MIXED-CAPITAL COMPANIES AND THE BRAZILIAN CONSTITUTION OF 1988[1]

EMPRESAS DE CAPITAL MISTO

E A CONSTITUIÇÃO BRASILEIRA DE 1988

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Resumo

A sociedade de economia mista é, em sua estruturação atual, um fenômeno do final do século XIX e início do século XX, que se intensificou, especialmente na Alemanha, durante a Primeira Guerra Mundial (1914-1918). A doutrina publicista brasileira contemporânea, com base no artigo 5º, III do Decreto-Lei nº 200, de 25 de fevereiro de 1967 (com a redação alterada pelo Decreto-Lei nº 900, de 29 de setembro de 1969), define a sociedade de economia mista como uma entidade integrante da Administração Pública Indireta, dotada de personalidade jurídica de direito privado, cuja criação é autorizada por lei, como um instrumento de ação do Estado. A Constituição brasileira, assim como várias outras constituições contemporâneas, não exclui nenhuma forma de intervenção estatal, nem veda ao Estado atuar em nenhum domínio da atividade econômica. A amplitude maior ou menor desta atuação econômica do Estado é consequência das decisões políticas democraticamente legitimadas, não de alguma determinação constitucional expressa. Mas o Estado deve ter sua iniciativa econômica pública protegida de forma semelhante às das iniciativas privada e cooperativa.

Palavras-chave: Empresas de capital misto. Constituição brasileira de 1988. Direito constitucional.

Abstract

The mixed-capital company is, in its current structure, a late nineteenth and early twentieth centuries phenomenon, which was intensified especially in Germany during the First World War (1914-1918). Contemporary Brazilian theory of public law, based on Article 5, III of Decree-law No. 200 of 25th February 1967 (with the wording amended by Decree-law No. 900 of 29th September 1969), defines mixed-capital company as an entity that is part of Indirect Administration, with legal personality under private law, whose creation is authorized by law, as an instrument of exploitation of an economic activity by the State. The Brazilian Constitution, as well as several other contemporary constitutions, does not exclude any form of state intervention, nor forbids the State to act in any area of economic activity. The greater or lesser extent of the economic role of the State is a result of democratically legitimized political decisions, not of some constitutional determination expressly. But

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the State should have its protected public economic initiative similar to the private and cooperative initiatives.

Keywords: Mixed-Capital companies. Brazilian 1988 Constitution. Constitutional law.

Sumário: *1. The debate of mixed ownership government corporations. 2. Mixed-capital companies in Brazil. 3. The economy of mixed company and its controls. 4. Mixed-capital companies and government sponsored companies and government acquired companies. 5. The economy of mixed- capital company as exploitation of an economic activity by the State in the economy. 6..References.*

1 THE DEBATE OF MIXED OWNERSHIP GOVERNMENT CORPORATIONS

The mixed-capital company is, in its current structure, a late nineteenth and early twentieth centuries phenomenon, which was intensified especially in Germany during the First World War (1914-1918) (JELLINEK, 1931, p. 526-528)[4]. The German Constitution of 1919, the Weimar Constitution, in turn, provided expressly, in the article 156, the possibility of socialization, nationalization or state participation in business sector[5].

The traditional view, inspired by writings of the German industrialist, Walter Rathenau, perceived the mixed-capital company ("gemischtwirtschaftliche Unternehmung") as a free association of private capital and public funds for the exploitation of an economic activity, an "economic" phenomenon, which would not belong to the administrative institutions.[6] This misconception has led to a series of debates, especially dissimulated among us by Bilac Pinto, about the impossibility of reconciling the public interest (the State) and private (the other private shareholders who aims to get profit), which would lead to the replacement of mixed-capital company by the public company, whose total capital stock belongs to State.[7]

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4 About “societies at war” (*"Kriegsgesellschaften"*), created in Germany between 1914 and 1918, see Regina ROTH, 1997, p. 103-156.

5 See René BRUNET, 1921, p. 298-318; Gerhard ANSCHÜTZ, 1987, p. 725-729; Heinrich FRIEDLAENDER, "Artikel 156. Sozialisierung" *in* Hans Carl NIPPERDEY (org.), 1975, vol. 3, p. 322-348 and Gerold AMBROSIUS, 1984, p. 64-102. For the debate on economic constitution during the period of The Weimar Republic (1918-1933), see Gilberto BERCOVICI, 2004, p. 39-50.

6 Fritz FLEINER, 1933, p. 82-84; Ernst Rudolf HUBER, 1953, vol. 1, p. 529-530; Ernst FORSTHOFF, 1966, vol. 1, p. 485 and Jean-Yves CHÉROT, 2007, p. 471-472. For the difficulties encountered by Brazilian theory of public law with the concept of state-owned enterprise, see Alberto VENÂNCIO Filho, 1968, p. 385-406.

7 See Bilac PINTO´s classical article, 1954, p. 43-57. See also Waldemar Martins FERREIRA, 1956, p. 151-153. For contemporary critics concerning Bilac Pinto´s perspectives, see Alfredo de Almeida PAIVA, 1995, p. 316-317.

In this debate on mixed-capital companies, many authors like Hedemann, one of the founders of economic law, perceived the mixed capital company as an issue predominantly of private law research field, calling it "public business activity" ("öffentliche Hand"). Others, like Forsthoff, although still maintain reservations about mixed-capital companies as administrative entities, they have already perceived them on the basis of the influence that the State could exercise on company's management due to its shareholding position, seeing this capital stock as a constitutive element of mixed-capital companies[8].

2 MIXED-CAPITAL COMPANIES IN BRAZIL

Contemporary Brazilian theory of public law, based on Article 5, III of Decree-law No. 200 of 25th February 1967 (with the wording amended by Decree-law No. 900 of 29th September 1969), defines mixed-capital company as an entity that is part of Indirect Administration, with legal personality under private law, whose creation is authorized by law, as an instrument of exploitation of an economic activity by the State. Despite its corporate legal personality under private law, mixed- capital company, like any state-owned enterprise, is subjected to special rules due to its nature of being part of Public Administration. These special rules stem from its creation authorized by law, whose text makes exception to corporate, commercial and private law applicable to private companies. In the creation of mixed - capital company, authorized through legislative means, a State laws as public authority, not as a shareholder. Its constitution can only be given in the form of mixed-capital company, whose majority shareholding control belongs to the State[9], in any of its government spheres, as it was deliberately created as an instrument of exploitation of an economic activity by the State[10].

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8 Justus Wilhelm HEDEMANN, 1939, p. 146-157 and Ernst FORSTHOFF, vol. 1, p. 485-486. See also Ernst Rudolf HUBER, vol. 1, p. 519-526.

9 The mixed- capital company is not allowed to make shareholder agreements that transfer the power of state control to private minority shareholders. The State must be the controller of law and fact that is, it is not allowed to share the controlling power of a mixed-capital company. After all, the State must not freely negotiate the public interest as it is bound by the Constitution and law. Cf. Celso Antônio Bandeira de MELLO, 2006, p. 179; Fábio Konder COMPARATO, 1999, p. 65-68; Lúcia Valle FIGUEIREDO, 2000, p. 227-235 and Eros Roberto GRAU, 2000, p. 350-357.

