# THE OIL AND GAS LAW REVIEW

Seventh edition

**Editor**
Christopher B Strong

THE LAWREVIEWS

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SEVENTH EDITION

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# PREFACE

International oil and gas law is a fascinating field, sitting at an intersection of law, politics and business. Practitioners in this field must be familiar not only with international norms and practices, but also local legal and regulatory requirements that can vary substantially from jurisdiction to jurisdiction. The task can be daunting, especially in the context of fast-paced transactions or urgent legal or operational issues.

*The Oil and Gas Law Review* is intended to serve as a starting point for practitioners in gaining an understanding of the key legal requirements in the jurisdictions in which they may be advising clients on transactional and operational matters. The thinking behind the sub-topics it covers has been to try to answer those questions that come up most frequently when dealing with a new or unfamiliar jurisdiction. Although not a substitute for detailed local law advice, the hope nevertheless is that it will serve as a reference guide and point users in the right direction when considering local legal issues.

I would like to thank the many experts who contributed to this volume. Without their substantial efforts, a work such as this would not be possible. Thanks also to the editors and publishers of *The Oil and Gas Law Review* for having the vision to publish a volume such as this and for their efforts in making it such a success.

**Christopher B Strong**
Vinson & Elkins LLP
London
October 2019

**Chapter 5**

# BRAZIL

*José Roberto Faveret Cavalcanti and Ivan Lafayette Bandeira Londres*[1]

## I INTRODUCTION

In 2018, the Brazilian oil and gas industry grew stronger on the back of a continued offer and interest for pre-salt assets. Despite a marginal decrease in current production, Brazil recorded a substantial growth in revenue from government participations and signature bonuses. A reasonable rise in proven reserves was enough to keep Brazil in the 15th global position. With respect to natural gas, Brazil stayed in the 32nd place in the global ranking, with 570 billion cubic metres in proven reserves.

Helped by the upward trend in oil prices (around 30 per cent up in comparison with 2017's average spot prices), the level of activity in the industry is picking up as the regulator managed to complete three bid rounds with positive results. During 2018, The Brazilian National Oil, Natural Gas and Biofuels Agency (ANP) conducted the 15th concession bid round and the fourth and fifth production sharing (pre-salt) rounds. In these instances, a total of US$2 billion in signature bonuses were paid, signalling a further investment of US$300 million in minimum work programmes. Together with the fourth and fifth bid rounds for pre-salt acreage, the revenue from signature bonuses totalled US$4.5 billion and more than US$700 million committed with exploratory work.

According to the latest report issued by the regulator ANP , in 2018, (1) oil production decreased to 2,683,000 bbl/d, which is a marginal drop from previous year, but still above the annual results for the past decade; (2) 1.4 billions of barrels were added to the proven reserves calculation, which represent a 5 per cent increase from the previous year; (3) royalties and special participation revenues climbed to approximately US$5.9 billion (53 per cent above 2017 levels) and to US$7.4 billion (96 per cent above 2017 levels), respectively.

Key regulatory steps were taken in order to create a balanced and predictable environment and boost investors' appetite for Brazilian acreage. One of these steps was to publish a multiple-year bid round plan, which include the ongoing 16th round for concession assets and the 6th round for pre-salt areas for 2019. Furthermore, 2019 will also see the auction for the Excess Rights in connection with the onerous assignment made to Petrobras by means of Law 12,276/2010. In 2019, ANP also started the first cycle of 'permanent offer' (sometimes referred to as 'open acreage') to attract investment to mature areas.

Brazil is clearly becoming a major global oil destination, with an increased commitment for the development of giant fields located in ultra-deep water in the pre-salt layer. The reason is a combination of reduced development costs and high productivity (sometimes over 50,000

1 José Roberto Faveret Cavalcanti and Ivan Lafayette Bandeira Londres are partners at Faveret Lampert Advogados.

barrels a day). The pre-salt fields have, however, a very high quantity of associated natural gas, which need to be sold to the market or reinjected. Reinjection is happening on a large scale today, but sometimes it cannot be used for technical reasons, and in other situations it may reduce the amount of oil that could be extracted from the reservoir over its economic life.

Thus, the federal government has been devoting itself to revising the legislation applicable to natural gas to facilitate investment in the construction of a new infrastructure necessary for the offloading of natural gas from pre-salt fields. In addition, it is taking steps to end Petrobras' *de facto* monopoly on the sale of natural gas in Brazil, with the expectation that this will facilitate the sale of natural gas produced by other companies, creating a more dynamic market for the locally produced and competitively priced associated natural gas from pre-salt fields.

