Internal Discussion Paper

LATIN AMERICA AND THE CARIBBEAN REGION

"Foreign Investment in Brazil: Major Legal Obstacles"

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ABSTRACT

This paper provides an overview of a number of major legal factors that discourage foreign investment in productive activities in Brazil. It identifies restrictions on foreigners and non-residents arising from the Constitution, from ordinary laws and from other administrative regulations. It also briefly identifies a number of major non-legal factors that inhibit foreign investment in Brazil.

Among the restrictions arising from the Constitution, the paper lists formal state monopolies (for instance, oil and natural gas), quasi-monopolies (for instance public telecommunications) and the de facto monopolization of a number of public services (for example, electric power and railways). It discusses limitations on foreign participation directly written into the Constitution (for instance mining) and limitations which the Constitution directed Congress to enact (for example, finance, health care and rural property). In addition, the paper analyzes the definitions of the Brazilian company and the Brazilian company of national capital, explaining how the Constitution allows discrimination against the Brazilian company, especially in the field of high technology.

The paper also identifies ordinary laws which discriminate against foreign participation, whether these were enacted before the 1988 Constitution (computer software, for instance) or after (information technology, for instance). The paper further describes the major intellectual property issues that concern holders of valuable intangible assets.

The paper also describes the regime that non-residents face in bringing investment into the country, the regime in remitting service payments, profits and capital and the restrictions on international royalty and fee payments for patents, trademarks, technology and computer software. The paper further analyzes the restrictive definitions of activities allowing for the registration and repatriation of foreign capital, rigorous foreign exchange controls and the considerable discretionary powers of the bureaucracy in deciding which transactions will be granted hard currency.

Finally, the paper briefly identifies obstacles to foreign investment deriving from deficiencies in the legal system and from economic factors, such as the cost of capital and labor, taxation and a deteriorating infrastructure.
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FOREWORD

This report was finalized in September of 1992. A few days after its completion, President Collor was impeached, following a corruption scandal. He was succeeded by his Vice-President Itamar Franco. The new President has not abandoned the reforms initiated by his predecessor. Progress, if at a slower pace, continues to be made in some areas, such as privatization, while there are signs of reversal in others, telecommunications and information technology for instance. Since the completion of this report, there have been few changes of significance in the policy regime for foreign investment. However, further changes may well occur as part of the process of constitutional revision, which is to be initiated today.

As the report discusses, the Collor Administration had submitted a number of bills to Congress that would have continued to liberalize the regime for foreign investors. Prominent among these was the Emendão, proposing important changes to the Constitution. Some of these bills -- like the bill to reform the ports and the bill on public bids -- have been signed into law. Others -- like the patent and trademarks bill -- are likely to be approved. But others are condemned to fall into oblivion -- like the bills that constitute the Emendão. While these latter bills may have died, the proposals they contain nonetheless continue to indicate some of the main reforms necessary to provide a solid legal foundation to a liberalized regime for foreign investment.

Georges Charles Fischer
Susan Christina Forster

October 6, 1993
EXECUTIVE SUMMARY

Historically, Brazilian attitudes toward foreign investment have been cautious and at times hostile. Numerous constitutional, legal and bureaucratic obstacles have stood in the way. Some specifically circumscribed foreign investment, others just provided powerful disincentives -- by heavily taxing the repatriation of profits, for example.

The Collor Administration, coming to power in early 1990, undertook substantial reforms to establish a more liberal economic order, many of which profoundly favored foreign investors. However, many obstacles remain, some of which would be removed if Congress passed the proposed Emendão ("Large Amendment") to the Constitution.

The obstacles to foreign investment discussed in this paper are divided into five main areas: constraints on specific activities deriving from the Constitution; similar constraints deriving from ordinary laws; controls on foreign investment; intellectual property issues; and a group of other factors relating to the legal system and economic issues. Each is considered in turn.

Constitutional Restrictions

The 1988 Constitution represents a landmark in Brazil’s political evolution, innovating in areas as diverse as political and social rights, tax reform and the structure of government. But reflecting the broad consultative process that went into the preparation of the document and the broad range of interests it had to reconcile, the Constitution is a prolific, overly-detailed and at times ambiguous document. It decreed certain state monopolies and quasi-monopolies, reserved certain activities to Brazilian nationals or local residents and permitted ordinary law to create further restrictions. In addition, as a practical matter, it allowed the state to monopolize certain public services.

Monopolies. Most activities related to the extraction and processing of oil, natural gas, and nuclear mineral ores and minerals are a formal monopoly of the federal government. These activities may not be delegated to third parties. On the other hand, this list cannot be extended by simple legislation (as it could under the previous Constitution). The Emendão would open certain prospecting, refining and transportation activities to third parties, at the government’s discretion.

Public Services. Under the 1988 Constitution, the government must provide certain public services directly or through third parties. A number of these services -- "quasi-monopolies" -- must be provided exclusively by federal or state governments or public enterprises. Telecommunications, nuclear power and local gas distribution are quasi-monopolies. Other public services may be sub-contracted to private suppliers, but in practice this seldom happens. These services include sound and image broadcasting, remaining telecommunications services, electric and hydroelectric power, air and aerospace navigation and airports, railways and waterway transportation, inter-state and international highway transportation, ports and use of radioisotopes. (Postal and national air mail services remain something of a gray area in terms of the above categorization.) The government has been opening certain telecommunications services to the private sector, although court challenges to this reform have so far slowed down private entry.
Activities Reserved to Brazilians or Local Residents. The Constitution reserves some activities, either totally or partially, for Brazilians or local residents. These include newspapers, radio and TV, mining, as well as ship suppliers and owners. Other constitutional restrictions -- less absolute inasmuch as they require additional legislation -- govern foreign participation in local financial institutions, health care and rural property.

Market Reserves. The new Constitution also elevated to constitutional status the traditional distinction between foreign and locally-controlled firms: it defined a "Brazilian company" as any one incorporated and having its administrative headquarters in Brazil and a "Brazilian company of national capital" as one that is, in addition, locally controlled. This distinction, creating an exception to the normal principle of equality before the law, permits the passage of new laws granting "temporary protection and benefits" to Brazilian companies of national capital whose activities are deemed "strategic to national defense or vital to the development of the country". The provision also provides the basis for the creation of new "market reserves" in high-technology sectors and validated the 1984 Information Technology Law (under which foreign participation could not exceed 30 percent of equity).

Other Legal Restrictions

New laws passed since 1988 -- a 1991 amendment to the Information Technology Law and a 1992 law on audio-visual works -- apply the above provisions to establish incentives which favor locally-controlled firms. At the same time, the government continues to apply several pre-1988 laws whose provisions discriminate against foreign participation in a way that does not accord with the provisions of the 1988 Constitution. These apparently unconstitutional laws cover highway transportation, private security companies and software, among others. That they continue to be applied is a reflection, among other factors, of the reluctance of the bureaucracy -- some agencies more than others -- to change its practices.

Controls on Foreign Investment

Significant reforms have been achieved in this area, but several restrictions still remain. Many of these are based on the 1962 Foreign Capital Law, which still regulates foreign investment in conjunction with powerful Central Bank Ordinances.

Foreign Remittances. Regulations severely limit foreign remittances, which unless expressly allowed by Central Bank Ordinances, require the Bank's prior approval. The Central Bank's approval process is highly discretionary and it is time-consuming and costly for applicants. Traditionally, the Central Bank has recognized as foreign capital -- for the purpose of registration, remittance of dividends and repatriation of capital -- only "productive" and "economic" activities, which do not for example include many financial-market operations. This is a particular problem in a country with high nominal interest rates. However, recent ordinances have proven less restrictive and removed some discretion.

Investment in Kind. Traditionally cautious in allowing productive assets to qualify as foreign capital, the Central Bank has now taken a slightly more liberal stance towards tangible goods, but it remains excessively cautious towards intellectual property. The infrequency with which intellectual property has been used to contribute to foreign
equity reflects tax penalties and other restrictions on technology transfer and related remittances.

"Contaminated Capital". The restrictive Central Bank definition of foreign capital creates what is known as "contaminated capital" which is ineligible for repatriation or registration. "Decontamination" remains discretionary and expensive.

