

PROPERTY REGULATION IN THE NATURAL GAS SECTOR IN BOLIVIA:  
IMPACTS FOR DEVELOPMENT?

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**Introduction – The nationalization of hydrocarbons: after all, what is the problem?**

The political scenario in Bolivia is known among experts for its high instability<sup>1</sup>. Although the beginning of the negotiations between Bolivia and Brazil for the importation of natural gas, occurred in a period of greater stability (1990-1996), Bolivia's political history has constantly presented periods of instability. The issue came out to the public opinion in Brazil and in the South American region when Evo Morales took over the presidency and, even more strongly, when Decree number 28,701, of May,1, 2006 was issued for the "nationalization" of the natural gas sector.

The decision of "nationalization" brought a new wave of instability in the region's political relations, as it interfered in the form of organization of the economic chain for the natural gas sector in Bolivia and, therefore, in the conditions for providing of an essential good – energy – to sectors of the economy and to the population in Brazil, specially.

That decision instigated polarized positions, not only among the experts but also in the public opinion. One of the prevailing point-of-views considers that such instability is the result of the lack of and the fragility of regulatory frameworks – internally in each one of the States as well

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<sup>1</sup> ANDRADE, Everaldo de Oliveira. *A revolução boliviana*, Coleção Revoluções do Século XX, COSTA, Emilia Viotti da. São Paulo: Editora Unesp, 2007. In the period between 2001 and 2006, for instance, over five presidents occupied the presidency: Jorge Quiroga Ramírez (2001-2002); Gonzalo Sánchez de Lozada (2002-2003); Carlos Mesa Gisbert (2003-2005); Eduardo Rodríguez Veltzé (2005); Evo Morales Ayma.

as in the conformation of their relations<sup>2</sup>. The objective of this article is to expose how the legal-institutional elements between Bolivia, Brazil, YPFB and Petrobras have been formed and have evolved, aiming to test that argument in the case of Petrobras investments in Bolivia and their impacts for the relation of this country with Brazil.

The first part of the article analyses the energy cooperation relationship between Bolivia and Brazil, its formal arrangements and the elements listed in them regarding development. The second part deals specifically with questions about the regulation the natural gas reserves property and the impacts for Petrobras and YPFB as the main economic agents in that sector for the relation Bolivia-Brazil.

## **Part I – The diplomatic relation Brazil-Bolivia and its influence on the companies' strategies**

### **The South American energy matrix**

Two main recurring issues must be considered when analysing the energy sector: the fact that energy is central to the development of States<sup>3</sup> and that there is a resulting strategic importance for them, that takes into account the resulting dependence on some main sources and suppling centers<sup>4</sup>. Those concerns instigated the elaboration of strategies as to the diversity of

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<sup>2</sup> PINHEIRO, Leticia. *Traídos pelo desejo: um ensaio sobre a teoria e a prática da política externa brasileira contemporânea*, Contexto internacional, Rio de Janeiro, v. 22, n. 2., jul/dez, pp. 305-35, p. 325. KOZULJ, Roberto. *La industria del gas natural en América del Sur: situación y posibilidades de la integración de mercados*. Santiago, CEPAL, División de Recursos Naturales e Infraestructura, dez. 2004. The latter author also argues that a supranational authority should be created to solve the possible conflicts in the relations between regulations and national authorities (pp. 70 on).

<sup>3</sup> Despite being indicated as "classic" themes, the evolutive idea of the concept of development must be taken into account here: embodying not only its economic perspective, but also regarding social and sustainable development, both human and environmental aspects. In this sense, as an example, the incorporation of the item energy in the statistics and international classifications of the World Bank and the United Nations Development Programme. In the latter, among some indexes, the relevance of measuring the total electricity consumption per capita and of the participation of natural gas, oil, nuclear energy, biomass and others residues in the supply of energy, for example, cf. <<http://hdrstats.undp.org/indicators/>> (April.2008). When it comes to the World Bank, the example of the reference to energy production and consumption as one of the indexes for measuring by the World Development Indicators, for details, see <<http://go.worldbank.org/U0FSM7AQ40>> (April, 2008).

<sup>4</sup> Regarding that, the theme of the diversity of the energy sources.

energy sources and those were exactly the reasons for the cooperation between Bolivia and Brazil in the natural gas sector.

The natural gas was introduced in the Brazilian energy matrix in 1968, from the exploration of national reserves in the Northeastern region of the country. Until 1992, the consumption of natural gas corresponded to 2% of the total consumption of energy in the country<sup>5</sup>. In order to extend the use of that energy source, that potential should increase, according to projections made by the Commission for Studies of the Energy Matrix, created in 1990<sup>6</sup> to: 9.8%, in 2000, and 12% in 2010 (according to a report dated as of March, 20, 1992)<sup>7</sup>.

The intensification of Bolivia-Brazil relations, in the natural gas sector, took into account several fact and conjunctural elements as well as others of strategic policies. A first particularity to be considered is the pre-existing physical co-dependence between Bolivia-Brazil reinforced by their joint project for the gas pipeline connecting the two countries (known as Gasbol). It is a fact that the natural borders between those countries is relatively diffuse and encompasses prominent points in natural resources, as the Amazon and the Pantanal wetlands (or Chaco, in the Bolivian side); besides, of course, being the biggest border of Brazil with a neighboring country<sup>8</sup>.

In addition to that, the regional energy integration between Bolivia and Brazil has always counted on a strong articulation between the States, especially on the part of Brazil, being

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<sup>5</sup> NOGUEIRA, Danielle A. *Diplomacia do gás – a Petrobrás na política externa de Cardoso para a integração energética com a Bolívia (1995-2002)*. Masters Degree Dissertation, Pontifícia Universidade Católica do Rio de Janeiro, Rio de Janeiro, May, 2007, p. 125.

<sup>6</sup> Decree No. 99.503, of Sept. 3. 1990, "Constitutes a commission with the objective of reexamining the national energy matrix".

<sup>7</sup> NOGUEIRA, Danielle. Op. cit, pp. 125-29. That projection was not confirmed in the exact proportion indicated. It was only in 2006 that the natural gas began to represent 9.6% of the Brazilian energy matrix, according to the Ministry of Mines and Energy – MME, 2007 Annual Energy Balance, chapter 1, p. 17. Available in <<http://www.mme.gov.br>> (April 2008). We must highlight, however, the growing importance that such energy source has acquired in Brazil; not just regarding the total of the national production that was almost duplicated from 1996 to 2006 (from 9,156 million m<sup>3</sup>/day to 17,706 million m<sup>3</sup>/dia), but mainly regarding the volume of imported natural gas that grew by 24 times, from 1990 (with the beginning of the imports) to 2006. For the details about that evolution, see 2007 Annual Energy Balance, table 2.3.

<sup>8</sup> In this sense, HAGE, Jose Alexandre A. *Brasil, Bolívia e a guerra do gás*. Curitiba, Juruá Editora, 2007, p. 132, reinforces that: the creation of a subsystem is a natural calling for countries that have common goods to share.

coordinated, along history, with the processes of economic and political integration between South American countries.

The specific interests of each country have also strongly influenced the negotiation rounds, in the energy sector, that have become more concrete from the 1990's on. In particular, on the side of Brazil, the agenda was guided by the diversification of the energy matrix<sup>9</sup>. The choice of Bolivia as a strategic partner considered the fact of that there was a good ratio between volume of reserves and domestic consumption, not to mention the possibility that, in the future, the sector's infrastructure be able to be connected to the reserves in Argentina and Peru<sup>10</sup>. Bolivia, in its turn, bet in Brazil the enlargement of its consumer market<sup>11</sup> and the attraction of the foreign investment in the natural gas sector.

Finally, the coordination between the goals and ambitions of the companies acting in the sector in both countries also favored the approach between them<sup>12</sup>. Both companies, Petrobras and YPF, are generally identified as operational arms of their States, what implies relevant limitations to their autonomy. For Petrobras, the Bolivia-Brazil energetic integration project, mostly after 1990, came to match the strategic standards of the multinationals in the natural gas sector, comprehending: internationalization, diversification and verticalization<sup>13</sup>. For YPF, on the other

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<sup>9</sup> The 1990's crisis in the energy sector generation and supply in Brazil – which has led to the “blackout” in 1999 – was determinant for the restart of negotiations with Bolivia in the natural gas sector. NOGUEIRA, Danielle, *Op. cit.*, p. 129.

