

STATE OWNED ENTERPRISES: 05 YEARS OF THE NEW CORPORATE GOVERNANCE RULES

EMPRESAS ESTATAIS: 05 ANOS DAS NOVAS REGRAS DE GOVERNANÇA CORPORATIVA

EMPRESAS ESTATALES: 05 AÑOS DE LAS NUEVAS REGLAS DE GOBIERNO CORPORATIVO

Ricardo Lupion*

1 Introduction. 2 Corporate governance in state-owned enterprises: the new Brazilian regulatory environment. 3 Progress: Petrobras case: the new bylaws and new integrity *background check* requirements. 4 Setback. 4.1 Itaipu Binational case: the election of the member of the board of directors. 4.2 Petrobras: Setback regarding the form and fulfillment of requirements in the election of a board member. 4.2.1 As to form. 4.2.2 As to the fulfillment of professional experience and academic background requirements. 5 Final Remarks: The future of SOEs Law is in the hands of the Courts. 5.1 Light Case - Federal District Court of the 1st Region. 5.2 The word is with the Supreme Court. References.

ABSTRACT

Objective: This article intends to address the new Brazilian regulatory environment created by the SOEs Law (Law No. 13,303, of June 30, 2016) which created new corporate governance rules in state-owned enterprises for the election of directors, officers and fiscal council members, with the purpose of protecting the public companies, the mixed joint-stock corporation and its subsidiaries ("state-owned") against any possible (and unfortunately common) political-partisan interference in the appointment of the members of these top-level management positions in the SOEs. The article will also present cases of progress, setbacks, and the future of this new Brazilian legal norm.

Methodology: Review of the bibliography and analysis of judicial and administrative precedents involving the application of new corporate governance rules for state-owned enterprises.

* Post-Doctor in Legal and Business Sciences from the Faculty of Law of the University of Lisbon. LL.M and Ph.D in Law from the Pontifical Catholic University of Rio Grande do Sul (PUCRS). Full Professor of Business Law at PUCRS School of Law. Tenured Professor of the Postgraduate Law Program (PPGD) at PUCRS. Attorney-at-law. E-mail: <ricardo.lupion@pucrs.br>. ORCID ID <https://orcid.org/0000-0001-9739-287X>



Results: It is possible to conclude that the new corporate governance rules were created by Law No. 13,303, of June 30, 2016 with the purpose of protecting the state-owned enterprises (SOEs) against any possible (and unfortunately common) political-partisan interference in the appointment of the members of the top-level management positions in the SOEs.

Contributions: From the results found, it is possible to verify: (a) One of the most relevant aspects of the Law No. 13,303, of June 30, 2016 was the creation of academic background, professional experience and professionalization for the top-level management of state-owned enterprises, as usual in the private sector. (b) that the Brazilian Securities and Exchange Commission (CVM) determined the application of the new corporate governance rules for state-owned enterprises; (c) the Judiciary, especially the Federal Supreme Court (STF), can make a relevant contribution if it decides to apply these new rules of governance corporate in order to mitigate political-partisan interference in the appointment of the members of these top-level management positions in the state-owned enterprises (SOEs).

Keywords: company; state-owned enterprises; corporate governance; directors and officers; legal requirements and impediments.

RESUMO

Objetivo: Este artigo pretende abordar o novo ambiente normativo brasileiro criado pela Lei das Estatais (Lei nº 13.303, de 30 de junho de 2016) que criou novas regras de governança corporativa na estatais para a eleição de conselheiros de administração, diretores e conselheiros fiscais, com a finalidade de proteger a empresa pública, a sociedade de economia mista e suas subsidiárias (“estatais”) contra possíveis (e infelizmente comuns) ingerências político-partidárias na nomeação dos integrantes desses cargos de administração das estatais. O texto também apresentará casos de avanços, de retrocessos e o futuro desse novo diploma legal brasileiro.

Metodologia: Revisão da bibliografia e análise de precedentes judiciais e administrativos envolvendo a aplicação das novas regras de governança corporativa para as estatais.

Resultados: É possível concluir que as novas regras de governança corporativa foram criadas pela Lei nº 13.303, de 30 de junho de 2016 com a finalidade de proteger as estatais contra possíveis (e infelizmente comuns) ingerências político-partidárias na nomeação dos integrantes dos cargos de administração.

Contribuições: A partir dos resultados encontrados é possível verificar: (a) Um dos aspectos de maior relevância da Lei nº 13.303, de 30 de junho de 2016, foi a criação de experiência acadêmica, de vivência profissional e profissionalização para os cargos na administração das estatais, como é habitual no setor privado. (b) que a Comissão de Valores Mobiliários (CVM) determinou a aplicação das novas regras de governança corporativa para as estatais; (c) o Poder Judiciário, especialmente o Supremo Tribunal Federal (STF), poderá prestar uma relevante contribuição se vier a decidir pela aplicação dessas novas regras de governança corporativa, de modo a mitigar interferências político-partidárias para na nomeação dos integrantes dos cargos de administração das estatais.

Palavras chave: empresa; estatais; governança corporativa; administradores; requisitos e impedimentos legais.

RESUMEN

Objetivo: Este artículo pretende abordar el nuevo entorno regulatorio brasileño creado por la Ley de las Estatales (Ley nº 13.303, de 30 de junio de 2016) que creó nuevas reglas de gobierno corporativo en las empresas estatales para la elección de miembros de la junta directiva, del directorio y del consejo de vigilancia, también conocido como inspectores de cuentas, con el objeto de proteger a la empresa pública, a la empresa de capital mixto y a sus subsidiarias (“empresas estatales”) contra posibles (y lamentablemente comunes) injerencias políticas partidarias en la designación de los integrantes de estos cargos directivos de las empresas estatales. El texto también presentará casos de avances, retrocesos y el futuro de este nuevo diploma jurídico brasileño.