10 See, by all, Waldemar Martins FERREIRA, 1956, p. 133-136; Alfredo de Almeida PAIVA, 1995, p. 313-316; Alberto VENÂNCIO Filho, 1968, p. 415-437; Manuel de Oliveira FRANCO Sobrinho, 1983, p. 68-74; Washington Peluso Albino de SOUZA, 1994, p. 273-276; Celso Antônio. Bandeira de MELLO, 2007, p. 111-119; Maria Sylvia Zanella DI PIETRO, 2007, p. 394, 414-415 e 420-421 and

State-owned enterprises, according to legislator of Decree-law No. 200/1967, should have the same operating conditions as the private sector. Moreover, their autonomy should be guaranteed, as they would be linked, not subordinated to ministries, which could only exert control over results.[11] This view was held even by Marshal Castello Branco himself, who stated in his message to Congress in 1965, he wanted, with administrative reform, "get the public sector to operate as efficiently as a private enterprise"[12].

How one explains the expansion of state-owned enterprises in the post-1964? Despite the official speech concerning restriction of exploitation of an economic activity by the State of unsuspected liberals like Octavio Gouveia de Bulhões, Roberto Campos, Antonio Delfim Netto and Mario Henrique Simonsen, about 60% of Brazilian state-owned enterprises were created between 1966 and 1976[13].

The Brazilian military government installed after 1964 had a great concern to tackle public deficit and combat inflation. Therefore, measures recasting fund raising and intergovernmental transfers to state-owned enterprises were promoted, aside from requiring a realistic price policy. The Reforms carried out by PAEG aimed fundamentally at revive market economy. One of the explicit objectives of Decree-law No. 200/1967 was precisely to increase the "efficiency" of the public production sector through decentralization in the implementation of government activities. Thus, state-owned enterprises had to adopt performance standards similar to that of private companies and were forced to be "efficient" and compelled to seek alternative sources of funding.

Endowed with greater autonomy, state-owned enterprises have become legally perceived as private capitalist enterprises (Article 27, sole paragraph of Decree-law No. 200/1967[14]). Thus, applying the "business reasoning," many state enterprises

Modesto CARVALHOSA, 1999, vol. 4, tomo I, p. 357-361 and 375-378. See also, Maria Teresa CIRENEI, 1983, p. 516-519.

11 José de Nazaré Teixeira DIAS, 1969, p. 78-80.

12 *Apud* José de Nazaré Teixeira DIAS, 1969, p. 50.

13 Cf. Luciano MARTINS, 1991, p. 60-62.

14 Artigo 27, parágrafo único do Decreto-Lei nº 200: "Parágrafo Único - Assegurar-se-á às emprêsas públicas e às sociedades de economia mista condições de funcionamento idênticas às do setor privado cabendo a essas entidades, sob a supervisão ministerial, ajustar-se ao plano geral do Govêrno". (Public enterprises and mixed-capital enterprises shall be assured in equal conditions of operation as those of the private sector, and these entities must, under ministerial supervision, adjust themselves to the general government plan) (Free translation).

have expanded to different branches of activity of high profitability, and have also fallen back upon external debt. The state increased its share of goods and services sector, increasing the amount of state-owned enterprises in the energy, transport, communications, processing industry (petrochemicals, fertilizers, etc.), financial and other services (data processing, foreign trade, equipment, etc.) sectors. The expansion of state-owned enterprises may also be explained by the legal framework of Decree-law No. 200/1967. The operational decentralization provided for in Decree-law No. 200/1967 offered the opportunity for the creation of several subsidiaries of already existing state-owned enterprises, forming sectoral holdings and expanding, thus, operation activities of state-owned enterprises. The State had been already operating in most of the above mentioned sectors, but expanded its operations to maintain the rapid economic growth policy.

The autonomy of state-owned enterprises (as well says Luciano Martins, autonomy from the government, not in relation to the economic system) is enhanced as well, with the ability to acquire self-financing and and foreign borrowings. The higher the capacity, more autonomous (from the government) is the state-owned company. According to Fernando Rezende, it was precisely this "efficiency" the cause of the greater range of direct exploitation of an economic activity in the production of goods and services, contradicting the official governmental speech of restriction and limitation of state´s role in the economy.[15]

State-owned enterprises even started to work on the stock exchanges, encouraged by the government, especially after 1976, with the enactment of law No. 6.385, of December 7th1976, which reforms the legislation on capital markets and creates the Securities and Exchange Commission (SEC), and the law No. 6404 of December 17 th 1976, the new corporate law. Not surprisingly, their roles still account for the majority of transactions on the stock exchange, reflecting the idea of a “Business” management that seeks to maximize profit in state-owned enterprise. (MARTINS, 1991, p. 71)

[15] Wilson SUZIGAN, 1976, p. 89-90 e 126; Fernando REZENDE, 1987, p. 216-218 and Luciano MARTINS, 1991, p. 70-71 and 75-79.

3 THE ECONOMY OF MIXED COMPANY AND ITS CONTROLS

Under the 1988 Constitution, all state-owned enterprise is subject to the general rules of public administration (Article 37 of the Brazilian Constitution), the Congress´ control (Article 49, X, in the case of state-owned enterprises belonging to the Federal Government), the Federal Audit Court (Article 71, II, III and IV of the Constitution, also in the case of state-owned enterprises from federal level) and, in the case of federal state-owned enterprises, the Comptroller General of the Federal Government (Articles 17 to 20 of law No. 10,683, of May 28 th 2003). In addition to that, the budget of the federal state-owned corporations investments should be provided in the Federal Budget (Article 165, Paragraph 5 of the 1988 Constitution).

The mixed- owned companies are also subject to external control of Federal Court of Auditors (Article 71, II, III and IV). The constitutional provision for supervision of mixed-owned companies by the Federal Court of Auditors is regulated by Article 7 of law No. 6,223, July 14 th , 1975 (as amended by law No. 6,525, of April 11 th 1978) and by the and by Article 1, I of law No. 8,443, of July 16 th , 1992 (Organic law of the Federal Court of Auditors)[16]. The abovementioned law No. 8,443 / 1992 even declares in Article 4, IX, that its jurisdiction also covers " Federal Government's representatives or Public Power at the general meeting of state-owned enterprises and joint- stock companies in whose capital the Federal Government or the Government participate, jointly, with members of the fiscal Council and management, for practicing baneful management or liberality at the expense of state-owned enterprises."[17]

In addition to that, the jurisdiction of Federal Audit Court is limited to " evaluate the accounts of the administrators and other persons responsible for public monies, assets and values of the direct and indirect administration" (Article 71, II of the Constitution). Therefore, it does not reach the commercial or business activity itself of

[16] Celso Antônio Bandeira de MELLO, 2006, p. 187 e 191-192. See also Lúcia Valle FIGUEIREDO, 1978, p. 51-56. By way of comparison, about the various forms of public control of state-owned enterprises, see Jean-Philippe COLSON, 2001, p. 337-350; Pierre DELVOLVÉ, 1998, p. 731-746 and Jean-Yves CHÉROT, 2007, p. 514-532.

