The Brazilian Law N° 13.303/2016 and mixed-economy companies: corporate aspects, control and efficiency*

A Lei nº 13.303/2016 e as sociedades de economia mista: aspectos societários, controle e eficiência

*Marcia Carla Pereira Ribeiro***
*Rodrigo Fernandes Lima Dalledone****

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** Pontifícia Universidade Católica do Paraná, Curitiba, PR, Brazil. E-mail: marcia.ribeiro@pucpr.br.
Corporate Law professor (PUC/PR), undergraduate, master's and doctor's degrees; associate professor of business law (UFPR), undergraduate, master's and doctor's degrees; post-doctorate work at FGVSP (2006) and Faculdade de Direito da Universidade de Lisboa (2012); guest researcher (Université de Montreal — CA, 2007); lawyer.

*** Universidade Federal do Paraná, Curitiba, PR, Brazil. E-mail: rfldalledone@gmail.com.
Master of laws, doctor of laws (being pursued) from UFPR. Judge.

ABSTRACT

This article analyzes some of the changes introduced by Law No 13.03/2016 to the corporate design of state-owned enterprises, with a thematic narrowing in the controlling of the institutional functioning and results of mixed-economy companies exploiting economic activity. For this, the descriptive method was chosen, through the analysis of the main innovations of the Law in the corporate aspect. Based on Luigi Zingales' contributions to social improvement resulting from the free market system, the article claims that the new legislation has the potential to improve the role played by state enterprises in the construction of national development, which, however, depends on a cultural change.

KEYWORDS

State-owned companies – anonymous society – Law No 13,303/2016 – control – development

RESUMO

O artigo analisa algumas das alterações trazidas pela Lei nº 13.303/2016 ao desenho societário das empresas estatais, com estreitamento temático no aspecto do controle do funcionamento institucional e dos resultados das sociedades de economia mista exploradoras de atividade econômica em sentido estrito. Para tanto, optou-se pelo método descritivo, por meio do registro e análise das principais inovações da referida lei no aspecto societário. A partir dos aportes trazidos por Luigi Zingales a propósito do aperfeiçoamento social decorrente do sistema de livre mercado, o artigo sustenta que a nova legislação tem o potencial de aprimorar o papel desempenhado pelas empresas estatais na construção do desenvolvimento nacional, o que, todavia, não prescinde de uma efetiva mudança cultural.

PALAVRAS-CHAVE

Empresas estatais – sociedades anônimas – Lei nº 13.303/2016 – controle – desenvolvimento

1. Introduction

State-owned companies have played a prominent role in Brazil's economic history, particularly in the 1950s and 60s when governments used them as a crucial means of developing the economy while private investors were absent from certain key sectors. In the subsequent period too, national identity hinged on high-profile state-owned companies in the energy, aviation and communications industries.

By the 1990s, however, Brazil had to follow the worldwide trend of reviewing the State's role as economic agent since scarce public funds were needed for crucial development purposes elsewhere, including aspects related to social programs.

Today the inevitable conclusion is that the task of directly operating business must be left primarily to private agents, while the State should concentrate more on its regulatory activity and less on directly intervening in economic activity.

Brazil still has a long way to go to reach the ideal in terms of State-private sector relations. The economy is mainly operated by private economic agents but there are still plenty of state-owned companies here.

Some of them combine public and private capital while control is retained by a legal entity governed by public law; other companies are still wholly owned by the State. In some cases, privately owned companies compete with them; in others they have no rival – but the latter cases are getting rarer.

However, close relations with the State – and therefore with political agents – has an effect on a state-owned company's approach to managing its business. There comes a time when the interests of a company, its shareholders and the public interest – which had initially led to the company being founded– will involve political-party or private-sector interests in conflicts of interest or agency-conflict situations.

Brazil's Law No. 13.303/2016 coincided with a period of great social unrest due to criminal acts perpetrated through state-owned companies, thus causing losses not only for companies and their shareholders, but indirectly for the State too, since many of these cases were covered up by overpriced contracts and misappropriation.

Brazil's State-Owned Companies Law was drafted to prevent state-owned companies having their charter purposes denatured and more obviously being diverted away from good management practices.

Based on amendments introduced by the State-Owned Companies Law, this article examines the possibility of obtaining the effects lawmakers intended through these changes and additional requirement for state-owned companies managing and controlling their results. It also highlights the expected effects on the competitiveness of state-owned companies when subjected to the marketplace.

Our proposal, therefore, is to ask whether Brazil's State-Owned Companies Law (Law No. 13.303/2016) can actually help avoid or mitigate any situations in which capitalism is distorted or denatured by cronyism, thus making the State sector more transparent and efficient while helping build a fairer and more democratic society.

We will focus on the entrepreneurial activity undertaken through state-controlled companies (in the narrow context of economic activities in the strict sense), by allowing the State and private enterprise to join forces in the economic sphere in order to allocate resources more efficiently and pursue relevant public interests. On issues that apply indistinctly to both state-controlled and state-owned companies however, this article will refer to state-owned companies.

The opening chapters introduce the Brazilian context and chapter 3 briefly analyzes how the State-Owned Companies Law altered the institutional design of state-controlled companies; chapter 4 examines the main innovative aspects of the State-Owned Companies Law in relation to efficiency and internal control of state-owned companies; chapter 5 addresses the redefined role of state-owned companies from the point of view of the prevailing competitive environment, and conclusions will be posed in chapter 6.

2. Brazilian context

In Brazil's state capitalist system,[1] the public power intervenes in the economy both directly (by its economic activity and instruments used

[1] Musacchio and Lazzarini define "State capitalism" as a system characterized by "diffused influence of the government in the economy through shares or majority holdings in companies, or by furnishing subsidized credit and/or other privileges for private business." MUSACCHIO, Aldo; LAZZARINI, Sergio G. Reinventando o capitalismo de estado: o Leviatã nos negócios: Brasil e outros países. Translated by Afonso Celso da Cunha Serra. São Paulo: Portfolio-Penguin, 2015. pg. 10

to energize the public sector)[2] and indirectly (in general terms, through regulation, planning and development initiatives).

The 1988 Constitution of the Federative Republic of Brazil endorsed a capitalist production system based on private ownership of the means of production and free competition (Article 170, subsections II and IV), while the State has the role of "rule-making agent and regulator of economic activity" (Article 174, main section) and its direct action is authorized only to ensure "national security imperatives or the relevant collective interest" as defined by the law (Article 173, main section).