Metodología: Revisión de la bibliografía y análisis de precedentes judiciales y administrativos relacionados con la aplicación de nuevas reglas de gobierno corporativo para las empresas estatales.

Resultados: Es posible concluir que las nuevas reglas de gobierno corporativo fueron creadas por la Ley nº 13.303, de 30 de junio de 2016, con el objetivo de proteger a las empresas estatales contra posibles (y lamentablemente comunes) injerencias de los partidos políticos en la designación de miembros de los cargos directivos.

Contribuciones: De los resultados encontrados, es posible verificar: (a) Uno de los aspectos más relevantes de la Ley Nº 13.303, de 30 de junio de 2016, fue la creación de experiencia académica, experiencia profesional y profesionalización para cargos en la administración de empresas estatales, como es costumbre en el sector privado. (b) que la Comisión Nacional del Mercado de Valores (CVM) determinó la aplicación de las nuevas reglas de gobierno corporativo para las empresas estatales; (c) el Poder Judicial, especialmente el Supremo Tribunal Federal, puede hacer una contribución relevante si decide aplicar estas nuevas reglas de gobierno corporativo, a fin de mitigar la injerencia de los partidos políticos en la designación de miembros de los cargos directivos de las empresas estatales .

Palabras clave: empresa; estatales; gobierno corporativo; administradores; requisitos e impedimentos legales.

1 INTRODUCTION

Improving corporate governance in Brazilian state-owned enterprises was the path chosen by the legislator to mitigate political influences and appointments in the top-level management of companies controlled by the federal government, in which the president has the power to elect and dismiss members of the Board of Directors and the Executive Board:

The fact is that throughout its history, Petrobras has suffered from political interference that ran counter to its business interests. The state-owned enterprise was asked to build several industries, such as petrochemicals, fertilizers, ethanol, and thermal-based energy generation. [...] Colonel Ozires Silva, former president of the oil company during the Sarney presidency period, defined the company's position precisely: 'Petrobras' decision-making center is not on Avenida Chile [address of the company's headquarters in Rio de Janeiro]. It's in Brasília (PADUAN, 2016, p. 13).

This article intends to address the new regulatory environment created by the SOEs Law (Law No. 13,303, of June 30, 2016) with the purpose of protecting the public company, the mixed joint-stock corporation, and its subsidiaries ("state-owned") against any possible (and unfortunately common) political-partisan interference in the appointment of the members of the top-level management positions in the SOEs. The text will also review cases of progress, setbacks, and the future of this new legal norm.

Despite the need to enact Law 13,303/16 being expressed in the constitutional text since Constitutional Amendment No. 19 of 1998, its text arose from an independent initiative of the National Congress in a context of political and economic crisis aggravated by accusations of corruption, related, in some way, with state-owned enterprises (ANTUNES, 2017).

Despite the good intentions of the SOEs Law and the undeniable advances made by Brazilian state-owned enterprises, "among which the SOEs Law is, without a doubt, the most relevant",¹ however, some voices questioned the adoption of corporate governance practices in state-owned enterprises, "because such governance criteria already exist in constitutional norms, administrative law rules, corporate law, capital market regulation and the laws that actually establish state-owned enterprises", in the words of Warde Junior (2017, p. 105).

This article will address the topic in four sections: the first one reports corporate governance in state-owned enterprises, the new Brazilian regulatory environment and the important decisions of the Brazilian Securities Commission - CVM to immediately apply the new governance rules; the second one presents an important advance with the new Petrobras Bylaws, the new Integrity *Background Check* requirements; in the third one, the text addresses the election of a member of the board of directors appointed by the Brazilian government at Itaipu Binacional and the election of the chairman of the board of directors of Petrobras that took place in 2019, which represent, in form and content, examples of setbacks in the application of this new legal norm; at the end, in the fourth section, the future of the SOEs Law in the hands of the Federal District Court of the 1st Region and the Supreme Court is discussed.

¹ According to the report "Integrity and Transparency of State Companies in Brazil", prepared by FGV Law Rio in partnership with Transparency International - Program Brazil (MOHALLEM; VASCONCELOS; FRANCE, 2017).

2 CORPORATE GOVERNANCE IN STATE-OWNED ENTERPRISES: THE NEW BRAZILIAN REGULATORY ENVIRONMENT

One of the most relevant aspects of the SOEs Law was the creation of minimum requirements for academic background and professional experience for the appointment of applicants for positions in the top-level management of state-owned enterprises, as a measure to mitigate the political-partisan allotment of high-level positions in the management of state-owned enterprises, until then reserved for political appointments. With this measure, the aim is to professionalize the top-level management of state-owned enterprises.²

These are already common requirements in the private sector, as it is usual for applicants for positions in the top management of a large company to have previous experience and professional background, compatible with the responsibilities of the intended position.

Thus, those appointed for member of the Board of Directors³ or for positions on the Executive Board⁴ of the state-owned enterprises, will be chosen among citizens of unblemished reputation and notable knowledge and must meet the requirements of professional experience or academic background and also cannot fit into any of the prohibitions and impediments,⁵ all as provided for in the SOEs Law and related to situations that could compromise the independence and impartiality of the director or officer, necessary for the correct and appropriate decision-making in the interest of the state-owned enterprise.