[17] However, it should be made constant exception of Article 7, paragraph 3 of law No. 6,223 / 1975 (as amended by law No. 6,525 / 1978): "Paragraph 3 - The Union, the State, the Federal District, the municipality or entity of its indirect administration that participates in private company´s capital owning only half or a minority of shares will exercise the right of supervision provided to minority shareholders by the law of Corporations and does not constitute that that participation reason of supervision provided in the caput of this Article " (my italics).

mixed- owned companies, under penalty of undue and excessive interference of the Federal Audit Court on economic activity of mixed-capital companies, this possibility has already been rejected by the Supreme Court in the judgment of the Mandado de Segurança No. 23875-5 / DF (Rapporteur for Judgment: Minister Nelson Jobim) on March 7 th, 2003[18].

Centralized control over state- owned enterprises, although formally set out in Decree-law No. 200/1967, it has never been actually implemented. The ministerial supervision provided for in Article 26 of Decree-law No. 200/1967, was a failure, even due to the greater importance of many of the state-owned enterprises in relation to the organs responsible for their supervision. Thus, internal control ended up being limited in the purely bureaucratic sphere and legal formal issues[19]. The last attempt to institute an internal control over state-owned enterprises took place with the creation, through Decree No. 84128 of 29 th October 1979, the Department of state- owned enterprises (SEST), which tried to replace the model of 1967 by a centralized control eminently budgetary, for Fernando Rezende, "subverts the principle of managerial autonomy." The emphasis of any administrative control passed to the accountability of public spending as a cause of economic crisis[20].

The creation of SEST, however, brought another issue: the expansion of the concept of "state- owned enterprise" beyond what it was provided for the Decree law 967. Decree No. 8,129 / 1979 defined in its Article 2, state- owned enterprises as: "I - state-owned companies, mixed-capital companies, their subsidiaries and all

18 In addition to the Federal Audit Court, the companies of federal mixed economy, such as Banco do Brazil, are subject to supervision by the Comptroller General of the Federal Government (Articles 17 to 20 of law No. 10,683 / 2003) and the Internal Control System Federal Executive Branch, established by Decree No. 3591 of 06 September 2000. This decree provides that the Board of Directors of Indirect Administration entities to found internal audit units linked to them (Article 15).

19 Fernando REZENDE, 1987, p. 224-226. About “ministerial supervision”, see José de Nazaré Teixeira DIAS, 1969, p. 89-98 and Mauro Rodrigues PENTEADO, 1982, p. 23.

20 Fernando REZENDE, 1987, p. 228-232. For criticism of the argument that state-owned enterprises are the main responsible for the Brazilian public deficit, see José Carlos de Souza BRAGA, 1984, vol. 1, p. 194-206. On the creation of SEST on the context of increase of public budget control in Brazil, a process that would end with the Fiscal Responsibility law in 2000, see Gilberto BERCOVICI & Luís Fernando MASSONETTO,2006, p. 60-64. Only as a record, the Fiscal Responsibility law (Complementary law No. 101 of May 4th, 2000) does not apply to any state-owned enterprise, but only for so-called " dependent state-owned companies", ie companies controlled by the State which receive state funds for personnel and general expenses and those which receive capital expenditure of resources, if not from the increased equity shares. (artigo 2º, III da Lei Complementar nº 101/2000). See Eros Roberto GRAU, 2000, p. 17-21 and Simone de Almeida CARRASQUEIRA, 2006, p. 26-37.

companies which are directly or indirectly controlled by the Federal Federal Government; II - agencies and foundations instituted or maintained by the Government; III - autonomous entities of the direct administration." The definition of Decree No. 8,129 / 1979 is legally facted as it includes government agencies and foundations as species of state-owned enterprises, which does not make any sense, aside from expanding overly the category's scope of "state-owned enterprise", apart from state-owned enterprise and mixed-capital company, including their subsidiaries (independently whether their creation have been authorized by law or otherwise) and all companies which are controlled directly or indirectly by the Federal Government that are not part of the Indirect Administration[21].

The misconception of the expanded of SEST´s "state-owned enterprise" definition has been maintained by subsequent legislation. Decree No. 137 of May 27 th, 1991, established the Management Program of state-owned companies, and in its article n°1, sole paragraph, maintained the enlarged definition of "state-owned enterprise", by considering it as public companies, mixed- capital companies, their subsidiaries and affiliates, and other entities under direct or indirect Federal Government´s control". In turn, this decree was revoked by Decree No. 3735 of January 24 th, 2001, whose definition of" state - owned enterprise "(Article 1 paragraph 1) is:. "are deemed to be federal state-owned enterprises: the public enterprises, mixed- capital companies, their subsidiaries and affiliates and other companies in which the Federal Government holds directly or indirectly the majority of capital share with voting rights" The latter definition became predominant in all subsequent legislation such as the law No. 10.180, of February 6th, 2001, which organizes and discipline planning and federal budget systems (Article 7, sole paragraph), and Decree No. 6021 of January 22 th, 2007, which creates the Interministerial Commission on Corporate Governance and Management of Federal Government's companies in whose capital stock the Union holds a direct or indirect interest (Article 1, single paragraph, I).

[21] Mauro Rodrigues PENTEADO,1982, p. 21-22 and 25-26; Mauro Rodrigues PENTEADO, 1989, p. 50-51; Maria Sylvia Zanella DI PIETRO, 2007, vol. 4, tomo I, p. 364-365. See also Simone de Almeida CARRASQUEIRA, 2006, p. 94-97.

4 MIXED-CAPITAL COMPANIES AND GOVERNMENT SPONSORED COMPANIES AND GOVERNMENT ACQUIRED COMPANIES

The mixed-capital company, established by law, therefore, is not to be confused with GOVERNMENT SPONSORED COMPANIES and GOVERNMENT ACQUIRED COMPANIES even under its companies in whose capital stock the Union holds the control. Admission of the State as a shareholder in company originally private does not produce any change of legal nature in the company established by private economic agents with profit-purpose. The mere participation of public entities, or controlled by them as shareholders is not sufficient to modify society's structure. The state or state entity that becomes a partner of corporate entity in operation undergoes its corporate estatute. In this case, usually minority share of the State, the public interest is held by the fact of state ownership interest itself (for various reasons such as having to finance companies or poor investment sectors, for example), without any need for change in the capital stock structure. Corporate does not become a mixed-capital company by the emergence transient or permanent of the State or state entity, as its shareholder. Even if it acquires most of its shares or the power to control, the company is not transformed into a mixed-capital company. It is about a simple inversion of public capital in a private company[22]. The legal definition of private law remains the same, despite the state shareholder, including not being tied to the same limitations as entities of the Indirect Public Administration, even with legal corporate legal personality under private law (such as mixed-capital companies and state-owned companies), are, as the need for hiring employees by competitive examination for civil service or submission to the procedures stipulated in the Lei de Licitações (law No. 8666 of June 21st, 1993).[23]

Companies'legal regime is not to be applied to all companies in which the State has a stock share. A subsidiary company formed through the proper legal authorization

[22] Waldemar Martins FERREIRA, 1956, p. 131-133 and 176-177; Modesto CARVALHOSA, 1999, p. 354-355; Maria Teresa CIRENEI, 1983, p. 538-539 and 590-592 and Luis S. Cabral de MONCADA, 2007, p. 397-401. According to Roberto Cafferata, equal participation between public and private capital or participation of state capital as minority in private companies can be an instrument of economic policy and economic and financially attractive for the private sector. However, he points out, the more the public sector is oriented to the market with pure business economic viability criteria, and not with macroeconomic policy concerns, there more balance will be in the partnership and more attractive it will be for the private power. Cf. Roberto CAFFERATA, 1993, p. 149-150.