Other Foreign Capital and Exchange Issues. Profit repatriation is also a source of concern, facing high withholding taxes (25 percent), in addition, until recently, to further punitive tax levies. However, beginning January 1, 1993, income tax on profits and dividends distributed to foreign investors are to be reduced to a flat 15 percent. Similarly, corporate reorganizations and the resulting repatriation of capital were until recently treated unfavorably by the Central Bank. The Central Bank still regulates (and intervenes in) international loans. From 1992, technology-related remittances (royalties and so on) from subsidiaries to controlling companies abroad were not only permitted (for new contracts only) but for the first time became deductible expenses. But the tax regime for these transactions remains unfavorable. Finally, the legality of certain foreign exchange dealings remains highly controversial, the result of the many regulations that have been passed in this area.

Intellectual Property Issues

Brazil is a signatory to the Paris, Bern and Geneva Conventions which establish agreed norms for protecting intellectual property. A number of factors have, however, given the country an unfavorable reputation in the area of intellectual property protection, though this has not been wholly justified. First, certain kinds of inventions, notably pharmaceuticals, completely lack protection. Second, Brazilian law establishes apparently permissive provisions for compulsory licensing, though in practice these provisions have been seldom applied. Third, forfeiture for lack of exploitation of a patent need not be preceded by compulsory license. Fourth, foreign trademarks which have not been filed in Brazil are not well protected. Fifth, there are concerns about the copyright protection of computer software. These have diminished, but not vanished, since the passage of the Software Law in 1987. Sixth, there is no adequate legal recourse to protect trade secrets (confidential unpatented information and business secrets). In the past, in addition, INPI (the industrial property rights agency) sought effectively to deny the trade-secret nature of international technology-transfer agreements. This policy was abandoned, though not entirely, in 1991.

Other Factors

A variety of other factors act as barriers to foreign investment and, indeed, business activity in general. There are substantial deficiencies in the legal and administrative systems. The judiciary lacks resources and is overburdened, partly because of the flood of cases in response to the emergency economic policy measures of the last few years. Arbitration is little used as an alternative to the courts because existing laws frustrate the process. Brazil’s bureaucracy continues to enjoy large discretionary powers which have made Brazil a difficult place to do business.
Other barriers are more purely economic. Under conditions of pervasive macroeconomic instability, the government has in the past manipulated price indexes and applied price controls the fear is that these practices may resurface. Taxes and the cost of capital, construction and materials are high. Charges and taxes on labor are excessive. There has been a steady decline in the quality of Brazil’s infrastructure in the recent past.

Conclusions

Despite the considerable policy reforms introduced since 1990, many and varied obstacles to foreign investment remain. Some of these obstacles were addressed by various constitutional amendments (the Emenda) and bills that the government has proposed to Congress since 1990. Many of these proposals have not been passed.

The Emenda proposed severely to restrict the federal government’s monopoly, to permit these monopolized activities to be sub-contracted to private firms and to delete the constitutional distinction between Brazilian companies and Brazilian companies of national capital. Various bills placed before Congress sought: to establish a new more liberal foreign investment law; to amend the industrial property code; to improve protection to software; to protect semiconductor chips; and to introduce new arbitration rules.

In addition, it is also within the powers of the government to reduce the problem of bureaucratic “drag”. The administration could direct its organs to update the administrative rules that guide their behavior so that it is consistent with the 1988 Constitution. A legal opinion from the General Counsel of the Republic could also, in contentious cases, help change bureaucratic behavior.

The continued momentum of policy reform is not, however, assured. The political uncertainties in Brazil are substantial and the extent to which the government will maintain the existing reforms or continue to pursue new reforms is difficult to predict.
I. INTRODUCTION

1. When President Fernando Collor de Mello was sworn into office in March 1990, he immediately began to implement his campaign promise: to liberalize the Brazilian economy and to redefine the state’s role as a catalyst and participant in the country’s industrial growth. His policies included:

- removing barriers to hundreds of foreign imports which had faced prohibition or "suspension" for decades;
- a gradual reduction of import duties, designed to allow local industry to adapt to the new competitive environment;
- the end of price controls;
- reducing income tax rates on repatriated profits and clarifying Central Bank policy on foreign investments;
- a new industrial and foreign commerce policy, outlined in the Industrial Competitiveness Program and the Brazilian Quality and Productivity Program;
- amending the 1984 Information Technology Law in order to end the market reserve and to permit greater foreign participation in joint ventures;
- new technology transfer rules which facilitate the access of local companies to foreign technology;
- a privatization program.

2. Though many of these policies have been either totally or partly implemented, much remains to be done to transform Brazil into an open economy. The Collor Administration has, therefore, submitted a number of relevant bills to Congress. If these are approved, they will provide a solid legal foundation to the new policies.

3. This paper describes the major legal obstacles that still thwart foreign capital investments in productive activities in Brazil. When applicable, it identifies the steps that are being taken, or could be taken, to remove these barriers. The paper addresses the following topics:

- Restrictions on foreign participation imposed by or derived from the Constitution in the form of state monopolies in specific activities or general controls on private or foreign ownership.
- Restrictions on foreign participation in specific activities arising from the application of ordinary laws.
- Controls on resource flows in and out of the country that relate to foreign investments.
- The regime for protecting intellectual property as it relates to foreign investment.

- Other factors that inhibit foreign investment.
II. CONSTITUTIONAL RESTRICTIONS

4. Brazil's eighth Constitution is a prolific and ambiguous document. It is sprinkled in some parts with declarations of principle and in others provides detailed regulations that smack of over-concern with immediate interests. It is at the same time both markedly progressive and surprisingly retrogressive at times unreal. The Constitution reflects both the affirmation of certain basic principles and its own populist roots. It reflects the cohabitation of modernity and outmodedness that characterizes the country and the Constituent Assembly that drafted the document.

5. Throughout its 245 articles and 70 transitory provisions, the 1988 Constitution assured individuals of a long list of fundamental rights and created new mechanisms for the defense of the citizen, such as the writ of injunction, the "habeas data," and the collective writ of "mandamus". It introduced a series of new labor rights, including the reduction of the working week to 44 hours. It decreed an extensive tax reform aimed at the decentralization of power. It strengthened Congress, permitting it greater control over the Executive Branch. It limited interest rates to 12 percent per year. And it solemnly announced that the market is a national asset. Thus, the 1988 Constitution is a landmark in the political evolution of Brazil, providing a structure to consolidate a truly democratic society even though it contains numerous defects.

6. If the text of the 1988 Constitution is excessively long and replete with rules that are not exactly of a constitutional nature, this is due to the open process through which it was created, with very wide participation from numerous segments of society. The process permitted the civilian population as a whole to gain a healthy awareness and expansion of its fundamental rights, elements essential to the exercise of active citizenship and democracy. The open process was also beneficial to the more organized and politically active groups, although not always to the good of society in general.

7. The ambiguous language and frequent postponement of certain issues (to be resolved by complementary or ordinary law) merely reveal the magnitude of the conflicts of interest reflected in the 1988 Constitution. At times, delayed confrontations or the use of imprecise language were the only available compromises. Naturally, the result has been a juridically imperfect text.

8. In this paper we shall analyze, without losing perspective of the whole, only those provisions of the 1988 Constitution that deal with restrictions on foreign participation. These provisions are summarized in Box 1. Basically, the Constitution created a number of monopolies and quasi-monopolies. It also required that certain public services be entrusted to the state and reserved certain economic activities, either totally or partially, to Brazilian nationals or residents. In addition, the Constitution expressly allowed ordinary law to create further restrictions on foreign participation in local companies.
Box 1. A Summary of Constitutional and Legal Restriction on Foreign Investment by Sector

<table>
<thead>
<tr>
<th>Monopolies Activities reserved to the Union</th>
<th>Oil Natural Gas Nuclear mineral ores and minerals</th>
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<tbody>
<tr>
<td>Quasi-monopolies Activities reserved to the Union, member States or State controlled companies</td>
<td>telephone, telegraph, data transmission &amp; other public telecommunication services; nuclear facilities and services; and operation and distribution of local services of piped-in gas.</td>
</tr>
<tr>
<td>Other Public Services Activities reserved to the State, which may be explored by private enterprise through authorization, concession or permission</td>
<td>sound &amp; image broadcasting and retransmitting; telecommunication services; electric power services; air navigation; airport infrastructures railway, waterway &amp; highway transportation; ports; etc.</td>
</tr>
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### Constitutional Restrictions