In other words, private agents are as a rule able to conduct a whole range of economic activities, but the State is only allowed to directly run certain economic activities on a subsidiary basis in a few cases limited by the constitution.[3]

In this respect, the State must necessarily rely on state-owned companies, be they public or state-controlled companies. Both must be created by law (as per the Constitution's Article 37-XIX) as legal entities under private law; but while public companies' share capital is wholly owned by one of the federal entities, state-controlled companies have their shareholding control belonging to public entities and part of their share capital is held by private agents (on similar lines to joint-stock corporations).

State-owned companies play an important role in capitalist systems, either by correcting market failures (providing products and services in the case of private sector constraints), or by implementing public policies (such as sectoral development or job creation)., without losing their entrepreneurial character, aimed at achieving profitable activities.

As a result, state-owned companies, particular state-controlled companies, conjoin characteristics that are difficult to reconcile in as far as they show "behavior fluctuating between their state-owned aspect – favoring

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[2] As per SUNDFELD, Carlos Ari. A participação privada nas empresas estatais. In: _____ (Coord.). Direito administrativo econômico. São Paulo: Malheiros, 2000. pg. 275-277.

[3] Eros Grau explains that the term "economic activity" corresponds to a genre that includes public services and economic activity in the narrow sense. The Brazilian Constitution's Article 173 addresses the latter, i.e. "[...] the State - at federal, state and municipal levels - acting as economic agent in an area of private-sector ownership". GRAU, Eros. Constituição e serviços públicos. In: _____; GUERRA FILHO, Willis Santiago (Org.). Direito constitucional: estudos em homenagem a Paulo Bonavides. São Paulo: Malheiros, 2001. pg. 251. On the same lines, see BARROSO, Luís Roberto. Intervenção no domínio econômico - Sociedade de Economia Mista - abuso do poder econômico (parecer). Revista de Direito Administrativo, Rio de Janeiro, v. 212, pg. 310-311, Apr./Jun. 1998. Although many of the abovementioned points may be applied indistinctly to both cases, the analysis will focus on cases in which state-controlled companies conduct economic activity in the narrow sense of the term as their charter purpose.

political and macroeconomic objectives – and their entrepreneurial aspect prioritizing private interests...".[4] In addition to this particular feature, state-owned companies tend to be heavily subjected to political motivations and misappropriation of public funds, as Brazil's current experience shows.

Since state-owned companies are subject to different demands and stimuli arising from the political process and the productive sector, they require a very high level of supervision and measurement of their results, especially in the Brazilian case, where the State is still directly intervening in a wide range of economic sectors.

A survey conducted by the Ministry of Planning, Development and Management's Secretariat for the Coordination and Governance of State-owned Companies (Sest) in the third quarter of 2017 found 149 state-owned companies, 48 of them directly controlled by Federal Government, that were active in health, food supplies, communications, manufacturing, ports, finance, trade and services, energy and oil and its by-products.[5]

This scenario prompts well known arguments over the size of the State[6] and poses the issue of monitoring and benchmarking for state-owned companies, particular for two cases recently featured in press coverage.

One showed that political appointments prevailed in official banks: "most executives are career professionals, but they only move up senior positions in the institution when they get backing from ("are godfathered by") a member of the parliament."[7]

The other cited a report from Instituição Fiscal Independente, or IFI, an oversight body attached to the Federal Senate, showing that federal government "allocated over R$40 billion to state-owned companies" in 2015 and 2016.[8-9]

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4 ABRANCHES, Sérgio Henrique. A questão da empresa estatal: economia, política e interesse público. Revista de Administração de Empresas, São Paulo, v. 19, pg. 97, Oct. /Dec. 1979.

5 Boletim das Empresas Estatais, No. 4, 2017. Available at: <www.planejamento.gov.br/assuntos/empresas-estatais/publicacoes/boletim-das-empresas-estatais>. Accessed on: Jan. 29, 2018.

6 For recent developments concerning privatization: DALLEDONE, Rodrigo Fernandes Lima. O Programa de Parceria de Investimentos (PPI) e o papel do Estado na economia. Revista de Direito Público da Economia — RDPE, Belo Horizonte, yr. 15, No. 57, pg. 191-204, Jan./Mar. 2017.

7 ESTADO DE SÃO PAULO. Indicações políticas ainda predominam em bancos estatais. B3. Jan. 26, 2018. Available at: <http://economia.estadao.com.br/noticias/governanca,indicacoes-politicas-ainda-predominam-em-bancos-oficiais,70002166048>. Accessed on: Jan. 30, 2018.

8 LIMA, Flávia. Nos últimos 2 anos, estatais custaram R$ 40 bilhões à União. Folha de S.Paulo, Jan 9, 2018. Available at: <wwwl.folha.uol.com.br/mercado/2018/01/1949017nos-ultimos-2anos-estatais-custaram-r-40-bilhoes-a-uniao.shtml>. Accessed on: Jan. 30, 2018.

9 IFI's tax monitoring report (Relatório de Acompanhamento Fiscal) is available at:: <www2.senado.leg.br/bdsf/bitstream/handle/id/535500/RAF11_DEZ2017_pt08.pdf>. Accessed on:

The first of these examples seems to contradict the principle of free competition that is supposed to govern the economic system (the Constitution's Article 170, III), since the article mentions that political connections were crucial to get access to leading positions – a criterion that in itself clashes with the key aim of efficiency and may undermine a company's competitiveness.

In the second case, the issue of state-owned companies' results and their effective contribution to the country's development is highlighted. In many situations involving a legal entity governed by public law, public funds that could ultimately be used for relevant social-policy initiatives had to be spent to subsidize an activity that would not depend on regular public contributions if managed properly.

3. Overview of Law No. 13.303/2016, corporate aspects

As required by the Brazilian Constitution's Article 173, paragraph 1, Law No. 13.303 of June 30, 2016 (hereinafter referred to as the "State-Owned Companies Law") was enacted, "providing for the legal bylaws governing public companies and state-controlled companies and their subsidiaries at Federal, State and Municipal levels, including the Federal District".

In relation to state-owned companies, a number of provisions in this law altered some of the arrangements introduced in Brazil's Corporations Law (LSA),[10] by creating a special legal status emphasizing corporate governance and transparency, risk management and internal control, as well as shareholder protection mechanisms (State-Owned Companies Law, Article 6).