[23] Brazilian law for contracts and acquisitions

has the same legal nature of the state entity that controls it. As for the subsidiaries and companies which were set up by a mixed-capital company or have a stock share of this, without proper legal authorization, can not be considered as mixed-capital companies.The administrative law´s legal regime is not applicable, even partially, to companies which, although controlled by mixed-capital companies, were not created as mixed- capital company by law and cannot therefore be classified as " second degree mixed-capital companies". In either case, they are common commercial companies with no ties to State indirect administration.

The article 235, paragraph 2 of Lei das S.A.[24]: (law 6,404 of December 15th, 1976) [25] , including, excludes expressly from classification of the mixed-capital companies that were not created by law, although have public share stock directly or indirectly. Even if controlled by the State or a state entity, as a mixed- capital company, if it was not created by law, the company concerned is governed exclusively by private law, it is not a exploitation of an economic activity by the State instrument. Being controlled by a state entity does not make it a mixed-capital company[26].

Based on Article 5, paragraph III Decree-law 200/1967 and Article 236 of law 6,404 / 1976, which would require prior legislative authorization for the creation of mixed-capital companies, the Federal Supreme Court, under the previous constitutional system, decided repeatedly in the same sense that the mixed- company may not be confused with government sponsored and government acquired companies, as in the STF´s case No. 91035-2 / RJ (Rapporteur: Minister Soares Muñoz), 26 June 1979:

> Syllabus: Mixed-capital company. One should not confuse it with state-owned company. It is the special situation that the State assures through the law which creates the legal entity which characterizes it as a mixed capital company...[27]

[24] Lei das S.A can be translated as Brazilian law for stock corporations.

[25] Article 235, paragraph 2 of Lei das S.A: "§ 2 - The companies that take part, majority or minority, the mixed-capital companies are subject to law provisions, without the exceptions which were specified in this Chapter." The chapter to which the legal provision refers is the XIX chapter of the Lei das S.A, which deals exactly with the mixed-capital companies (Articles 235-242, with Articles 241 and 242 now revoked).

[26] Maria Sylvia Zanella DI PIETRO, 2007, p. 415-416 and 420; Mauro Rodrigues PENTEADO, 1989, p. 55-68 and Modesto CARVALHOSA, 1999, p. 364-365.

[27] The same contents of the syllabus, with minor modifications, was published on the occasion of the decision of extraordinary appel No. 92338-1 / RJ (The justice´s opinion: Minister Soares Muñoz) on

And in the trial extraordinary appeal No. 94777-9 / RJ (The justice´s opinion : Minister Décio Miranda) on August 14th, 1981:

> Syllabus:... commercial. Stock company. Mixed-capital company. It is mixed-capital company those that are created by law, being not enough to characterize it as such the simply presence of public capital (law 6404 of 12/15/76, art. 236)[28].

These Supreme Courts´decisions were given exclusively based on legal provisions of Decree-law No. 200/1967 and law No. 6,404 / 1976. In the current constitutional regime, it would even not be necessary to mention these laws, as the 1988 Brazilian Constitution itself, in Article 37, XIX, explicitly provides for the need of specific legislation to authorize the creation of a mixed-capital company. If the stock corporation, though state shareholding, has not been established by law, will not be a mixed-capital company.

The article 37, XX of the 1988 [29] Brazilian Constitution states that the establishment of subsidiaries of administrative authorities mentioned in line of the same article XIX (agencies, state-owned companies, mixed-capital companies and foundations)[30] as well as their participation in private enterprise depends on legislative authorization.

The question that may exist with respect to the expression "in each case" for legislative authorization for the creation of subsidiaries or participation in a private company state entities mentioned in the Article 37, XIX of the Constitution. This item XX of Article 37, unlike of the line XIX, there is no reference to the "specific law", as in the creation of state-owned enterprises, but to the case of each company or public

March 18th, 1980; extraordinary appeal No. 92340-3 / RJ (Rapporteur: Minister Soares Muñoz) on March 25th, 1980; extraordinary appeal No. 93175-9 / RJ (Rapporteur: Minister Soares Muñoz), on October 14th, 1980; extraordinary No. 94777-9 / RJ (The justice´s opinion: Minister Soares Muñoz), on August 14th, 1981 and extraordinary appeal No 95554-2 / RJ (The justice´s opinion: Minister Rafael Mayer) on March 2nd, 1982. In an earlier decision, the Supreme Court had already expressed the need for a law authorizing the creation of mixed-capital company, according to Justice Ministro Moreira Alves in August, 18th, 1975.)

28 The same syllabus was published on the occasion of the extraordinary appeal No. 96336-7 / RJ (Rapporteur: Minister Décio Miranda) on March 2nd, 1982.

29 Art 37, XX:. "XX - depends on legislative authorization, in each case, the creation of subsidiaries of the agencies mentioned in the preceding paragraph, as well as the participation of any of them in a private company."

30 Article 37, XIX. "XIX - only by specific law may be created agency and authorized the public enterprise, mixed capital company and foundation, it is for the complementary law, in the latter case, to define the areas of its operations" .

entity. There is no need for an indication expressly of which specific company will receive public investment.

The expression "each case" indicates the area or activity being contemplated. I therefore believe that this expression "in each case" must be understood as "in the case of each entity" that intend to establish subsidiaries or participate in other companies. State-owned enterprises that possess legislative authorization, whether for its creation law or by any subsequent law, can law in this regard. If this item were understood otherwise, the existence of numerous state entities acting on share operations, as the BNDES (National Bank for Economic and Social Development) would be unfeasible[31].

This understanding of the provisions of Article 37, XX of Constitution was also adopted by the National Congress, which adopted several laws granting broad authorizations for the creation of subsidiaries by mixed-capital companies. Only in the case of Petrobras, for example, they were approved law No. 8,395, of January 2nd, 1992, authorizing Petrobras Química SA, Petroquisa, to participate with minority of private capital companies in the Chemical Industrial Plants of Northeast, formed by the states of Bahia, Sergipe, Alagoas, Pernambuco and Rio Grande do Norte. The law No. 8,403, of January 8th, 1992, which authorizes Petrobras and Petrobras Distribuidora (BR) to participate in the capital of other companies, and Article 65 of the law No. 9478 of August 6th, 1997, which authorizes Petrobras to form a subsidiary with specific tasks to operate and build their pipelines, sea terminals and vessels for transporting oil and oil products and natural gas, and may also be associated with other companies. The Brazilian oil´s law also granted in its article 64[32] a general authorization for the setting up of subsidiaries by Petrobras.

The Supreme Court also adopted this interpretation on the scope of the legislative authorization provided for in Article 37, XX of the Brazilian Constitution in the trial of decision direct unconstitutionality action No. 1649 / DF (In the justice opinion: Minister Mauricio Correa), judged on March 24th, 2004:

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31 Caio TÁCITO, 1997, vol. 1, p. 683-686; Caio TÁCITO, 1997, vol. 2, p. 1154-1155 and Modesto CARVALHOSA, 1999, p. 387-389. On the other hand, defending the requirement for legislative authorization in each case, see Celso Antônio Bandeira de MELLO, 2006, p. 189-190.