#### Public Services

<table>
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<th>Absolutes Restrictions on foreign participation which may not be attested by law.</th>
<th>Absolute Prohibitions</th>
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<tr>
<td>newspaper, sound &amp; image broadcasting; ship owners, captains and crew of Brazilian vessels; coastal &amp; internal navigation; prospecting &amp; mining of mineral &amp; hydraulic resources.</td>
<td>newspaper, sound &amp; image broadcasting; ship owners, captains and crew of Brazilian vessels; coastal &amp; internal navigation; prospecting &amp; mining of mineral &amp; hydraulic resources.</td>
</tr>
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</table>

#### Activities Reserved to Brazilians or Local Residents

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<th>Relative Restrictions on foreign participation which may be attested by law.</th>
<th>Relative Restrictions</th>
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<tr>
<td>financial institutions, insurance, pension, and capitalization companies; health care; rural property.</td>
<td>financial institutions, insurance, pension, and capitalization companies; health care; rural property.</td>
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</table>

#### New Market Reserves

| Information Technology Audiovisual Works Highway Transportation Security and Transportation of Values, Software, etc. | Information Technology Audiovisual Works Highway Transportation Security and Transportation of Values, Software, etc. |

### Monopolies

9. The following activities were reserved as monopolies of the federal government (the Union):

- prospecting and exploitation of oil and natural gas deposits and other fluid hydrocarbons;
refining of Brazilian or foreign oil;

- imports and exports of products and basic by-products resulting from the activities mentioned above;

- ocean transportation of crude oil and basic oil by-products produced in Brazil and pipeline transportation of oil, its by-products natural gas of any origin; and

- prospecting, mining, enrichment, reprocessing, industrialization trading of nuclear mineral ores and minerals and their by-products.²

10. Even though monopolized activities are reserved to the Union, the way the monopoly has been implemented is varied. Oil prospects are explored through PETROBRAS, a state-controlled company whose shares are traded on the stock exchange. However, the Union’s monopoly does not extend to distribution, which is currently under the control of several private companies, many of them foreign. Refineries in operation before 1988 were also grandfathered into the private sector.³ Likewise, risk contracts for oil prospecting, executed by PETROBRAS before the enactment of the 1988 Constitution, were validated. However, the 1988 Constitution prohibited the Union from assigning or granting to third private parties any sort of participation, whether in kind or money, in the exploitation of oil or natural gas.⁴

11. Notwithstanding the three constitutional monopolies mentioned above, the 1988 Constitution is less "monopolistic" than its predecessor. While the latter expressly allowed monopolies to be created by law,⁵ the 1988 Constitution did not permit legislators to enlarge the list of monopolized activities. New monopolies require constitutional amendment -- as does the removal of existing monopolies.⁶

12. In 1991, the Collor Administration submitted to Congress a Bill, the Emendão (literally "Big Amendment"), that would provide for a major amendment to the Constitution. If approved, this would limit the Union’s monopoly to (i) prospecting for and exploitation of deposits of oil and natural gas and other fluid hydrocarbons; and (ii) the conversion, reconversion, enrichment, reprocessing industrialization of nuclear mineral ores and minerals and their by-products.⁷

13. Under the Emendão, the Union would continue to enjoy its former monopolies, either directly, or through concessions or permissions to private enterprise. The novelty of the Emendão resides in the opening to third parties (including companies under foreign control) of existing monopolized activities. These activities include:

- refining of national or foreign oil, ocean transportation of Brazilian crude oil or oil by-products, as well as pipeline transportation of crude oil, its by-products and natural gas of any origin;

- imports and exports of products and basic by-products resulting from the prospecting and exploitation of oil and natural gas deposits and other fluid hydrocarbons;
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prospecting, mining and trading of nuclear ores, as well as nuclear services and installations of any kind.8

Clearly, Congressional approval of the Emendaõ could significantly reduce the list of monopolized activities.

Public Services

14. The 1988 Constitution determined that, subject to applicable ordinary law, it is incumbent upon the Government to provide certain public services, either directly or through concessions or permissions preceded by a bid.9 Not all services that one would ordinarily think of as public are subject to governmental concession or permission. Health care and education may, for example, be undertaken by private business (although these activities may still remain under government supervision).10

15. Quasi-monopolies. Nonetheless, certain public services are provided exclusively by the Government or by companies under direct government control and, therefore, as a practical matter, constitute monopolies. The following services are quasi-monopolies:

- Telecommunications. The operation of telephone, telegraph, data transmission other public telecommunications services: these services may be provided solely by the Union itself or state-controlled companies (which does not preclude foreign equity participation).11

- Nuclear power. The operation of nuclear facilities and services of any nature: these services are reserved directly to the Union itself.

- Gas. The operation and distribution of local gas pipeline services: local gas services are provided through the member States, which may do so directly, or through a concession to a state company.12

16. Other public services. The Constitution also reserves an additional seven public services to the Union. These services may either be provided by the Union or, unlike quasi-monopolies, through an authorization, concession or permission to private business.13 The seven services are:

(a) sound and image broadcasting services and the remaining telecommunications services;
(b) electric power services and facilities and use of hydroelectric energy;
(c) air and aerospace navigation and airport infrastructure;
(d) railway and waterway transportation services between Brazilian ports within national boundaries or beyond State or Territory borders;
(e) interstate and international passengers’ highway transportation services;
(f) sea, river and lake ports;  

(g) use of radioisotopes for research and medical, agricultural, industrial and analogous uses.\textsuperscript{14}

17. In addition to the public services incumbent on the Union, the member States and Municipalities must also render public services either directly or indirectly by granting concessions or permissions to state controlled companies or private business. While state monopolies and quasi-monopolies require direct state exploration or control, the provision of other public services may be delegated to private business and allows for foreign participation. As a practical matter, however, past governments only seldom agreed to delegate public services to private business.\textsuperscript{15}

18. Postal and national air mail services remain controversial. The 1988 Constitution established that these activities are incumbent on the Union. It is unclear, however, whether they constitute a quasi-monopoly, whether they may be performed by private enterprise by means of concessions, permissions, or authorizations, or whether they may be freely performed in competition with the Union, without requiring any governmental approval.\textsuperscript{16}

19. Reform proposals for telecommunications. Changing the regulations on quasi-monopolies would require a constitutional amendment. In fact, the Emendão proposes important changes in the telecommunications field. Currently, telephone, telegraph, data transmission and other public telecommunications services are treated as quasi-monopolies,\textsuperscript{17} while the remaining telecommunications services may be either provided directly by the Union and companies under its control or by private business, subject to authorization, concession, or permission, as the case may be.\textsuperscript{18} Basically, the Emendão proposes that telephone, telegraph, data transmission and other public telecommunications services be opened to private business, subject to the Union’s concession or permission.\textsuperscript{19}

20. The difficulty in drawing a clear boundary between public telecommunications and remaining telecommunications services controversies over the effectiveness and applicability of the Brazilian Telecommunications Code of 1962,\textsuperscript{20} has led political parties (led by associations of state employees) to challenge liberalization in both the Courts and Congress.\textsuperscript{21} These challenges seek to block several initiatives of the Collor Administration:

(a) the termination of EMBRATEL’s virtual monopoly in the provision of data communications services;

(b) regulations allowing private business to provide so-called limited services;

(c) authorization for private business to provide mobile cellular telephone services; and

(d) regulations covering telecommunications services by satellite, as well as the construction, launching and operation of corresponding Brazilian satellites.\textsuperscript{22}
21. The ensuing uncertainties have discouraged private entrepreneurs, national and foreign, from taking full advantage of the new regulations, specially with regard to the end of EMBRATEL's virtual monopoly. Approval of the *Emendão* would end these uncertainties.

Activities Reserved to Brazilians or Local Residents

22. The Constitution has reserved certain activities, either totally or partially, to Brazilians or local residents. Some restrictions (absolute constitutional restrictions) were exhaustively covered by the Constitution; others (relative constitutional restrictions) were delegated to legislators.

23. **Absolute constitutional restrictions** on foreign participation are those that cannot be modified by ordinary legislation, since they contain self-enforcing dispositions. They can only be removed by amending the Constitution. Absolute constitutional restrictions cover the following areas:

(a) Newspaper and sound and image broadcasting companies must be owned by native Brazilians or individuals naturalized for more than ten years. The owners must also be responsible for the management and intellectual guidance of these companies.

