

# ***Regulation of Special Purpose Companies in the Natural Gas Transportation Sector through Gas Pipelines and the Principles of Corporate Governance in Brazil***

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## **Overview**

The purpose of this study was to analyze the related regulations: special purpose entities in the transport of natural gas through pipelines, noting that brazilian legislation is stumbling, with no specific rules for this institute. Still, sought to analyze the institute of corporative governance applied to such type of corporate model, pointing to the need for improvement of the Institute, it being understood that there is a legal loophole to its application in this sector.

Keyword: Specific purpose company; Corporate Governance; Natural Gas

## **Introduction**

Since the late 1970s, there has been a shift in the profile of energy consumption and supply, when oil price raised in 1973 and 1978 - "oil shocks" which have influenced the reorientation of energy policies in practically all countries in the world. In this scenario, natural gas became one of the priorities of Brazilian energy policy during the late 1980s, and acquired a great importance in the 1990s with the discovery of important gas reserves associated with oil in the Campos Basin and the development in negotiations to import of 30 million m<sup>3</sup> / day of gas from Bolivia in 1994 (PIQUE & MIRANDA, 2009).

The viability in implementing the infrastructure of gas transportation depends on a proper legal structure in order to create an environment that can allow large private capital to construct and operate natural gas transportation plants, which implies rules oriented to the specific characteristics of the activity, of greater stability, with the possibility of a return on the private investment, through reasonable risk distribution among the enterprise (PRISCO, 2010).

According to the Brazilian Ministry of Mines and Energy (2007), the availability of natural gas in Brazil must regard the modal transportation currently available, which are gas pipe transportation of long distance, distribution lines of piped gas and natural gas processing units.

As a result of the national expansion of the natural gas sector, the logistics of transportation of such product in order to meet the needs of the country stands out, taking into account the need to expand the national gas network. Another important aspect for the analysis of Special Purpose Companies is the scope of corporate governance as an instrument to confer management transparency and to attribute reliability to foreign investment in partnerships in the area of natural gas transportation.

Thus, there is a need for a more in-depth study of the model currently used by gas transportation concessionaires through a pipeline in order to point out ways for more efficient regulation that comply with corporate governance rules.

## **Literary Review**

Considering these introductory considerations, it is necessary to develop studies related to the regulation of SPEs in the natural gas transportation sector through gas pipelines and its relation to rules of corporate governance. In this way, as a guide to an investigative and analytical view, this theoretical study, subsidized by a theoretical-conceptual model, establishes the current legislative framework as well as authors such as Álvares et al. (2008), Sabbag (2015), Santos (1999, 2011), Steinberg (2003), among others that are timely and add knowledge to the elaboration of this work.

## **Methods**

Considering the context of this article, the research methodology used for its elaboration was qualitative, exploratory and explanatory, based on research strategy and bibliographic review, since there was a description and explanation of the current knowledge regarding the subject of gas and public data collection provided by the municipal, state and federal powers. The exploratory research attempts to collect the information regarding the chosen object of analysis, helping and facilitating the delimitation of the work to be performed, while the explanatory research, which is posterior to the exploratory research, deals with the analyzes and the records of the study with intention of identifying its causes, according to Severino (2007, p 123).

## Results/Discussions

The current regulatory model proposed by Law 11.909 / 2009 is not enough to delineate many aspects of the legal regime for the concession of gas transportation by pipelines of general interest, this activity still depends on the detailed discipline of the matter, which will arise from rules of contracts to be signed between Administration and individuals. Even so, it is possible to discern in Law 11,909 / 2009 the basic outline of the legal-economic structure of this adjustment and its regulatory apparatus (PRISCO, 2010).

According to article 4º, paragraph 2º of Law nº. 11.909 / 2009, the federal legislation of Public Private Partnerships (Law nº. 11.079 / 2004) is applicable to the natural gas transportation pipeline model, as well as to be able to apply the General Law of Concessions (article 3, paragraph 1 of Law No. 8,987 / 1995), so only in this type of model of the business can be applicable to this regulatory frame. Under this aspect, it is necessary to study the ways that Specific Purpose Society can be used, in the way that it is determined in art. 9 of the Public Private Partnership Act.