Thereafter, state-owned companies were governed by their own microsystem formulated by Law No. 13.303/2016 and its supplementary legislation (Decree No. 8.945/2016) as well as – on a subsidiary basis – Law No. 6.404/1976 (the LSA) and Law No. 6.385/1976[11].

Jan. 29, 2018.

[10] On this subject see: GONÇALVES NETO, Alfredo de Assis. Manual das companhias ou sociedades anônimas. 3rd ed., revised and updated. São Paulo: Revista dos Tribunais, 2013. pg. 38-39.

[11] In this respect, see Article 10, main section, and paragraph 2 of Decree No. 8.945/2016: "Article 10. A state-controlled company shall be organized as a joint-stock corporation under Law No. 6.404 of December 15, 1976 except for: I - the minimum number of members of its Board of Directors, II - the term of office of Fiscal Council members, and III - persons eligible to litigate for reparation due to abuse of controlling power and prescription for bringing cases. [...] §2

Under the LSA, joint-stock corporations are characterized by capital stock divided into shares (Article 1), thus favoring funding and borrowing for large companies[12] and this law establishes that corporate purposes must in all cases be related to a profitable business activity (Article 2).

As mentioned above, state-controlled companies must necessarily be organized as joint-stock corporations and their structure must be compatible with a combination of public and private capital (State-Owned Companies Law, Articles 4, main section, and 5).[13]

The fact that they require prior legal authorization to be created poses the first distinctive feature of state-controlled companies: their corporate purpose is not defined by shareholders, but by the Legislative Power at the initiative of the Executive, which must "clearly" define which "relevant collective interest or national security imperative" calls for direct state intervention in that particular segment of economic activity (State-Owned Companies Law, Articles 2, paragraphs 1, and 27, main section).

The State-Owned Companies Law itself poses references to define "relevant collective interest" for the purpose of creating state-owned companies (Article 27, §1).

The economic welfare objective takes into account the community in the company's coverage area. Note that this criterion does not necessarily involve the geographic aspect, but rather the relevant market, meaning the economic sector directly or indirectly impacted when the public power is intervening in business activity. Therefore, given the subsidiary aspect of the State's direct action in the economy, we suggest that the enabling law include an analysis of the potential impact of creating a company in a certain segment, analytically comparing the costs involved and projected benefits, which will be of use when drafting annual charters mentioned in Article 8-I. This tool prioritizes results arising from the creation of the company in relation to potential beneficiaries.

In addition to the rules set forth herein, a state-owned company registered with the Brazilian Securities Commission (CVM) is subject to Law No. 6.385 of December 7, 1976."

12 BERTOLDI, Marcelo M.; RIBEIRO, Marcia Carla Pereira. Curso avançado de direito comercial. 10th ed., revised and updated. São Paulo: Revista dos Tribunais, 2016. pg. 215.

13 Although public companies may use corporate structure allowed by the law, Article 10, main section, of Decree No. 8.945/2016, establishes that "public companies should preferably be organized as joint-stock corporations, which will be compulsory for their subsidiaries", which shows that the type of corporate structure in question favors the oversight of state assets and properties, mainly due to the system structured by Law No. 13.303/2016.

Socially efficient allocation of resources managed by a public company speaks to the concept of "economicity", which combines ethical, political and economic aspects and is not restricted to the company's financial results.[14] The matter in question concerns not only economic indicators for a specific entrepreneurial activity of the State, but also objectively showing that the resources used helped to concretize a given public policy and boost national development, the eradication of poverty and reduction of social and regional inequalities, as objectives inscribed in Article 3 of Brazil's Constitution, which must be used as guidance for lawmakers and public-sector management.

In the legislative context, mentioning socially efficient allocation means that the resources managed by a company are allocated to it as the outcome of an administrative decision taken in the context of scarce resources (denoting one option from the several investments needed) that will be justified by the associated social efficiency.

Note that keeping the State's business activity within objectively measurable economic and financial criteria while setting escalated control instances is one of the most distinctive aspects of the new legislation (Articles 8, items I, III, VIII and IX; 9, main section, item II and §3, item II; Article 13, III; 18, §4;23, main section and §2; 24, §1; 85 to 89).

On the other hand, the economically sustained growth of consumer access to products and services supplied by a public company or state-controlled company shows that a given sector's growing user base and democratized consumption must not be attained at the expense of the economic rationality that underlies business performance. Although profit is not the only motive (perhaps not the most important one) for state-owned companies, their managers cannot ignore this aspect to the detriment of minority shareholders and society itself, particularly in relation to state-controlled companies that presuppose the existence of private investments, the pursuit of access to consumers must not neglect the economic sustainability of the enterprise, otherwise the public objective may not match with private investors capital

[14] "Therefore, economicity is a criterion for economic efficacy to the extent that its elaboration must necessarily take into account the rationality of relations between means and ends. The economicity criterion must show how means may feasibly be effectively adjusted to the ends of a state-controlled company, The ends of a government-controlled company are social and political (collective interest) while its means are economic." CARVALHOSA, Modesto. Comentários à lei das sociedades por ações. 3rd ed., revised and updated. São Paulo: Saraiva, 2002. v. 4, t. I, pg. 405.

However, even for wholly state-owned companies, losses are undesirable for the reasons noted in the comments on the above-mentioned guideline, since losses will necessarily lead to scarce budgetary funds being reallocated to ensure the economic activity's continuity.

Finally, the development or use of Brazilian technology for the production and supply of products and services by a public company or state-controlled company, always in an economically justified manner, confirms the lawmaker's concern over the balance of macro– and microeconomic objectives, showing not only that neither of them may be suppressed in favor of the other, but also that the purpose of the State's entrepreneurial activity is to reduce asymmetries and ensure development, while lawmakers must drop the argumentative burden of objectively and measurably proving that the chosen option is the most suitable for achieving the intended objectives. The legal determination rules out the premise of absolute protectionism for the use of local technology, which must depend on economic reasons to enable efficient alternatives to prevail over less functional local options.