In late 2018, the new president, Jair Bolsonaro, who has a much more liberal economic agenda than previous governments, was elected. This new agenda seeks to facilitate the entry of private companies in the oil and natural gas sector in Brazil as a way of accelerating the development of pre-salt fields. The new federal government has been accelerating Petrobras' divestment process as a way of obtaining funds to be invested in the development of pre-salt fields. In this divestment programme, there are several mature fields located onshore. This is attracting several smaller companies to the oil sector, many of which are controlled by local entrepreneurs, which tends to completely change the prospect of this industry in Brazil, until now concentrated only on large international companies.

## II LEGAL AND REGULATORY FRAMEWORK

The Brazilian oil and gas sector is regulated by general provisions of the Brazilian Constitution, as well as by a number of different federal laws, and ordinances and resolutions enacted by ANP.

Pursuant to Articles 20 and 176 of the Brazilian Constitution, oil and gas reserves located in Brazilian territory (including continental shelf, territorial sea and exclusive economic areas) are considered assets of the federal government. However, once they are produced in accordance with applicable laws, the property of these resources is vested in the person that holds the extraction rights.

After the enactment of Constitutional Amendment No. 09/1995, the federal government's monopoly over exploration and production of oil and gas reserves was loosened, allowing the federal government to contract state-owned or private companies.

### i Domestic oil and gas legislation

The Constitution gave the federal government monopoly over several activities related to oil and gas. Constitutional Amendment No. 9/95 allowed these activities to also be performed by private companies.

Thus, with the end of Petrobras' monopoly over the oil industry, Law No. 9,478/97, which governs the new legal framework for the oil industry (the Oil Law), was approved. It created the National Council for Energy Policy (CNPE), chaired by the Minister of Mines and Energy (MME), with the duty to prepare energy policies and guidelines, and ANP, the entity in charge of regulation, engagement and inspection of the oil, gas, and biofuels industry's economic activities, and responsible for, among other duties, preparing the bidding proceedings for the concession of rights of oil and gas exploration and production, executing the concession agreements and inspecting their performance.

In 2008, a discussion to modify the Oil Law regarding 'midstream' gas activities was initiated, resulting in the enactment of Law No. 11,909/09 (the Gas Law), whose regulation was approved by Decree No. 7,382/10. The Gas Law is currently under revision, as part of the 'Gas to Grow' programme launched by the federal government to diagnose all the problems in the industry and propose solutions to stimulate its development (Bill No. 6,407/13).

In 2010, Law No. 12,276/2010 was created, authorising the federal government to assign to Petrobras the exploration and production rights over an area where the existence of at least 5 billion barrels of oil and gas was estimated (this area was converted into four production fields named Atapu, Sépia, Búzios and Itapu). Such rights were granted to Petrobras in exchange of new shares issued by that company and subscribed by the federal government in accordance with a contract also known as the onerous assignment agreement (OAA). In accordance with Law No. 12,276/2010, Petrobras is not allowed to assign any working interest in the fields subject to this law.

Law No. 12,351/2010 was also enacted in 2010, and established the production sharing legal regime for the exploration and production of oil in a given geographically demarcated area under the terms of this law, which became known as the pre-salt polygon. The rest of the territory – around 98 per cent of the total area of the Brazilian sedimentary basins – is still subject to the concession regime established by the Oil Law.

Originally, Petrobras had to be the operator in any consortia (unincorporated joint ventures) that acquired areas within the pre-salt polygon and had to hold an ownership interest of at least 30 per cent in these consortia. Law No. 13,365/2016 made these rules more flexible, and, today, Petrobras only has a right of first refusal for acquiring an interest of up to 30 per cent in the consortia, as an operator. According to the relevant law, Petrobras must indicate the areas in relation to which it intends to exercise its right in advance, so that the companies participating in the bid for the acquisition of these areas know beforehand when they will be subject to Petrobras' right of first refusal.

Since in areas subject to the production sharing regime, a part of the production belongs to the federal government, Law No. 12,304/2010 created government-owned company Pre-Sal Petróleo SA (PPSA), with the purpose of representing the federal government in the consortia operating under this regime.

In summary, in terms of oil and gas exploration and production, Brazil has three legal regimes: (1) the concession regime created by Law No. 9,478/97 that is the 'general rule' in Brazil; (2) the onerous assignment regime created by Law No. 12,276/2010 that is applicable to certain fields (Atapu, Sépia, Búzios and Itapu) and up to 5 billion barrels of oil and gas; and (3) the production sharing regime created by Law No. 12,351/2010 that is applicable to reservoirs located inside the pre-salt polygon. In any situation, a specific agreement will be entered into with ANP.

