Federal union's tort liability for damages caused to mixed capital companies: an analysis of the conflict between public interest and the federal union's interest as majority shareholder

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ABSTRACT

This study aims to examine legal aspects around the tort liability of the Government for damages caused to mixed capital companies as a result of acts in the self-interest of the Government as majority shareholder that fail to meet the public interest for which the company was set up or that cause a negative financial impact on the company. The methodology that was used for this purpose is basically a comparative doctrinal study and analysis of theoretical works associated with descriptive research of legal rules applicable to the subject. Case studies can be used as a way to illustrate the analysis that was carried out. Using inductive or deductive methods, information will be analyzed to achieve the paper's objective, namely, that of clarifying whether and how the tort liability of the Government can be characterized for damages caused to mixed capital companies as a result of acts in the self-interest of the Government but not in the public interest. The research mainly addressed issues related to social role and tort liability, taking into account latent conflicts of interest in mixed capital companies, which must meet the primary public interest that justified their creation and the interests of the Government as majority shareholder, the interests of minority shareholders, and its responsibilities toward its employees and the community that it serves. It was seen that the law provides for the preponderance of primary public interest over the

self-interest of the Government as majority shareholder and over the interests of private shareholders, even if the company's profitability has to be reduced for this purpose. Nonetheless, studies have determined that it is not possible to establish criteria in advance to define conducts that may be characterized as abuse of power and that the public interest that justified the creation of a mixed capital company must be analyzed in each case and compared to the conduct adopted by the Government as majority shareholder.

Keywords: Mixed capital company; Majority shareholder's liability (Government); Abuse of power; Public interest.

1. INTRODUCTION

As the majority shareholder of private law companies, whether public or mixed economy companies, the Government uses its controlling power and influences managers to carry out management acts that, on the one hand, meet its interests as majority shareholder but, on the other, can cause damages to the company's assets.

A mixed capital company is a private law legal entity established by law to engage in economic activities as a joint stock company whose shares with voting rights are owned, in their majority, by the public entity that established it.

In the context of open mixed capital companies, directly controlled by the Government, this academic paper analyzes legal aspects concerning the tort liability of the Government for damages caused to mixed capital companies as a result of acts that meet the interests of the Government, as majority shareholder, but fail to meet the public interest, in accordance with Articles 117 and 238 of Law 6,404/1976.

2. THE TORT LIABILITY OF THE STATE AS MAJORITY SHAREHOLDER OF MIXED CAPITAL COMPANIES

As provided for in articles 186 and 187 of the Civil Code, tort liability presupposes tort, damages and a causal link between tort and damages caused by it. Objective and subjective liability are differentiated by the subjective existence, in the latter, of the element of guilt. In subjective liability, characterizing the guilt of the relevant agent is fundamental, as no one should be required to repair damages if they did not fail in their duty of caution in their actions.

For the purposes of this paper, what matters most is the liability characterized by abuse of a right, which is a sort of objective liability in accordance with articles 187 and 927 of the Civil Code.

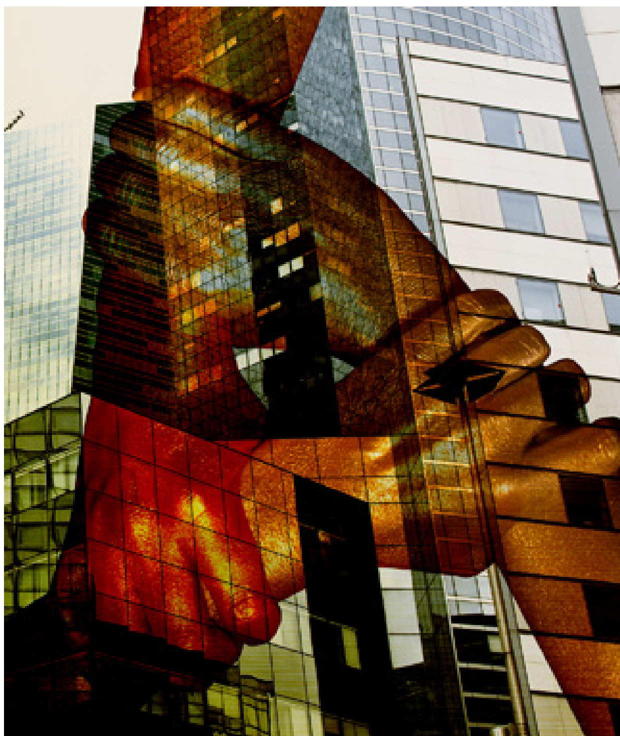
Sergio Cavalieri Filho teaches us that abusing a right boils down to exercising it unethically, failing to meet the social or economic purpose of the right. In