Article 27, §1, from which the guidelines use to define relevant collective interest were extracted, appears in the State-Owned Companies Law in the chapter on the state-owned company's Social Function. Therefore the social function of state-owned companies is combined with the motivation for their creation, unlike the traditional social function concept that usually appears related to the effects produced by the legal concept, as in the case of the social function of property, or the social function of companies or contracts.[15]

Given the imperatives of advertising/publicity and efficiency inscribed in Article 37, main section of Brazil's Constitution, one must recognize that the State-Owned Companies Law's Article 2, §1, means that lawmakers bear an additional argumentative burden of showing why there is a need for the

[15] This is a decisive aspect for ends-related control of the State's entrepreneurial activity, which must be guided by the parameters for managers' ethical conduct and obtaining results that are socially compatible with the magnitude of the resources managed, if only to enable citizens to ensure that lawmakers have correctly decided to intervene directly in a particular sector of the economy. In the words of Lamy Filho, "[...] it is imperative that companies fulfilling their social duties and faithfully pursuing the public interest should efficiently uphold basic criteria distinguishing between good and bad corporation, between suitable and unsuitable - and that the good be privileged as sanction for the bad. " LAMY FILHO, Alfredo. A função social da empresa e o imperativo de sua reumanização. Revista de Direito Administrativo, Rio de Janeiro, v. 190, pg. 60, Oct./Dec. 1992.

State to directly take on an entrepreneurial role, how it should be developed and for which objectives (which are precisely the "public policy objectives" referred to in Article 8, item I of the State-Owned Companies Law), subject to failure to comply with Article 173, §I of Brazil's Constitution.[16]

Since this will be the guiding purpose of the business activity, it must be stated in the company's bylaws (Decree, Article 5), and will be used as the basis for the charter to be drafted annually (State-Owned Companies Law, Article 8, item I), whereby the Board of Directors undertakes to achieve those objectives and states the means that will be used, the resulting impacts and which markers will be available to measure business efficiency.

Or on the other hand, the annual charter lends itself to the fulfillment of those objectives generically outlined in the authorizing law, setting goals and the course to be followed by the company, explaining to other shareholders and the community which resources will be applied for this purpose and the consequences (or, in the wording of the law, which are the "economic and financial impacts of reaching these objectives"), all of the above in order to enable control over the public power's business activity, results and regularity. Moreover, this is the reason for Article 8, §1, of Law No. 13.303/2016 stating that "[the] public interest of the public enterprise and state-controlled company, respecting the reasons that motivated the legislative authorization, is expressed through the alignment between its objectives and those of public policies, as stated in the annual charter referred to in item I of the main section."

The law authorizing the creation of a state-controlled company must determine the scope and limitations of its bylaws, which must necessarily meet the requirements listed in Article 13 of the State-Owned Companies Law and Article 24 of the Decree. Note that the latter, as well as some other new points introduced by the State-Owned Companies Law, has been criticized by legal theorists because the Constitution "stipulates the need for a law to create a state-owned company but not to determine the content of its bylaws".[17]

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[16] "The concept of public interest applied to state-owned companies should prioritize the institutional dimension but not be conjoined with the State's interests arising from the political line adopted by a certain government, even if it is democratically elected one. The enterprise public interest requires greater stability and must not be left to reflect whatever may be most convenient for temporary sectional or party political interests." PINTO JUNIOR, Mario Engler. Empresa estatal: função econômica e dilemas societários. São Paulo: Atlas, 2010. pg. 229.

[17] RIBEIRO, Marcia Carla Pereira; ALVES, Giovani Ribeiro Rodrigues. Dogmática no século XXI: A lei versus a prática nas sociedades estatais. Revista de Informação Legislativa, Brasília, v. 55, No. 220, pg. 204, Oct./Dec. 2018.

On the aspect of its structuring, the State-Owned Companies Law and its supplementary decree set certain organizational parameters for compulsory compliance by state-owned companies, thus showing a marked concern for corporate governance practices,[18] which will be addressed below.

State-owned companies are characterized, as noted above, by power being concentrated in the hands of a legal entity governed by public law. Comparato and Salomão Filho note that power in joint-stock corporations is exercised on three different levels: shares in capital, control and management.[19]

In the companies' corporate structure there is a division of powers on different levels working concurrently through a system of reciprocal checks and balances in order to guide business activities and fulfill objectives. These levels – identified with shareholders, controller and executive board – will impact a company's organizational aspect.

As holders of a portion of share capital, shareholders have the right to vote,[20] share the company's profits and oversee the conduct of the company's business and its earnings (Article 109 of the LSA).[21]

Shareholders as a whole attend General Meetings called on the terms and at the periodicity stated in the respective bylaws and the LSA (Article 121), and its role is resolving on matters of interest to the company as provided for

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[18] The term is used here to mean a "system for organizing a joint-stock corporation that ensures absolute transparency in rules governing the relations of senior executives and their conduct with shareholders, employees and society". LACOMBE, Francisco. Dicionário de negócios. São Paulo: Saraiva, 2009. pg. 317.

[19] COMPARATO, Fábio Konder; SALOMÃO FILHO, Calixto. O poder de controle na sociedade anônima. 5th ed. Rio de Janeiro: Forense, 2008. pg. 41.

[20] The right to vote is a kind of "political right" assured only to holders of common shares (LSA, Article 110), since Article 111 of Law No. 6.404/1976 states that "the bylaws may no longer confer on preferred shares any or some of the rights granted to common shares, including voting rights, or confer the latter on a restricted basis." Therefore, although Jorge Lobo classifies voting rights as a predicate of shares, he emphasizes that from a contractual point of view: "the right to vote is an essential, intangible, undisputable and unwaivable right of a holder of common shares and preferred shares of companies in which the bylaws do not reject or restrict the right to take part in corporate decision making at shareholders' general meetings". LOBO, Jorge. Direito dos acionistas. Rio de Janeiro: Elsevier, 2011. pg. 94. This exception being made clear and for the purpose of analyzing the internal functioning of state-controlled companies, minority shareholders shall have voting rights that must be effectively characterized in each specific case.

[21] Carvalhosa notes that there are five categories of shareholder rights: a) individual rights, which are unwaivable and common to all shareholders; b) minority rights, which presuppose that a minority shareholder does not hold controlling power or belong to the controlling group; c) rights associated with classes of shareholders; d) general dissenting rights; e) collective rights. CARVALHOSA, Modesto. Comentários à lei das sociedades anônimas. 3rd ed., revised and updated. São Paulo: Saraiva, 2003. v. 2, pg. 335 et seq.

in Article 122 of the LSA, including board-member compensation (Decree, Article 27, §1).

The decree's Article 27, §3, states that "every state-owned company shall have a General Meeting, which shall be governed by the provisions of Law No. 6.404 of 1976, including its power to alter the company's share capital and bylaws, and to elect or dismiss its directors at any time."

