on the same basis as the case between ENERSIL and TBG, stating that the contract should be valid for one year and should contain an automatic renovation clause. Moreover, the same 0.5% annual rate increase should apply.

The SCG granted BG's right to have gas delivered to a multiple number of delivery points based on the open access principle. Having the second dispute resolution between ENERSIL and TBG as a benchmark, the SCG decided that the load factor that should apply to BG's contract was the same, namely, 90% on the "relevant firm contracts price". In its prior commentaries, BG agreed with a fixed load factor, but, according to it, it should not be lower than 100%.

The discount factor was eliminated as it was with regard to ENERSIL's contract. Also based upon that decision, the SCG decided that the distance factor should apply.

b. Case Concerning the Firm Gas Transportation Service

i. BG v. TBG

On 14 December 2000, the same date that BG requested the resolution of its conflict with TBG regarding an interruptible transportation contract; it requested the resolution of a conflict with the same company regarding a short-term firm transportation contract.

BG had requested TBG the transportation of 0.7 million m³ a day from April 2001 until August 2001 and 2.1 million m³ a day, to be transported from September 2001 until December 2003. The reception and delivery points would be the same as provided in the interruptible contract.

TBG responded to BG's transportation request saying that it would not be able to comply with it because it allegedly had no available capacity for the period because the contracts renegotiation with its original marketer were not finished.

Until the renegotiation was finished, all capacity would be destined to the contracts with the original marketer.

BG found that this conduct was a procrastination destined to maintain transportation capacity out of market in order to protect its main shareholder interest.

The main issue under discussion in this case was the inconsistency of the data regarding the pipeline's capacity presented by TBG. In different moments, TBG presented different data; it would change the data because of new factors and new negotiations with its original marketer and then just present the previous numbers again without giving any explanation. Therefore, it was impossible for market players to know exactly what the available capacity of the pipeline was. TBG would allegedly rely on this confusion in order to deny access to interested parties and protect Petrobras' interest. *Infra*, a description of the inconsistency will be presented.

Complying with Article 9 of Order ANP nº 169/98, TBG presented to ANP the transportation contracts that it had concluded with its original marketer Petrobras. A chart explained the contracted capacities for the TCQ, TCO and TCX contracts for each year between 1999 and 2019. The first problem verified was that the contracted quantities were not allocated for each delivery point.¹³ This means that Petrobras could allocate the quantities according to its own will at different delivery points. This was found to make it almost impossible to determine what the available capacity was, since, according to the contract, Petrobras could at any time decide that the whole capacity technically deliverable to a determined delivery point should be delivered to it, leaving no space for other marketers. ANP decided that TBG and Petrobras should change their contracts in order to specify the contracted quantities for each delivery point.

The second problem was that this first set of data provided by TBG was inconsistent with the declared capacity of GASBOL. Therefore, the contracted capacity was higher than the pipelines capacity so that the available capacity was "negative" between the years of 2001 and 2006. These would make the open access to companies other than Petrobras impossible.

After that, on December 1999, TBG sent a revised chart to ANP, explaining that it had changed the potency of some compressors from 7,000 hp to 15,000 hp. This would have the single effect of making it possible for TBG to transport all the contracted capacity of Petrobras. Nevertheless, it would still be impossible for third companies to use the pipeline's transportation service, since all pipeline's capacity was contracted by Petrobras.

Not only was this information a blunder if an open access pipeline was desirable, but also it was completely inconsistent with information provided by TBG three months later, on March 2000. Responding to ENERSIL's request to have an interruptible transportation service, TBG did not inform it that it had no available capacity, but rather, that because it had so much available capacity to transport gas, it could offer

¹³ As provided by Article 2 of Order ANP nº 169/98.

ENERSIL a service by which the latter would pay only by the quantities taken, like the interruptible service. The difference in this proposition was that TBG would guarantee that there would be no interruption in the service, as normally provided in firm contracts. TBG informed ENERSIL that it would have a large available capacity during the ramp-up period.