other words, the act might be formally legal but the holder of the right deviates from the norm, turning it substantially into tort. In this case, a right is exercised in disregard of the axiological context of the legal norm, and it is not necessary that the agent is aware of having exceeded the bounds of the law. In the abusive exercise of a right, the conduct might backed by law while ostensibly hurting its spirit. The author also points out that an illegal act characterizing abuse of rights can be committed without the agent's behavior causing harm to others. In such cases, compensation will not always be the sanction, which may take the form of nullification of the act, the loss of a right (CAVALIERI FILHO, 2014, pp. 203-205).

In corporate law, abuse of power is a tort that can give rise to civil liability of a majority shareholder (article 117), as that shareholder has the power-duty to guide the company in fulfilling its purpose and social role.

The liability of a majority shareholder stems from its prerogative of permanently setting the company's policy by means of voting or through its managers, and its acts should always be aimed at promoting the social interest and based on its duties of loyalty, due diligence, and transparency.

The power-duty of a majority shareholder presupposes the duty of loyalty, as measured by the principle of objective good faith (articles 113 and 422 of the Civil Code), which embeds the duty of due diligence. The majority shareholder shall not be held liable for mistakes in conducting a company's business if it can be demonstrated that it acted with due care and diligence (PINTO JUNIOR, 2009, p. 626).



Thus, the mere occurrence of financial losses is not sufficient to determine the liability of the majority shareholder or of the company's managers, provided that they fulfilled their duties of loyalty and due diligence and acted in pursuit of social interest.

The elements that characterize abusive conduct by a majority shareholder are the actual exercise of the power-duty to control; the legal impermissibility of such exercise; losses derived therefrom; and the causal relationship between a conduct and damages, which should represent the main cause of the damages, without which the damages would not have occurred (PINTO JUNIOR, 2009, pp. 688-689).

3. CONFLICT OF INTEREST IN MIXED CAPITAL COMPANIES

The shareholders of these companies have three different coexisting interests: the primary public interest, the secondary public interest, and the private interest.

First, the primary public interest is the interest of the community. This concept encompasses the notion of the company's social role and its obligation to respect the other shareholders, its staff, and the community it serves. It also includes the public interest that justified the legal establishment of the company, which can be known by analyzing its founding law and bylaws.

Second, the secondary public interest means the interest of the Government as a public law legal person that controls the company. The interest of the Government should not be confused with the interest of the community. The Government must ensure that the Constitution and other laws are duly complied with (Brazilian Constitution, article 23, item I); therefore, it should, in theory, conduct the company's business is such a way as to fulfill the public interest that justified its creation. In other words, the secondary public interest should coincide with the primary public interest. Nonetheless, in certain cases the Government conducts the company's business for purposes other than those for which it was established. This latent dichotomy between primary and secondary public interest in the context of mixed capital companies is the main object

of this study, as illustrated by case studies that will be presented below.

Third, the private interest is the interest of the other shareholders of the mixed capital company. For purposes of simplicity, we assume that the interest of these shareholders is maximizing profits.

The conflict of interest addressed in this study occurs when the Government conducts the company's business in such a way as to fulfill the secondary public interest, that is, its own interest as a shareholder, which in this case is not in tune with the primary public interest.

According to Modesto Carvalhosa, the state as majority shareholder should focus on meeting the primary public interest (the interest of the community) and not the secondary public interest (state apparatus) or the purpose of profit. In other words, the primary public interest must always prevail in the operations of mixed capital companies (CARVALHOSA, 2009, p. 409).

According to him, the profitability of mixed capital companies, as derived from their very existence, is desirable and constitutes a necessary means for achieving their purpose, namely, that of meeting the primary public interest. Profit is legitimate when it is achieved in the process of pursuing the public interest. In mixed capital companies, which combine public and private capital, pursuing the public interest is a must and, consequently, profit to remunerate their private capital. This is the fundamental equation of mixed capital companies (CARVALHOSA, 2009, pp. 410-411).