<sup>10</sup> For the formation of the so called “energy belt” in the region, according to Valor Economico, *Anel energético vira prioridade para bloco*, June, 21, 2006 and *Brasil, Peru, Chile, Argentina e Uruguai planejam criação de anel de gasoduto*, June, 14, 2005.

<sup>11</sup> According to International Energy Agency and Organization for Economic Co-operation and Development, *South American Gas, Daring to tap the bounty*. Paris: OECD/IEA, 2003, p. 144: “Reflecting the size of its economy and population, Brazil's energy consumption is the largest in South America. In 2000, Brazil's total primary energy supply (TPES) amounted to 183 Mtoe8, equivalent to 46% of total South American primary energy supply. With TPES just above that of Italy or Korea, Brazil is the world's tenth largest energy consumer and the fourth largest non-IEA energy consumer after China, Russia and India”. Available at: <[http://www.iea.org/textbase/nppdf/free/2000/southa\\_2003.pdf](http://www.iea.org/textbase/nppdf/free/2000/southa_2003.pdf)> (April, 2008).

<sup>12</sup> NOGUEIRA, Danielle. *Op. cit.*, p. 132 on, highlights how weakened, in the beginning of the negotiations for the exploration of natural gas in Bolivia and the conception of the gas pipeline, Petrobras was, politically and economically, having participated in a disadvantage position in the decision process at that time. Such position that, according to the author, was reverted with the company strengthening along the nineties and its consolidation as the biggest South American company, in the last few years. Regarding Petrobras expansion and its growing investments, see CEPAL, *La inversión extranjera en América Latina y el Caribe*. Santiago, 2005, p. 129 on.

<sup>13</sup> NOGUEIRA, Danielle. *Op. cit.*, p. 145.

hand, acting in the economic chain of natural gas permits it achieving its goal of accessing the export prices formation.

#### a) The construction of the relation Bolivia-Brazil in the natural gas sector

In the beginning of the 20th century, natural gas was identified as a byproduct of the oil; for that reason in that time the negotiations between Bolivia and Brazil in that sector were linked to the agreements on oil exploration in Bolivia. In that aspect, the first treaty signed between those countries for cooperation in the energy sector, the "Treaty on the Exit and Use of the Bolivian Oil" (2/25/1938) and the "Trade Covenant" annex to the "Notes of the Agreement of Robore" (01/28/1958)<sup>14</sup> are to be considered.

It is interesting to observe that it was the first agreement that drew the guidelines for the future specific agreements in the natural gas sector. Basically that agreement brought devices about: (i) technical cooperation, (ii) exploration by joint-ventures (between a corporation owned by the State and private agents), (iii) tax incentives, (iv) a special regime for investments in Bolivia coming from Brazil and in its relation regarding Bolivia imports (preference), and (v) plans of joint investment in infrastructure (pipelines, mainly).

During the 1970's and the 1980's, the Bolivian and Brazilian States signed some other agreements in the energy sector, as well as agreements of regional trade and technical cooperation<sup>15</sup>. But, it was just in the 1990 – as mentioned previously<sup>16</sup> – that the cooperation between Bolivia and Brazil in the natural gas sector was structured, with the signature of the following documents: the "Agreement, by exchange of notes, on the Purchase and Sale of Bolivian

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<sup>14</sup> For access to the agreements information, see: <<http://www2.mre.gov.br/dai/biboliv.htm>> (April, 2008).

<sup>15</sup> Already in the 1970's the new agreements between Bolivia and Brazil included the specific question of the natural gas and its supply to Brazil; however, due to internal politics of the States those commitments were not implemented at the time. For a detailed description about the history of the international agreements between Bolivia and Brazil, from the beginning of the 20th century until 1990s, see HAGE, Jose Alexandre A. *Op. cit.*, pp. 113-22, 211-13; and NOGUEIRA, Danielle. *Op. cit.*, pp. 113-23.

<sup>16</sup> The history of such international agreements shows that, despite the concern about the diversity of sources for the energy matrix has always been an issue in the Brazilian political agenda, in fact, it became urgent only in the 1990's.

natural gas" and the "Partial Reach Agreement about the Promotion of Trade between Brazil and Bolivia (natural gas supply)", both of August, 17, 1992 (hereinafter Agreements of 1992).

The Agreements of 1992 brought along two new strategic elements regarding the structure of the first agreement: (i) the regional contextualization, reinforcing the importance of the energy and economic integration between Bolivia and Brazil, in the context of the relations between South American nations<sup>17</sup> and (ii) the insertion in the agreements of issues to be ruled in the contracts, such as the minimum volume of imports and exports, the payment forms and currencies conversion systems, the commitment to the principle of the financial economic equilibrium, among others.

The references to the contents of contractual instruments, on their turn, count on the particularity of the investments and the economic organization in the natural gas sector<sup>18</sup> and also with the specificity of the cooperation framework between Bolivia and Brazil in this sector. About that last aspect, we recall the points indicated above about the physical integration and the need to diversify the energy matrix, but, above all, the particularities of the actors involved and of the relation developed between them: Petrobras as a relevant international investor in a strategic sector for Bolivia, that also keeps an intimate relation with the Brazilian State in its share composition and in as the agent in a sector in which Brazil is highly dependent on Bolivia (and that influences the country development).

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<sup>17</sup> With an aim to reinforce the process of integration of the region, initiated in the 1970's and incorporated in 1980 by ALADI, in the 1990's, new integration processes arise in the region involving, as well, the relation Bolivia-Brazil. In this sense, the following agreements are prominent: Agreement on Economic Complementation No. 36 signed between the Governments of the MERCOSUR Party States and the government of the Republic of Bolivia (Dec. 17, 1996) and the Memorandum of Understanding for the Promotion of Trade and Investment between the Government of the Federal Republic of Brazil and the Government of the Republic of the Bolivia (Nov. 18, 2003).

<sup>18</sup> The characteristics of the kind of investment in this sector are described in UNCTAD. *World Investment Report 2007 – Transnational Corporations, Extractive Industries and Development*. New York/ Geneva, United Nations, 2007, p. 91: "Investments in extractive industries have particular features, relevant for their development impact. The extraction of mineral resources is largely dominated by large-scale, capital-intensive investments (...) Some projects are technologically challenging, and investments in them are characterized by a high degree of uncertainty and long gestation periods."

Generally speaking when it is a matter of foreign investments in the exploration of natural resources there is still the particularity of the internal regulation of the host State, which, in general, tries to keep the control of this exploration by means of "contracts of State"<sup>19</sup>. That consideration is prominent for us to understand the interfaces of the international agreements signed between Bolivia and Brazil with other forms of regulation between the other concerned agents (mainly, the contracts)<sup>20</sup>.

The most sensitive aspects concerning the regulation structure for the contracts signed in the case under analyses will be examined in Part II. And such references have to be taken into account due to the specificities of the investments done by Petrobras, which are connected to all the policies of concertation between Bolivia and Brazil, considering the legal structure for the protection of the interests of each State in their development policies.

#### **b) The protection of the investment in the region: politics of development and property**

Among the 14 agreements and memorandums signed between Bolivia and Brazil to regulate specific issues of the natural gas sector, eight of them and one other joint statement were ratified after 1990: besides the two Agreements of 1992, there is also the Agreement of Economic Complementation No. 36 signed between the Governments of the MERCOSUR Party States and the Government of the Republic of Bolivia (1996), the Agreement for Exemption of Taxes Relative to the Implementation of the Project of the gas pipeline Brazil-Bolivia (1996), the Memorandum of Understanding about the Development of Electric Exchange and Future Electric Integration (1998), the Agreement, by exchange of notes, for Creation of a Permanent Mixed Bilateral Commission on

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<sup>19</sup> UNCTAD. *State contracts*. UNCTAD Series on issues in international investment agreements. New York/ Geneva, United Nations, 2004, p. 1: "State contracts have played a major role in the foreign direct investment process, especially in developing countries that are dependent upon the exploration of natural resources for their economic welfare."