32 Art. 64: "For strict compliance with its corporate statute, within the oil industry activities, Petrobras is authorized to establish subsidiaries, which may be associated, majority or minority, to other companies."

Syllabus:..... Unconstitutionality direct action law 9478/97 authorization to petrobras to constitute subsidiaries. Offence to articles 2 and 37, XIX and XX, The Brazilian Federal Constitution. Absence. claim unfounded. 1. The law 9478/97 did not authorize the creation of mixed-capital company, but rather the creation of separate subsidiaries of the headquarter company, in accordance with the line XX, not with the XIX Article 37 of the Brazilian Federal Constitution. 2. It is unnecessary the legislative authorization for the creation of subsidiaries, as long as there is provision for this purpose in the law itself which created the headquarter of mixed-capital company, given that the law which created it is the authorizing measure itself. Direct action of unconstitutionality decided dismissed.

The law no. 11,908, of March 3rd, 2009 (result of the adoption by Congress Provisional Measure no. 443, of October 21th, 2008), authorizes the Banco do Brasil and Caixa Econômica Federal to form wholly or partially owned subsidiaries as well as to acquire participation in financial, public or private institutions, including supplementary company branches to the financial sector (Articles 1 and 2 of law no. 11.908 / 2009). The law no. 11.908 / 2009 only gives a broad authorization for creating subsidiaries and direct and indirect interests in other companies by two federal public financial institutions, the Banco do Brasil and Caixa Economica Federal[33].

The eventual share stock of these public financial institutions in other companies does not create a mixed-capital company, nor the law no. 11.908 / 2009 authorizes this, in the same way that the law no. 9.478/1997 in its article 64 authorizes Petrobras to create different subsidiaries of the headquarter company, not mixed-capital companies. This, also, was the same sense of Supreme Court´s interpretation in the trial of unconstitutionally direct action no. 1649 / DF, reported above.

The expression "private enterprise", which refers to the participation of state entities in Article 37, XX, can also not be interpreted in any way. The Constitution always refers expressly to state-owned enterprises and their kind (public company and mixed-capital company). Despite the constitutional determination of equivalence of legal regimes between the state-owned enterprises (public enterprises and mixed-capital companies) to explore economic activity and private companies (Article 173, Paragraph 1, II), the Constitution always distinguishes state-owned companies from private companies themselves. Every time that there is reference to "private enterprise" in the Constitution, the text refers to private companies themselves, composed entirely

[33] Article 237, paragraph 2 of Lei das S.A. has already stated that the participation of mixed-capital financial as Banco do Brasil in the capital of other companies require authorization from the Central Bank. See Modesto CARVALHOSA, 1999, p. 409-410.

by private capital, never to mixed-capital companies, made up partly by private capital. The article 37, XX, mentions the private company in the same way[34].

Just as the mixed-capital company must have its establishment authorized by law statute (Article 37, XIX of the Constitution), it can only be dissolved by statute law. This need for legislative authorization to the extinction of the state-owned enterprises in general (including mixed-capital companies) has always been defended by the Brazilian administrative law[35] doctrine and is now enshrined in Article 61, paragraph 1, II, 'and' the 1988 Constitution, with the wording amended by Amendment Constitutional no. 32 of September 11th, 2001[36].

5 THE ECONOMY OF MIXED- CAPITAL COMPANY AS EXPLOITATION OF AN ECONOMIC ACTIVITY BY THE STATE IN THE ECONOMY

It is incorrect to accept uncritically concepts and pre-constitutional principles only because they have already been consolidated in the administrative law doctrine. The Constitution requires reformulation, even partial, of all categories of administrative law. The fulfillment of constitutional programs does not depend on legal practitioners legal operators, but on many other factors such as Government Administration to be realized. This "political leadership" of the Administration, as says Paul Otero, is far from the liberal administrative tradition. It is clear, therefore, the need to build a dynamic administrative law, in the service of the application of fundamental rights and the Constitution[37].

Under the 1988 Constitution, state-owned enterprises are subject to state goals, such as development (Article 3 II of the Constitution). In this sense, it is correct Paulo Otero´s statement, for whom the public interest is the reason, the public interest

[34] In the same way, the Supreme Court stated in the decision of the abovementioned unconstitutionally direct act no. 1649 / DF (In the justice´s opinion: Minister Mauricio Correa) in March 2004.

[35] Cf. Celso Antônio Bandeira de MELLO, 2006, p. 190 and Maria Sylvia Zanella DI PIETRO, 2007, p. 414-416.

[36] Article 61, paragraph 1, II, 'and': 'Paragraph 1 - is the exclusive initiative of the President the laws that:: II - provides for e) creation and extinguishment of Ministries and public administration branches, as set forth in art. 84, VI "(my emphasis in bold).

[37] Peter BADURA, 1966, p. 12-27; Antonio Troncoso REIGADA, 1999, p. 87-98 and Paulo OTERO, 2003, p. 147-151.

is the reason, the limit and the criteria of public economic initiative.[38] The constitutional legitimacy in the Brazilian case, of this public economic initiative, which mixed-capital companies Banco do Brasil and Nossa Caixa are examples, is due to fulfillment of constitutional and legal requirements set for its operation.

As stressed Washington Peluso Albino de Souza, the creation of a state-owned as a mixed-capital company or a public company, it is already an law of economic policy. (SOUZA, 1994, p. 278) The objectives of state-owned enterprises are set by law and cannot escape to these goals. They must abide by them, under penalty of misuse of purpose. For this, they were created and are maintained by the Government.

The mixed-capital company is a exploitation of an economic activity by the State instrument and should be above private interests. The Brazilian Stock Corporation law (law 6. 404 / 1976), applies to mixed-capital companies[39], as long as it preserves the public interest which justifies its creation and activity (Article 235). The Article 238 also states that the purpose of the mixed-capital company is to serve the public interest, which motivated its creation. The mixed-capital company is linked to the purposes of the law which authorizes its institution, which determines its social object and allocates a part of public property for that purpose. The mixed- capital company cannot, by its own will, use public property to serve a purpose other than provided by law (DI PIETRO, 2007, p. 417-418), as expressed in Article 237 of the Stock Corporation law.

The essential purpose of the mixed- capital companies is not to make profit, but the implementation of public policies. According to Fábio Konder Comparato, the legitimacy of exploitation of an economic activity by the State to an entrepreneur (public economic initiative of Article 173 of the 1988 Brazilian Constitution) is the production of goods and services which cannot be obtained efficiently and fairly in a free market system the private economic exploitation regime. There is no sense in the State to earn

[38] Paulo OTERO, 1998, p. 122-131 and 199-217. See also Günter PÜTTNER, 1969, p. 87-98; Jean-Philippe COLSON, 2001, p. 99-111 and Celso Antônio Bandeira de MELLO, 2006, p. 178-183.