It should be noted that the term "Specific Purpose Company" appeared in the legal order of the country in Law No. 11,079, of December 30 of 2004, which established the public-private partnerships regime, in its art. 9, which requires the constitution of such company before the conclusion of the agreement, with the need to comply with corporate governance standards.

Its rule is also given by art. 981 of the Brazilian Civil Code, which explains that it is possible to set up a business company aiming at the development of a very restricted activity, and in some cases may have a certain term of existence, usually used to isolate the financial risk of the activity developed. As a rule, it is the result of the union of efforts to achieve a specific undertaking (article 50, item XVI, of Law 11.101 / 2005).<sup>1</sup>

As a business model where there is segregation of funding for project implementation and individualization of costs, revenues and results, it is verified that there is no specific legislation for SPEs in the field of gas transportation, but it is widely used in Concessions that seek to provide public services, such as the gas transportation service.

The transportation of gas by pipeline requires high investments and presents low flexibility, its cost being determined by its length, route and volume to be transported, and 50-60% of the total costs of assembly and expropriation costs. However, with the falls seen since 1985, pipeline transport has become more competitive even for distances over 5,000 km (PIQUE & MIRANDA, 2009).

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<sup>1</sup> Law 11.101 / 2005. Art. 50. *The following are among the means of judicial recovery, observing the legislation pertinent to each case, among others: (...) XVI - constitution of a special purpose company to adjudicate, in payment of credits, the assets of the debtor. "*

In this sense, investment in such a model is possible, but there is a need to improve the business exploitation model, in order to adapt the specific purpose company to the gas market, and to enable the segregation of the explorer of activity from activity itself. It is considered that the SPE model benefits transparency because it gives the regulator greater possibility to carry out a more adequate inspection, and in case of return of the activity to the granting power, the equity is already ready for that purpose.

When integrating operation in the gas logistic field, it is essential that an SPE develops a project that is presented in a clear and objective way, in addition to its operations plan and its financial plan, which must have total transparency on fundraising, a level of Compliance that meets regulatory requirements.

The natural gas transportation logistics should primarily aim to guarantee the supply of natural gas to the plants belonging to the Priority Thermoelectricity Program, the PPT, and should, according to Technical Note 002/03 / SCG and based on the Petroleum Law, be carried out by independent enterprises that possess administrative, technical and operational capacities, as well as technical elements of their own support, decision-making autonomy and advanced level of compliance, which will result in periodic publications of their financial statements in the most appropriate and transparent way possible, which makes the importance of Corporate Governance evident, given the explicit context, since this is based on the dialogue between regulators, companies, market and society.

The structuring of project in gas-nets must fully comply with technical-financial requirements of the National Petroleum Agency (ANP) and of the legislation in force through observation of applicable norms, regulations and objectives and principles established by law, without disregarding, ways to encourage the development of the natural gas market in Brazil.

In this perspective, the design of the natural gas distribution sector implies the consideration of possible contractual mechanisms to stimulate the competition or the maintenance of more closed contracts from the competitive point of view of the capital needs to build a network at a stage very nascent (or practically nonexistent). (COSTA, 2006, p.27).

The proposal of a gas transportation model must be fully compatible between its structure and the organization model of the natural gas sector according to the Law N°. 9.478 / 97 and the Law 11,909/2009. The project must foresee flexibility when strategic adaptations are needed, however, without losing focus on its main objective and its characteristics. It is important to note that financial engineering characteristics of those involved in SPEs should always be subject to extreme attention, through continuous analysis and monitoring that ratify their solidity and suitability.

The project should present as a fundament the integration among the members involved so that there is a common vision about all its implications, such as the development of the natural gas transport infrastructure, the national interest, the generation of employment and income, the technological

development, relations between financial gains and competitiveness, and, of course respecting the regulatory model established by the Oil Law and the Gas Law.