On the other hand, the State-Owned Companies Law reiterates the requirement for the structure of state-controlled companies to include a Board of Directors, as previously set forth by Article 239 of Law No. 6.404/1976.[22] The new development is that the board must now have at least 7 members and at most 11 (Article 13, item I), in contrast to the LSA's Article 140, main section. Alternate board members are not allowed (Decree, Article 32, §2).

A majority of board members are elected by the votes of the public power as a logical consequence of their majority shareholding, as per Article 2, main section of Law No. 12.353/2010.

At least one of the board members must be elected by minority shareholders (State-Owned Companies Law, Article 19, §2; Decree, Article 33, item II) unless they elect a higher number through the multiple voting mechanism (LSA, Article 141),[23] while one of the directors will be elected from among the "active employees" of state-controlled companies that have a headcount of more than 200 "own employees" (State-Owned Companies Law, Article 19, main section and §1; Law No. 12.353/2010, Articles 2, §1 and 5, Decree, Article 33, item I).

On this point, the following should be explained: in addition to at least one director elected by minority shareholders and one by active employees, the State-Owned Companies Law's Article 22, main section, sets aside 25% of seats on the board for "independent members", which generally means those not in certain kinds of relationship (personal or professional) with the

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[22] The exception being closely-held subsidiaries for which appointing a Board of Directors is optional (Decree No. 8.945/2016, Articles 24, §1, and 31).

[23] Carvalhosa notes: "multiple voting is the process whereby each shareholder has a number of votes that corresponds to the number of their voting shares multiplied by the number of positions on the Board of Directors. As mentioned above, the purpose of multiple voting is to ensure that minority shareholders holding at least 10% of voting shares may be proportionally represented on the Board of Directors." Modesto Carvalhosa, Comentários à lei das sociedades anônimas, op. cit., pg. 115.

state apparatus or its members (§1). If there is a multiple voting option (LSA, Article 141), only one independent director will be required.[24]

Directors elected by employees must not be counted when calculating the number of seats to be filled by independent directors, unlike the rule for members elected by minority shareholders (State-Owned Companies Law, Article 22, §§3 and 4).

Members of the Board of Directors shall not hold office for more than two years, for all members together, but membership may be renewed up to three times consecutively (State-Owned Companies Law, Article 13, item VIII; Decree, Article 24, item VI).

Determining that state-owned companies are managed by "members of the board of directors and executive board" (Article 16, sole paragraph), the State-Owned Companies Law introduced new requirements for managers in addition to "unblemished reputation" (Article 17, main section).

These requirements apply to all board members and officers (regardless of their origin – Decree, Article 28, §6) and may be grouped as follows:

a) professional requirements (Article 17, item I) shown by periods of professional experience in the company's line of business or directly or indirectly related activities ("a" or "c"), or occupying certain positions ("b"), from which they may be presumed to have acquired the expertise needed to tackle the challenge of managing a state-owned company.

Different types of experience are listed in the Decree's Article 28, §2 and §3. Their durations cannot be added together to meet the above legal requirements;

b) academic requirement (Article 17, item II), undergraduate and/or graduate degree in a field of learning "compatible with the position for which they were appointed", shown by a certificate issued by an Education Ministry accredited entity (Decree, Article 62, §3).

c) personal requirements (Article 17, item III), show by not being flagged as ineligibility on the general aspects mentioned in Article 1, main section,

[24] Legislative technique eventually restricted the reach of this stipulation. If the reason for the existence of independent directors is to reduce the controlling shareholder's ascendancy over the board in order to ensure that corporate objectives are met, "[...] it is sufficient for the controlling shareholder to request the faculty (which is not exclusive to the minority) to reduce the number of positions for independent directors, if there are more than four members of the Board of Directors, from two or more to just one independent director." Marcia Carla Pereira Ribeiro e Giovani Ribeiro Rodrigues Alves. Dogmática no século XXI: A lei versus a prática nas sociedades estatais, op. cit., pg. 208.

item I of Supplementary Law No. 64/1990 or situations listed in the LSA's Article 147, §§ 1 and 2.

In relation to these requirements, certain personal and professional aspects bar eligibility for management positions in state-owned companies (Board of Directors, regardless of origin, and executive board) as per Law No. 13.303/2016 (Article 17, §2, Decree, Article 29).

Key concerns here are impartiality and transparency. Kinship relations or previous work in certain segments is presumed to undermine the impartial decision making required to fulfill social objectives.

On the other hand, members of the management of state-owned companies require constant personal development. On taking up their positions and annually thereafter, they must attend, "specific training programs covering corporate and capital market legislation, disclosure, internal control, code of conduct, Law No. 12.846 [...], and other matters related to the activities of public companies or state-controlled companies" (State-Owned Companies Law, Article 17, §4; Decree, Article 42).

All appointments mentioned in the State-Owned Companies Law require submission of documents showing fulfillment of requirements and eligibility (certified copies of documents must be filed at the company's registered office – LSA, Article 147, main section), by filling in standardized forms (Decree, Article 22, item I; §§1 and 4, and Article 30).

The aforementioned board, a body whose administrative and decision making role cannot be delegated (LSA, Articles 138 and 139),[25] has a longer list of powers and duties. In addition to those in Article 142 of the LSA, there are more in Articles 8 and 18 of the State-Owned Companies Law and Articles 27, §3, 32, and 37, §2 of the Decree that involve altering bylaws and share capital; electing and removing directors at any time; drafting and approving the "annual charter"; discussing, approving and monitoring "decisions involving corporate governance practices, stakeholder relations, personnel management policy and code of conduct"; implementing and supervising internal control and risk management systems, including those "related to

[25] "The role of the Board of Directors, when there is one for a corporate body, either by its shareholders decision or when legally required, is making decisions and overseeing the company's internal organization. [...]. - In its decision making capacity, the board may legitimately decide matters of interest to the company, except for those corresponding exclusively to shareholders general meetings. The board is therefore in an intermediate position between the shareholders' general meeting and the executive board." CAMPINHO, Sérgio. Curso de sociedade anônima. Rio de Janeiro: Renovar, 2015. pg. 336.

the integrity of accounting and financial information and those related to corruption and fraud"; standardizing "spokesperson policy" in order to standardize information management and consistency; assessing executive board performance using objective criteria; evaluating fulfillment of business plan targets and results and long-term strategy.

Also on the management aspect, state-controlled companies must have an Executive Board consisting of at least three members serving for a maximum of two years, subject to a maximum of three consecutive reelections (State-Owned Companies Law, Article 13, items II and VI). Officers are elected (and removed) by the Board of Directors (LSA, Article 142, item II) and are eligible to represent companies (LSA, Article 144).