Legal entities may not participate in the capital of newspaper and radio broadcasting companies, except where the capital is held exclusively and in name by Brazilians or political parties. Even this participation is limited: it must be represented by non-voting stock may not exceed 30 percent of the total capital stock.

These restrictions were extended to news agencies as a result of a flagrantly erroneous reading of the 1988 Constitution and of positive ordinary law.

(b) Chandlers, ship owners, captains at least two thirds of the crew of Brazilian vessels must be Brazilian (either native or naturalized). In addition, ordinary law establishes that when ownership of the vessel is held by legal entities, its registration (which is mandatory) is contingent upon 60 percent of the legal entity’s voting stock being held by native-born Brazilians.

This requirement predated the 1988 Constitution and has now become clearly unconstitutional. Nevertheless, it is still regularly applied by the Port and Maritime authorities.

(c) Coastal and internal navigation is reserved for Brazilian vessels. Exceptions must be made by law solely on the basis of public need.

(d) Only Brazilians or "Brazilian companies of national capital", as defined below, may prospect and mine mineral resources and exploit hydraulic resources. These activities can only be undertaken with the Union’s authorization or concession. All mineral deposits and all other mineral and hydraulic-energy resources belong to the Union. Concessionaires are assured only the fruits of their labor, that is, the mined product.
The new rules are more restrictive than those of the former Constitution. However, the 1988 Constitution granted companies operating in this field a four year grace period (from October 5, 1988) to become locally controlled "Brazilian companies of national capital" (see paragraph 26). Alternatively, companies had four years to industrialize, within Brazil, the product they mine. Similarly, holders of hydraulic energy concessions had four years to use the energy produced in their own industrial processes in Brazil.

The 1988 Constitution also exempted companies that might not be locally controlled ("Brazilian companies" as defined in paragraph 26) seeking prospecting authorizations and mining or hydroelectric concessions, provided the mined product and energy are used in their respective industrial processes.

These exceptions provide the only mechanism whereby foreign capital can participate in these activities, without entering into a joint venture with local capital. However, the Emendão would remove these limits on foreign participation. The prospecting and mining of mineral resources and the use of hydraulic resources would remain, however, subject to concessions or authorizations from the Union.

24. Relative constitutional restrictions on foreign participation, unlike absolute constitutional restrictions, require complementary or ordinary laws for full implementation. Likewise, they can be modified or, for all practical purposes, removed by complementary or ordinary law. These restrictions exist in the areas of financial institutions, health and rural property.

(a) The participation of foreign capital in local financial institutions, insurance, pension and capitalization companies must be regulated by a complementary law that takes into account in particular national interest and international agreements. Until such legislation is enacted, foreign financial institutions are prohibited from opening new branches and foreign residents may not increase their equity participation in financial institutions headquartered in Brazil.

These limitations do not apply to authorizations resulting from international agreements, reciprocity agreements or agreements of interest to the Brazilian Government. As a result, the Government need not necessarily await Congressional passage of the relevant law before authorizing new institutions or allowing increased equity participation in existing joint ventures.

Though the Constitution did not specifically impose these limitations on insurance companies, the Superintendency of Private Insurance (SUSEP) does in fact follow these rules. In addition, the Reinsurance Institute of Brazil (IRB) exercises a de facto monopoly on all reinsurance activities, which the Federal Government (together with SUSEP and IRB) recently proposed to end. This proposal includes opening insurance, pension and capitalization companies to foreign capital. However, implementation of these measures requires Congressional approval.
(b) Except as otherwise established by ordinary law, both the direct and indirect participation of foreign companies or capital in health care is prohibited by the Constitution.  

(c) Similarly, the Constitution establishes that the acquisition or lease of rural property by foreigners shall be regulated and restricted by law. This law will also define the transactions subject to Congressional authorization.

Until this law is passed, the general rule is that only Brazilians may acquire rural land in Brazil. Acquisition by aliens, branches of foreign companies and Brazilian companies under foreign control is subject to numerous governmental approvals and faces both quantitative and territorial restrictions.

New Market Reserves

The 1988 Constitution potentially harbors a much more ample and encompassing restriction on foreign participation in local activities: subject to certain requirements, the Constitution allows ordinary law to discriminate against foreign-controlled companies, even if they are incorporated in Brazil. The 1988 Constitution abolished the former terminology of "national" and "non-national" companies, euphemistically renaming them "Brazilian companies of national capital" and "Brazilian companies", respectively.

Article 171 of the Constitution, defining the two types of companies and the distinction in their treatment, is reproduced in Box 2. In brief, a Brazilian company is one with its head-office and management in Brazil, while a Brazilian company of national capital is one with its head-office and management in Brazil and where effective control (51 percent of voting stock plus legal and "de facto" management control) is ultimately held by individuals domiciled in Brazil. The latter company may be granted special temporary protection and benefits by law. In fact, the 1988 Constitution maintained the same basic criteria inscribed in ordinary law since 1940 for defining the nationality of legal entities. This general definition applies to most cases. However, the distinction between Brazilian companies and Brazilian companies of national capital created an exception to the normal principles of equality before the law and freedom of enterprise. In so doing, it eliminated questions of legal doctrine that had arisen in the past by enshrining the distinction in the Constitution.

It would have been better if the Constituent Assembly had named the Brazilian company of national capital a company under local control, since the definition in Section II of Article 171 clearly focuses on this aspect.

In fact, effective control of a company’s voting stock, as required by Section II of Article 171, can occur even when as little as 17 percent of its capital is held by individuals domiciled in Brazil (who need not be Brazilian natives or even naturalized). Corporation Law authorizes the issuance of preferred stock with absent or restricted voting rights up to a total of two-thirds of the stock issued by the corporation. Thus, if only 33 percent of a company’s stock has voting rights, individuals domiciled in Brazil need hold only 17 percent of the total stock (i.e. 51 percent of the 33 percent) to retain control. Moreover, since the 1988 Constitution explicitly refers to indirect control (see Article 171,
II), even more reduced capital participation by individuals domiciled in Brazil is possible. For example, if this same controlling 17 percent of the stock is wholly in the hands of a holding company which is a Brazilian company of national capital, this could, in the extreme case, result in final capital participation of individuals domiciled in Brazil of no more than 2.9 percent in the operating corporation.

Box 2. Provisions of the 1988 Constitution on Brazilian Companies and Brazilian Companies of National Capital

"Article 171. - The following concepts shall apply:

I - A Brazilian company is a company organized under Brazilian law and having its head-office and management in Brazil.

II - A Brazilian company of national capital is a company whose effective control is directly or indirectly held permanently either by individuals resident and domiciled in Brazil or by domestic public entities, provided that effective control of a company shall mean ownership of the majority of its voting capital and de facto and legal exercise of the decision-making power to manage its activities.

Paragraph 1. - The law may, with regard to a Brazilian company of national capital:

I - grant special temporary protection and benefits for the conduct of activities deemed strategic to national defense or vital to the development of the country;

II - establish, whenever it deems a sector vital to national technological development, the following conditions and requisites, among others:

a) the requirement that the control mentioned in item II of the main provision be extended to the company's technological activities, this being understood as de facto and legal exercise of the decision-making power to develop or absorb technology;

b) percentages of capital participation by individuals domiciled and resident in Brazil or domestic public entities.

Paragraph 2. - In the acquisition of goods and services, the Government shall give preferential treatment to Brazilian companies of national capital, according to the terms of the law.

29. Clearly, the Constituent Assembly's preoccupation was not so much with the origin of the capital as with the effective control of the company. A good example of this is in the field of telecommunications. The Union holds about 58 percent of the voting stock of TELEBRAS, but less than 23 percent of its total capital.

30. In principle, Brazilian (foreign-controlled) companies and Brazilian companies of national capital (ultimately controlled by individuals domiciled in Brazil) are subject to the same legal treatment. The Constitution, however, established that in the case of activities
considered to be strategic for national defense, or activities essential to the development of the country, the law (and not merely administrative acts) may grant transitory protection and special benefits to Brazilian companies of national capital. Thus, any existing or future discrimination in favor of the Brazilian company of national capital of a permanent nature or not based on these two criteria is unconstitutional.