It is important to note that certain activities involving natural gas (transportation, storage, trading, etc.) are governed by the Gas Law. The main goal of this law was to turn natural gas transportation through pipelines into a public service. Consequently, the construction and operation of natural gas pipelines become subject to a concession agreement that must be granted through a public tender organised by ANP. However, Bill No. 6,407/13, which is under discussion in the Congress, aims at carrying out a profound modification in the legal regime applicable to those activities. The objective of the bill is to simplify the legal regime applicable to those activities.

Oil and gas exploration and production activities must also comply with environmental laws and regulations created by the national environmental agency (IBAMA).

### ii Regulation

MME is mainly responsible for planning the use of oil and natural gas. MME, after consulting with ANP, proposes to CNPE the definition of the areas that will be subject to concession agreement or production sharing agreement (PSA) regime, and the technical and economic parameters for the PSA. MME also approves the drafts of the bid documents and the PSA prepared by ANP.

CNPE has the main purpose of fostering the rational use of the nation's energy resources, ensuring the proper functioning of the national fuels inventory system, reviewing energy matrixes for different regions of Brazil and establishing guidelines. It is responsible for authorising ANP to offer blocks under the concession regime and the PSA regime.

ANP is the national regulator of the oil, gas and biofuels industry, and is in charge of regulating, contracting and supervising economic activities related to the oil, natural gas and biofuels industry, as well as establishing technical standards for various related activities. ANP is also responsible for supervising compliance with safety standards and its regulations.

IBAMA is responsible for environmental regulations regarding upstream offshore activities. For onshore activities, other state and local environmental agencies may also have the power to regulate upstream activities.

The Brazilian Maritime Transportation Agency (ANTAQ) is responsible for regulating and supervising the maritime transportation of oil as well as maritime support activities. Only Brazilian navigation companies, duly authorised by ANTAQ and ANP, may perform maritime transportation and support activities within the country.

The Brazilian Navy has multiple roles in offshore exploration and production. In addition to technical inspection and entry control for any vessel or platform, it has jurisdiction over any incidents that take place on Brazilian waters. It is also responsible for maintaining the registry of maritime property, such as vessels.

### iii Treaties

The demarcation of the Brazilian continental shelf was established in accordance with the United Nations Convention on the Law of the Sea, executed on 10 December 1982. This convention is of great importance since the definition of areas where mineral resources may be exploited by Brazil, notably oil and natural gas, depend on it.

Therefore, it was a major milestone for the Brazilian upstream industry when an authorisation from the Commission on Limits of the Continental Shelf to extend the national continental shelf boundaries to 350 nautical miles from the southern coastline came forth. This important diplomatic and economic achievement was concluded in 2019, at the 50th plenary session, allowing Brazil to exploit natural resources in this new region, which is 150 nautical miles wider than the standard 200-mile limit.

The process of extending the outer limit of Brazilian Continental Shelf was claimed to the United Nations (UN) in 2004, after 17 years of studies, conducted and promoted by ANP, the Brazilian Geological Service and the Navy, which found evidence of not only oil reserves, but also of other minerals such as cobalt and manganese.

Experts estimate that the exploration of this maritime area could increase the volume of oil and gas reserves in Brazil, today estimated at 15.9 billion barrels, by 50 per cent. In the extended range of the continental shelf near the pre-salt, seismic studies have indicated that the structures may contain total reserves between 20 billion and 30 billion oil barrels.

In respect to tax treaties, and for the purpose of avoiding double taxation, Brazil has entered into tax treaties with the countries listed below. These treaties executed by Brazil and

its partners usually follow the Model Tax Convention of the Organisation for Economic Co-operation and Development (OECD) even though Brazil is not an OECD member. Brazil has entered into treaties with Argentina, Austria, Belgium, Canada, Chile, China, the Czech Republic, Denmark, Ecuador, Finland, France, Holland, Hungary, India, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Norway, Peru, the Philippines, Portugal, Slovakia, South Africa, Spain, Sweden and Ukraine.

Brazil has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) through Decree 4,311/2002. However, Brazil does not have significant bilateral investment agreements in force. In relation to tax information exchange agreements (TIEAs), Brazil has enacted Decree 8,003 of 15 May 2013, which put into effect a TIEA executed with the United States.