Officers must fulfill the abovementioned requirements for members of the Board of Directors in addition to any set forth in the corresponding bylaws (Decree, Article 24, item II), in addition to the formal "commitment to specific targets and results to be reached (State-Owned Companies Law, Article 23, main section; Decree, Article 37, main section), and the same considerations previously explained apply here. They must also reside in the country (Decree, Article 28, §5).

As per the LSA's Article 143, a company's bylaws must specify the number of directors and the maximum number permitted; how they will be replaced; and each executive board member's duties and powers.

Since they are subject to diffuse control, the role of the controlling shareholder is of paramount importance, as a person or legal entity holding shareholder rights who has a stable "majority vote for General Meeting decision-making and the power to elect a majority of company directors", and may therefore "effectively use their power to manage the company's business and guide the functioning of its bodies "(LSA, Article 116, main section).

Underlying the notion of control is the power to dictate the course of an enterprise and guide a company's activities toward its goals. In other words, control transcends the mere preponderance of votes in the general meeting, therefore requiring "a) that this control be constant and stable; and b) that person (s) holding controlling power use it to imprint their mark on the business."[26]

There are other types of control (by management, or by using veto rights) but in the case of state-owned companies, the internal control exercised by

[26] Marcelo M. Bertoldi and Marcia Carla Pereira Ribeiro, Curso avançado de direito comercial, op. cit., pg. 299.

public entities (federal, state, federal district, municipal or indirect government entities) is of the majority control type, i.e. based on owning a majority of "voting shares" (State-Owned Companies Law, Article 4, main section).

Being a controlling shareholder involves highly functional powers and duties (fulfilling the company's charter purpose and meeting public policy objectives) with a plethora of "duties and responsibilities" extrapolating from the company's business to include the other shareholders, its employees and its local or surrounding community (LSA, Article 116, sole paragraph)[27].

On top of these duties, the State-Owned Companies Law' Article 14 adds: I) the state-owned company's Code of Conduct and Integrity must prohibit undue disclosure (i.e. without authorization from the competent body) of insider information that may impact prices of its securities (which applies to publicly listed companies of course) or their relations with the market, suppliers or consumers; II) preserve the independence of the Board of Directors in the exercise of their duties; III) ensure appointment policy is followed when selecting managers and Fiscal Council members.

In relation to Fiscal Councils, Law No. 13.303/2016 introduced the following specific provisions: they must be active on a permanent basis (Article 13, item IV, as determined by the LSA's Article 240); members are elected for two year mandates and are allowed two consecutive renewals (Article 13, item VIII); members must be resident in the country, have suitable academic background[28] and at least three years professional experience in a "management or advisory position in the public administration or as a company fiscal council member or manager" (Article 26, §1); at least one director must be appointed by the controlling shareholder from among public servants attached to the public administration on a long term basis (Article 26, §2); Fiscal Council members will not be eligible for profit sharing program amounts or compensation higher than that paid to members of the Board of Directors (Decree, Article 40, §1).

Aspects incurring ineligibility for Fiscal Council membership are listed in Article 29, main section, items I, IV, IX, X and XI of the abovementioned Decree (Article 41, item IV).

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[27] In this respect, Article 26 of Decree No. 8.945/2016 states: "A legal entity that controls a state-owned company has controlling shareholder duties and responsibilities as per Law No. 6.404 of 1976, and it shall exercise the power of control in the interest of the state-owned company while respecting the public interest that led to its being created".

[28] The educational background required for Fiscal Council membership is an undergraduate or postgraduate degree in any of the fields listed in Article 62, §2, item I of Decree No. 8.945/2016.

Precisely to assess compliance with the long list of requirements to be met by the members of the Boards of Directors and Fiscal Council, state-owned companies must have an Eligibility Committee (State-Owned Companies Law, Article 10), whose duties are described in the Decree's Article 21.

This committee must decide on nominations within eight business days of receiving forms, after which time names will be considered tacitly approved, and " its members shall be held accountable if any requirement is not met" (Decree, Article 22, §2).

Finally, state-owned companies must have a Statutory Audit Committee (State-Owned Companies Law, Article 13, item V) attached to the Board of Directors, its duties to include oversight and compiling reports, consisting of at least three and at most five members with "professional experience or academic background commensurate with the position, preferably in accounting, auditing or the company's business." At least one member must have "recognized experience in corporate accounting matters" (State-Owned Companies Law, Article 25, main section, and §2; Decree, Article 39, §5).

Members are elected and removed by the Board of Directors and they must fulfill the requirements of the Law's Article 25, §1 and the Decree's Article 39, §1. Their mandates for two or three years must not coincide with each other. There are no alternate members (Decree, Article 39, §§8 and 9).

Highlights among a Statutory Audit Committee's wide range of duties include: overseeing internal control mechanisms; monitoring quality and integrity of business information disclosed; drafting an annual report on activities developed and information collected, as well as conclusions and recommendations; receiving complaints, including anonymous reports of matters related to their activities (State-Owned Companies Law, Article 24, §§1 and 2; Decree, Article 38, §1).

Statutory Audit Committees must enjoy operational autonomy and their own budget allocation to carry out their duties. Independent outside specialists may be engaged too (State-Owned Companies Law, Article 24, §7; Decree, Article 38, §7).

In this respect, therefore, the State Companies Law may help reduce "the deficit in terms of ability to produce socially desired results, revert the top-down pattern of the State's activities and finally reduce the accountability deficit and arbitrary rule by government authorities".[29]

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[29] DINIZ, Eli. Estado, globalização e desenvolvimento em contexto pós-neoliberal: retomando um antigo debate. In: MANCUSO, Wagner Pralon; LEOPOLDI, Maria Antonieta Parahyba;

4. Controlling means and ends in state-owned companies[30]

From the angle of this article, state-owned companies are the means of materializing a State's decision to directly operate a given economic activity in order to obtain certain socially relevant outcomes (boosting national security or catering to particularly relevant collective interests).

This aspect attracts a series of oversight mechanisms that are far more intrusive than those applicable to private business because the state-owned company activity is highly functional: using scarce public funds to achieve socially relevant outcomes.