[39] Waldemar Martins FERREIRA, *A Sociedade de Economia Mista em seu Aspecto Contemporâneo cit.*, pp. 131-133 and 138-145 and Modesto CARVALHOSA, 1999, p. 351-353, 367-368, 374 and 376-378. On the influence of public law in the corporate structure of Sate corporations in Germany, see Günter PÜTTNER, 1969, p. 318-324 and 374-378 and Volker EMMERICH, 1969, p. 162-165 and 189-210.

revenue through the direct exploitation of economic activity.[40] The sphere of activity of mixed-capital companies is based on the objectives of economic policy, on structuring of larger purposes, whose establishment and operation goes beyond the of a single individual actor (as the company itself or its shareholders). The state-owned company in general and the mixed-capital company in particular has not only microeconomic purposes, ie strictly "business" but has essentially macroeconomic objectives to be achieved, an instrument of State´s economic activity[41].

These constitutional provisions are different ways of linking and legal conformation, constitutionally defined, which goes beyond the provision of Article 173, Paragraph 1, II, which equalizes the regime statute of the state-owned enterprises.

Providers of economic activity in the strict sense with same private companies in its civil, commercial, labor and tax law aspects[42]. The legal status of private law is a technical that does not override the administrative law, under penalty to wreck state-owned any as an instrument of exploitation of an economic activity by the State.[43] In this sense, explains Celso Antonio Bandeira de Mello:

> The nuclear trait of state enterprises, that is, of public enterprises and mixed-capital companies, lies in the fact that they are supporting state duties. Nothing can dissolve this sign inscribed in their natures. This legal regime is the surest north to the knowledge of these people. Therefore, there is the guide criterion for interpretation of legal principles which are applicable to them, at the risk of becoming accidental - its corporate legal personalities of private law - in

[40] Cf. Fábio Konder COMPARATO, 1977, p. 289 and 390-391 and Eros Roberto GRAU, 1994, p. 273-276. See, also, Modesto CARVALHOSA, 1999, p. 376-378 and 412-418 and Günter PÜTTNER, 1969, p. 86-87.

[41] Maria Teresa CIRENEI, 1983, p. 479-480 and 483 and Roberto CAFFERATA, 1993, p. 31, 42 and 104-105. See, also, Alfredo de Almeida PAIVA, 1995, p. 319-320; Volker EMMERICH, 1969, p. 71-78 and Gilberto BERCOVICI, 2009, vol. 1, p. 266-269.

[42] About the influence of the given activity (public service or economic activity in the strict sense) the legal regime of state-owned enterprises (public enterprises and mixed-capital companies), see Celso Antonio Flag MELLO, 2006, p. 140-146 and Sylvia Maria Zanella DI PIETRO, 2007, p. 412-414. In foreign doctrine, see, eg, Fritz FLEINER, 1933, p. 198-209 and Jean-Philippe COLSON, 2001, p. 330-332.

[43] Caio TÁCITO, 1997, vol. 1, p. 691-698; Eros Roberto GRAU, 1981, p. 101-111; Celso Antônio Bandeira de MELLO, 2006, p. 178-183 and 185-188; Eros Roberto GRAU, 1997, p. 111-123 and 278-281 and Maria Sylvia Zanella DI PIETRO, 2007, p. 416-418 and 421-428. In foreign doctrine on legal regimes of state-owned enterprises in general, and mixed-capital companies, in particular, see Ernst Rudolf HUBER, 1953, p. 530-532; Bernard CHENOT, 1965, p. 312-313; Ernst FORSTHOFF, 1966, p. 478-483; Günter PÜTTNER, 1969, p. 125-140 and 368-380; Volker EMMERICH, 1969, p. 58-62; Gérard FARJAT, 1971, p. 189-198; Massimo Severo GIANNINI, 1999, p. 163-166; Jean-Philippe COLSON, 1977, p. 297-301 and 328-330; Pierre DELVOLVÉ, 1998, p. 672-675 and 706-731 and Peter BADURA, 2005, p. 145-164, especially p. 146-147.

essencial, and the essencial- its character of helpers subjects of the State- in accidental. (MELLO, 2006, p. 179).

The 1988 Constitution guarantees in the same way that the private economic initiative, the economic cooperative initiative (Articles 5, XVIII and 174, paragraph 3 and paragraph 4 of the Brazilian Constitution) and the public economic initiative (Articles 173 and 177 of the Brazilian Constitution, among others). Therefore, the creation of mixed-capital companies does not hurt, in any way, the constitutional principle of free enterprise (Articles 1, IV and 170, caput of the 1988 Brazilian Constitution). Free enterprise, in the Brazilian Constitution of 1988 does not represent the triumph of economic individualism, but it is protected in conjunction with the value of human labor in an economic order in order to guarantee everyone a decent life[44], based on social justice. This means that free enterprise is the foundation of constitutional economic order in what it expresses of socially valuable.[45]

Free enterprise can not be reduced, at risk of a partial and erroneous interpretation of the constitutional text[46], the full economic freedom or free enterprise, it covers all forms of production, individual or collective, as individual economic initiative, cooperative economic initiative and the public economic initiative itself.

The Brazilian Constitution, as well as several other contemporary constitutions, does not exclude any form of state intervention, nor forbids the State to act in any area of economic activity. The greater or lesser extent of the economic role of the State is a result of democratically legitimized political decisions, not of some constitutional determination expressly. But the State should have its protected public economic initiative similar to the private and cooperative initiatives. The public economic initiative obviously has its specificities, it is determined positively by the Constitution or by law (as well as the freedom of private initiative is also limited by law) and must be in accordance with the public interest, or more specifically, with the imperatives of national security or relevant collective interest (Article 173 of the

44 About the relations between constitutional economic order and dignity of human person see Gilberto BERCOVICI, 2008, p. 319-325.

45 Cf. Eros Roberto GRAU, 2007, p. 200-208; Fábio Konder COMPARATO, 1991, p. 18-23 and Cláudio Pereira de SOUZA Neto; José Vicente Santos de MENDONÇA, 2007, p. 709-741. See, for european law, Antonis MANITAKIS, 1979, p. 31-37 and 265-277; Oscar de Juan ASENJO, 1984, p. 148-169; Luís S. Cabral de MONCADA, 2007, p. 140-151; Natalino IRTI, 2001, p. 18-20, 68-69, 85-88 and 93-96 and José Joaquim Gomes CANOTILHO; Vital MOREIRA, 2007, vol. I, p. 791-792.

46 As an example of this type of argument with no basis in the Constitution of 1988, see Luís Roberto BARROSO, 2003, tomo II, p. 145-188 and Paulo BONAVIDES, 2007, p. 323-324.

Constitution).[47] The Brazilian State is governed by a Constitution whose provisions call for, in one way or another, State´s activity in the economic order. The 1988 Constitution thus does not exclude any form of state intervention, nor forbids the State to act in any area of economic activity.

6 REFERENCES

AMBROSIUS, Gerold. Der Staat als Unternehmer: Öffentliche Wirtschaft und Kapitalismus seit dem 19. Jahrhundert, Göttingen: Vandenhoeck & Ruprecht, 1984.

ANSCHÜTZ, Gerhard. **Die Verfassung des Deutschen Reichs vom 11. August 1919**, reimpr., 14. ed. Aalen: Scientia Verlag, 1987.