The SOEs Law provided for the emergence of a new Brazilian regulatory environment, with the issuance of decrees, regulations, ordinances and other normative acts that aim to improve new governance practices in Brazilian state-owned enterprises, such as Federal Decree No. 8,945, of December 27, 2016 with rules regulating the application of the SOEs Law in the scope of state-owned enterprises controlled by the federal government, including companies in which the federal government holds equity interest.

² On technical parameters, academic background, and professional experience for those in positions in the top-level management of state-owned enterprises created by the SOEs Law, please check (COSTÓDIO FILHO, 2016; FERRAZ, 2018; MAIA, 2016; TOMAZETTE, 2017).

³ On the roles and responsibilities of the Board of Directors, please check *Caderno de Boas Práticas para Reuniões do Conselho de Administração* (INSTITUTO BRASILEIRO DE GOVERNANÇA CORPORATIVA, 2010).

⁴ On the roles and responsibilities of the Board of Directors, please check (COELHO, 2012, p. 256).

⁵ To know the requirements of professional experience or academic background and also the prohibitions and impediments, please check article 17 of Law No. 13,303, of June 30, 2016. **Bylaws of the public company, mixed joint-stock corporation, and its subsidiaries** (BRAZIL, 2016).

In 2017, the Brazilian stock exchange (B3)⁶ amended the Regulation of the SOEs Outstanding Governance Program to adapt it to this new regulatory environment⁷ and the Brazilian Institute of Corporate Governance (IBGC)⁸ edited the booklet Corporate Governance in Listed SOEs in Brazil.

Also, in these years of validity of the legal norm, important decisions of the Brazilian Securities Commission - CVM declared unlawful certain political-partisan appointments for failure to comply with these new requirements of the SOEs Law. At least three decisions issued by the CVM reveal that, at first, there was an attempt to continue the political-partisan appointment for positions in the top-level management of state-owned enterprises, despite this new regulatory environment requiring a new attitude from controllers for the appointment of directors and officers of state-owned enterprises (governance beyond form).

In the Light case,⁹ CVM examined whether the appointment for member of the board of directors by the shareholder and state-owned enterprise Cemig¹⁰ fitted (or not) with the impediment rule provided for in art. 17, § 2, item II of the SOEs Law. The CVM board decided that the appointment made by the shareholder and state-owned enterprise Cemig to Light's board of directors fitted the impediment rule provided for in the aforementioned legal provision, because the applicant "participated, in a relevant manner, in carrying out the electoral campaign of Mrs. Dilma Rousseff in 2014", in the campaign committee in the 2014 presidential elections.¹¹

In the case of Copel,¹² CVM examined whether the appointment made by the Government of the State of Paraná for a member of the Appointment and Evaluation

⁶ About B3 - Brasil, Bolsa, Balcão, please check http://www.bmfbovespa.com.br/pt_br/institucional/sobre-a-bm-fbovespa/quem-somos/ Accessed on October 4, 2021.

⁷The SOEs Outstanding Governance Program Available at http://www.bmfbovespa.com.br/pt_br/listagem/acoes/governanca-de-estatais/. Accessed on: 4 Oct. 2021.

⁸ Reference in corporate governance. About the Brazilian Institute of Corporate Governance (IBGC), please check https://www.ibgc.org.br/quemsomos_ Accessed on: 27 Apr. 2021.

⁹ Light is a publicly-held company, subject to the control and supervision of the rules of the Brazilian Securities Commission (CVM) and the Brazilian Stock Exchange (B3 - Brasil, Bolsa, Balcão).

¹⁰Cemig is a publicly-held company, incorporated as a mixed joint-stock corporation, controlled by the Government of the State of Minas Gerais, subject to the control and supervision of the rules of the Brazilian Securities Commission (CVM) and the Brazilian stock exchange (B3 - Brasil, Bolsa, Balcão) Abroad, under the rules of the Securities and Exchange Commission (SEC) and NYSE, in the United States. Available at http://ri.cemig.com.br/static/ptb/estrutura_acionaria.asp?language=ptb. Accessed on: 4 June 2021.

¹¹ CVM Board, CVM Administrative Proceeding No. 19957.008923/2016-12, j. 12/27/2016

¹²Copel is a publicly-held corporation, incorporated as a mixed joint-stock corporation, controlled by the Government of the State of Paraná, subject to the control and supervision of the rules of the Brazilian Securities Commission (CVM) and the Brazil Stock Exchange (B3 - Brazil, Bolsa, Balcão). Available at: <http://ri.copel.com/ptb/estrutura-societaria>. Accessed on: 4 June 2021.

Committee (AEC) of the state-owned enterprise Copel fitted (or not) the case of prohibition provided for by the SOEs Law. After recognizing the application of the impediment rule to AEC members, the CVM board concluded that the appointed fitted the impediment rule because all AEC applicants are disqualified for having political-partisan links.¹³

Finally, on another occasion, also involving the company Light, CVM examined whether the appointment made by the shareholder and state-owned enterprise Cemig for a member of the fiscal council would (or not) be subject to the impediments by the SOEs Law. In this case, based on the precedent of the administrative process that judged the “Copel Case” - referred to above - the CVM board also concluded that the applicants were impeded because they had political-partisan links.¹⁴

3 PROGRESS: PETROBRAS CASE: THE NEW BYLAWS AND NEW INTEGRITY *BACKGROUND CHECK* REQUIREMENTS

Petrobras is a mixed joint-stock corporation or mixed capital company. Part of its share capital belongs to the Federal Government and part belongs to private investors. The Federal Government is the company's controller and private investors (minority and preferred shareholders) bought shares to obtain financial profit.¹⁵ These investors have no influence on Petrobras' management. Minority shareholders, although they have voting rights, do not exercise power (exercised by the Federal Government, which holds 50.26% of the common shares, and by BNDESPar with 0.16%, BNDES with 9.87% and Caixa Econômica Federal with 3.24%).¹⁶ Preferred shareholders do not have voting rights. Thus, the controlling shareholder of Petrobras is the Federal Government.