In theory, the valuation of interests that permeate mixed capital companies is accepted in doctrine; however, the interest of the Government as majority shareholder does not always coincide with the public interest that justified the establishment of a mixed capital company (article 238), and this is why the state as such can also practice abuse of power.

Mario Engler Pinto Júnior believes that the Union can practice abuse of power as majority shareholder when it leads the company to act outside the bounds of its purpose or against the social interest by exercising its voting rights or any other dominant influence. According to him, such abuse occurs when the Union uses social resources for its own benefit or for the benefit of non-legitimate third parties in pursuance of the secondary public interest only, when such measure cannot be justified as meeting the primary public interest. The Unino can also practice abuse of power by omission, when it fails to act positively according to the provisions of article 238 (PINTO JUNIOR, 2009, p. 33).

4. CASE STUDY: THE PRICING POLICY OF PETROBRAS FOR FUEL AND OIL DERIVATIVES

It is current news in the Brazilian and international press that the financial position of Petrobras in 2014 was harmed by its pricing policy for fuel and oil derivatives, as determined by its Governing Board, chaired by the Minister of Finance.

Petrobras is responsible for supplying the domestic market and it needs to import oil and oil by-products to complement its production. Although it is an objective of the company to set prices in Brazil based on international price references, it ends up importing products at market price and selling them in the domestic market according to the pricing policy determined by the Government and without taking the exchange rate into account. At certain times, as observed for months in 2014, the market prices of the products were higher than those charged in the domestic market and this was harming the company's finances. In practice, the media insisted that the Government had been using Petrobras as an economic policy instrument to control inflation by subsidizing the prices of oil and oil by-products charged in the domestic market.

This government practice is supported by those who believe that controlling inflation and monetary stability are important objectives not only for the Government, but also for the Union as a whole. Based on this belief, sacrificing the profitability of state-owned enterprises, and not only of Petrobras, would be in line with the public interest of a state enterprise. They also believe that the profits of Petrobras would not be affected because external and internal prices tend to become aligned in the long run. This means that at certain times domestic prices were higher than international prices, but not enough to force Petrobras to lower its prices. They also argue that this practice is necessary to reduce volatility in the prices of oil and oil by-products and the volatility of inflation, which is undesirable for the company and for Brazil at large.

On the other hand, this practice is criticized by those who believe that Petrobras has suffered excessive interference in its activities, as it is being prevented from passing costs on to the final selling price of its products. In a free economy, prices vary in response to

variations in factors that influence supply and demand and costs.

To address this issue, one must weigh the extent to which the purpose of guiding the business of the state enterprise is consistent with its primary public interest, i.e. the public interest that justified its creation.

The establishment of Petrobras was authorized in 1953 through Law 2,004/1953, which provided for the National Petroleum Policy. In 1997, Congress enacted Law 9,478, which provides for the National Energy Policy and activities related to the oil monopoly and revoked previous legal instruments on the matter. The law subtly changed the corporate purpose of Petrobras and provided that it was to operate under a free competition regime. In 2002, Law 10,438 authorized Petrobras to include energy-related operations in its corporate purposes.

According to Petrobras' bylaws, the purpose of the company is to carry out research on extract, refine, process, trade and transport oil from wells, shale and other rocks, oil derivatives, natural gas and other fluid hydrocarbons, in addition to carrying out energy-related activities and research, development, production, transportation, distribution and marketing of energy in all forms, as well as any other related or similar activities.

One can easily see that Petrobras was not established to play any role in policies designed to control inflation in Brazil. Thus, there is no legal basis to support any alleged price controls that Petrobras would have to apply to its products with the sole purpose of controlling inflation.