ASENJO, Oscar de Juan. **La Constitución Económica Española:** Iniciativa Económica Pública "versus" Iniciativa Económica Privada en la Constitución Española de 1978. Madrid: Centro de Estudios Constitucionales, 1984.

BADURA, Peter. **Verwaltungsrecht im liberal und im sozialen Rechtsstaat.** Tübingen, J.C.B. Mohr (Paul Siebeck), 1966.

BADURA, Peter. **Wirtschaftsverfassung und Wirtschaftsverwaltung:** Ein exemplarischer Leitfaden. 2. ed. Tübingen: J.C.B. Mohr (Paul Siebeck), 2005.

BARROSO, Luís Roberto. Regime Constitucional do Serviço Postal. Legitimidade da Atuação da Iniciativa Privada. In: **Temas de Direito Constitucional.** Rio de Janeiro: Renovar, 2003, tomo II, p. 145-188.

BERCOVICI, Gilberto. **Constituição e Estado de Exceção Permanente:** Atualidade de Weimar. Rio de Janeiro: Azougue Editorial, 2004.

BERCOVICI, Gilberto. Dignidade da Pessoa Humana e a Constituição Econômica de 1988. In: José Ribas VIEIRA (org.). **Vinte Anos da Constituição Cidadã de 1988: E**fetivação ou Impasse Institucional? Rio de Janeiro: Forense: 2008, p. 319-325.

BERCOVICI, Gilberto. Os Princípios Estruturantes e o Papel do Estado. In: CARDOSO Jr, José Celso (org.). **A Constituição Brasileira de 1988 Revisitada:** Recuperação Histórica e Desafios Atuais das Políticas Públicas nas Áreas Econômica e Social. Brasília: Instituto de Pesquisa Econômica Aplicada, 2009, vol. 1, p. 255-291.

BERCOVICI, Gilberto; MASSONETTO, Luís Fernando. A Constituição Dirigente Invertida: A Blindagem da Constituição Financeira e a Agonia da Constituição Econômica. **Boletim de Ciências Económicas**, vol. XLIX, Coimbra: Universidade de Coimbra, 2006, p. 57-77.

[47] About public economic initiative, see, also, Maria Teresa CIRENEI, *Le Imprese Pubbliche cit.*, pp. 212-220; Oscar de Juan ASENJO, *La Constitución Económica Española cit.*, pp. 90-99; Luís S. Cabral de MONCADA, *Direito Económico cit.*, pp. 224-230; Natalino IRTI, *L'Ordine Giuridico del Mercato cit.*, pp. 19-20; Paolo DE CARLI, *Lezioni ed Argomenti di Diritto Pubblico dell'Economia*, Padova, CEDAM, 1995, pp. 36-38 and 40-41; José Joaquim Gomes CANOTILHO & Vital MOREIRA, *Constituição da República Portuguesa Anotada cit.*, vol. I, pp. 958-959 and 982-986 and Gilberto BERCOVICI, "Os Princípios Estruturantes e o Papel do Estado" *cit.*, pp. 258-266

BONAVIDES, Paulo. Serviço Postal (Art. 21, X), **Revista de Direito do Estado,** nº 6, Rio de Janeiro, abr./jun. 2007, p. 311-325.

BRAGA, José Carlos de Souza. Os Orçamentos Estatais e a Política Econômica. In: BELLUZZO, Luiz Gonzaga de Mello; COUTINHO, Renata (orgs.). **Desenvolvimento Capitalista no Brasil:** Ensaios sobre a Crise. 3. ed. São Paulo: Brasiliense, 1984, vol. 1, p. 194-206.

BRUNET, René. **La Constitution Allemande du 11 Août 1919**. Paris: Payot, 1921.

CAFFERATA, Roberto. **La Società per Azioni Pubblica:** Equilibrio Economico e Strategie di Transizione. Milano: FrancoAngeli, 1993.

CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. **Constituição da República Portuguesa Anotada**. 4. ed., 2 vols. Coimbra: Coimbra Ed., 2007.

CARRASQUEIRA, Simone de Almeida. **Investimento das Empresas Estatais e Endividamento Público.** Rio de Janeiro: Lumen Juris, 2006.

CARVALHOSA, Modesto. **Comentários à Lei de Sociedades Anônimas.** 2. ed. São Paulo: Saraiva, 1999.

CHENOT, Bernard. **Organisation Économique de l'État**. 2. ed. Paris: Dalloz, 1965.

CHÉROT, Jean-Yves. **Droit Public Économique**. 2. ed. Paris: Economica, 2007.

CIRENEI, Maria Teresa. **Le Imprese Pubbliche.** Milano: Giuffrè, 1983.

COLSON, Jean-Philippe. **Droit Public Économique**. 3. ed. Paris: L.G.D.J., 2001.

COMPARATO, Fábio Konder. **O Poder de Controle na Sociedade Anônima**. 2. ed. São Paulo: RT, 1977.

COMPARATO, Fábio Konder. Regime Constitucional do Controle de Preços no Mercado. **Revista de Direito Público,** nº 97, São Paulo, RT, jan./mar. 1991, p. 17-28.

COMPARATO, Fábio Konder. Sociedade de Economia Mista Transformada em Sociedade Anônima Ordinária - Inconstitucionalidade. **Revista Trimestral de Direito Público**, nº 25, 1999, p. 61-68.

DE CARLI, Paolo. **Lezioni ed Argomenti di Diritto Pubblico dell'Economia**. Padova: CEDAM, 1995.

DELVOLVÉ, Pierre. **Droit Public de l'Économie**. Paris: Dalloz, 1998.

DIAS, José Nazaré Teixeira. **A Reforma Administrativa de 1967**. 2. ed. Rio de Janeiro: FGV, 1969.

DI PIETRO, Maria Sylvia Zanella. **Direito Administrativo**. 20. ed. São Paulo: Atlas, 2007.

EMMERICH, Volker. **Das Wirtschaftsrecht der öffentlichen Unternehmen**. Bad Homburg/Berlin/Zürich: Verlag Gehlen, 1969.

FARJAT, Gérard. **Droit Économique**. Paris: PUF, 1971.

FERREIRA, Waldemar Martins. **A Sociedade de Economia Mista em seu Aspecto Contemporâneo**. São Paulo: Max Limonad, 1956.

FIGUEIREDO, Lúcia Valle. **Empresas Públicas e Sociedades de Economia Mista**. São Paulo: RT, 1978.

FIGUEIREDO, Lúcia Valle. Privatização Parcial da CEMIG - Acordo de Acionistas - Impossibilidade de o Controle Societário ser Compartilhado entre o Estado de Minas Gerais e o Acionista Estrangeiro Minoritário. **Revista de Direito Mercantil**, nº 118, abr./jun. 2000, p. 219-235.

FLEINER, Fritz. **Les Principes Généraux du Droit Administratif Allemand**. Paris: Librairie Delagrave, 1933.

FORSTHOFF, Ernst. **Lehrbuch des Verwaltungsrechts**. 9. ed. München: Verlag C. H. Beck, 1966.

FRANCO Sobrinho, Manuel de Oliveira. **Comentários à Reforma Administrativa Federal**. 2. ed. São Paulo: Saraiva, 1983.