## III LICENSING

Since the end of Petrobras's monopoly in the 1990s and prior to the approval of the Pre-Salt Law, the only regime applicable for the granting of exploration and production rights in Brazil was the concession regime. At the end of 2010, the PSA regime was established to govern exploration and production on pre-salt areas and areas deemed strategic by the federal government.

Thus, there are two different regulatory frameworks for the granting of exploration and production rights in Brazil (from the licensing point of view, the onerous assignment regime is not relevant). Under the concession regime (similar to a tax-royalty regime), the granting of concession contracts for exploration and production activities is preceded by a tender (known as bid rounds). The tender documents must establish all technical, financial and legal criteria and requirements that a bidder must comply with in order to be qualified for the bidding round as a non-operator or operator A, B or C. In general terms, the 'non-operator' is a capital partner; operator A is the company qualified by the ANP to operate in any block offered in the bid; while operators B and C are eligible to operate in some restricted blocks to be defined by the agency (usually in shallow waters and onshore, respectively).

Companies may submit bidding offers individually or jointly in consortium. For a consortium, a qualified operator among them shall be indicated.

The criteria for the evaluation of bidding offers are:

*a* signature bonus: a lump sum payable in a single instalment upon execution of the concession agreement or PSA; and

*b* minimum work programme.

There is no restriction on foreign participation, provided that the foreign investor incorporates a company under the Brazilian law and complies with all technical, legal and financial requirements established by the ANP before the execution of the concession agreement (or the PSA). Companies of the same corporate group are prevented from making competing offers for the same block. Under the PSA regime, a portion of the oil and gas production is paid to the oil and gas companies as reimbursement for their exploration and production costs (known as cost oil), and the federal government shares the remaining production (known as profit oil) with the relevant oil and gas companies according to the ratio set forth in the respective PSAs.

Recently, a new law ended Petrobras' mandatory operation and minimum stakes in the pre-salt area. Now, Petrobras only has preferential rights for the operation and minimum

stakes in each pre-salt area to be offered in a bid round; and with respect to those areas in which Petrobras does not exercise its preferential rights, any company may be the operator, provided that the company qualifies as an operator A.

PPSA is a 100 per cent state-owned company created to represent the federal government in the consortium and is responsible for the management of the PSAs. PPSA cannot perform upstream oil and gas activities and will not make investments, but has very important responsibilities, including managing and supervising PSAs and representing the government in the operating committees. PPSA is entitled to appoint half of the members of the operating committee, including the chairperson.

The only criterion used to determine the winning bidders is the percentage of profit oil to be given to the government. Signature bonus under the PSA regime has a fixed value, as well as the minimum work programme and the local content. The special participation and payment for area occupation or retention, both part of the government take in the concession regime, are not applicable under the PSA regime.

The winners of the bid (individually or in a consortium) will bear 100 per cent of the exploration and production costs, but will receive a share of the profit oil as payment and will have the right to reimbursement of the cost oil (oil and natural gas equivalent to exploration and production costs), subject to payment of the applicable government take.

In both regimes, companies are required to comply with local content commitments as well as mandatory investment in research and development (R&D).

## IV PRODUCTION RESTRICTIONS

Although the concessionaires or contractors under the PSA are entitled to explore and produce oil and natural gas, property of hydrocarbons in situ, as in most jurisdictions, is vested in the government.

Concessionaires have ownership over the entire volume of the oil and natural gas produced under the concession regime, where the volumetric measurement of the oil and natural gas produced is made according to the ANP's regulations. For blocks within the scope of the Pre-Salt Law, the ownership is transferred to the oil company at the production sharing point, where the production is shared between the government and contractors.

Oil and gas are freely exportable in Brazil and there are no limits or quotas applicable to oil and gas production. Nevertheless, the export company must be authorised by ANP to perform these activities. The exporting and importing companies must present reports and information to ANP on each sale.

Furthermore, the exportation of any goods, including oil and its by-products, must necessarily be recorded in the national integrated system for international commerce, SISCOMEX, which is an online platform that enables the government to control international trade by establishing a one-way flow of information. Requirements of the maritime authorities (ANTAQ and the Navy), the tax authorities (the Federal Revenue Secretariat and the state tax secretariats) and the Brazilian Central Bank (currency exchange regulation) will also apply. All current import and export authorisations are governed by the recent ANP Resolution 777 of 5 April 2019, which revoked a large number of previously edited regulations by the ANP.

Notwithstanding the foregoing, in emergency situations in which the domestic supply of oil and natural gas is impaired or threatened (which must be declared by the Brazilian president), ANP may limit the export of hydrocarbons, as well as of its by-products, after giving 30 days' prior notice to the companies. The portion of the production on which the

restriction applies will be determined on a monthly basis considering the participation of the company in the national oil and gas production in the immediately preceding month. So far, Brazil has not faced this situation.