Rather than examining the means used to ensure external control of public business activity (concerning administrative oversight), the purview of this study has been the means of internal control (i.e. corporate controls) introduced by Law No. 13.303/2016 from the point of view that to fulfill their objectives "state-owned companies must be subject to fewer and simpler controls that are more akin to their nature as businesses".[31]

While the law governing state-owned companies was being voted, almost 18 years after the Constitution's enactment, the backdrop to the session was a state-controlled energy company involved in an episode of corruption on a huge scale.[32]

This historical circumstance underlined the imperative need to control State activities and lent its own particularity to the State-Owned Companies Law in terms of producing, organizing and analyzing relevant information,[33]

IGLECIAS, Wagner. Estado, empresariado e desenvolvimento no Brasil: novas teorias, novas trajetórias. São Paulo: Cultura, 2010. pg. 52.

30 The term "control" is used here in the sense of oversight or supervision, or the power-or-duty of "verifying the legitimacy (legal reason) and timeliness (political reason) of the form (procedure) and end (final cause) of public action, in order to verify correspondence between 'antecedent and consequent'." FRANÇA, Phillip Gil. Controle da administração pública: combate à corrupção, discricionariedade administrativa e regulação econômica. 4th ed., revised, updated and enlarged. São Paulo: Saraiva, 2016. pg. 100.

31 ARAGÃO, Alexandre Santos de. Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista. São Paulo: Forense, 2017. pg. 324. On the same lines, the author notes that corporate controls prevail over administrative ones.

32 For an overview of the case: <www.mpf.mp.br/para-o-cidadao/caso-lava-jato/entenda-o-caso>. Accessed on: Feb. 6, 2018.

33 The mere fact of companies joining their capital to build a separate asset pool, thus assuring limited liability for shareholders, poses a duty to publicize, which is obviously exacerbated by the presence of public funds. By the way, Ascarelli warns, "on the one hand, advertising is related to the constitution of the legal entity, in view of the importance the constitution of a separate asset pool takes on for third parties; [...]. On the other hand, advertising tracks

while setting objective criteria for efficiency, examining results and introducing new instances for state-owned companies oversight.

All oversight of public business activity is based on the following principle: although economic activity and political activity are complementary and mutually dependent,[34] they are driven by different rationales and they use their own specific channels of communication; thus being exposed to interference in their management and failure to meet business objectives.

Although the means of oversight and benchmarks were already available in corporate context,[35] the concern reflected in the State-Owned Companies Law was to set minimum transparency requirements and means of measuring results (Articles 8 to 10, 12, 13, items III and V, 24 and 25). The idea was to give minority shareholders and the general public the information needed to examine its record as an appropriate business for the purposes that had prompted Brazil to set up this company in the first place, while avoiding undue interference in the management of its business (Article 90).

Indeed, by ordering that information directly related to business activity (activities developed, economic and financial situation, management compensation and obtained) must be conveyed in "clear and direct language" (State-Owned Companies Law, Article 8, items III and VIII) and posted on the Internet (State-Owned Companies Law, Article 8, §4), the Law showed its concern to prevent any deviant conduct,[36] thus enabling minority shareholders

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the development of social life by enabling others to assess their amended articles/bylaws and management." ASCARELLI, Tullio. Princípios e problemas das sociedades anônimas. In: _____. Problemas das sociedades anônimas e direito comparado. Campinas: Bookseller, 1999. pg. 466.

34 Natalino Irti points out that the market is locus artificialis, a system that does not arise from nature but from the technique of law, which in turn is shaped by political decisions that drive the economy. The market consists of several successive concrete agreements between certain subjects, which only become intelligible and gain unity if they are ordered in relation to legal parameters, which shows the mutual dependence between economics and politics. IRTI, Natalino. L'ordine giuridico dei mercato. 3rd ed. Roma: Laterza, 2003. pg. 11.

35 In addition to the mechanisms set forth in Law No. 6.404/1976, the following may be taken as examples: the "Programa Destaque em Governança de Estatais" [State-owned Companies Governance Highlight Program] launched by Bovespa in 2015 (current version available at: <www.bmfbovespa.com.br/pt_br/listagem/acoes/governanca-de-estatais>. Accessed on: Feb. 6, 2018); CVM/SEP Circular No. 2/2015, which set forth "general guidelines on procedures to be followed by public, foreign and incentive-driven companies" (available at: <www.cvm.gov.br/legislacao/oficios-circulares/sep/oc-sep-0215.html>. Accessed on: Feb. 6, 2018).

36 ORTINI, Cristiana; SHERMAM, Ariane. Governança pública e combate à corrupção: novas perspectivas para o controle da administração pública brasileira. Interesse Público, Belo Horizonte, No. 102, pg. 30, Mar./Apr. 2017.

and the public to be more than mere onlookers of the activity of the controlling shareholder.[37]

Here there is an aspect that ought to be highlighted.

Lawmakers expressed their concern over the results of the State's business activity, to be measured by objective indicators (State-Owned Companies Law, Articles 8, items I and III, and 13, items III), thus reaffirming that together with public policy objectives, state-owned companies exploiting economic activities (in the broad sense of the term) should also pursue profit in the sense of a "positive number on the business entity's balance sheet".[38]

Despite respectable opinions to the contrary, earning profit is not a secondary public interest but one that is necessarily elected by the State (alongside "public policy" interest) when it decides to follow a state-controlled roadmap, since this was what private capital had in mind when it partnered public capital.

While the idea of earning profit must not be the State's only concern when doing business, it certainly cannot be forgotten or relegated to the background, under penalty of the characteristics of a business enterprise being lost, that – in cases of national security imperatives or relevant collective interest – it is undeniably an icon of constitutional dignity.

This is not just a matter of ensuring that shareholders (controlling and minority shareholders) get their dividend payouts. Following the constitutional principle of efficiency (Article 37, main section) means that current spending on state-owned companies must not eat into funds allocated to investments in socially relevant areas such as health, education and public safety.

As mentioned above, federal government spent over R$40 billion on federal state-owned companies in 2015-16, only to find that a new management model was needed, because "it is precisely this pursuit of profit for the sake of the public interest that is one of the main reasons for the business model in the Public Administration".[39]

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[37] Although in a different context, note that, " generally speaking, all these efforts [to introduce corporate governance measures] are intended to assure minority investors more protection and guarantees through mechanisms overseeing and monitoring controlling shareholders and by getting more company information." SHAYER, Fernando. Governança corporativa e ações preferenciais — dilema do legislador brasileiro. Revista de Direito Mercantil, São Paulo, No. 126, pg. 75-76, Apr./Jun. 2002.