31. Furthermore, in sectors vital to national technological development, the law may require the company to fulfill conditions in addition to those established by the 1988 Constitution in order to be considered a Brazilian company of national capital (items a) and b) of Section II, Paragraph 1 of Article 171 constitute only examples of the kind of conditions that may be required). These requirements could make foreign capital participation in certain sectors very difficult or even impossible, thus creating new "market reserves" (in the information technology field, for example). The extent to which this will happen depends upon the passage of statutory laws.

32. Thus, the 1988 Constitution has, de facto, created, in addition to the Brazilian company and the Brazilian company of national capital, a third type of legal entity, the Brazilian "high-technology" company: any Brazilian company of national capital active in a field deemed essential to the country’s technological development. In such a company, foreign equity participation may be restricted by law to low percentages (or, conceivably, even prohibited) and may also face other requirements.

33. The creation of the Brazilian "high-technology" company resulted largely from successful lobbying by Brazilian information technology companies to validate the 1984 Information Technology Law. That law limited foreign equity participation in what were then called national companies to a maximum of 30 percent of usually non-voting stock. It also required that, in addition to capital control, decision-making and technological control be permanently, exclusively and unconditionally held by individuals domiciled in Brazil. The 1984 Information Technology Law has already been amended in this regard. Needless to say, foreign investors are often reluctant to make substantial capital or state-of-the-art technology investments in companies where they possess only minority voting stock status. As a result, control has often been assured through indirect mechanisms.

34. Once again, the Emendão addresses the discrimination contained in Article 171 of the 1988 Constitution by proposing that reference to the Brazilian company of national capital and to the Brazilian "high-technology" company be simply deleted. As a result, Article 171 would read as follows:

"Article 171. - A Brazilian company is a company organized under Brazilian law and having its head-office and management in Brazil."

Should the new approach be approved, ordinary legislators would, in principle, lose the power to discriminate against foreigners: all companies incorporated in Brazil would receive equal treatment.
III. OTHER LEGAL RESTRICTIONS

35. As explained above, the 1988 Constitution authorized ordinary legislators to extend special protective measures and benefits to Brazilian companies of national capital, to the detriment of Brazilian companies (i.e., companies under foreign control). These measures and benefits must be justified as "strategic to national defense or vital to the development of the country" and must be temporary. New laws have already been enacted based on this constitutional discrimination. On the other hand, several laws enacted before 1988 clearly do not satisfy these requirements, yet continue to be applied by the relevant governmental agencies.

New Laws

36. Since the enactment of the 1988 Constitution, Congress has approved the President sanctioned, additional laws that extend protection and privileges to Brazilian companies of national capital. Two of these are discussed below.

37. A 1991 law amended the Information Technology Law of 1984, adopting the constitutional concept of Brazilian "high-technology" companies and defining effective control of the company as "the direct or indirect ownership of a minimum of 51 percent of the voting capital and the legal and 'de facto' decision-making power for management of its activities, including those of a technological nature". This amendment also eliminated, as from October 29, 1992, the controls on imports and on manufacturing projects in the information technology field that the Science and Technology Secretariat exercised.47

38. The new law also created a number of special benefits for Brazilian high-technology companies (see Box 3). In principle, two of these benefits are also available to mere Brazilian companies, but the requirements for access are greater (see note 3 of Box 3).

39. This law also establishes that the most relevant of the above benefits, the IPI (Federal Tax on Industrialized Products) exemption, shall, starting October 29, 1992 (according to some specialists, March 1993), be granted case-by-case to selected products.48 Obviously, this provision leaves considerable room for discrimination, even against less influential Brazilian companies of national capital. In addition, the IPI exemption is to be extended solely to products manufactured in Brazil, excluding foreign imports which also already face import tariffs (40 percent for finished information technology goods as of October 1, 1992). This discrimination violates the GATT (General Agreement on Tariffs and Trade).49 Moreover, the legislators were careful to limit these privileges, so as to avoid any claim of unconstitutionality in regard to the non-permanent element -- the last of these benefits, the IPI exemption, should expire in 1999.50
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<th>Box 3. Benefits Accorded to Information Technology Activities under law 8,248 of 1991</th>
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<td><strong>Brazilian Company of National Capital (BCNC)</strong>&lt;br&gt;(2)</td>
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<td><strong>Free activity in the market, with manufacturing projects and import licenses for a number of products approved by Secretariat of Science and Technology (SST) up until 10/29/92.</strong></td>
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<td><strong>Joint Venture (2)</strong></td>
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<td><strong>Brazilian Company (BC) (3)</strong></td>
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Box 3. Benefits Accored to Information Technology Activities under law 8,248 of 1991

Notes:

(1) Calculated on amount of R&D in Brazil, the donation of Information technology goods and services being excluded. Valid until fiscal year 1997.

(2) To benefit from the Law, Brazilian companies of national capital (including joint ventures formed as Brazilian companies of national capital) must allocate five percent annually of their in-country gross sales of information technology goods and services (less the applicable taxes) to R&D activities in Brazil. At least two percent must be allocated to Brazilian research centers or official educational entities. Donation of information technology goods and services is not considered to be R&D activity.

(3) To benefit from the Law, the Brazilian company must present to the National Council on Information Technology and Automation (CONIN): staff training programs in product and production process technology; R&D investment programs identical to those required from a Brazilian company of national capital (see item 2, above); and export programs.

(4) This benefit is to be extended for 7 years, as of 10/29/92, for information technology goods manufactured in Brazil, according to a list to be proposed by CONIN for approval by the Executive Branch, which must take into account local value added, indicators of technological capacity, price, quality, and international competitiveness.

(5) This is a one percent income tax deduction benefitting those acquiring new shares issued by information technology Brazilian companies of national capital (including joint ventures formed as Brazilian companies of national capital); the shares must remain non-negotiable for 2 years. This provision is valid until fiscal year 1997. Brazilian companies may not issue shares which grant income tax deduction to their subscribers, but may subscribe to shares of Brazilian companies of national capital and may therefore still benefit from the incentive.
40. The January 1992 law regulating audiovisual works establishes that all audiovisual works made by foreign companies must be produced under contract with Brazilian companies of national capital and must employ at least one third Brazilian artists and technicians. In addition, for a period of ten years: (i) owners or leasers of movie theaters must exhibit Brazilian motion pictures for a set number of days, to be established annually by the Government; and (ii) domestic video distributors must carry a set percentage of Brazilian audiovisual works. Public companies which provide sound and image broadcasts must dedicate 20 percent of their monthly broadcasting to Brazilian audiovisual works produced by Brazilian companies of national capital or in cooperation with foreign companies. The implementing regulation for this law were only issued in mid-1992.

41. If the Emendado does, in fact, amend Article 171 of the 1988 Constitution (Box 2 and paragraph 34 above), all discriminatory provisions of the laws on information technology and audiovisual works would, in principle, be eliminated along with the distinctions between different types of companies. But in practice, past experience might lead one to doubt such an outcome. It might be obvious to any second-year law student that legislation prior to the 1988 Constitution and materially incompatible with it would be automatically repealed. Yet much of this legislation has survived, as we discuss below, due largely to the enormous resistance of the state bureaucracy.

Old Laws in Conflict with the 1988 Constitution

42. A 1980 law restricted highway transportation to companies in which at least four-fifths of the voting stock is held by Brazilians. In addition, the management and administration of the company must be entrusted to Brazilians. This law is unconstitutional, among other reasons, because the market reserve it establishes is not temporary. Nevertheless, even after the enactment of the 1988 Constitution, the Executive Branch continued to enact Decrees and Ordinances based on the law’s provisions as if they were in full force and effect.

43. A 1983 law that regulates the incorporation and functioning of private-security and transportation-of-values companies permanently prohibits foreigners from owning or managing companies incorporated as of its enactment. Despite its unconstitutionality, an Ordinance issued this year by the Ministry of Justice itself confirms the continuing applicability of this law.

44. The Software Law of 1987 contains two permanent market reserves.

- First, only Brazilian companies of national capital are allowed to market computer programs. Companies under foreign control may sell these products only for use on hardware manufactured or commercialized by other companies under foreign control.

- Second, where local similar programs developed by a Brazilian company of national capital exist, foreign computer programs may not be registered with the Secretariat of Science and Technology. This means that their sale is prohibited in Brazil on penalty of severe criminal sanctions.
Though clearly unconstitutional, these provisions are rigorously enforced by the Secretariat of Science and Technology. In practice, the similarity test has now become nothing more than a useless and time-consuming exercise -- the Secretariat has up to one hundred and twenty days to approve requests -- since few Brazilian companies of national capital still bother to oppose the registration of foreign programs.