There is no specific requirement applicable to the sale of oil in local markets, only to its by-products. The overall taxation regime applies for oil and natural gas sales in the local market. Some quality requirements must be observed by companies selling natural gas.

Prices for oil and gas are freely stipulated between the parties according to the market price. However, ANP establishes the minimum oil price to be considered by the agency for the calculation of government takes or eventual cost oil.

Anticompetitive practices in connection with the exploration, production, transportation, refining or marketing of crude oil or crude oil products are subject to the scrutiny of the Brazilian Antitrust Authority (CADE), and may subject companies to penalties.

## V ASSIGNMENTS OF INTERESTS

Generally, any assignment of interests will require ANP's prior authorisation. The rationale only applies to direct transfers, as ANP recently changed its understanding and no longer evaluates indirect transfers (such as mergers).

Only Brazilian companies that meet ANP's requirements for technical, legal and financial qualifications are entitled to acquire participating interest in both the concession regime and the PSA regime.

No fees are required and no preferential purchase rights upon transfer are reserved for the government, either in the concession regime or in the PSA regime. ANP takes, on average, four to six months to approve an assignment request.

ANP is currently reviewing its assignment procedure, and several changes are likely to be implemented in the upcoming months – for example, ANP intends to change the effective date of the assignment.

In addition to ANP's approval, CADE's clearance may also be required if the groups involved in the transaction meet the following revenues threshold as set forth in the Brazilian antitrust laws: (1) at least one of the groups involved (seller or buyer) registered gross revenues in Brazil in excess of 750 million reais, during the fiscal year immediately prior to the transaction; and (2) at least one of the other groups involved registered gross revenues in Brazil in excess of 75 million reais, during the fiscal year immediately prior to the transaction.

In order to obtain CADE's approval, the payment of a 45,000 reais fee is required. The transfer of licence rights for oil and gas exploration and production to third parties is generally analysed by CADE under the fast-track procedure. Thus, CADE usually takes between 30 and 45 days to approve such a transaction.

CADE's approval is required by ANP as a condition for ANP's approval.

## VI TAX

The oil and gas industry is usually taxed at the same rates for indirect (IPI, ICMS, ISS, customs duties, CIDE) and direct taxes (IRPJ, CSLL, PIS and COFINS) applicable to most Brazilian companies.

REPETRO is a special customs regime for the industry that allows the suspension of federal import taxes (i.e., customs duties, excise tax and PIS/COFINS on imports), or

Brazilian federal import taxes, on the importation of goods intended for the exploration and production of oil and gas by certain eligible entities. Recently, the federal government extended the REPETRO regime until 2040.

REPETRO only applies to those goods listed by the Brazilian tax authorities. The entities that may be eligible to use REPETRO for the importation of eligible goods are: (1) the beneficiary of a concession or permit to carry out oil and gas research, or exploration and production activities in Brazil; and (2) those entities hired by the concessionaire under charter agreements, or to render services related to the performance of the activities involved in the concession or permit, as well as their subcontracted entities.

The following special customs treatments are available under REPETRO:

*a* symbolic exportation regime: full suspension of Brazilian federal import taxes on symbolic exportation of the benefited goods without actual removal of the goods from the Brazilian customs territory (goods manufactured by a Brazilian industry and sold to a foreign entity that does not physically remove the goods from the country) and subsequent importation under the temporary admission regime in item (c) below;

*b* special drawback regime: full suspension of Brazilian federal import taxes levied on the raw materials, semi-industrialised or finished products, parts and pieces to be used in the manufacture of an asset that will be imported under the symbolic exportation regime; and

*c* temporary admission regime: full suspension of Brazilian federal import taxes levied on certain goods of foreign origin that were actually imported on a temporary basis, for a fixed period of time. After the period of temporary admission, the goods must, among other options, be re-exported, destroyed, transferred to another special customs regime, or dispatched for consumption in Brazil (in the case of dispatch for consumption, the full payment of Brazilian federal import taxes will be required).

The terms and conditions for REPETRO's application are currently detailed by Normative Instruction No. 1,781/2017, issued by the Federal Revenue Secretariat, which has undergone a major change by Normative Instructions No. 1,880/2019 and 1,901/2019. Among the main modifications are the restrictions created for the temporary importation of platforms and vessels employed in oil and natural gas production (including FPSOs). If owned by a company linked to the concessionaire that operates the oil field, these platforms and vessels must be permanently imported, even with the suspension of all federal taxes (on state tax (VAT), see the following paragraph). This rule eliminates a tax saving that could be achieved by reducing the profit that would be taxed by income tax in Brazil, which compromises the economic feasibility of low-profit fields.