FRIEDLAENDER, Heinrich. Artikel 156. Sozialisierung. In: NIPPERDEY, Hans Carl (org.). **Die Grundrechte und Grundpflichten der Reichsverfassung:** Kommentar zum zweiten Teil der Reichsverfassung. reimpr., Frankfurt am Main: Verlag Ferdinand Keip, 1975, vol. 3, p. 322-348.

GIANNINI, Massimo Severo. **Diritto Pubblico dell'Economia**. reimpr. da 3. ed. Bologna: Il Mulino, 1999.

GRAU, Eros Roberto. **Elementos de Direito Econômico**. São Paulo: RT, 1981.

GRAU, Eros Roberto. **A Ordem Econômica na Constituição de 1988 (Interpretação e Crítica)**. 12. ed. São Paulo: Malheiros, 2007.

GRAU, Eros Roberto. Sociedades de Economia Mista, Empresas Públicas, Fundações e Autarquias Prestadoras de Serviço Público: O Tema do Lucro. **Revista Trimestral de Direito Público,** nº 6, 1994, p. 269-276.

GRAU, Eros Roberto. Sociedade de Economia Mista - Nulidade de Acordo de Acionistas que Importa em Mudança de seu Acionista Controlador. **Revista de Direito Administrativo** nº 222, out./dez. 2000, p. 348-357.

GRAU, Eros Roberto. A Lei de Responsabilidade Fiscal e as Empresas Estatais. **Revista Trimestral de Direito Público**, n. 30, 2000, p. 17-21.

HEDEMANN, Justus Wilhelm. **Deutsches Wirtschaftsrecht:** Ein Grundriss. Berlin: Junker und Dünnhaupt Verlag, 1939.

HUBER, Ernst Rudolf. **Wirtschaftsverwaltungsrecht**. 2. ed. 2 vols. Tübingen: J. C. B. Mohr (Paul Siebeck), 1953.

IRTI, Natalino. **L'Ordine Giuridico del Mercato**. 4. ed. Roma/Bari: Laterza, 2001.

JELLINEK, Walter. **Verwaltungsrecht**. 3. ed. Berlin: Verlag von Julius Springer, 1931.

MANITAKIS, Antonis. **La Liberté du Commerce et de l'Industrie en Droit Belge et en Droit Français**. Bruxelles: Bruylant, 1979.

MARTINS, Luciano. **Estado Capitalista e Burocracia no Brasil pós-64**. 2. ed. Rio de Janeiro: Paz e Terra, 1991.

MELLO, Celso Antônio Bandeira de. **Curso de Direito Administrativo**. 20. ed. São Paulo: Malheiros, 2006.

MONCADA, Luis S. Cabral de. **Direito Económico**. 5. ed. Coimbra: Coimbra Ed., 2007.

OTERO, Paulo. **Vinculação e Liberdade de Conformação Jurídica do Sector Empresarial do Estado**. Coimbra, Coimbra Ed., 1998.

OTERO, Paulo. Constituição e Legalidade Administrativa: A Revolução Dogmática do Direito Administrativo. In: TAVARES, André Ramos; FERREIRA, Olavo A. V. Alves & LENZA, Pedro (coords.). **Constituição Federal, 15 Anos: Mutação e Evolução – Comentários e Perspectivas**. São Paulo: Método, 2003, p. 147-173.

PAIVA, Alfredo de Almeida. As Sociedades de Economia Mista e as Emprêsas Públicas como Instrumentos Jurídicos a Serviço do Estado. **Revista de Direito Administrativo:** Seleção Histórica. Rio de Janeiro: Fundação Getúlio Vargas/Renovar, 1995, p. 307-320.

PENTEADO, Mauro Rodrigues. As Empresas Estatais e os Sistemas de Supervisão e Controle. **Revista de Direito Mercantil,** nº 45, jan./mar. 1982, p. 20-28.

PENTEADO, Mauro Rodrigues. As Sociedades de Economia Mista e as Empresas Estatais perante a Constituição de 1988. **Revista de Informação Legislativa,** nº 102, abr./jun. 1989, p. 49-68.

PINTO, Olavo Bilac. O Declínio das Sociedades de Economia Mista e o Advento das Modernas Empresas Públicas. In: INSTITUTO DE DIREITO PÚBLICO E CIÊNCIA POLÍTICA. **Estudos sôbre a Constituição Brasileira**. Rio de Janeiro: Fundação Getúlio Vargas, 1954, p. 43-57.

PÜTTNER, Günter. **Die öffentlichen Unternehmen:** Verfassungsfragen zur wirtschaftlichen Betätigung der öffentlichen Hand. Bad Homburg/Berlin/Zürich: Verlag Gehlen, 1969.

REIGADA, Antonio Troncoso. Dogmática Administrativa y Derecho Constitucional: El Caso del Servicio Público. **Revista Española de Derecho Constitucional,** nº 57, set./dez. 1999, p. 87-164.

REZENDE, Fernando. O Crescimento (Descontrolado) da Intervenção Governamental na Economia Brasileira. In: LIMA Jr. Olavo Brasil de; ABRANCHES, Sérgio Henrique (coords.). **As Origens da Crise:** Estado Autoritário e Planejamento no Brasil. São Paulo/Rio de Janeiro: Vértice/IUPERJ, 1987, p. 214-252.

ROTH, Regina. **Staat und Wirtschaft im Ersten Weltkrieg:** Kriegsgesellschaften als kriegswirtschaftliche Steuerungsinstrumente. Berlin: Duncker & Humblot, 1997.

SOUZA, Washington Peluso Albino de. **Primeiras Linhas de Direito Econômico**. 3. ed. São Paulo: LTr, 1994.

SOUZA Neto, Cláudio Pereira de; MENDONÇA, José Vicente Santos de. Fundamentalização e Fundamentalismo na Interpretação do Princípio Constitucional da Livre Iniciativa. In: SOUZA Neto, Cláudio Pereira de; SARMENTO, Daniel (coords.). **A Constitucionalização do Direito:** Fundamentos Teóricos e Aplicações Específicas. Rio de Janeiro, Lumen Juris: 2007, p. 709-741.

SUZIGAN, Wilson. As Empresas do Governo e o Papel do Estado na Economia Brasileira. In: REZENDE, Fernando *et al.* **Aspectos da Participação do Governo na Economia**. Rio de Janeiro: IPEA/INPES, 1976, p. 77-134.

TÁCITO, Caio. As Empresas Estatais no Direito Brasileiro. In: **Temas de Direito Público (Estudos e Pareceres)**. Rio de Janeiro: Renovar, 1997, vol. 1, p. 679-690.

TÁCITO, Caio. Direito Administrativo e Direito Privado nas Empresas Estatais. In: **Temas de Direito Público (Estudos e Pareceres)**. Rio de Janeiro: Renovar, 1997, vol. 1, p. 691-698.

TÁCITO, Caio. Sociedade de Economia Mista. Incorporação de Outra Empresa. In: **Temas de Direito Público (Estudos e Pareceres)**. Rio de Janeiro: Renovar, 1997, vol. 2, p. 1153-1158.

VENÂNCIO Filho, Alberto. **A Intervenção do Estado no Domínio Econômico:** O Direito Público Econômico no Brasil. Rio de Janeiro: FGV, 1968.