[38] CÂMARA, Jacintho Arruda. O lucro nas empresas estatais. Revista Brasileira de Direito Público, Belo Horizonte, No. 37, Apr./Jun. 2012. Available at: <www.bidforum.com.br/bid/PDI0006.aspx?pdiCntd=79745>. Accessed on: Jan. 30, 2018.

[39] Ibid.

The perennial conflict between public and private interests, which Bilac Pinto described as an "incurable defect", led to the decline of this type of corporate arrangement,[40] which actually highlights the need for the State's intervention through state-controlled companies to be circumstantial: "by returning the company to private enterprise as soon as there is an end to the exceptional situation that prompted its creation and maintenance".[41]

5. State-owned companies: instruments for "capitalism for the people"?

The role of state-owned companies in the Brazilian system may be examined in light of Luigi Zingales' argument that a series of factors (historical, geographical, cultural and political) meant that the success of the capitalist regime in the United States was precisely due to the perception that success reflects personal effort and constantly improving methods rather than personal relations.

In a free market system, therefore, (i) competition can hold down profiteering, thus narrowing inequality; (ii) consumers can enjoy the benefits of innovation and freedom of choice; (iii) by striving for efficiency and therefore meritocracy, the most capable individuals take on more responsibility and earn commensurate rewards for doing so.[42]_[43]

Distorting the system would lead to "crony capitalism", in which kinship and friendship decide outcomes rather than competence: underperforming

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[40] PINTO, Bilac. O declínio das sociedades de economia mista e o advento das modernas empresas públicas. Revista de Direito Administrativo, Rio de Janeiro, v. 32, pg. 5 et seq., 1953.

[41] RIBEIRO, Marcia Carla Pereira. Sociedade de economia mista e empresa privada: estrutura e função. Curitiba, Juruá, 1999. pg. 122.

[42] ZINGALES, Luigi. Um capitalismo para o povo: reencontrando a chave para prosperidade americana. Translated by Augusto Pacheco Calil. São Paulo: BEI Comunicação, 2015. pg. 26.

[43] Our argument is not that institutions developed in other countries should be uncritically transposed to Brazil. "...policies and institutions currently recommended for the developing countries are [not] those that were adopted by the developed countries when they themselves were developing." (CHANG, H'a-Joon. Chutando a escada: a estratégia do desenvolvimento em perspectiva histórica. Translated by Luiz António Oliveira de Araújo. São Paulo: Unesp, 2004. pg. 13). However, we could and should learn from the historical experience of countries that have followed the path we are now taking, in order to define the precise role of institutions in national development.

companies become less competitive by looking to political connections instead of pursuing innovation.[44]

Examining Brazilian state-owned companies from this perspective is no easy task. Since their controlling interests belong to the public power, their decisions are obviously permeated by political bias.

This has been the case ever since Brazil started industrializing so there is an urgent need for new criteria: not withstanding political assessments, the most capable individuals should get a chance to access management positions; targets must be set in objective and realistic terms; results must be measured, compared and reported; the laurels of victory or the burdens of failure must be attributed to the managers of public affairs.

This is the only way for public companies to fully comply with the constitutional principles of free competition and accessibility to public office (Articles 37, item I, and 170, item IV).

Society can no longer be the universal guarantor of companies driven solely by political objectives without any commitment to objective results. To do so, however, society must take an actively controlling role that is inherent to all those who hold power but transfer its exercise to others (Brazilian Constitution, Article 1, sole paragraph).

From this point of view, Law No. 13.303/2016 enables state-owned companies to correct their course, becoming instruments capable of promoting effective national development and social justice, which are the Federative Republic's objectives (Constitution's Article 3, items I and II).

6. Conclusion

It would be naive to think that the State-Owned Companies Law alone will change paradigms and renew practices that have been consolidated over many years.

In this respect, there is no intention of "demonizing politics": democracy presumes collateral interests sharing spaces in the public sphere. The aim is

[44] "[...]. Free and competitive markets are the creators of the greatest wealth ever seen in human history. But for markets to work their magic, the playing field must be kept level and open to new entrants. When these conditions fail, free markets degenerate into inefficient monopolies—and when these monopolies extend their power to the political arena, we enter the realm of crony capitalism. [...]". Luigi Zingales, Um capitalismo para o povo, op. cit., pg. 40.

just that the latter should not be the only force acting in the conduct of public affairs, since efficiency and free competition are principles of constitutional magnitude that cannot be ignored. It is therefore a matter of endeavoring to change a situation in which the State-as-entrepreneur "settles down and tends to underperform, so that state intervention as a rule leads to obsolescence and insolvency in the medium term."[45]

By consolidating a number of mechanisms for information and control that were already in place to some extent, as well as explicitly adding aspects concerning ethics and sustainability in the management of public affairs (e.g. Articles 8, item VII, 9, §1, item I, and 27, §§1 and 2), it has the merit of highlighting Brazilian society's need for a correction of course and helping to ameliorate shortcomings in terms of producing socially desirable outcomes and correcting arbitrary measures taken by governmental authorities.[46]

Its concrete effects, however, depend on a cultural change that spreads the perception of power and control as two sides of the same coin, and society has an active role to play in managing interests that are ultimately its own. From this point of view, as Engler Junior pointed out, there is "the convenience of submitting key decisions on how state-owned companies operate, including their objectives to be prioritized to the scrutiny of civil society."[47]

Ongoing exercise of active citizenship in a process of trial and error and constant learning will hone the political-institutional apparatus and enable state-owned companies to take their rightful place in the process of building a developed nation.

Not forgetting that the preponderant pursuit of public interests inherent to the State's intervention in the economy, while recognizing the importance of profit and competitiveness and being properly guided by ethical parameters, may crucially contribute to this purpose.

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[45] JUSTEN FILHO, Marçal. Empresa, ordem econômica e Constituição. Revista de Direito Administrativo, Rio de Janeiro, v. 212, pg. 120, April 1998.

[46] Eli Diniz, Estado, globalização e desenvolvimento em contexto pós-neoliberal, op. cit., pg. 52.

[47] Mario Engler Pinto Junior, Empresa estatal, op. cit., pg. 229-230.

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directly or indirectly holds a majority of voting shares, and other measures. Diário Oficial da União, Brasília, DF, Dec. 19, 2010. Available at <www.planalto.gov.br/ ccivil_03/_ato2007-2010/2010/lei/112353.htm>. Accessed on: Jan. 30, 2018.

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