At the state level, VAT benefits may also be available depending on the legislation of each state. CONFAZ Agreement No. 03/2018 has authorised Brazilian states to:

*a* reduce the ICMS tax base so that the final tax burden corresponds to 3 per cent on the importation or domestic acquisition of permanent goods or assets applied in the exploration and production of oil and natural gas, without appropriation of the corresponding credit;

*b* exempt the ICMS levied on the importation of temporary goods or assets for engagement in the exploration and production of oil and natural gas defined by Law 9,478/97, within the scope of REPETRO;

*c* exempt the ICMS levied on export operations of temporary or permanent goods and assets manufactured in the country that are admitted or acquired under the terms of the

previous items, even without them leaving the national territory, or for sale to a person based in the country, inside or outside the state where the manufacturer is located, as well as previous operations, which are all goods and assets supply operations performed by the suppliers and respective sub-suppliers of the national manufacturers of goods or assets employed in the oil and natural gas exploration and production activities.

Law No. 11,196/2005 establishes tax benefits for the oil and gas industry, among other provisions. The benefits covered include exemption of corporate taxes (IRPJ, CSLL) and IPI. However, Law No. 11,196 also requires companies to meet certain requirements to be eligible for the benefits, especially with regard to mandatory investment in R&D.

## VII ENVIRONMENTAL IMPACT AND DECOMMISSIONING

Article 225 of the Brazilian Constitution classifies the environment as a common usage asset and imposes on public authorities and on the community the duty to protect and defend it for present and future generations. These guidelines are generally established by the National Environmental Policy, outlined in Federal Law No. 6,938/1981, which is considered one of Brazil's main legal statutes on the environment.

The National Environmental Policy regulates civil liability for damage caused to the environment; this has a strict liability nature (i.e., irrespective of fault). The sole demonstration of the cause-effect relationship between the damage caused and the action or inaction suffices to trigger the obligation to redress environmental damages.

The fact that the wrongdoer's operations are permitted by environmental licences does not exclude this liability. The National Environmental Policy further expanded the list of parties that may be liable for environmental damage and set joint and several liabilities to polluting entities. Accordingly, all legal entities or individuals directly or indirectly involved in the damaging or polluting activities shall be jointly and severally liable for its recovery.

In the criminal sphere, the Environmental Crimes Act (Federal Law No. 9,605/1998) applies to every person, whether an individual or legal entity, who permits certain behaviours deemed damaging to the environment. As a result, upon occurrence of an environmental violation, a legal entity's officer, administrator, director, manager, agent or attorney who permits the behaviour deemed to be damaging to the environment will also be subject to criminal penalties. In the administrative sphere, non-compliance with environmental obligations may subject the company to sanctions, such as the imposition of fines of up to 50 million reais (according to federal legislation, fines imposed by state environmental authorities might have a different range), interdiction of activities, cancellation of tax incentives and credit lines with government financial entities.

IBAMA or the competent state environmental agency, in addition to supervising compliance with environmental matters, issues the necessary environmental licences. As a rule, the state environmental agency has jurisdiction for the environmental licensing proceeding of onshore activities, and IBAMA for offshore activities.

The environmental licensing procedure requires companies to submit environmental assessments, such as the environmental impact assessment and an environmental impact assessment report, which is mandatory for facilities that perform activities of significant environmental impact.

The research of seismic data in marine and transition land–sea areas requires a seismic research licence. Oil and gas exploration and production and extended well tests also require the following licences issued by IBAMA and the presentation of the corresponding environmental assessment:

*a* preliminary licence: granted during the preliminary planning stage of the operations and activities, it approves the location and conception, attests to the environmental feasibility and sets forth the basic and conditioning requirements to be met during the subsequent stages of their implementation;

*b* installation licence: authorises the implementation of the operations or the activity according to specifications defined in the approved plans, programmes and designs, including environmental control measures and constraints, of which they are determining factors; and

*c* operating licence: authorises the operation, after the effective compliance with the previous licences and with the environmental control measures and constraints determined for the operation have been verified.

With respect to decommissioning, the operator of a concession area or a PSA area must, upon termination of the agreement, procure the decommissioning and removal of the goods and assets in order to transfer them to the federal government according to the rules set by ANP. ANP may require financial guarantees to be presented during the term of the agreement to cover these obligations.