<sup>20</sup> UNCTAD, *op. cit.* 2004, p. 9: "Apart from State contract itself, the investment relationship is governed by applicable rules of national law and policy, any bilateral investment agreements (BITs) concluded between the host and the home country of the investors, any applicable regional or multilateral regime or customary international law."

Energy Issues (2002), the Memorandum of Understanding for the Promotion of Trade and Investment (2003), the Memorandum of Understanding on Energy Issues (2007) and the joint Statement Brazil-Bolivia: advancing towards a strategic partnership (2007)<sup>21</sup>. In the following parts, we will focus in this context after 1990, on the occasion of the resumption of the strategic project of cooperation between Bolivia and Brazil in the sector of natural gas.

All the development of the infrastructure works, for the construction of the gas pipeline, as well as the implementation of the natural gas supply to Brazil were the main concerns, not only for Bolivia but also for Brazil in the enterprise in question. The first one with the objective of attracting investments for the country and in favor of the exports of the material, what would have a relevant influence in Bolivia's Balance of Payments. Brazil, on the other hand, was interested in making the natural gas imports feasible and in attending its consumer market. However, neither the agreements nor the memorandums established a definition of investment and property regarding the Gasbol venture, not even details about how the works related to it would be structured<sup>22</sup>. In the same direction, in neither one of the agreements the form of investments for the operation of the activities for the natural gas supply to Brazil was established<sup>23</sup>.

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<sup>21</sup> For a complete list of the agreements between Bolivia and Brazil, see <<http://www2.mre.gov.br/dai/biboliv.htm>> (April, 2008).

<sup>22</sup> The only definition about what was comprised in the Gasbol venture is part of article 1 of the Agreement for Tax Exemption Related to the Implementation of the Brazil-Bolivia Gas Pipeline Project (1996): "1.(...) a) imports of goods and services aimed for direct use or to be incorporated in the construction of the Brazil-Bolivia gas pipeline; b) local purchase, supply and circulation of goods and services aimed for direct use or to be incorporated in the construction of referred gas pipeline; c) finance, credit, currency exchange, insurance and their related payments and payment orders to third parties. 2. These exemptions will be applicable when the referred operations are done or contracted by the gas pipeline builders, directly or through companies specially selected for this." This description by the agreement brought a little more precision to the generic provision of the tax exemption commitment that is in the item 7 of the Agreement, by the exchange of reversal notes, about the Sale of Bolivian Gas to Brazil, regarding the Definitive Contract between Petrobras and YPFB (1993): "Aiming at making the contract implementation feasible, the Governments of Brazil and Bolivia agree to take the necessary measures to obtain the exemption of taxes on goods and services involved in the construction of the gas pipeline in its integrity."

<sup>23</sup> The Agreement, by exchange of notes, on the Purchase and Sale of Bolivian Natural Gas (1992) and the Agreement, by exchange of notes, on the Sale of Bolivian Natural Gas to Brazil, regarding the Definitive Contract between Petrobras and YPFB (1993) contained the programmatic rule that agreements and contracts would define Petrobras participation, by itself or its subsidiaries, in the activities of exploration, production, trade and transportation of hydrocarbons in Bolivia, as well as in the distribution of oil and natural gas in the Bolivian national market. But, no later agreement has defined such operations neither Petrobras participation, as a foreign investor.

Besides that, the provisions of the agreements referred to items to be detailed in the contracts, such as: volume of imports/exports to be guaranteed, forms for the price revision, guarantee of free circulation of the natural gas, among others. This takes us back to the question of the complementarity relation between the agreements and the contracts mentioned above.

If not in specific instruments, it may be questioned if the general rules on investment negotiated between Bolivia and Brazil do not provide those definitions. The two documents with provisions about the theme "investments" – the Agreement of Economic Complementation No. 36 (1996) and the Memorandum of Understanding for the Promotion of Trade and Investment (2003) – contain only programmatic provisions, with the declaration of parties' intentions to negotiate and regulate the subject in the future.

Being so, when analyzing the question of the process of "nationalization" and its influence in the definition of the contracts between the parties and in the regulation of property in the natural gas sector it is not clear, by the agreements, which is the impact on Petrobras economic activity, as the operator of the supply commitment, neither what is the degree of interference in the implementation of the policies developed in the sector by both States. The agreements lack precision about what are the investments involved in energy cooperation, so that the impact on the exercise of the property rights can be assessed.

Moreover, more than not bringing the definition, neither have the agreements defined in any moment eventual procedures for cases of conflict or need of renegotiation between Bolivia and Brazil as to the commitments confirmed by the parties, towards one another. Which would be, then, the alternative for such cases – as it can be suggested in the "nationalization" situation?

Once again a relation of complementarity was established between the agreements and the contracts, mainly in relation to the instruments about investment forms (and, therefore, acknowledgement of property) and about controversies solution systems and revision of the

relation between the parties. The fact is that each one of those legal instruments – international agreements and contracts – has its functions and limitations.

Certainly those factors influenced in the Brazilian government and Petrobras reaction to the new measure adopted in Bolivia, with the revision of the YPFB's role in the natural gas production chain. After the "nationalization", Bolivia and Brazil began negotiations, with the participation of Petrobras and also of YPFB, and in the interstate level a new memorandum was signed: the Memorandum of Understanding in Energy Issues (2007). This Memorandum contains provisions that are even less precise than the ones included in the agreements ratified along the nineties and tries to strengthen the political discourse of cooperation and integration.

It thus becomes interesting to compare such 2007 Memorandum to the one about the 1998 Development of Electric Exchange and Future Electric Integration: while the latter reproduces a perspective about free market, with the action of any companies whatsoever, under contracts freely agreed; the first adopts the founding speech of the Bolivia's "nationalization" project and declares in its 4<sup>th</sup> article, 2<sup>nd</sup> paragraph, that the parties should act (in the exploration, execution and operation of the activities) by means of their state-owned companies or with participation of the State, endorsing the discourse of a bigger control by the States themselves – as regulators and investors – and of the strategic perspective of cooperation in the energy sector.

Finally, the "Joint Statement Brazil-Bolivia: advancing towards a strategic partnership" (2007) adopted the renegotiation model based on the political speech of regional integration and formation of common strategic alliances – what justifies the incorporation of all the political agenda between the two States in the Statement items. It was, however, such political coordination that permitted the re-establishment of a confidence environment between the parties, the basis for the renegotiation of the YPFB-Petrobras contracts, in more favorable conditions than predicted in the beginning of the "nationalization" process, in 2006, as will be shown below.

## Part II – The influence of the normative environment in structuring the YPFB -Petrobras business

### YPFB and Petrobras as agents of state intervention in the economy

Something that should fundamentally be considered is the fact of that both companies are "state-owned"<sup>24</sup>. Petrobras - Petroleo Brasileira S.A., created by the law 2004/53<sup>25</sup>, although it is organized as a state and privately owned corporation, is under the control of the Executive Power, by force of the existence of a golden share held by the Federal Union (in the terms of the law 9478/97). YPFB – Yacimientos Petroliferos Fiscales Bolivianos, in its turn, founded in 1936, that had been de-verticalized on the basis of article 86 of the Decree 21.060/85 and that, in 1996, had its part in charge of the exploration and production sold to transnational companies was re-nationalized in 2005 by force of the article 6 of the new hydrocarbons law of 2005<sup>26</sup>.

The two companies assume, therefore, similar identities if considered that they have, simultaneously, on account of their specific insertion in the economic and political settings of their countries of origin<sup>27</sup>, not only the duty of dealing with restraints (corresponding to the fulfillment of the political and/or macroeconomic demands of its main or single shareholder), but also the advantage of taking profit of very peculiar opportunities (corresponding to the utilization of corporation-government coalitions which serve as a guarantee to its survival).

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<sup>24</sup> Both were founded in that historical arch in which the States located in the periphery of the economic system take the role of managers and inductors of the late capitalist development. Being so, the state productive sector takes over the task of leading the industrialization process by means of the intermediation of the national and international private capital interests. It is within this triple alliance that the development of Latin American countries will take place after the 20th century thirties decade, a model that will start being replaced by the neo-liberal one from the 80's on and, more intensely, in the 20th century nineties. About the first moment, see EVANS, Peter. *A tríplice aliança – as multinacionais, as estatais e o capital nacional no desenvolvimento dependente brasileiro*, Rio de Janeiro: Zahar Editor, 1980.