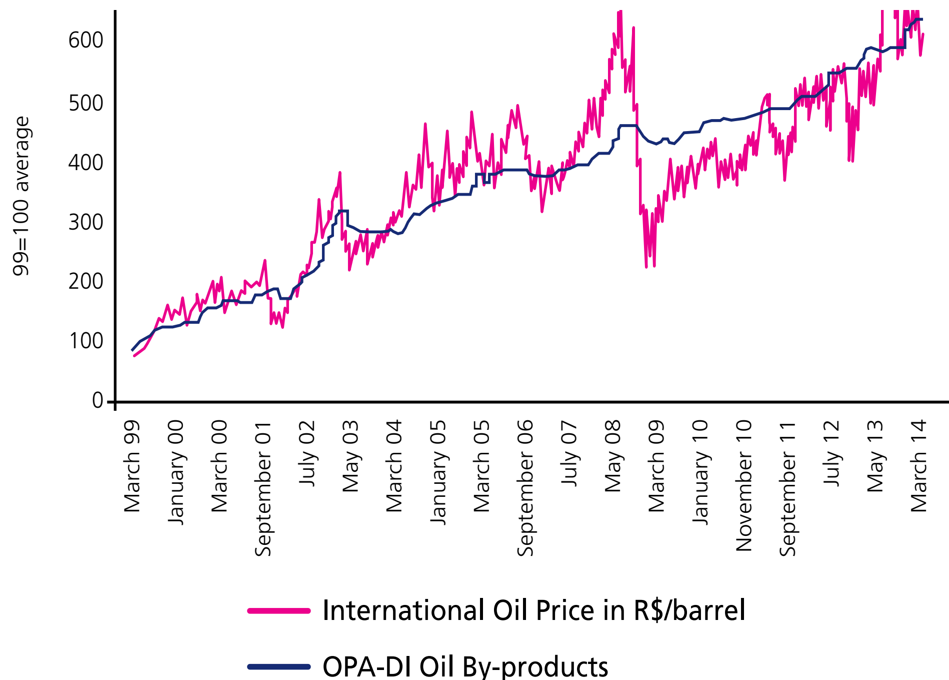
However, it is important to check the grounds of the argument that the prices charged by the state enterprise would tend to align themselves with international market prices in the long run. Considering that international market prices were at certain times below selling prices in the domestic market and that this was not a reason for Petrobras to be advised to reduce its domestic prices, it might make sense to assume that an albeit implicit pricing policy was adopted according to which it is not advisable to adjust prices in the short term to avoid volatility in the prices of oil and oil by-products domestically.

To clarify this issue, one must check the purpose for which the Government defines Petrobras' pricing policy.

Hypothetically, not passing short-term variations on to final prices with the main purpose of controlling inflation is not part of the company's corporate purpose, meaning that, in this case, the Government would be engaging in abuse of power.

Also hypothetically, not passing short-term variations on to final prices based on an actual pricing policy and not for the purpose of controlling inflation does not constitute abuse of power. Both upward and down-

Graph 1:
Prices of oil and oil by-products (until March 2014)



Sources: Bloomberg and Central Bank of Brazil

Prepared by the Central Bank of Brazil.

ward short-term price volatility creates uncertainty as to future revenues expected from the company and affects its planning.

Determining the practice of abuse of power by the majority shareholder is a fundamental requirement for determining the practice of an illegal act and, thus, the tort liability of a majority shareholder. If there is no abuse of power, there are no grounds to consider any possible tort liability of the Government.

According to a Central Bank report, wholesale prices of oil by-products (gasoline and cooking gas) are periodically adjusted to preserve their equivalence with international prices in the Brazilian currency, as shown in the graph below:

Between early 2009 and mid-2013, domestic prices were higher than international price used as reference. What this means is that, in theory, Petrobras imported oil and oil products at lower prices and sold them in the domestic market at higher prices, profiting from the difference. If domestic prices had to keep up with variations in international prices, Petrobras should have reduced the prices charged in the domestic market, but that did not happen.

Therefore, there are no grounds to say that when international prices were higher than domestic prices Petrobras should have increased its prices to keep up with that short-term variation.

There is only one rule that must be applied to both cases, whether for the advantage or disadvantage of the company. We cannot say that Petrobras' profits were negatively affected in 2014 during the months in which international prices were higher, as the company enjoyed benefits in the past.

Based on the graph, we can assume that domestic prices follow market prices in the long run.

Therefore, according to the information analyzed here, we can conclude that in the analyzed cases the Government did not commit abuse of power when it set Petrobras prices of oil and oil by-products in the domestic market. The momentary loss suffered by the company was due to a pricing policy designed to ensure the predictability of Petrobras' revenues and, indirectly, to ensure the stability of the prices of oil and oil by-products in the domestic market.