The stoppage of truck drivers in May 2018 and its serious economic consequences for the country triggered an intense debate about the origins of this crisis and placed Petrobras' pricing policy under intense questioning¹⁷, which to this day is

¹³ CVM Board, CVM Proceeding No. 19957.011269/2017-05, j. 01/05/2018

¹⁴ CVM Board, CVM Proceeding No. 19957.004466/2018-41, j. 26/04/2018

¹⁵ Petrobras is a publicly-held company, incorporated as a mixed joint-stock corporation, controlled by the Federal Government, subject to the control and supervision of the rules of the Brazilian Securities Commission (CVM) and the Brazilian Stock Exchange (B3 - Brasil, Bolsa, Balcão) Abroad, under the rules of the *Securities and Exchange Commission* (SEC) and NYSE, in the United States; the *Latibex of Bolsa y Mercados Españoles*, in Spain; and the *Comisión Nacional de Valores* (CNV) and the Buenos Aires Stock Exchange, Argentina, with a level of excellence in the IG-SEST indicator from the Secretariat for Coordination and Governance of State-owned Companies (Sest), and certification in the SOEs Outstanding Governance Program, of the Brazilian Stock Exchange (B3 - Brasil, Bolsa, Balcão). Available at <http://www.investidorpetrobras.com.br/pt/governanca-corporativa/modelo-de-governanca>.

¹⁶ Available at: <http://www.investidorpetrobras.com.br/pt/governanca-corporativa/capital-social>. Accessed on: 13 Jun. 2021.

¹⁷ It is not the purpose of this paper to examine Petrobras' pricing policy and its impacts.

present in the Brazilian news, even motivating the replacement of the Company's President.

For the purpose of receiving private investments to be consequent, it is necessary for investors to have a realistic expectation of return, in the form of dividends or in the form of appreciation of the acquired shares, thus the expectation of private investors for the management of the company to be efficient is legitimate. Private shareholders are right to demand that prices be fixed in such a way that, most of the time, the company is profitable and does not get tangled up in financial difficulties that are difficult to overcome. If it were not for taking this expectation seriously, the Federal Government should have incorporated Petrobras as a company with share capital composed exclusively with public funds from the Federal Government and not as a mixed joint-stock corporation with share capital composed both with public funds from de Federal Government and with private investments (SOUZA NETO, 2018).

This subject brings the debate around art. 238 of Law 6,404, of 1976, according to which, the government legal entity that controls a mixed capital company “may guide the company's activities in order to meet the public interest that justified its creation.” (BRAZIL, 1976, online).

It so happens that Petrobras was not created to serve the public interest to ensure reasonable fuel prices. On the contrary, Article 3, § 1, of the company's bylaws imposes on its managers the duty to manage “activities related to the corporate object shall be developed by the Corporation on a free competition basis with other companies according to market conditions.” (PETROBRAS, 2018, p. 1).

In order to have ample and unrestricted freedom to guide the federal state-owned enterprise exclusively to the achievement of public interests, a company could have been incorporated, formed exclusively by financial contributions from the state controller, without private investors.¹⁸

In line with the purposes of the SOEs Law, on 15/12/2017, the Federal Government promoted an amendment to Petrobras' bylaws to include the criteria to be followed by the company when the Federal Government guides the company's activities to contribute to the interest public that justified its creation. According to the new wording of the bylaws, these activities must be carried out by Petrobras under the same

¹⁸“Perhaps the public interest that justified the creation of the company would be better served if the government could neglect the profit purpose of the company and eventually allocate all surpluses to improving the public service it provides. Likewise, without worrying about the generation of profit, the government could charge consumers even lower rates, which were enough to maintain the economy of the provision of services – that is, its mere sustainability from a financial point of view. The State will always be able to do so, and legitimately, through some of the forms it can adopt to provide the public services under its responsibility. However, when resorting to corporations, especially in open form, the observance of the regime of Law no. 6,404, of 1976, is imposed and this freedom is restricted”. CVM Board, PAS No. RJ2013/6635 (BRAZIL, 2015, online).

conditions as any other private sector company operating in the same market and, otherwise, the company may only assume obligations or responsibilities, when: I – it is established by law or regulation, as well as provided for in a contract, agreement or arrangement entered into with the competent public entity to establish it, observing the wide publicity of these instruments; and II – its costs and revenues are broken down and disclosed in a transparent manner, including in the accounting plan.

Verification of compliance with the requirements of the "conditions identical to those of any other private sector company operating in the same market" will be carried out by the Finance Committee and the Minority Shareholders Committee, in their duties of advising the Board of Directors, which will evaluate and measure, based on the technical-financial analysis criteria for investment projects and for specific operational costs/results practiced by Petrobras' management, if the obligations and responsibilities to be assumed are different from those of any other private sector company operating in the same market.