Two months later, following ENERSIL's insistence on having an interruptible transportation service, TBG rejected it again because it supposedly had sufficient capacity in the next years to offer a short-term firm contract.

ANP requested of TBG a clarification as to why TBG mentioned that it had available capacity if the data previously sent to the regulatory agency did not show that. TBG responded that it had to postpone for 2003 the TCO and the take or pay provisions of the TCX contract with Petrobras, creating, thus, available capacity. The new chart sent to ANP, contained different data concerning the contracted capacity for the TCQ contract and the maximum capacity for the year 1999. According to TBG, at the same time that it was postponing for 2003 the TCO and TCX capacities, it was anticipating the maximum capacity of 18 million m³ a day of the TCQ contract from 2007 to 2004.

On May 2000, after a request from ANP, TBG had to publish in papers, the contracted, and the available capacities for the year 2000. According to it, the available capacity was 7.9 million m³ a day. The problem was that 12 days later, TBG informed ANP that the published data was wrong since the quantity of gas needed for its own consumption was not included in the calculations.

Following BG's request for ANP to settle the dispute between it and TBG, ANP ordered TBG to provide detailed information on the up-to-date capacity of the pipeline and its evolution until it reached 30 million m³ a day, as foreseen in the original project. TBG responded that the capacity evolution is intrinsically related to the contractual requirements. This affirmation was bizarre, since TBG was actually tailoring the evolution of capacity to the contracts of one single customer, Petrobras, and was not projecting the demand of other companies.

Subsequently, TBG sent new data to ANP, which changed again the projected capacities for numbers that were present in the original projections. Moreover, the information contained a new type of capacity contract named TCO/X, which was simply not explained. Without justification, TBG once again presented different data.

During the proceedings, BG was requested by ANP to inform the wanted capacity for each delivery point. After receiving this information, ANP Ordered TBG to offer a contract to BG with the capacities that it informed.

On February 2001, ANP requested TBG to provide clarifications on why there had been so many inconsistencies in the data that it issued before. ANP also requested information that clarified the evolution of the capacity in the pipeline, the last version of

the "Thermo Hydraulic Simulation Report", as well as all information, premises and hypothesis used to calculate the capacity of the pipeline.

TBG responded that the "apparent inconsistency" in the data was due to the fact that one important compressor had not yet been installed in the Bolivian part of the project. That was the first time that this reason was raised by TBG.

Another interesting point is that while analyzing the last version of the "Thermo Hydraulic Simulation Report", ANP discovered that the capacity of 30 million m³ a day included also gas from Bacia de Campos, in the Rio de Janeiro State and from Santos, in the State of Sao Paulo. Moreover, the existing pipelines from the Southeast region of Brazil were also regarded as being part of GASBOL.

According to BG, ANP should take the conflict of interests between Petrobras and TBG into account and assure that the actions purported to TBG would not aim the protection of the original marketer. In fact, in its decision, ANP stated that TBG had always acted in a manner to protect its main shareholder from competitors, while procrastinating decisions and rejecting requests. According to ANP, the aim of this behavior was to give time to Petrobras to sign contracts with different state companies. Thus, Petrobras would consolidate its position before competitors had a chance to develop their own business, since these contracts normally have terms of 20 years.

ANP also affirmed that the inconsistent information given by TBG illustrated that it was not a company interested in developing its business by efficiently using its pipeline, and conquering new customers. According to ANP, the access to the pipeline should be broad and non-discriminatory. TBG should act as an independent company. ANP also stressed that legislation should be enacted in order to limit the participation of marketers as transporter's shareholder with voting rights.

ANP also avowed that the TBG's decision to postpone the pipeline's capacity ramp-up in order to supply only Petrobras' demand was discriminatory because it ignored the demand of other interested companies.

An audit committee was designated by ANP to verify the actual capacity of the pipeline.