5. CASE STUDY: DELAYS IN TRANSFERRING FUNDS OWED TO PUBLIC BANKS

With the deterioration of the public accounts in 2014 and the increasing threat that the government would not be able to meet the surplus target determined in the Budget Guidelines Act, there was some information that the National Treasury had been delaying transfers due to public banks for paying off agricultural loans or financing of productive activities.

Subsidies are allowed under public policies adopted by the Government, but they are made available through public banks, which place the money in the hands of farmers. Because the subsidies are granted by the Government, the banks become its creditors regarding the funds transferred to the beneficiaries.

A public bank has the dual mission of meeting the demand of both types of accounts (deposits and credit) and it is up to them to provide the safest popular savings alternative. They also conduct businesses and assume risks that private banks are not willing to assume but which are, nonetheless, strategically important for socioeconomic development always exercising good judgment. Public banks also play the role of fostering competition by charging lower fees and interest, without, however, affecting the profitability of operations as a whole.

The media has reported that the government has been delaying transfers of funds to Banco do Brasil for paying off agricultural loans as a way of trying to increase the government surplus momentarily.

In order to check whether this practice of the Treasury is in line with legal regulations, one must consider the corporate purpose of Banco do Brasil. Article 5 of its bylaws provides that the bank and the Government must enter into contracts to make government funding available and that the Government must leave the corresponding resources at the disposal of the Bank, duly compensated with interests.

Under the Civil Law, the Government would be in overdue debt to Banco do Brasil, as they have been failing to transfer the amounts contemplated in contracts between them.

This contractual default can characterize the tort liability of the Government in this case. The assumptions of contractual liability are present: we assume the contract is valid; we assume the Government is in default, characterizing breach of contract; the damage consists in the negative impact on the cash flow of Banco do Brasil, as it is deprived of financial resources to carry out its business; and the relation to cause comes from the fact that if the Government had complied with its contractual obligations within the prescribed time, the damage would not have existed.

Under the Corporate Law, the conduct of the Government could, in theory, be characterized as abuse of power on the part of the majority shareholder, as provided for in article 117 of the Corporate Law (LSA).

With this conduct, the Government would be engaging in actual breach of fiduciary duty according to the only paragraph of article 116 of the LSA, as it would be using its power as majority shareholder to meet its own interest in increasing the government surplus momentarily, disregarding the public mission of Banco do Brasil.

Once the abuse of power by the majority shareholder is determined, the resulting damages, and the link between the conduct and the damages are characterized, the tort liability of the majority shareholder and its consequent obligation to indemnify the company can be established.

Good solutions that can mitigate the harmful effects of abuse or misuse of power in state enterprises include, in particular, the adoption of newly developed corporate governance practices.

6. CONCLUSION

The debate on government intervention in the economy has led to many discussions in academic circles. The most discussed topics include what it means to sacrifice the profitability of state-owned enterprises as a way to guide public policies defined by the Government as majority shareholder.

The objective of this study was to make a legal analysis of the extent to which the conduct of the Government in guiding the operations of mixed capital companies can be considered as legal or illegal conduct.

The case that was selected was one related to the pricing policy adopted by Petrobras for selling oil and oil by-products in the domestic market, which according to recent media stories is not in tune with actual market prices. We found out that Petrobras has not been passing the short-term variations in market prices abroad on to domestic prices. We concluded, therefore, that the Government has not been committing abuse of power as a result of the pricing policy applied to oil and oil by-products sold by Petrobras.

We examined a case of delays in transferring funds owed by the Treasury to public banks for paying off loans to farmers and other credits. And, concluded, that the conduct of the Government in this case can be characterized as abuse of power, as it would be in default in complying with obligations agreed upon.

The study is relevant because there has been much discussion on state intervention in the economy and on the role of mixed capital companies, as well as on the increasing importance given to corporate governance practices, including in state-owned enterprises.

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NOTES

1 Considering the blind peer review process, we request that the author's name is not provided. This piece of information will be provided if the paper is approved for publication, in which case the information recorded when the author registered the paper for publication will be used.