<sup>25</sup> Already in December 1951, the Vargas government sent to the National Congress a Presidential Message which forwarded Bill 1516 which determined the constitution of the Petroleo Brasileiro S/A corporation.

<sup>26</sup> Available at <<http://www.ypfb.gov.bo/historia.html>> (April, 2008).

<sup>27</sup> About this fundamental ambiguity of these companies that are created as actors of the state productive sector, more specifically, Petrobras S.A., see ALVEAL CONTRERAS, E. C. *Os desbravadores: a Petrobras e a construção do Brasil Industrial*, Rio de Janeiro: Relume Dumará, 1994 and FREIRES, L. P. *A autonomia das empresas públicas: o caso da Petrobras*. São Paulo: Masters Degree Dissertation, Escola de Administração de Empresas/FGV, 1993.

In the specific case of Petrobras, we believe that a point to be investigated should be: in what measure is its internationalization and diversification project initiated in the 1990's (of which one example is exactly the natural gas exploration in the Bolivian territory) an effect of diplomatic options made by the Brazilian State or is it a reason to contribute for an enlargement of the country's geopolitical influence in the region to take place?<sup>28</sup> Is there in the enlargement of the international presence of Petrobras a new convergence of interests?<sup>29</sup>

The end of the Federal Government's monopoly in the oil exploration, leaving it open to the private capital – national or foreign<sup>30</sup> – led Petrobras to decide for a double change of route: diversification and internationalization:

"With the opening of the Brazilian market to other companies, Petrobras is experiencing new challenges and growth opportunities, now acting under a competition regime. In that context, Petrobras starts to seek growth, in Brazil and abroad, with the greatest possible return to its stock holders, preparing itself to become, in the next decade, an international energy corporation."<sup>31</sup>

Considering the aforementioned information, the Petrobras' investments in Bolivia, specifically, in order to carry out the exploration and production of natural gas could be explained as a result of the need to make compatible its interests –profits maximization – with the ones of the Brazilian State – assuring energy supply levels necessary to the country's economic development

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<sup>28</sup> On the connection between economic activity of the Brazilian companies and the State acting strategy in the international scenario, see: HAGE, José Alexandre Altahyde. *Op. cit.*, pp. 26 and 36; OLIVEIRA, Jorge Amâncio. ONUKI, Janina. *Mercosul e segurança regional* in Revista Brasileira de Política Internacional. Brasília: Universidade de Brasília, 2000, n. 2.; NOGUEIRA, Danielle. *Op.cit.*, pp. 129-134.

<sup>29</sup> About the historic convergence of interests between the Brazilian State and Petrobras, besides the works previously mentioned on footnote 12, see: DIAS, José Luciano de Mattos. QUAGLINO, Maria Ana. *A questão do petróleo no Brasil – uma história da Petrobras*, Rio de Janeiro: CPDOC/SERINST, Fundação Getulio Vargas, 1993.

<sup>30</sup> Constitutional Amendment number 09, of February, 16, 1995, whose regulation was given by law 9478/97.

<sup>31</sup> Message from the company's chairman in 1999 Annual Report. Available at <<http://www2.petrobras.com.br/ri/port/ConhecaPetrobras/RelatorioAnual/relat99/missao.htm>> (April, 2008).

and the enlargement and/or consolidation of the Brazilian presence in certain sectors of geopolitical importance.

#### a) The construction of the regulatory framework in a country of scarce institutional resources: the Bolivian decisions

The Bolivian development model has been, since the 1952 revolution, based on a great presence of the state in the economy<sup>32</sup>. It was after the 1980's that the Bolivian government initiated, in compliance with the IMF demands, the replacement of this interventionist state model<sup>33</sup>. Such measures were deepened in the nineties. It was in that period that the capitalization law (law 1544/94)<sup>34</sup> and the so called "hydrocarbons law" (law 1689/96) were promulgated.

The law 1689/96, even though it kept the state property over the oil and natural gas reserves in the terms of its article 1<sup>35</sup>, in its article 24 established that:

"Whoever signs contracts of joint venture with YPF for the exploration, production and trade of hydrocarbons **acquires the right of prospecting, exploring, extracting and**

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<sup>32</sup> The prerogative of performing the central activities of the productive sector and also the activities of little centrality and relevance was reserved to state agents. This model was kept to a bigger or lesser extent by the military governments that ruled during the 20th century seventies (ANDRADE, Everaldo de Oliveira. *A revolução boliviana*, Coleção Revoluções do Século XX, COSTA, Emilia Viotti da. São Paulo: Editora Unesp, 2007, p. 83).

<sup>33</sup> From this moment on, Bolivia begins to adopt macroeconomic measures aiming at the reduction of the public administration size, the decrease of its direct participation in the productive sector, the opening of the market for the private capital and the attraction of foreign investment.

<sup>34</sup> The so called capitalization of state owned companies was a process that was structured on the "de-verticalization" of their operations – by means of separating their countless segmented activities in the production chain so that they could be explored by distinct companies – and over the alienation, to transnational private companies, of shares of these companies that were created with the fragmentation of the activities of the formerly state owned companies. In this "de-verticalization" the Bolivian government gave 50% of its companies' shares to foreign investors in exchange for commitments of investments that could create a productive sector able of exploring the country's comparative advantages and, by doing that, generating foreign currency necessary for the payment of external debt and holding back inflation. The other 50% of the capital stock was divided between private pension funds and employees of the formerly state owned companies. This process reached five strategic sectors – hydrocarbons, electricity, telecommunications, air and rail transportation.

<sup>35</sup> The referred article establishes that "By constitutional rule, the hydrocarbons reserves, whatever the state or form they are found, are under direct State domination, inalienable and unprescribable. No concession or contract may grant property of the hydrocarbons reserves. The exploration, production, trade and transportation of the hydrocarbons and their derivatives belong to the State. This right will be exercised through autarkic entities or through concessions and contracts of limited duration with state and privately owned corporations of joint operation or private persons according to the law."

**trading the production obtained. It is considered apart from the aforementioned free trade** the volume required to satisfy the internal consumption of natural gas and to comply with export contracts agreed by YPFB previously to the present law entrance in force. These volumes will be established periodically by the Superintendence of Hydrocarbons of the System of Sector Regulation (SIRESE)." (the bold highlights are ours)

Considering this rule, the following question arises: how would it be possible that the private companies, Petrobras among them, could have the right to freely trade a good of exclusive property of the Bolivian State?

One orientation defended that it was necessary to have an authorization of the Congress in the terms of article 59, item 5 of the Bolivian Constitution<sup>36</sup>. Another interpretation presented was that in the terms of the constitutional norm only the State property over the hydrocarbons reserves was inalienable, and not the property over the particles that had been extracted from those reserves, since the rules that regulated them allowed their alienation<sup>37</sup>.

For the second interpretation, we conclude that, by the terms of article 24 of the law 1.689/96, the Bolivian government altered the regime of property regarding the products of the natural gas reserve, since after the natural gas extraction from the subsoil, that is, in the moment that it emerged in the "mouth of the well", the transnational companies acquired the right of trading

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<sup>36</sup> QUIROGA, Carlos Villegas. *Rebelión popular y los derechos de propiedad de los hidrocarburos*. Revista Observatorio Social da América Latina, n. 12, September-December, 2003, p. 30. This orientation ends up leading to a situation in which there is an enlargement of the bargaining power of the Bolivian State, since it does not defend the illegality of the exploration by private companies, but it demands in every case the State intervention by means of the authorization from the Congress.

<sup>37</sup> It must be reinforced that by the Bolivian Civil Code the gas reserves are considered real property, in the terms of article 75, item I ("Son bienes inmuebles la tierra y todo lo que está adherido a ella natural o artificialmente") and II ("Son también inmuebles las minas, los yacimientos de hidrocarburos, los lagos, los manantiales, y las corrientes de agua") and the property of its products – the extracted gas – would belong to the owner of the reserves by force of what is determined in article 83, item I ("Son frutos naturales los que provienen de la cosa, con intervención humana o sin ella, como respectivamente, las crías de los animales, o los productos agrícolas y minerales) and III ("Los frutos pertenecen al propietario de la cosa que los produce, excepto cuando su propiedad se atribuye a otras personas, caso en el cual se los adquiere por percepción"), being the alienation authorized by force of item II of article 83 ("Los frutos, antes de ser separados, integran la cosa; pero puede disponerse de ellos como de cosas muebles futuras").

all the surplus, that is, everything that was left after the necessary volumes has been discounted:  
a) to service for the internal consumption and, b) to comply with the export commitments of the Bolivian state.