45. In 1991 the Executive proposed a Bill to replace the Software Law. The new legislation would eliminate both the distribution and product market reserves. It would also eliminate the need for software publishers and distributors to register their products and international distributorship agreements with the Secretariat of Science and Technology. However, the Bill treats copyright payments from subsidiaries to parents as if they were patent, trademark or royalty payments. This would make them subject to the limitations regarding tax deductibility described below.60

46. Similarly to the three above examples, exploitation of the Brazilian coastal platform, certain activities in the frontier strip, certain fishing activities, requirements relative to ownership of vessels, air transportation concessions, engineering services, etc. are all based on restrictive Laws, Decrees, or Ordinances whose constitutionality is controversial.61

Bureaucratic Resistance to Implementation of the 1988 Constitution

47. Three major reasons help to explain the state bureaucracy's resistance to full implementation of the 1988 Constitution.

- First, deregulation implies a direct loss of power for bureaucrats.
- Second, there is a significant ideological component, since many secondary- and tertiary-level civil servants are quite nationalistic.
- Third, bureaucrats tend to rely almost exclusively on administrative acts (Ordinances, Circulars, Normative Acts, Normative Instructions, Manuals, etc.) issued by their respective Ministries, Secretariats, Departments, Agencies, etc. It is not uncommon to hear businessmen and attorneys complain that a simple administrative act or Central Bank telex is worth more than the Constitution.

48. Although the two first issues cannot be addressed in the short term, this is not the case for the third. One obvious possibility is direct recourse to the Courts. Claims that involve clarification of facts are naturally expensive and time consuming, but suits that treat solely of matters of law (i.e., the constitutionality of a specific Law or Ordinance) are less costly and more expeditious. In fact, injunctive relief is often granted by courts under writs of mandamus if the rights of plaintiffs are clearly established and if delays threaten to cause irreparable damage.62

49. However, foreign investors are very cautious about direct recourse. They fear retaliation by the government body which they decide to defy. They also fear for the outcome of the claim. In addition, while foreign investors already long established in Brazil have often found a way to coexist with abusive administrative practices, newcomers do not regard going to court as an attractive way to enter a new market.
50. An alternative solution lies in the hands of the administration. It is essential that the administration coherently direct its various bodies to issue administrative acts corresponding to the new Constitution. It is precisely these administrative acts which guide the behavior of the lower bureaucracy.

51. Moreover, in controversial cases (for example the constitutionality of a law enacted before the 1988 Constitution) a legal opinion from the General Counsel of the Republic may be an expeditious solution, since that opinion, once approved by the President of the Republic and published in the Official Gazette, "acquires a normative character for the Federal administration, whose organs and entities are obliged to abide faithfully by same." In addition, the President of the Republic, the Attorney General, political parties with representation at the National Congress and unions and other entities representing interest groups at the national level, inter alia, may often lodge claims of unconstitutionality directly with the Supreme Court, thus avoiding the natural delays of the Lower, Appellate and Superior Courts.

52. Clearly, government agencies vary widely in their attitudes toward foreign investors. An example of a government agency that is doing a good job at the administrative level in removing (or, at least, clarifying) obstacles to foreign investment is the Central Bank (see the next section). On the other hand, in spite of the 1988 Constitution, the National Secretariat of Communications (which also recently enacted a number of liberalizing ordinances) persists in creating market reserves through administrative acts. For instance, it has issued an ordinance reserving the commercialization of foreign satellite capacity for telecommunications services in Brazil to Brazilian companies of national capital.
IV. CONTROLS ON FOREIGN INVESTMENT

53. It would be unfair to list the barriers that still inhibit the inflow of foreign capital without first recognizing that many have been fully or partly removed, while other reforms are in the pipeline. The discussion that follows will cover both the barriers that remain and those that have been removed.

54. The 1988 Constitution establishes that "the law shall regulate foreign capital investments, according to national interest, shall encourage reinvestments and shall regulate the remittance of profits". This should be the fundamental principle guiding the attitudes of legislators and of public administrators toward foreign capital. In this spirit, the Executive in 1990 forwarded to Congress a Bill, regulating foreign investment in Brazil, which would remove many of the disincentives. Once enacted into law, this Bill would immediately replace existing legislation and administrative ordinances that prove to be incompatible with it, including provisions of the 1962 Foreign Capital Law.

55. Until the Bill is signed into law, however, the 1962 Foreign Capital Law, as amended, remains the major piece of regulation. Foreign capital investments are also largely regulated by Central Bank ordinances, which have delegated substantial discretionary powers to the Bank's technical staff. These third-tier bureaucrats often base their discretionary decisions on internal unpublished ordinances or on undivulged administrative "jurisprudence." This practice is, however, clearly on the decline.

Foreign Capital and the Problem of Foreign Remittances

56. The 1962 Foreign Capital Law guarantees foreign capital identical treatment to that afforded to national capital and prohibits discriminatory treatment not expressly foreseen in that law. This principle was, however, openly and systematically subverted by supervening legislation and the ordinances and practices of several governmental agencies which imposed additional burdens or impediments on the inflow (and outflow) of foreign capital.

57. This Law defines foreign capital as "the goods, machinery and equipment for the production of goods or services that enter the country without initial expenditure of hard currency, as well as financial or monetary resources introduced into the country, to be applied in economic activities, provided, in both cases, they belong to individuals or legal entities resident, domiciled or headquartered abroad".

58. Though it is not mandatory to register "foreign capital" with the Central Bank, registration is a prerequisite to allowing repatriation of the investment and its fruits such as reinvestments, interest, profits, dividends and capital gains. Similarly, payments under patent, trademark, or technology and technical services contracts require Central Bank approval (preceded by approval from the National Institute for Industrial Property -- INPI).

59. Unless a specific rule expressly authorizes a given hard currency payment, that payment is subject to discretionary Central Bank approval. The general principle is prohibition: the right to remit hard currency needs to be expressly foreseen in law or administrative acts or authorized on a case-by-case basis (payments made for employees' stock-purchase plans are a
good example of a non-regulated remittance). This approval usually implies an enormous amount of bureaucracy, with time-consuming visits to regional Central Bank offices and often appointments in Brasilia, with entirely unpredictable results.

60. With the adoption of floating exchange rates (in 1988), a number of international payments no longer require case-by-case approval from the Central Bank (e.g. certain copyright payments related to computer software and several other payments for goods and services). Likewise, payments for legal, financial, economic and technical consulting services not subject to registration with INPI, up to a monthly limit of US$ 20,000, face no controls.73 But much still needs doing to free payments from bureaucratic controls.

61. Traditionally, the Central Bank has recognized as "foreign capital" only the investments channeled into "productive activities" or "economic activities". According to the Central Bank, the following activities, inter alia, do not meet these requirements: (i) investments in areas where foreign investment is prohibited by law; (ii) monies invested primarily in speculative activities, such as operations in the financial and stock exchange markets -- this does not include foreign portfolio investments74 -- and in the real-estate market; and (iii) a number of activities performed by service companies, which, as a result, cannot have their profits recognized for the purpose of remittance or reinvestment.75

62. The Central Bank's peculiar interpretation of "productive" and "economic" activities has no basis in the law. In fact, an elementary principle of juridical hermeneutics states that legal restrictions must be strictly interpreted, that is, they may not be read in a manner that amplifies a prohibition.

63. In addition despite this principle, the Central Bank has often blocked the repatriation of dividends and reinvestment of profits when these were generated from profits "preponderantly and systematically" resulting from financial operations,76 even if the investor's main activity was accepted as "productive." In a country where financial investments often render monthly nominal returns of more than 30 percent of invested capital (indexation plus interest), this is the case for many businesses. The prohibition described in this paragraph was inscribed in a mere internal unpublished Ordinance, recently supplanted by a less restrictive published Ordinance.77

64. The new Ordinance provides for the registration of reinvestments and the repatriation of profits. It grants the Central Bank discretionary powers to "curtail abusive situations in which profits are not grounded on normal and legitimate market practices."78 Only time will tell how the Central Bank bureaucracy interprets this provision (though lately the Central Bank's technical staff has been working to change it: restrictive attitude toward reinvestment and the repatriation of foreign investments and profits).