When the Federal Government directs Petrobras to contribute to the public interest (not related to the public interest that justified its creation), in addition to meeting the above conditions, the Federal Government will compensate Petrobras, each fiscal year, for the difference between the market conditions that would be practiced by any other company in the private sector and the operating result or financial return of the assumed obligation (PETROBRAS, 2018).

This reform of the bylaws ensures, on the one hand, the prerogative of the Federal Government, as Petrobras' controller, to guide the company's activities to serve the public interest, but, on the other hand, it establishes that these activities must be carried out under conditions identical to those of any other private sector company that operates in the same market and, when that is not the case, the Federal Government shall compensate Petrobras, preserving and harmonizing the interests that coexist in a mixed capital company: the public interest of the controlling state entity and the private interest of the shareholders who invested their private funds in the company.

Finally, on July 9, 2020, Petrobras held an Extraordinary General Meeting to update some of the criteria for characterizing an unblemished reputation for members in the top-level management (directors, officers) and the fiscal council (*Integrity Background Check*), "so that the created environment of compliance may remain appropriate to the current moment of the company and the market". This review includes (I) verification of the regularity of the Individual Tax ID (CPF), (II) aspects related to business interests, (III) examination of the history of internal investigation and disciplinary sanctions detailed in the Employee Registration Form, (IV) inexistence of non-conformities in the quarterly reports of the internal audit, and inexistence of (V)

commercial and financial pending issues and (VI) judicial and/or administrative proceedings.¹⁹

4 SETBACK

4.1 ITAIPU BINATIONAL CASE: THE ELECTION OF THE MEMBER OF THE BOARD OF DIRECTORS

At the end of his term of office, on 31/12/2018, the then president of Brazil, Michel Temer, appointed his former Chief Minister of the Government Secretariat Carlos Eduardo Xavier Marun²⁰ to join the board of directors of the company Itaipu Binacional.²¹

A lawsuit was filed to prevent the appointment for violating the new governance rules created by the SOEs Law, especially: (a) lack of professional experience and academic background compatible with the position for which he was appointed, requirements set out in article 17, items I and II; and (b) characterization of the impediment rule provided for in article 17, article § 2, item II, which prohibits the appointment of "a person who has worked, in the previous 36 months, as a participant in the decision-making structure of a political party or in work linked to the

¹⁹The entire contents of this document is available at <https://www.investidorpetrobras.com.br/governanca-corporativa/assembleias-e-reunioes/>. Accessed on: 13 July 2021.

²⁰The Official Gazette of the Federal Government of December 31, 2018, brings the decree appointing Carlos Marun to the Board of Itaipu Binacional. He replaces Frederico Matos de Oliveira, who has resigned. Carlos Marun leaves the position of chief minister of the Government Secretariat to integrate the binational company until May 16, 2020. The appointment is signed by President Michel Temer. Available at: <https://www.itaipu.gov.br/sala-de-imprensa/noticia/marun-e-novo-conselheiro-da-itaipu>. Accessed on: 14 Mar. 2020.

²¹Itaipu is a Binational Entity created and governed, with equal rights and obligations, by the Treaty signed on April 26, 1973, between the Federative Republic of Brazil and the Republic of Paraguay. The companies seek to act in line with international, Brazilian, and Paraguayan standards in terms of transparency, through consensual resolutions involving Brazilians and Paraguayans. Itaipu has policies, guidelines and objectives that provide for transparent management and access to information, highlighting the following initiatives: Itaipu's Code of Ethics and the respective Binational Ethics Committee; adherence to the Sarbanes-Oxley Act (SOX); the implementation of the Electronic Procurement Portal; the Code of Conduct for suppliers, the adoption of an Integrated Business Management System (Enterprise Resource Planning -ERP), from the SAP company; the Ombudsman; the External Complaints Line; and the Access to Information menu, containing information such as the entity's official documents, information on Human Resources, institutional information, Financial, Annual and Sustainability Reports, Strategic Planning guidelines and frequently asked questions. Available at: <https://www.itaipu.gov.br/institucional/gestao-transparente>. Accessed on: 14 Mar. 2021.

organization, structuring and carrying out an electoral campaign." (BRAZIL, 2019, online).²²

The action was dismissed and definitively closed on the grounds that the SOEs Law would not be applicable because Itaipu binational is a legal entity of International Law that is subject "to its own rules established in its constitutive Treaty and in international agreements, observing the internal norms only when the subject is referred back to the domestic legislation of each Covenant Country by express provision" and, therefore, the provisions of the SOEs Law are "inapplicable to the International Law entity, since, as seen, such entity is regulated by its own international acts, with no provision for referring to the internal norm when it comes to administrative law rules." (BRAZIL, 2019, online).²³

The binational nature of the company is not unknown, but the practice of good corporate governance would require, on the part of the Brazilian government, the appointment of a member of the board of directors who meets the requirements set out in Brazilian law (to subsequently verify the conditions required in the binational agreement) since the explanatory memorandum of the SOEs Law recognized that "it is essential that the law imposes governance standards to be observed in the management of state-owned enterprises, established by decision of the State, and that they are not subject to the flavors of the interests of Governments." (PROJETO..., 2015, online).

Therefore, the mere fact that Itaipu Binacional was also formed with the contribution of capital from another country should not rule out, on the Brazilian side, the application of the rules governing the appointment of directors of companies in which public funds have been invested. In addition, Decree No. 8,945, of December 27, 2016, which regulated the application of the SOEs Law, determined its application "to transnational companies", pursuant to article 1, sole paragraph.