TBG contended that it could not comply with ANP's decision that it should, together with Petrobras, specify the contracted capacity for each delivery point because this was a bilateral relation. The appellate body simply extended the order to Petrobras as well.

c. Comments on the Issues Underlying the Cases

The real dispute underlying the four cases is the dispute between the oil multinationals and Petrobras to acquire market share that could last as long as 20 years. The more time TBG would take to permit the participation of multinationals, the more contracts with state distributors its controller would have. Petrobras aim was to maintain *de facto* its monopoly as a marketer. It would accomplish its goal, at least with

The argument against the attitude of TBG was that its controller and main stockholder, Petrobras, is also the original marketer and, therefore, the conflict of interests in the companies is clear. Petrobras wanted to remain as the main marketer and acted within TBG to accomplish its goals. TBG and Petrobras agreed to speed up the schedule of extension of the pipelines capacity. However, at the same time, TBG was rejecting the offers of BG and ENERSIL. Both actions would make it possible for Petrobras to conclude more contracts with the state distribution companies. Since these contracts usually last for 20 years, when the competing companies such as BG and ENERSIL were granted the right to carry gas thru TBG pipelines, they would have a very narrow market, while Petrobras would retain the great majority of contracts with the state distributors.

One argument that of course was not cited in any TBG petition, but could be read in press reports¹⁴ was that Petrobras made most of the investments¹⁵ to build the pipeline and, thus, would have the right to explore it and make profits that it generates, at least for a certain period, so as to recover the investment made and be able to set-off the debt to the financiers. Therefore, it would be unjust to let companies that had a minor participation during the construction period make the profits. Following this argument, Petrobras aim was not to recover the investment by the profits made by TBG only, but also by the profits that it would make as a marketer. Actually, the question whether TBG and Petrobras were vertically integrated was not asked during the dispute settlement proceedings.

Companies that want gas from Bolivia to be sold in markets such as Sao Paulo or Rio Grande do Sul have no choice but to contract with TBG. The open access system in Brazil has the role of preventing the monopolist company from discriminating and barring the access for companies that wish to use the service. In an environment of many transportation companies, the need for open access, although important, would probably not be so great: interested marketers would have more bargaining power to win contracts since competing transportation companies could accept the contractual substance denied by the original transportation company. Therefore, the open access system in Brazil plays the important role of mitigating the problems that can occur due to the existence of a monopoly in the transportation business.

¹⁴ In "Revista Isto E", in its issue number 1645, for example.

¹⁵ It is important to stress that Petrobras has not yet recovered its original investment in TBG and owes many borrowers that contributed t

V. Conclusion

A great concern of multinationals while dealing with foreign developing markets is that the foreign country provides a legal framework that protects principles well assented in the most developed markets. Throughout the paper, it could be noticed that not only has Brazil a legal framework compatible to the international Oil & Gas standards, but also, and more importantly, it applies the set of legislation through ANP.

ANP's role as the dispute settlement body sponsor was of extreme importance to assure that the *open access* was guaranteed. All decisions were based on legislation enacted by Congress and by the agency itself. In one of the decisions, the agency expressed that it had discretion to decide whether to apply the legislation enacted by it, taking into account the market factors, the macroeconomic environment, and the financial outcomes that the decision may produce. This statement should be regarded as a means of protecting market players in exceptional situations. It should not be interpreted as a risk that legislation is not applied. Moreover, as it is implied in the statement, the regulatory agency does not have the same discretion towards legislation enacted by Congress.

It could be argued that the decision made by ANP reflected a political environment that favored the participation of foreign companies in the preceding federal government. The Brazilian federal government today could be characterized as not being as free market oriented as the former one. Nevertheless, no significant changes are expected. Even though there is no *stare decisis* in the Brazilian legal system or, specifically, in administrative law, the principles applied to the cases are well assented within the regulatory agency doctrine and should be further applied.

The decisions boost domestic and international confidence in the Brazilian regulatory system and make the Brazilian and South American environment more investor friendly.