That was the orientation consolidated indirectly<sup>38</sup> with the publishing of the Supreme Decree 24.806, that was the target of a *recurso directo o abstracto de inconstitucionalidad* (direct or abstract appeal of unconstitutionality) interposed by the then senator Juan Evo Morales Ayma and others. The argument presented was that the referred decree was contrary to articles 59, items 5 and 7 and 129 of the Bolivian Constitution. What would mean that the joint venture contracts signed between the Bolivian State and the transnational companies would be void<sup>39</sup>. We have then that by means of the abstract appeal of unconstitutionality they intended to dismantle the economic operation conformed by the joint venture contracts alleging that they had clauses incompatible with the Bolivian legal system.

The Bolivian Constitutional Court by means of the Constitutional Sentence 114/2003 decided for the constitutionality of the decree. This way, it ended up concluding that the referred contracts are about the production that is obtained in the "mouth of the well" due to the activity developed in the natural gas extraction located in the subterranean reserve, stating that this property, of the production, does not correspond to the property of the reserve itself, being that the reason why one could not talk about disrespect for the constitutional norms (as they establish the

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<sup>38</sup> The referred Decree, with a single article, is not about hydrocarbons property when they come out of the soil, but it is limited to approving joint venture contracts signed until then between the Bolivian State and the transnational companies in charge of exploration and production of oil and gas wells. The third clause happened to establish that: "Objeto del Contrato - Es facultar al TITULAR [the transnational companies] para realizar actividades de Exploración, Explotación y Comercialización de Hidrocarburos en el Área de Contrato, bajo los términos y condiciones de este contrato, mediante el cual el TITULAR adquiere el derecho de propiedad de la producción que obtenga en Boca de Pozo y de la disposición de la misma, conforme a las previsiones de la Ley de Hidrocarburos". (the bold highlights are ours). As a way to clarify that the transnational companies did not have the property of the reserves, the same contract clause established: "Este contrato no confiere al titular la propiedad de los yacimientos de hidrocarburos 'in situ'. En caso de un Descubrimiento Comercial, el TITULAR tiene derecho a explorar en su área de explotación, de acuerdo a lo establecido en la Ley de Hidrocarburos " (the bold highlights are ours).

<sup>39</sup> "Por lo expuesto solicitan se dicte Sentencia declarando la inconstitucionalidad del DS 24806 de 4 de agosto de 1997 y la nulidad de los contratos de riesgo compartido que se haya suscrito en base a dicha disposición legal" (Sentencia Constitucional 114/2003 Available at <<http://www.tribunalconstitucional.gov.bo/resolucion8313.html>>. (April, 2008).

State property over the hydrocarbon reserves)<sup>40</sup> and, as a consequence, one could not sustain the invalidity of the joint venture contracts<sup>41</sup>.

After the revocation of the Supreme Decree 24.806 by the government of Carlos Mesa, Sánchez Losada vice president that substituted him after his resignation, it was published, on May, 17, 2005, law 3.058 (known as "new hydrocarbons law"). This new regulation, by force of Popular Referendum, carried out on July, 18, 2004, recognizes "the value of natural gas and other hydrocarbons as strategic resources, that supports the objectives of social and economic development of the country and to international policy of the Bolivian State, including obtaining of a sovereign and useful exit to the Pacific Ocean" (article 4), and "recuperates the property of all hydrocarbons in the mouth of the well for the Bolivian State"<sup>42</sup> establishing by that the imposition that all joint venture contracts signed before the entrance in force of this law be converted, in 180 days time, into one of the possible modalities in the instrument (article 5)<sup>43</sup>, which are: contracts of

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<sup>40</sup> "(...) cuando la citada cláusula Tercera del Modelo de Contrato se refiere a la producción que se obtenga en boca de pozo se refiere a la actividad desarrollada en la transformación del yacimiento a través de medios o procedimientos técnicos o industriales, de manera que la titularidad sobre la producción no compromete al yacimiento mismo ni significa habérselo enajenado pues no hay transferencia alguna del dominio que tiene el Estado sobre dicho yacimiento, el mismo que se lo mantiene dentro de las previsiones del art. 139 constitucional, ratificado por la Ley de Hidrocarburos, por lo que no cabe inferir que el Decreto Supremo impugnado al aprobar un Modelo de Contrato de Riesgo Compartido contraría las normas constitucionales mencionadas por los recurrentes" (Sentencia Constitucional 114/2003). Available at <<http://www.tribunalconstitucional.gov.bo/resolucion8313.html>>. (April, 2008).

<sup>41</sup> According to the aforementioned court, the joint venture contracts, approved by Supreme Decree 24608 of August, 04, 1997 that is contested in this appeal, mainly its third clause, does not grant the property rights of the hydrocarbons reserves, what is equivalent to saying, of the reservoir or the location itself where they are deposited or reside naturally, in the sense that constitutional article 139 prohibits, as it does not contradict the prerogative of direct domination that the State has over 'the hydrocarbons reserves, whatever the state or form they are found...'. In the original text: "el modelo de contrato de riesgo compartido, aprobado por el Decreto Supremo 24608 de 4 de agosto de 1997 que se lo impugna mediante este recurso, en especial a su Cláusula Tercera, no confiere el derecho de propiedad de los yacimientos de hidrocarburos, vale decir del reservorio o sitio mismo donde éstos se encuentran depositados o yacen de manera natural, en el sentido que prohíbe el art. 139 constitucional pues no contradice a la prerrogativa del dominio directo que el Estado tiene sobre "los yacimientos de hidrocarburos, cualquiera que sea el estado en que se encuentren o la forma en que se presenten..." (Sentencia Constitucional 114/2003 Available at <<http://www.tribunalconstitucional.gov.bo/resolucion8313.html>>. (April, 2008).

<sup>42</sup> It should be remarked that since the Constitutional Court had taken the decision about the constitutionality of Supreme Decree 24806, what happened with the publishing of law 3058 was not the "recuperation" of the property, but the "establishment" of such property, given that it did not exist beforehand.

<sup>43</sup> The concern about the hydrocarbons property regime is expressed also in the contents of article 16: "The hydrocarbons reserves, whatever the state or form in which they are found, are under direct State domination, inalienable and unprescribable. No contract may grant property of the hydrocarbons reserves neither at the mouth of the well, nor until the inspection point. The party of a Shared Production Contract, Operation or Association must deliver to the State all the hydrocarbons produced in the contractual terms established by it."

shared production (*producción compartida*), article 72; contracts of operation (operación), article 77; and contracts of association (*asociación*), article 81.

Furthermore, the new hydrocarbons law established in its article 114 that "in compliance with articles 4, 5, 6, 15 and 18 of the ILO Convention 169, ratified by the Republic law number 1257, of July, 11, 1991, the rural and native communities and peoples, regardless of their type of organization should be consulted in an opportune, mandatory and previous way when there is the intention to develop any hydrocarbon activity mentioned in the present law", such consultation, according to article 115, will be done so that an agreement or a consent can be obtained from the referred communities<sup>44</sup>.

The new hydrocarbons law established that for the exploration and production of hydrocarbons the companies were subject to the payment of 18% of royalties to be paid according to division established in article 52 and of a direct hydrocarbons tax whose rate is 32% on the total production measured in the inspection point (article 55.2) to be paid also according to the division established in article 52.

On May, 01, 2006, by force of the publishing of Supreme Decree 28701, the values for the fields whose natural gas certified production average in the year of 2005 had been over 100 million cubic meters were modified in the following way: maintained the 18% of royalties and the 32% of the Direct Tax on Hydrocarbons, it granted 32% of additional participation to YPFB, therefore remaining to the transnational companies the equivalent to 18% of the production to cover for their operation costs, for the amortization of their investments and for their profits<sup>45</sup> (article 4.I). By force

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<sup>44</sup> It should be remarked that in no time the law demands that the reserves to be explored be located in the territory of the referred communities for the referred consultation to be mandatory, what seems to be a clear sign of the intention to increase the deciding power of such groups regarding the issue of the exploration of the country's natural resources.