Therefore, the SPE's employment is adequate, but the model that uses it needs legal improvement.

### **Gas Logistics and Corporate Governance**

The gas issue, which is still insipid, requires professionalization and insertion of robust and effective management practices, which means that Corporate Governance, GC, is not only applicable but an extremely desirable practice, what makes its adoption imperative, since its system represents "competitive and innovative postures, which do not constitute extravagances of the favorable times, but necessities for survival in moments of transition and global changes" (SANTOS, 1999: 37).

In Brazil, the Brazilian Institute of Corporate Governance (IBGC) guides the CG as a management system that incorporates demand organizations, their monitoring, and the relationship between stakeholders, shareholders and control bodies in search of continuous improvements aligned with their interests, preserving and optimizing its organizational value and consequently achieving its economic efficiency and permanence.

As a management system Corporate Governance presents four principles: transparency, fairness, accountability and corporate responsibility; These principles are supported by an organizational structure responsible for decision-making processes related to the strategic orientation of the organization that is subsidized by solid and dynamic structural conditions.

The adoption of best management practices necessarily entails the reconciliation of the organization's strategic objectives and the link between its members, which leads to the principle of transparency, whose obligation of timely and reliable information is disclosed to interested parties in general, and not only to regulated stakeholders, which consequently effective the principles of equity, where there is fair and adequate treatment to all stakeholders, and accountability, which states the total responsibility of the managers with regard to their acts in the course of their working periods. The principle of responsibility is based on zeal for organizational longevity, which depends, on a mandatory basis, on social and environmental compliance.

According to Álvares, Giacometti and Gusso (2008), the organizational structure of Corporate Governance is composed of the Board of Directors, Committees of the Board of Directors, Fiscal Council, Family Council, Executive Management and Holdings.

The SPE should provide business management with emphasis on four pillars of Corporate Governance: transparency, fairness, accountability and corporate responsibility, as this will allow the viability of new investments, maximization of the use of existing infrastructure and to be created, of gas production to

Brazil and abroad, tariff planning that results in a clear plan that reflects the real costs involved in the associated logistics processes and strengthening the role of the transporter.

[...] Must observe the principles of isonomy, highlighting the following guidelines:

1.1. Adoption of non-discriminatory treatment of users of the natural gas transportation infrastructure under their responsibility;

1.2. Application of the same general contracting terms and conditions to carry out natural gas transportation contracts with any shipper;

1.3. From the implementation of the adequacy of said meshes, realization of public offers of transport capacity available at its facilities, existing or resulting from new investments;

1.4. Promotion of the efficient operation of gas pipelines, seeking to: (i) maximize their use, (ii) allow access by as many user companies as possible and (iii) to meet the gas production flow of the various companies involved in gas exploration and production in Brazil or in the importation of gas from other countries (PETROBRÁS, 2003, p. 3).

It is necessary to have in-depth discussion on the alternatives for raising funds, as well as the total and unrestricted attendance to the regulatory events so as not to impede the introduction of new competitors in the gas sector in the country.

It is not enough to recognize the economic and financial importance of the project. The national commercial interests and the regulatory objectives of the ANP and other relevant legislations need to be allied with them.

## **Conclusion**

The development of an appropriate legal structure that will enable the entrance of large amount of private capital required for the construction and operation of the natural gas transmission facilities is determinant to make feasible the gas transport infrastructure, since the investment depends on a glimpse of stable and attractive regulatory frameworks in terms, that could encourage the entrepreneur to see a possible and attractive economic return.

The SPE should be based on the four pillars of Corporate Governance, such as transparency, fairness, accountability and corporate responsibility, because this will allow the viability of new investments, maximization of usage of existing and to be created infrastructure.

As mentioned above, an SPE is the result of joining efforts to achieve a specific enterprise, so it is imperative to adopt clear and objective rules, where there is complete transparency in their actions and high commitment to organizational compliance.

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