4.2 PETROBRAS: SETBACK REGARDING THE FORM AND FULFILLMENT OF REQUIREMENTS IN THE ELECTION OF BOARD MEMBER

Among the bylaw changes made by Petrobras with regard to the governance rules of the SOEs Law addressed in this text, the new wording of articles 16, 21 of Petrobras' bylaws stands out, which expressly included the requirements and impediments created by the new legal norm (SOEs Law).²⁴

²²BRAZIL. 6th Federal Court of Curitiba. Popular Action No. 5014238-03.2018.4.04.7002. Vera Lúcia Feil, federal judge.

²³BRAZIL. Federal District Court of the 4th Region. 3rd Panel, Interlocutory Appeal No. 5006803-95.2019.4.04.0000/PR, Rapporteur Judge Margue Inge Barth Tessler. j. on 03/09/2019.

²⁴The entire contents of these articles of Petrobras' bylaws are available at <http://www.investidorpetrobras.com.br/pt/governanca-corporativa/instrumentos-de-governanca/estatuto-social>. Accessed on 13 Jun 2021.

In short, such provisions of the bylaws establish that "appointments for the position of senior management or fiscal council member that the Company is entitled to in its subsidiaries, controlled companies and affiliates, even if they are appointed by the Federal Government under the terms of current legislation, must fully comply with the requirements and prohibitions imposed by the Corporation Law, as well as those provided for in arts. 21, §§ 1, 2 and 3 and 43 and its paragraphs of these Bylaws, in Law No. 13,303, of June 30, 2016, and Decree No. 8,945, of December 27, 2016.

In addition to these changes, Petrobras' bylaws also created the Appointment, Compensation and Succession Committee (ACSC)²⁵ in compliance with the provisions of article 10 of the SOEs Law, because the public company and mixed joint-stock corporation must create a statutory committee to verify the compliance of the process for appointing and analysis of members for the Board of Directors.

Regardless of the progress achieved by the reform of Petrobras' bylaws, mentioned above, it seems that this new regulatory environment was not able to bring about an effective change in the position of the controlling state entity in the election of the director Eduardo Leal Ferreira, at the Annual General Meeting held on April 25, 2019.

From the reading of Minutes No. 153 of the Appointment, Compensation and Succession Committee (ACSC)²⁶ which examined the appointment of director Eduardo Leal Ferreira, currently chair of the board of directors, it appears that:

4.2.1 As to the form

The minutes did not meet the requirements of the sole paragraph, of article 10, of the SOEs Law, according to which the committee must disclose minutes of the meetings "in order to verify the compliance, by the appointed members, with the requirements established in the appointment policy." (BRAZIL, 2016, online).

The minutes contain generic statements, without indicating, precisely, how the person appointed meets the conditions to fulfill the requirements of professional experience and academic background compatible with the position for which he was appointed, (in article 17, items I and II) and otherwise if the same person does not fit in the impediments (art. 17, §§ 2 and 3), so that all this information can be promptly verified and audited by the authorities, shareholders and third parties.

²⁵The Appointment, Compensation and Succession Committee shall have the attributions provided for in arts. 21 to 23 of Decree No. 8,945, of December 27, 2016, and shall also analyze the integrity requirements provided for in art. 21 of these Bylaws for the investiture in the position of the Company's senior management and fiscal council member.

²⁶The entire contents of this document is available at: <https://www.investidorpetrobras.com.br/governanca-corporativa/assembleias-e-reunioes> Accessed on: 23 July 2021.

The text of the minutes contains generic statements, without precision of data and information and also do not meet the new regulatory environment created by the SOEs Law, which imposes on state-owned enterprises the adoption of transparency practices in clear and direct language (art. 6).²⁷

4.2.2 Regarding the fulfillment of professional experience and academic background requirements

According to data provided by Petrobras, Mr. Eduardo Bacellar Leal Ferreira has a career in the navy.²⁸ There is no information that he meets the requirements of the aforementioned article 17 of the SOEs Law that is, if he has professional experience or academic background compatible with the position for which he was appointed, which are aspects of greater relevance of the SOEs Law.

With this initiative, the intention is to mitigate the political-partisan allotment of the top-level management positions of SOEs, reserved for political appointments and, at the same time, professionalize these senior management positions of SOEs, as the adoption of good corporate governance practices tends to bring benefits that translate into improvements in the organization of company, in access to sources of financing in the performance of its activities (TOMAZETTE, 2017, p. 145).

The report "Integrity and transparency of state-owned enterprises in Brazil" recommends that political-partisan appointments be curbed, and that the recruitment process be transparent and rigorously based on considerations, among other aspects, in academic background, experience in senior positions and technical qualification in areas relevant to the company's activities and its management.²⁹

²⁷The text of the minutes is as follows: "In relation to the appointment of Mr. Eduardo Bacellar Leal Ferreira considering (i) the relevant procedures; (ii) the supporting documents presented; (iii) the information provided by the applicant in the standardized form provided for in article 30, §1 of Decree No. 8,945/2016 and in the Appointment Policy Annex; (iv) the clarifications provided; (v) the Technical Note to the ACSC", the members of the Committee concluded that the applicant meets the requirements and does not incur in the impediments to the position, with recommendation for approval of the appointment by the General Meeting. The entire contents of this document is available at: <https://www.investidorpetrobras.com.br/governanca-corporativa/assembleias-e-reunioes> Accessed on: 23 July 2021.