<sup>45</sup> In this situation, there is an exact inversion of what had been established by the former hydrocarbons law (law 1689/96), because in that one the value to be paid by the transnational companies corresponded to 18% of the inspected production (article 18, item e) to be divided in: 11% of royalties to the province where the production came from, 1% of royalties to the provinces of Beni and Pando as a compensation fee and 6% to YPFB as a fee for participation in the production. It is important to highlight that beyond the 18% limit established in the referred article

of article 5 of the referred Supreme Decree the Bolivian State "takes control and direction of the production, transportation, refinement, storage, distribution, trade and industrialization of hydrocarbons in the country" and as a way to guarantee that statement "the necessary shares are nationalized for YPFB to control with a minimum of 50% plus 1% the companies Chaco S.A., Andina S.A., Transredes S.A., Petrobras Bolivia Refinamento S.A. and Companhia Logistica de Hidrocarbonetos da Bolívia S.A." (Article 7.II).

We observe that the two fields operated by the Petrobras in Bolivia, San Alberto and San Antonio, were the only ones that had surpassed the threshold of 2.8 million cubic meters daily in 2005<sup>46</sup>.

Taken as a whole the rules issued from 2005 on give a clear sign that the process of nationalizations had a redistributive effect on the positions from which the several agents involved in the situation exercise their bargaining power<sup>47</sup>. Such rearrangement was carried out by the Bolivian State as an attempt to extend the control of the activity of exploration of the natural resources, especially natural gas. That was done basically in two forms. Let us see:

a) by the enlargement of the participation of agents in the process of decision-making involved in the process of negotiation of the concessions for exploration and production of the natural gas reserves. That happens not only due to the new regulation about the property of public goods by the State, which starts to treat differently the products of the exploration of the natural gas reserves, what generated the enlargement of the

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18, item e, article 51 mentioned a National Complementary royalty fee on the existing hydrocarbon production in the rate of 13% on the inspected production.

<sup>46</sup> Technical Note number 012/2006-SCM, *Considerações da SCM/ANP acerca do Decreto Supremo nº 28.701 published by Bolivia on May, 01, 2006*, Brasília: Agência Nacional do Petróleo, Superintendência de Comercialização e Movimentação de Petróleo, seus Derivados e Gás Natural, May, 2006, p. 05. Available at <[http://www.anp.gov.br/doc/gas/Nota\\_12\\_2006.pdf](http://www.anp.gov.br/doc/gas/Nota_12_2006.pdf)> (April, 2008).

<sup>47</sup> According to Vital Moreira, the nationalization of companies and/or means of production even when it does not change the legal order of capitalist property ends up generating "a re-distribution of property within the same economic order" (*A ordem jurídica do capitalismo*, 4ª ed., Lisboa : Editorial Caminho, 1987, p. 120). Well, if we admit also with Vital Moreira that "the property right has the function of allowing the decision of the holders of the means of production and the goods about their production, distribution and usage" (op. cit., p. 114), we conclude that the changes in the property legal regime affect the spaces for political decisions in the social field and vice-versa.

participation Congress, but also for the establishment of the need of prior consultation to the rural and native communities and peoples with an aim to obtain their authorization as to the country's natural resources exploration.

b) by the increase of the participation of the Bolivian State in the benefits resulting from the exploration and production of the natural gas reserves. That takes place due to the enlargement of the tax bases as well as for the enlargement of the participation of YPF in the production of the natural gas fields.

The explanations for the adoption of that strategy by the Bolivian government may be found both in the identification of a concern about the broadening of social and political control of the economic activities in a perspective of promotion of democracy (representative and participatory) and in the identification of a measure compatible with the scarcity of institutional resources, that is, with a situation of few qualified human resources and high costs implied in the creation of regulation organs and controls specific for the sector.

## **B) The pacifying reaction: the Brazilian option – cooperation as strategy**

The "nationalization of the reserves" and of the production chain of oil and natural gas in Bolivia generated at first just a reaction from one Brazilian company<sup>48</sup>. Only in a subsequent moment, on account of the manifestations and actions of the Bolivian government, a reaction of the Brazilian diplomatic corps could be identified.

The Bolivian government's decision provoked very diverse consequences for Petrobras and the Brazilian State.

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<sup>48</sup> Jose Sergio Gabrielli, when learning about the situation, qualified as "unilateral" and "non-friendly" the Bolivian government action (*Petrobras afirma que decisão foi não amistosa*. São Paulo: Folha de São Paulo, May, 02, 2006).

Since 2000, the Brazilian State has been developing the national natural gas market towards increasing its participation in the energy matrix and trying to use the Bolivian natural gas<sup>49</sup>. Already in 2005 the natural gas imported from the Andean country corresponded to around 50% of the natural gas consumed in the Brazilian territory<sup>50</sup>. This way, as the Brazilian demand for natural gas had been reaching the expectations of use of the Bolivian natural gas, there were no efforts made in order to increase the national production significantly.

For the Brazilian State the Bolivian natural gas is, therefore, vital, as in the short and medium terms there is no perspective of reduction of the dependence on Bolivia through the increase of the national natural gas offer. Being so, eventual price adjustments, in conditions differing from those defined in the GSA, can become a burden, substantially, for the Brazilian economy. As an example, the natural gas offer in the State of São Paulo corresponded in 2005 to 25% of national natural gas and 75% of Bolivian natural gas<sup>51</sup>.

As a result, the Brazilian government carried out diplomatic arrangements for the compliance of the Bolivian natural gas imports contract and renegotiation of the Petrobras concessions on one side, and simultaneously Petrobras sought a solution for the problem resulting from the nationalization of its assets, occurred in May, 2006, that did not have to go through the beginning of arbitration trials in International Arbitration Courts.

Regarding the nationalization of the hydrocarbons, the Brazilian government spoke officially in a note directed to the press on the day of May, 03, 2006. It reads that "the decision of

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<sup>49</sup> One of the reasons for the incentive to the increase lies in the fact that the gas imports contract is based on a take-or-pay regime that leads to a situation in which even if the total amount of gas contracted is not used, the buyer must pay for all of it. This regime is a consequence of what is established in clause 12.7.

<sup>50</sup> Technical Note number 012/2006-SCM, *Considerações da SCM/ANP acerca do Decreto Supremo nº 28.701 published by Bolivia on May, 01, 2006*, Brasília: Agência Nacional do Petróleo, Superintendência de Comercialização e Movimentação de Petróleo, seus Derivados e Gás Natural, May, 2006, p. 05. Available at <[http://www.anp.gov.br/doc/gas/Nota\\_12\\_2006.pdf](http://www.anp.gov.br/doc/gas/Nota_12_2006.pdf)> (April, 2008).

<sup>51</sup> Technical Note number 012/2006-SCM, *Considerações da SCM/ANP acerca do Decreto Supremo nº 28.701 published by Bolivia on May, 01, 2006*, Brasília: Agência Nacional do Petróleo, Superintendência de Comercialização e Movimentação de Petróleo, seus Derivados e Gás Natural, May, 2006, p. 05. Available at <[http://www.anp.gov.br/doc/gas/Nota\\_12\\_2006.pdf](http://www.anp.gov.br/doc/gas/Nota_12_2006.pdf)> (April, 2008).

the Bolivian government of nationalizing the wealth in its subsoil and controlling its industrialization, transportation and trade is recognized by Brazil as an action inherent to the its sovereignty"<sup>52</sup> also because Brazil "as rules its Constitution, exercises total control over the wealth of its own subsoil"<sup>53</sup>.