## VIII FOREIGN INVESTMENT CONSIDERATIONS

### i Establishment

Foreign investors must incorporate a company under Brazilian law, with headquarters and administration in Brazil, or acquire interest in a Brazilian company in order to perform operations in Brazil. Operations cannot be conducted by a branch of the foreign corporation.

The entire process of incorporating a local entity usually takes between 30 and 45 days to be completed, as of the date the corporate documents are registered with the commercial registry until the day the company is able to fully operate with all other required government licences and registrations.

All documents related to foreign entities must be notarised by a public notary, stamped by the Brazilian consulate and duly translated into Portuguese, by a sworn translator enrolled in any commercial registry. The company must also be registered with the Brazilian Central Bank.

### ii Capital, labour and content restrictions

Companies must comply with the local content commitment undertaken in the applicable bid round. Generally, if the commitment is not fulfilled, ANP may impose a penalty of 60 per cent over the amount not complied with, in the event the percentage of local content not observed is less than 65 per cent. If the amount not observed is more than 65 per cent, the penalty may vary between 60 and 100 per cent of the amount not complied with. In 2013, ANP published rules and criteria for the local content certification procedure.

For the 14th bidding round and third PSC bidding round, ANP promoted changes in the local content, reducing the local content levels and the penalties for non-compliance.

Now, the penalties are limited to a maximum of 75 per cent of the value of the required minimum local content. However, companies are no longer able to request waivers for local content commitments that were not fulfilled.

All companies established in Brazil, whether foreign or Brazilian, are required by law to hire Brazilian employees, observing the minimum proportion of two-thirds of Brazilian employees and one-third of foreign employees in the company (which includes the headquarters and each branch with more than three employees). This proportion must also be observed in relation to the payroll, meaning that the remuneration received by the foreign employees must be limited to one-third of the overall payroll.

In order to work in Brazil, a foreign employee must have a work visa and fulfil all the requirements established by the Brazilian National Immigration Council. In this regard, there are two types of visa that allow foreign employees to work in Brazil: (1) a permanent visa: granted to a foreign citizen who will take a managing position in a Brazilian company (officer), and is usually granted for the maximum period of five years; and (2) a temporary visa: granted to foreigners who come to Brazil for short periods of time and have an employment relationship with a Brazilian company.

Brazilian law requires that foreign investments be registered with the Brazilian Central Bank to entitle the foreign investor to overseas dividends, interest on equity and funds related to repatriations of capital. The law establishes broad rules governing the reinvestment of profits and the payment of royalties and technical assistance fees.

Foreign investments must be registered with the Brazilian Central Bank's computer system by means of the declaratory electronic registration. After the foreign currency funds are exchanged into local currency, the Brazilian beneficiary company must register the investment electronically with the Central Bank, in the currency in which the funds have been remitted to Brazil. This registration is necessary for the remittance of dividends to the investor, for obtaining additional registration upon the reinvestment of profits and for the repatriation of the capital in foreign currency.

### iii Anti-corruption

Federal Law No. 12,846/2013 was recently enacted and regulates civil and administrative liability of companies for the performance of corrupt acts against the government. This law establishes a straightforward criterion to hold national or foreign legal entities accountable for any acts of corruption that are detrimental to the government. Parent companies, subsidiaries, affiliates and consortia will be jointly and severally liable for the practice of corrupt acts.

Sanctions include the publication of the conviction and a fine that can reach 20 per cent of the gross sales for the financial year preceding the commencement of the administrative proceedings. If this criterion cannot be applied, the fine will vary between 6 million and 60 million reais. These actions may also result in the suspension or partial banning of activities, and, in severe cases, the compulsory dissolution of the corporation.

## IX CURRENT DEVELOPMENTS

Currently under discussion in the Congress is Bill No. 8,939/2017. This seeks to eliminate the restriction set forth in Law No. 12,276/2010, which does not allow Petrobras to assign any working interest in the fields subject to this law.

Even though Bill No. 8,939/2017 has not yet been approved by the Congress, the Federal Auditing Court has issued a legal opinion authorising the bid round for the volumes

of oil that exceeds the volumes under the OAA. In light of that, CNPE, by means of CNPE Resolution No. 06/2019, has already authorised ANP to carry out bids under the production sharing regime for volumes exceeding those contracted under the onerous assignment regime in pre-salt areas (Buzios, Atapu, Itapu and Sepia fields in Santos Basin). Ordinance MME No. 265/2019 governs the co-participation agreement between Petrobras and the companies that win this bid. Given the enormous potential of those fields, it is estimated that such a bid could raise approximately US$25 billion in signature bonuses alone. Those fields will follow a hybrid legal regime: (1) up to 5 billion oil and gas barrels will comply with the regime created by Law No. 12,276/2010 (onerous assignment regime); (2) the additional volumes will comply with the regime created by Law No. 12,351/2010 (production sharing regime) to the extent the reservoir is located inside the pre-salt polygon; and (3) if part of the reservoir is located out of the pre-salt polygon, the regime created by Law No. 9,847/07 (concession regime) may also be applicable to that section.