²⁸Eduardo Leal Ferreira is an Admiral of the Fleet and was Commander of the Brazilian Navy until January 2019, having therefore reached the top of his career. In addition to the Navy School, Leal Ferreira received higher-level training at the Escola de Guerra Naval do Brasil and the Academia de Guerra Naval de Chile. He was also an instructor at the Annapolis Naval Academy, USA. Before becoming Commander of the Brazilian Navy, he held several important positions, having been Commander-in-Chief of the Fleet and Commander of the Escola Superior de Guerra. Available at: <https://www.investidorpetrobras.com.br/pt/governanca-corporativa/administracao>. Accessed on: 14 Mar 2021.

²⁹According to the report "Integrity and Transparency of State Companies in Brazil", prepared by FGV Law Rio in partnership with Transparency International - Program Brazil. Available at:

In this case of Petrobras, due to the lack of precise and clear information, it is not possible to verify whether the elected professional to the board of directors meets these important requirements that contribute to the professionalization of the top-level management of SOEs.

5 FINAL REMARKS: THE FUTURE OF SOES LAW IS IN THE HANDS OF THE COURTS

5.1 LIGHT CASE - FEDERAL DISTRICT COURT OF THE 1ST REGION

The State of Minas Gerais (controller of Cemig) took legal action against the CVM decision mentioned at the end of section 1 (company Light, appointment for a member of the fiscal council) and the lower court decision ruled out the impediments in article 17 of the SOEs Law for the members of the fiscal council, in the following terms:

From a logical interpretation of the legislative reference made by art. 26 of Law 13,303/16, it should be taken as a "special law" (the one referred to in §1 of article 147 of the Corporation Law) other prohibitions provided for in specific rules outside of Law 6,404/76, which are not in the very SOEs Law. However, if the legislator wanted to repeat the prohibitions imposed on the board of directors to the members of the fiscal council, it would be enough to make an express reference in art. 26 to §2 of art. 17 of Law 13,303/16, which did not occur.³⁰

In this lawsuit, CVM filed an appeal, pending trial by the District Court of the 1st Region.³¹

If article 17, § 2, of the SOEs Law created prohibitions and impediments related to political-partisan situations that could compromise the independence and unbiased approach of the director or officer, necessary for the correct and appropriate decision-making in the interest of the state-owned enterprise, to admit the waiver of impediments provided for in art. 17 of the SOEs Law for members of the fiscal council would mean accepting political-partisan influence in the choice of members of this important body of top-level management supervision and advice to shareholders, which would show a

<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/20342/Integrity%20e%20Transparencia%20de%20Companies%20Estatais%20no%20Brasil.pdf?sequence=1&isAllowed=y>. Accessed on: 14 June 2021.

³⁰BRAZIL. Federal District Court of the 1st Region. 21st Federal Civil Court of the Judiciary Section of the State of Minas Gerais; Common Procedure No. 1006938-45.2018.4.01.3800; Parties: State of Minas Gerais, Securities Commission and Companhia Energética de Minas Gerais - CEMIG; Rapporteur: Gláucio Ferreira Maciel Gonçalves; Belo Horizonte; Judgment of July 4, 2019.

³¹BRAZIL. Federal District Court of the 1st Region. 6th Class; Appeal No. 1006938-45.2018.4.01.3800; Parties: State of Minas Gerais, Securities Commission and Companhia Energética de Minas Gerais - CEMIG; Rapporteur: Federal Judge Jirair Aram Meguerian.

literal misalignment with the fundamental purpose of the SOEs Law. This is what is expected of the judgment by the Court.

5.2 THE WORD IS WITH THE SUPREME COURT

There is a direct unconstitutionality action in progress before the Supreme Court³² under the allegation that the SOEs Law invades the administrative activity of the Head of the Executive Branch and establishes restrictions and limitations to the performance - if not to the constitution itself - of state-owned enterprises, extrapolating the very material limits of the law, but, above all, in an affront to the reserved right of initiative of the Head of the Executive Branch to submit such legislation to the Legislative Branch.

In defense of the legal act, the Federal Attorney General, maintains that the requirements of professional experience and academic background "converge with the good governance and management practices required in the business environment, allowing the management of state-owned enterprises to be performed in a transparent manner" and that impediment rules are necessary "to avoid conflict between the interests of state-owned enterprises and the political-partisan or corporate interests of party leaders, class representatives, holders of mandates in the Legislative Branch" and that such requirements and impediments are "fully justifiable in light of the legally established objectives of ensuring efficiency, probity and transparency to the acts performed in their management".

The Attorney General's Office also expressed its defense of the legal act as it understands that the provisions of the SOEs Law are "aimed at curbing possible conflicts of interest, ensuring decision-making autonomy and administrative probity of the persons in such positions".

As seen, the future of the provisions of the SOEs Law that deal with the requirements of professional experience, academic background, and impediments, is in the hands of the Supreme Court when judging the merits of the direct unconstitutionality action.

We expect they are maintained, as they contribute to improving the management and administration of SOEs and to mitigate political-partisan influences in the appointment for positions of SOEs.

Car Wash Operation proved that these political-partisan influences were devastating in one of the main Brazilian state-owned enterprises, Petrobras.

³²BRAZIL. Federal Supreme Court. Full Panel. Direct Unconstitutionality Action No. 5624, rapporteur Justice Ricardo Lewandowski

REFERENCES

ANTUNES, Gustavo Amorim. **Estatuto Jurídico das Empresas Estatais: Lei nº 13.303/16 comentada**. Belo Horizonte: Fórum, 2017.