65. This Ordinance also clarifies the Central Bank's understanding of several past controversial issues, such as the capitalization of premium reserves, subscription premiums, revaluation, contingencies and profits to be realized reserves, donations and results generated by equity accounting. Again, the Central Bank still retains great discretionary powers in these matters. Moreover, the Ordinance limits the reinvestment and remittance of profits to the percentage of the registered investment, calculated on capitalized or distributed amounts. As a result, for example, profit distributions which do not match the foreign investor's share of
company equity, the payment of fixed dividends and payments to holders of founders’ shares, remain a source of concern to foreign investors. 79

Investment in Kind

66. The 1962 Foreign Capital Law allows foreign capital to be represented by both monies and goods, but the Central Bank has usually interpreted "goods" as "tangible goods" only, to the exclusion of intangible goods (patents, trademarks, copyright, unpatented technology and know-how). Paying up equity with tangible goods is subject to time-consuming bureaucratic processes which were often in the past thwarted by import-substitution policies. Yielding to the new policy of the Collor Administration, however, the Central Bank enacted a 1991 Ordinance which contains the criteria for the authorization and registration of foreign investments in kind. The Ordinance covers only goods, machinery and equipment for the production of goods and services. 80

67. The Ordinance does not cover intangible property. In this area, the Central Bank has been excessively cautious and rigid. In principle, it does not object to the registration of remittable fees due under patent and trademark licenses or to the transfer of technology agreements as equity, provided that these fees are duly approved and registered with INPI. In practice, though, the use of remittable intellectual property fees to pay in equity has been rare. 81 In the main, this is a result of:

(i) limitations on remittances and on the deductibility of payments and INPI’s administrative practices regarding payments; 82

(ii) restrictions on remittances and the deductibility of royalties from subsidiary to parent companies (these restrictions have been recently partly removed, as further explained below); and

(iii) the requirement that the capital contribution (i.e., the value of the fees actually due under the license/transfer of technology agreement) be subject to income tax at a rate of 25 percent (or a lower rate if the investment originates from a country with which Brazil has a treaty to avoid double taxation). 83 84 The theory behind this charge is that the equity investment is the product of a credit (i.e., patent, trademark, etc. fees) that, if remitted, would have been taxable. Obviously, few investors are willing to pay heavy taxes on amounts that they did not actually pocket in order to be allowed to convert a credit into an equity investment.

68. The Central Bank recently established rules for direct capital contributions through patents and trademarks. These rules require that INPI certify that these patents and trademarks exist and are in full force in Brazil. The applicable agreement must be filed with INPI, which also values the investment. This new ruling is unlikely to stimulate the payment of capital with these intellectual property rights. 85

Contaminated Capital

69. The Central Bank’s self-imposed definition of "foreign capital," coupled with the complex rules that govern its registration, often make part or all of these investments (and their
respective reinvestments) ineligible for registration and repatriation. This capital is commonly referred to as "contaminated capital". As explained above, recent changes in Central Bank rules now regulate in more detail direct capital payments with tangible goods, patents and trademarks as well as the capitalization of profits and reserves. But much remains obscure to the foreign investor. The "decontamination" of capital is contingent on the investor fulfilling the Central Bank's discretionary instructions, which invariably result in the investor being saddled with the obligation of introducing additional hard currency into Brazil.

70. The Central Bank's interpretation of what constitutes "foreign capital" can only become consistently and permanently less restrictive after the new Bill amending the 1962 Foreign Capital Law is signed into law and provided that the new law clearly adopts a more encompassing definition. In fact, among several proposed amendments to the Bill, at least one suggests that a broader definition of "foreign capital" be adopted.

Reinvestment and Remittance of Profits

71. Paradoxically, the reinvestment of profits was discouraged in the past, thus provoking the repatriation of capital. Until a December 1991 Decree which established that the average exchange rate to be used is that of the date of the capital increase, reinvested funds were converted at rates linked to the average rate calculated between the date that profits were recorded and the date of reinvestment. As a result, the amount of registered foreign capital was reduced and that reduction was magnified by the time elapsed between these two dates. In addition, capitalized net profits were taxed at the rate of eight percent until December 31, 1992.

72. Furthermore, remittance of profits was (and to a lesser extent still is) a major source of concern to the foreign investor for several reasons:

(a) Until recently, the value of the equity and shares that were still in the process of registration as investment or reinvestment was excluded for the purposes of profit remittance could only be included on the final issuance of the Certificate of Registration. A 1991 Ordinance finally allowed special authorizations for the repatriation of profits from foreign investments caught in the middle of the time-consuming registration process. (The Central Bank often has a backlog of several months of registration requests.)

(b) Profits distributed to foreign residents are subject to the withholding of income tax at source at the rate of 25 percent (or a lesser rate in cases where Brazil has signed a relevant tax treaty). Until December 31, 1991 this income was subject to Surplus Tax at 40, 50, or 60 percent according to criteria defined in the 1962 Foreign Capital Law. This heavy taxation, coupled with the general taxation on the profits and operations of legal entities, placed a considerable burden on the foreign investor.

Recent legislation eased that burden by establishing that: (a) the Surplus Tax be abolished as of December 31, 1991; (b) beginning in January 1, 1993, income tax on profits and dividends distributed to foreign investors be reduced to 15 percent (or a lesser rate where a relevant tax treaty exists); and (c) the eight percent income tax on net profits be abolished as of January 1, 1993. The same law, however, exempts from taxation profits distributed to individuals or legal entities domiciled in Brazil by companies subject to
taxation on their "real profits" ("lucro real") (which is the case of practically all companies that possess foreign investments). As a result, residents abroad would continue to be subject to income tax at the rate cited in this paragraph. Thus, the old discrimination against those residing abroad is perpetuated, despite the anti-discrimination provisions contained in the numerous international double-taxation treaties to which Brazil is a party.

Corporate Reorganizations and Repatriation

73. Corporate reorganizations have often also had negative effects on foreign investors' registered capital, since the Central Bank regarded these operations as investment liquidations and hence frequently reduced foreign capital registration. In addition, the Central Bank's practice was to require the recognition of eventual losses upon repatriation, thus thwarting remittance of the entire registered capital in cases where the investment failed. The Central Bank recently published new rules relating to corporate reorganizations (spin-offs, mergers, amalgamations amalgamations and capital contributions with shares/quotas), as well as to capital reductions followed by repatriation. These new rules allow registered investments to be added to each other in the case of mergers and amalgamations. The new rules seem less burdensome on foreign investment registration than the previous unwritten rules, since they do not require immediate reduction of amounts registered in cases of failed investments. Losses may, however, be finally imposed upon repatriation. Clearer regulations on investment losses, as well as on the remittance of capital gains, would provide reassurance for foreign investors.

Loans

74. Though international loans are beyond the scope of this paper, these loans are also subject to prior approval and registration with the Central Bank. The criteria used by the Central Bank approval and registration are subject to government policy and, like investment registration, highly bureaucratic. Interest rates allowed by the Central Bank are usually directly related to international market rates. However, in many cases fees or other financial charges are not permitted. Moreover, requests for the approval of international loans to individuals are turned down as a matter of course.

Royalty Payments

75. Legislation governing both foreign exchange and the remittance abroad of royalties from patents and trademarks as well as technology transfer fees presents further problems. The legislation especially affects transactions between subsidiaries and their parent companies.

76. Until recently, royalty payments from local subsidiaries to foreign parents for patents and trademarks were prohibited. If these payments were eventually made, the expense was deemed non-deductible. Payments for the transfer of technology (unpatented know-how) or technical services from subsidiaries to parent companies were permitted by law, although this expense was deemed non-deductible. As a practical matter, INPI seldom approved technology or service agreements between controlled and controlling companies.

77. This pattern was profoundly changed by 1991 legislation. From 1992, royalties and fees owed by a local subsidiary to its controlling company for patent and trademark licenses, as
well as technology and technical services fees, became both remittable and deductible, subject to the legally-defined limitations. These transactions remain subject to INPI’s discretionary approval and to Central Bank registration, as explained below.