Besides that, the note stresses that:

"the Brazilian government will act **firmly** and **calmly**, in all forums, in the direction of **preserving the interests of Petrobras** and will conduct the necessary negotiations in order to **guarantee the balanced and mutually beneficial relationship between the two countries.**" (the bold highlights are ours)<sup>54</sup> and clarifies that "the natural gas supply for its market is assured by the **political will of both countries**, as reinforced by President Evo Morales in a telephone conversation with President Lula and, equally, by **contractual provisions supported in the International Law**. In the same occasion, it was made clear that the issue of the natural gas price will be solved through bilateral negotiations."<sup>55</sup>

In the Petrobras exclusive view, its retreat from Bolivia could represent a loss of around US\$ 1 billion invested in the country<sup>56</sup>, what represented about just 1% of the its assets shown in

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<sup>52</sup> Second paragraph of the note to the press of May, 03, 2006. Available at <<http://www.senado.gov.br/web/senador/tiaovian/Atua%C3%A7%C3%A3o/Discursos%20Texto%20na%20%C3%ADntegra/2006/dicurso03do05de06.html>> (April, 2008).

<sup>53</sup> Second paragraph of the note to the press of May, 03, 2006. Available at <<http://www.senado.gov.br/web/senador/tiaovian/Atua%C3%A7%C3%A3o/Discursos%20Texto%20na%20%C3%ADntegra/2006/dicurso03do05de06.html>> (April, 2008).

<sup>54</sup> Second paragraph of the note to the press of May, 03, 2006. Available at <<http://www.senado.gov.br/web/senador/tiaovian/Atua%C3%A7%C3%A3o/Discursos%20Texto%20na%20%C3%ADntegra/2006/dicurso03do05de06.html>> (April, 2008).

<sup>55</sup> Second paragraph of the note to the press of May, 03, 2006. Available at <<http://www.senado.gov.br/web/senador/tiaovian/Atua%C3%A7%C3%A3o/Discursos%20Texto%20na%20%C3%ADntegra/2006/dicurso03do05de06.html>> (April, 2008).

<sup>56</sup> According to the company's data, between 1996 and 2004 it had invested 988.7 million dollars in its activities in Bolivia (*A Petrobras e as medidas adotadas na Bolívia*, presentation by Petrobras chairman, Jose Sergio Gabrielli, in the company's headquarters on May, 03, 2006. Available at: <[www2.petrobras.com.br/ri/pdf/APRESENTACAOPRESIDENTE03052006.pdf](http://www2.petrobras.com.br/ri/pdf/APRESENTACAOPRESIDENTE03052006.pdf)> (April, 2008).

the 2005 Consolidated Balance<sup>57</sup>, affecting very little its financial statements, profitability and shares performance.

Moreover, Petrobras relations with Bolivia are characterized in two distinct forms, one as investor in that country and another one as the buyer of the energetic natural gas from the Bolivian company YPF, with take-or-pay contract named Gas Supply Agreement (GSA), which defines prices adjustments to be done quarterly. The delivery of natural gas resulting from the GSA has never been threatened at any times. It so happens, however, that inside the situation created with the publishing of the Supreme Decree 28701 the Bolivian government began to question the price used and the adjustment criteria adopted by the contract of gas purchase and sale (GSA)<sup>58</sup>.

As for the problem of the nationalization of its assets – the shares that it owned in the operations carried out in Bolivian territory – the state-owned Brazilian company only decided for the sale of 100% of the refineries after the publishing, on May, 06, 2006, of the Supreme Decree 29122<sup>59</sup> that affected Petrobras cash flow of the in the refining activity in Bolivia. Up to that time, despite the nationalization announced by Morales, the company still considered staying in the country as a partner of the neighboring government in all the operations that it had already been carrying out in that country. But when the decree granted to YPF the monopoly of the exportation

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<sup>57</sup> Available at: <<http://www2.petrobras.com.br/ri/port/InformacoesFinanceiras/BalancosInterativos.asp>> (April, 2008).

<sup>58</sup> One of the arguments presented by Petrobras for the rejection of the price increase was based on the fact that being it a contract with a take-or-pay clause, there were payments of those same values in the initial moments of the importing when the Brazilian market was still not capable of absorbing the entire offer. If in that moment the Bolivian government had turned down the Brazilian company's request to reduce the gas price when it paid for importing 24 million cubic meters of gas and only consumed half of it, which would be the justification to modify now the price paid? The beginning of the operations of the gas pipeline Brazil-Bolivia (Gasbol) in 1999 was marked by the demand deficiency that ended up causing damages to Petrobras until there was a growth in the consumption coming from the industrial sector, the thermoelectric generation and the automotive segment (PINTO JR., Helder Queiroz *et alli*, *Economia da indústria do gás natural* in: PINTO JR., Helder Queiroz (org.), *Economia da Energia – Fundamentos econômicos, evolução histórica e organização industrial*, Rio de Janeiro: Campus, 2007, p. 281). About the impact of the take-or-pay clause in the conformation of the price paid for the gas in the supply contracts, see: RAMOS, Fernando Augusto Werneck. *Da cláusula 'take or pay' nos contratos de compra e venda de gás natural*, in: ROSADO, Marilda. *Estudos e pareceres – Direito do petróleo e gás*, Rio de Janeiro: Renovar, 2005, p. 199.

<sup>59</sup> Supreme Decree 29122 of May, 06, 2006 that "establishes norms about the trade of reformato and white gasolines and constitutes Yacimientos Petrolíferos Bolivianos – YPF as the sole exporter of those products according to Supreme Decree 28701 of May, 1, 2006, of Nationalization of the Hydrocarbons". Available at <<http://www.derechoteca.com/gacetabolivia/decreto-supremo-29122-del-06-mayo-2007.htm>> (April, 2008).

of reformat crude oil and "white" gasolines produced by the country refineries (article 1) that interest ceased to exist, at least regarding the activity of oil refining.

Petrobras reacted to those new restraints created for the operation of multinationals in Bolivia by sending to the Bolivian government its "final proposal" of price to sell its refineries in the country.

The Petrobras chairman, Jose Sergio Gabrielli, qualified the Bolivian government decision of "taken of cash balance" and declared that the change of rule would provoke losses in the financial flow of the Brazilian state-owned corporation. That was so because, according to him, by the decree, just the Bolivian Yacimientos Petroliferos Fiscales Bolivianos (YPFB) has the right to export the fuels refined in the country, to the foreign investors they would pay a fixed value per barrel, quite below what had been negotiated before the intervention. In the main product, the reformat crude oil, Petrobras would receive US\$ 30.35 per barrel and the international value at that time was US\$ 55<sup>60</sup>.

Also in Gabrielli's words, the Bolivian maneuver did not come to constitute a breach of contract, but it caught the company and the Brazilian government by surprise: "What we have in the refining is not a contract, but a business. That is why the decree is legitimate, but it generates some difficulty for whoever is going to invest there"<sup>61</sup>.

Faced with that situation, the Petrobras chairman decided to harden the talk and threaten with a cut in investments<sup>62</sup>. Gabrielli claimed that in light of what had occurred the company would

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<sup>60</sup> Statements by Petrobras chairman, Jose Sergio Gabrielli (MAZZA, Mariana. "Petrobras quer vender refinarias na Bolívia", *Correio Brasiliense*, May, 08, 2007. Available at: <<http://clipping.planejamento.gov.br/Noticias.asp?NOTCod=353004>> (April, 2008).

<sup>61</sup> Statements by Petrobras chairman, Jose Sergio Gabrielli (MAZZA, Mariana. "Petrobras quer vender refinarias na Bolívia", *Correio Brasiliense*, May, 08, 2007. Available at: <<http://clipping.planejamento.gov.br/Noticias.asp?NOTCod=353004>> (April, 2008).

<sup>62</sup> According to the company's data, between 1996 and 2004 it had invested 988.7 million dollars in its activities in Bolivia (*A Petrobras e as medidas adotadas na Bolívia*, presentation by Petrobras chairman, Jose Sergio Gabrielli, in the company's headquarters on May, 03, 2006. Available at: <[www2.petrobras.com.br/ri/pdf/APRESENTACAOPRESIDENTE03052006.pdf](http://www2.petrobras.com.br/ri/pdf/APRESENTACAOPRESIDENTE03052006.pdf)> (April, 2008).

preserve only the investments to guarantee the natural gas supply to Brazil, because all the rest "will depend on higher return rates and a stable regulatory environment"<sup>63</sup>.