BRAZIL. **Extrato da sessão de julgamento do processo administrativo sancionador CVM nº RJ2013/6635**. Rap. Director Luciana Dias. 2015. Disponível em: https://conteudo.cvm.gov.br/export/sites/cvm/sancionadores/sancionador/anexos/2015/20150526_PAS_RJ20136635.pdf. Acesso em: 15 jul. 2020.

BRAZIL. 6th Federal Court of Curitiba. **Popular Action No. 5014238-03.2018.4.04.7002**. Vera Lúcia Feil, federal judge. Federal District Court of the 4th Region. 3rd Panel, Interlocutory Appeal No. 5006803-95.2019.4.04.0000/PR, Rapporteur Judge Margue Inge Barth Tessler. j. on 03/09/2019.

BRAZIL. 21st Federal Civil Court of the Judiciary Section of the State of Minas Gerais. **Common Procedure No. 1006938-45.2018.4.01.3800**. Gláucio Ferreira Maciel Gonçalves, federal judge. Federal District Court of the 1st Region. 6th Class; Appeal No. 1006938-45.2018.4.01.3800; Federal Judge Jirair Aram Meguerian.

BRAZIL. **Law no. 6.404, of december 15, 1976**. Provides for Corporations. Brasília, DF: Presidência da República, 1976. Available in: http://www.planalto.gov.br/ccivil_03/leis/16404consol.htm. Access at: 15 Jul. 2020.

BRAZIL. Law nº. 13.303, of June 30, 2016. **Bylaws of the public company, mixed joint-stock corporation, and its subsidiaries**. Brasília, DF: Presidência da República, 2016. Available in: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/113303.htm. Access at: 15 Jul. 2020.

BRAZIL. Federal Supreme Court. Full Panel. **Direct Unconstitutionality Action No. 5624**, rapporteur Justice Ricardo Lewandowski.

COELHO, Fabio Ulhoa. **Curso de Direito Comercial: direito de empresa**. São Paulo: Saraiva, 2012. v. 2.

COSTÓDIO FILHO, Ubirajara. Primeiras questões sobre a Lei 13.303/2016 – o Estatuto Jurídico das Empresas Estatais. **Revista dos Tribunais**, v. 974, p. 171-198, dez. 2016.

FERRAZ, Sergio. Das regras de governança corporativa, transparência e gestão de riscos. **Revista de Direito Administrativo e Infraestrutura**, v. 7, p. 109-137, 2018.

INSTITUTO BRASILEIRO DE GOVERNANÇA CORPORATIVA (IBGC). **Caderno de Boas Práticas para Reuniões do Conselho de Administração**. 2010. Disponível em: <http://www.ibgc.org.br/userfiles/9.pdf>. Acesso em: 5 nov. 2020.

MAIA, Fernanda Caroline. A administração das empresas estatais. **Revista de direito administrativo contemporâneo**. Revista dos Tribunais, v. 4, n. 27, p. 67-76, nov./dez. 2016.

MOHALLEM, Michael Freitas; VASCONCELOS, Beto; FRANCE, Guilherme. **Integridade e transparência de empresas estatais no Brasil**. Rio de Janeiro: FGV Direito Rio, 2017. Disponível em: <https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/20342/Integrity%20e%20Transparency%20de%20Companies%20Estatais%20no%20Brasil.pdf?sequence=1&isAllowed=y>. Acesso em: 15 jun. 2021.

PADUAN, Roberta. **Petrobras: uma história de orgulho e vergonha**. Rio de Janeiro: editora objetiva, 2016.

PETROBRAS. **Estatuto social do petróleo brasileiro S.A. Petrobras**: conforme aprovado na Assembleia Geral Extraordinária de 11 de dezembro de 2018. Available at: <http://www.investidorpetrobras.com.br/pt/governanca-corporativa/instrumentos-de-governanca/estatuto-social>. Accessed on: 13 Jun. 2021.

PROJETO de lei. Governanças Estatais. 2015. Available at: <http://static.psd.org.br/wp-content/uploads/2015/06/expomotivos.pdf>. Accessed on: 4 Mar. 2021.

SOUZA NETO, Cláudio Pereira de. A política de preços da Petrobras. **JOTA**, 1 jun. 2018. Disponível em: <https://www-jota-info.cdn.ampproject.org/c/s/www.jota.info/opiniao-e-analise/artigos/a-politica-de-precos-da-petrobras-03062018/amp>. Acesso em: 15 jul. 2020.

TOMAZETTE, Marlon. A Administração das Empresas Estatais. In: NORONHA, João Otávio de; FRAZÃO, Ana; MESQUITA, Daniel Augusto (coord.). **Estatuto jurídico das estatais: análise da Lei nº 13.303/2016**. Belo Horizonte: Forum, 2017.

WARDE JUNIOR, Walfrido Jorge. “Legislador Frankenstein! – Não é possível transplantar a governança das empresas privadas às empresas estatais”. In: NORONHA, João Otávio de; FRAZÃO, Ana; MESQUITA, Daniel Augusto (coord.). **Estatuto jurídico das estatais: análise da Lei nº 13.303/2016**. Belo Horizonte: Fórum, 2017.

Como citar este documento:

LUPION, Garcia. State owned enterprises: 05 years of the new corporate governance rules. **Revista Opinião Jurídica**, Fortaleza, v. 21, n. 38, p. 1-17, set./dez. 2023. Disponível em: link do artigo. Acesso em: xxxx.