A key settlement was reached by Petrobras and CADE, the anti-trust body, on 8 July 2019, seeking the liberalisation of the natural gas market in Brazil. By this agreement, Petrobras has undertaken a series of commitments related to the sale of interests in gas transportation and distribution companies and, as regards natural gas production, Petrobras has committed not to acquire new volumes above 1MMm³/day as of the date of execution of the TCC, and to allow third-party access to the production offloading pipeline infrastructure. Considering the gas flaring limitation imposed by ANP, the commitment made by Petrobras by means of the TCC entails the need for producers of gas, especially the associated pre-salt gas, to find viable commercial solutions for the sale of their production under penalty of compromising oil production.

Another important milestone for the oil industry in Brazil was the commencement of the process of permanent offering of areas for oil and natural gas exploration and production. The permanent offer process consists of the continuous offer of returned fields (or fields undergoing a return process) and exploratory blocks offered in previous bids and not sold or returned to ANP. Companies interested in acquiring any of these areas may, at any time, submit a request to ANP, which must carry out the bidding of this area through a simplified process.

Finally, ANP has issued Resolution No. 785/2019, which consolidates the rules applicable to the assignment of rights in oil and natural gas exploration and production contracts, as well as the possibility of pledging the rights arising from these contracts as security for the financing procured for the development of oil and natural gas fields. This created the missing legal base in Brazil to enable reserve base lending operations, which are already widely used in other countries, to be performed.

Lastly, it should be noted that Petrobras' sale of mature fields continues to evolve well as a way of concentrating its financial and human resources on the development of pre-salt fields. Several Brazilian companies and smaller foreign companies have expressed interest. The major challenge for mature field sales lies in the treatment to be applied to the payment of the abandonment cost. Petrobras is seeking to limit its liability for the payment of these costs, which in many cases leads buyers to question the economic feasibility of the business. However, many companies continue to show interest, and this process could create a new generation of small and medium-sized oil companies in Brazil like the companies that exist in countries such as the United States and Canada.

**Appendix 1**

# ABOUT THE AUTHORS

## JOSÉ ROBERTO FAVERET CAVALCANTI

*Faveret Lampert Advogados*

José holds a law degree that was obtained from the Rio de Janeiro State University in 1986. He joined Villemor Amaral Advogados in 1986, where, for 25 years, he was the leader of the infrastructure and projects practices.

José holds more than 15 years of experience in the areas of energy and oil and gas, where he has represented Petrobras and many other state gas distributors in several structuring projects, greenfield developments, commercial agreements, funding structures (he has been a pioneer in representing Petrobras in project finance related to oil fields, floating production unities, natural gas pipelines, power plants and petrochemical plants), regulatory advisory matters and licensing.

As external counsel of Petrobras, he has led several projects and transactions that were landmarks for the foundation of the current format of the gas industry in Brazil.

Due to his vast experience in the oil and gas industry as Petrobras external legal counsel, he was invited in 2007 to take the position of general counsel of OGX Petróleo e Gás Participações SA.

## IVAN LAFAYETTE BANDEIRA LONDRES

*Faveret Lampert Advogados*

Ivan's practice focuses on commercial transactions and regulatory work for the energy industry. In the past 15 years, Ivan has been involved in key projects in Brazil and internationally as well.

While abroad, he was able to expand his experience into other domains of the energy business, including upstream and power. Ivan received a full international scholarship and obtained an LLM degree in petroleum law and policy (distinction) from the University of Dundee. Professionally, he progressed towards an international career with Schlumberger in Qatar and as partner of CMS Cameron McKenna LLP in London.

Over the years, Ivan has developed a full set of legal and commercial skills in all levels of the oil and gas industry, allowing him to provide valuable transactional capability along with comprehensive regulatory advice.

From an academic perspective, he lectures on 'upstream and natural gas contracts and policy' in conferences and postgraduate courses. In addition, Ivan has had several articles and essays published in newspapers and online covering topics such as natural gas commercialisation, climate change policy and liberalisation of energy markets.

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