On top of Petrobras S.A., the Brazilian government also expressed its surprise and disappointment with the strategy adopted by the Bolivian government. On a note to the press the Ministry of International Relations spoke in the following terms:

"The Brazilian Government expresses its disappointment with Supreme Decree number 29122. (..) Regardless of the lawful actions that Petrobras may take in defense of its legitimate interests, the Brazilian Government cannot help but notice the negative impact that this and any other unilateral gesture can have in the cooperation between the two countries."<sup>64</sup>

After a long predicament about what would be the "fair price" to be paid by Bolivia, the state-owned Brazilian company presented a final proposal to close the deal sustaining that in case there was no consensus, Petrobras and the Brazilian government would turn to international arbitration<sup>65</sup>. The Petrobras Bolivia chairman, José Fernando de Freitas, Brazil's Minister of Mines and Energy, Silas Rondeau, the Minister of Hydrocarbons, Carlos Villegas and the chairman of the state-owned Bolivian company, YPFB, Guillermo Aruquepa, all of them took part in that negotiation.

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<sup>63</sup> Statements by Petrobras chairman, Jose Sergio Gabrielli (MAZZA, Mariana. "Petrobras quer vender refinarias na Bolívia", *Correio Brasiliense*, May, 08, 2007. Available at:

<<http://clipping.planejamento.gov.br/Noticias.asp?NOTCod=353004>> (April, 2008).

<sup>64</sup> "Decisão da Bolívia sobre monopólio na exportação de petróleo e gasolina", nº. 221, Ministério das Relações Exteriores, May, 07, 2007. Available at:

<[http://www.mre.gov.br/portugues/imprensa/nota\\_detalhe3.asp?ID\\_RELEASE=4376](http://www.mre.gov.br/portugues/imprensa/nota_detalhe3.asp?ID_RELEASE=4376)> (April, 2008).

<sup>65</sup> The Petrobras chairman stated that the company could fight for its rights in the international courts in case it did not receive a "fair value" for the refineries: "If we don't have an agreement, we are going to the international justice on the basis of the investments protection treaty. We are also going to the Bolivian justice in case we do not have an agreement" (MARTELLO, Alexandro. *Petrobras aceita US\$ 112 milhões pelas duas refinarias na Bolívia*, Brasília: G1 with information from Reuters, Agência Estado, AFP and Agência Brasil, Maio, 10, 2007. Available at:

<<http://g1.globo.com/Noticias/Negocios/0,,MUL34664-5600-1921,00.html>> (April, 2008).

Finally, on May, 10, 2007, the two Petrobras facilities, the Gualberto Vilarroel Refinery located in Cochabamba and the Guillermo Elder Bell Refinery, located in Santa Cruz, acquired from the Bolivian State in 1999, in a bid, for US\$ 104 million and in which US\$ 30 million more were invested in its modernization<sup>66</sup>, were re-acquired for the value of US\$ 112 million.

According to the information given to the press stamps by the Minister Silas Rondeau, the agreement provided that the payment could be done in two installments - half in the act of the signature of the contract and the remainder two months afterwards – and both could be paid by delivering natural gas imported by Brazil. By the way, the existence of this imports contract, in the words of Rondeau, was one of the reasons for which the negotiations about the price of the refineries should be carried so that the "good relationship" between the countries could be maintained, given that on account of that contract of importing until 30 million cubic meters of natural gas daily, Bolivia is responsible for almost half of the daily Brazilian needs of the fuel<sup>67</sup>.

On account of that need, Petrobras assumed that even if it did not have any interest in the participation in the refining process, the natural gas exploration activities would be maintained because of the dependence that Brazil had on the Bolivian fuel<sup>68</sup>. It should be highlighted that this is a mutual dependence<sup>69</sup> considering the big share that the foreign currency resulting from the

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<sup>66</sup> Those investments made it possible, for example, that the Guillermo Elder Bell Refinery, built in 1949 to be the first raw oil separation factory in Bolivia with a capacity for 6500 bbl/d, started to produce, after its acquisition by Petrobras, 40,000 bbl/d distributed in automotive gasolines, diesel oil, greases, paraffin, lubricants and products for asphalt. (DUARTE, Bernardo Pestana M. C., SARAIVA, Thiago Carvalho, BONE, Rosemarie Bröker. *Impacto na relação Brasil-Bolívia com a nacionalização dos hidrocarbonetos bolivianos em 2006*

<sup>67</sup> ZIMMERMANN, Patrícia. "Bolívia pagará US\$ 112 milhões por duas refinarias da Petrobras", Folha Online, Brasília, May, 10, 2007. Available at <<http://www1.folha.uol.com.br/folha/dinheiro/ult91u117034.shtml>> (April de 2008).

<sup>68</sup> Statements by Petrobras chairman, Jose Sergio Gabrielli (MAZZA, Mariana. "Petrobras quer vender refinarias na Bolívia", *Correio Brasiliense*, May, 08, 2007. Available at: <<http://clipping.planejamento.gov.br/Noticias.asp?NOTCod=353004>> (April, 2008).

<sup>69</sup> One of the causes of this mutual dependence is derived from the option for transportation in pipelines, since the infrastructure of this type of transportation itself establishes an extremely rigid space integration that generates a lesser flexibility in the interaction strategies of the actors involved, in this direction "the decisions, not only operational but also of investment, of the agents present in each space are made in a context marked by interdependence" (PINTO JR., Helder Queiroz *et alli*, *Economia da indústria do gás natural* in: PINTO JR., Helder Queiroz (org.), *Economia da Energia – Fundamentos econômicos, evolução histórica e organização industrial*, Rio de Janeiro: Campus, 2007, p. 238).

natural gas exports to Brazil represent to the Bolivian economy and the volume of investments and royalties and taxes payments made by Petrobras in that country.

By the way, despite the strong criticism by the Brazilian public opinion, it was the "calm" and "firm" position led by the Itamaraty that gave the tone of the negotiations<sup>70</sup>. That position was translated into the adoption of a strategy that sought to eliminate the conflict by means of the construction of more incentives to the cooperation<sup>71</sup>. One of the possible results from that strategy may have been obtaining, in the new operation contracts signed between Petrobras Bolivia and YPF, an obligation to transfer an amount that, despite being higher than what is determined in the new 2005 hydrocarbons law, it is lower than the amount determined in the Supreme Decree 28701 of 2006<sup>72</sup>.

### Final observations

- The case Bolivia-Brazil reproduces the usual coordination of the States diplomatic relation with the companies' strategy for international investments. In the regulation of the investments and of the technical-economic cooperation between Bolivia and Brazil, by the agreements and memorandums between those States, we can observe the incorporation of provisions as to the contracts – to be celebrated by the companies involved, Petrobras and YPF – and the establishment of the conditions for their execution. That brings the

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<sup>70</sup> The discussions in the diplomatic field, resulting to a great extent from the fact that it is a matter of "contracts of State", may have served as ways to insert the relation between the companies in a longer durability cenario, that is, the relation between the two countries. About the weight of the future and the role of the past in the establishment of the cooperation see: AXELROD, Robert. *The evolution of cooperation*, Basic Books, 1984, p.182.

<sup>71</sup> Inside the negotiations there was the presentation of proposals of construction of a biodiesel factory in Bolivia, export financing for Brazilian tractors to Bolivian farmers, access to the Atlantic Ocean by Madeira River and access to the Pacific Ocean by the inclusion of Bolivia in the highway route that links the state of Rondonia, in Brazil to the port region of Peru. The package of measures was announced in the XXXII MERCOSUR Leadership Meeting that happened between January 18 and 19, 2007 in Rio de Janeiro.

<sup>72</sup> One point to investigate is if this really meant any advantage regarding the other transnational companies or it was a result of the strategy adopted by the Bolivian government in the renegotiation of all the contracts signed with those companies before the Supreme Decree of May of 2006.

evidence of the strategic importance for the States themselves, in the design and implementation of their development policies, of the behavior of the companies involved.

- Analyzed as a whole, the rules issued by the Bolivian government from 2005 on allow us to infer that the redistributive effect resulting from the nationalizations process altered the positions from which the economic agents (YPFB and Petrobras) started to exercise their bargaining power of in the negotiations relative to the contracts of production and exports-imports of natural gas. Facing the enlargement of the bargaining power of the Bolivian company, the intervention of the Brazilian diplomacy by means of a strategy based on the construction of more incentives to cooperation seems to have permitted the Brazilian company to achieve better results than the ones that would have been achieved if it had been negotiating autonomously.