78. Payments from branches (as opposed to subsidiaries) to parents remain restricted agreements registered with INPI and the Central Bank before January 1, 1992, do not benefit from the new rules. Nor may these agreements be "renegotiated" between the parties for that purpose, according to INPI. In addition, the deductibility of expenses for patent and trademark licenses and technical services fees continues to be subject to the old rules. This means, "inter alia", that: (i) deductibility is limited to a maximum of five percent of net income from the sale of the products; within that limit, the Ministry of Finance establishes percentages for each type of activity or product; (ii) fees related to the transfer of technology can be deducted only during the first five years in which the company operates (or the first five years following the introduction of a special production process) and may be extended for another five years only upon special authorization from the National Monetary Council.

79. Finally, royalty payments may not be made to foreign residents for the licensing of computer software in Brazil by companies under foreign control. The applicable remuneration may only be channelled as profits.

Foreign Exchange

80. A common complaint from foreign investors relates to the difficulty of distinguishing between legal and illegal exchange operations, since the interpretation of laws enacted between 1933 and 1986 is highly controversial. While some experts (and a number of court decisions) maintain that the parallel market is not illegal, or that leaving the country with hard currency is not an offense, the Federal Police continue to bar those attempting to leave the country carrying hard currency.

81. Recently, due to accusations of corruption involving individuals connected to President Collor, the Central Bank issued a Resolution determining that carrying of more than US$ 10,000.00 across Brazil’s borders must be reported to the Central Bank. Any remittance abroad exceeding this amount may only be made through a bank transfer. Any operation with foreign currency in excess of this limit, as well as any related transfers, may only be conducted by institutions which are part of the National Financial System and are authorized to operate in foreign exchange.

82. Even the legality of the international private compensation of credit operations remain in a limbo. Clearly, these uncertainties have had an inhibiting effect on foreign investors. Moreover, the numerous and ever-changing forms required to convert hard currency into cruzeiros and vice versa the specific consequences of each operation, also cause considerable confusion (parallel market, informal conversion, Uruguay alternative, blue chip swap, etc.).
V. INTELLECTUAL PROPERTY PROTECTION AND TECHNOLOGY TRANSFER

83. Brazil is a signatory of the Paris Convention on Industrial Property to both the Bern and Geneva (Universal Copyright Convention) Conventions on Copyrights. In general terms, Brazil's internal legislation follows the principles described in these international treaties. Six main factors have conspired, however, to give the rest of the world the impression that intellectual property does not receive adequate protection in Brazil.

84. First, the 1971 Brazilian Industrial Property Code does not afford protection to a number of inventions, including pharmaceutical products and medicines and their respective processes. This has resulted in the U.S. Government retaliating under Section 301 of its 1974 Trade Act. Even though Brazil is not under any obligation to extend such protection under the Paris Convention, the controversy around this issue has led many to believe that protection is either unavailable or fragile in other fields as well.

85. Second, the compulsory licensing chapter of the Brazilian Industrial Property Code has become a permanent bone of contention. The first article of this chapter reads as follows:

"Art. 33 -The owner of a patent who, in the period of three years following the date of grant, has not actually worked the patent in the country or has interrupted such working for more than one year shall, save in proven cases of force majeure, be compelled to grant to any third party who so requests a license to work the patent under the terms and conditions set forth in this Code.

§ 1 -A special compulsory and non-exclusive license may also be granted for reasons of public interest to any third party who so requests, in case of lack of actual working or in case the working does not satisfy market demand.

§ 2 -For the purposes of this article, working shall not be deemed actual if it is replaced or supplemented in any respect by imports, except in the case of international agreements to which Brazil may have acceded.

§ 3 -For the purpose of this article and articles 49 and 52, the owner of the patent shall be required to present evidence that the patent is being actually worked in the country, either by him or by duly authorized third parties."

86. Despite these stiff conditions, the reality is that this provision has seldom been applied -- and this has often been overlooked in the heated debate. Less than ten compulsory licenses have been requested by interested parties over the past 40 years. Two were approved on public interest grounds in the 1950s, when Brazil had a severe outbreak of foot-and-mouth disease. In this case, the foreign company was ready to allow the licenses, which were immediately cancelled after the crisis was over. In three cases, the foreign holders of the patents decided to place the patent in the public domain so as to avoid furnishing further information to prospective licensees. One case resulted in a judicial settlement; in another case, involving two Brazilian companies, the compulsory licensing actually took place.

87. Third, the forfeiture of patents for lack of exploitation need not, under the present Code, be preceded by compulsory licensing.
88. Fourth, the Brazilian Industrial Property Code grants proprietary rights solely to trademarks registered with the INPI. As a result, prior use of a non-registered trademark does not, in general, give users proprietary rights or exclusive use within Brazil.\textsuperscript{104} Foreigners who have failed to file their trademarks in time in Brazil are often faced with a most unsympathetic INPI in disputes with those who did file the same mark first in Brazil. As a result, quite a few foreign companies have resorted to Brazilian courts during the last few years, alleging either that their trademark is well known, or alleging unfair competition or even violation of a trade name, when the mark happens to also be part of the company's name (under Articles 6 bis, 8 and 10 bis of the Paris Convention, respectively). Brazilian courts have not been totally deaf to these claims.

89. In addition, Brazilian courts have extended protection to famous though unregistered pseudonyms, names of artistic works which were registered by INPI on behalf of third parties. The following registrations, among others, were cancelled by judicial order: Christian Dior, Elizabeth Arden and Snoopy.

90. The Collor Administration has sought to resolve, or at least attenuate, these problems by sending a Bill to Congress proposing the enactment of a new Industrial Property Code. Some of the relevant features of the Bill include:

(a) The scope of patentable subject matter was significantly enlarged (with the inclusion of food products, as well as pharmaceutical products and medicines and their respective processes) the term of protection was extended from 15 to 20 years for patents, counted from the date of deposit (the limits for utility models and industrial designs were fixed at 15 and 20 years, respectively).\textsuperscript{105}

(b) The universe of events that might trigger compulsory licensing was restricted. For example, under both the present and the proposed Code, exploitation must begin within three years. Under the proposed Code, however, demonstration that appropriate steps to initiate exploitation are being implemented, or that lack of exploitation results from legal obstacles, suffice to avoid compulsory licensing.\textsuperscript{106} In addition, the current Code provision states that "... working [of a patent] shall not be deemed effective if it is replaced or supplemented in any respect by imports, except if foreseen in an international act of complementary agreement to which Brazil is a signatory."\textsuperscript{107} This was replaced by:

"Article 58 - § 2 - Importation may be deemed effective exploitation, provided that the following conditions are cumulatively met:

a. when the object of an international act of complementary agreement in force in Brazil;

b. in case of parts, components, raw materials and other materials aimed at integrating Brazilian products to be sold internally, subject to the localization requirements by the competent authorities;

c. when their manufacture in the country is demonstrated to be uneconomical, considering the level of internal demand and their price in comparison with the imported product."
As a result, the present mandatory local working provision will still be essential to guarantee patent protection in Brazil. In fact, the proposed Code, by requiring that the three above conditions be fulfilled cumulatively, practically renders local manufacture of finished products an essential requirement for patent protection.

(c) Forfeiture for lack of exploitation of a patent must, under the proposed Code, be preceded by compulsory licensing. The titleholder of a patent is granted three years, from issuance, to begin to work the patent (interruption is allowed for no more than a year). Lack of exploitation would, however, no longer permit the automatic institution of forfeiture procedures, since these would now have to be preceded by a two-year compulsory license period.

(d) The trademark chapter of the Code was improved. Under the proposed Code, any person able to demonstrate a minimum six-month prior use of a trademark will be entitled to precedence over other applicants. Likewise, the proposed Code states that well-known foreign marks will also be entitled to priority rights -- a principle inscribed in the Paris Convention that INPI has simply refused to apply.

(e) There are several negative aspects to the proposed Code. First, it has significantly increased bureaucratic requirements. Second, criminal transgressions are poorly defined, thus rendering penal sanctions in many cases impossible.

91. Fifth, there are concerns related to copyright protection of computer software. These concerns were significantly reduced after the enactment of the 1987 Software Law, especially as Brazilian courts proved very receptive to the new law. Though no final court decisions under this law have been issued at the time of writing, a significant number of search and seizure measures against pirated programs have been authorized by the courts. Most of these measures have resulted in settlements (which helps to explain the absence of final decisions). Interestingly, several defendants were multinational companies (Black and Decker, Johnson Wax, etc).

92. In 1991, the Executive sent Congress a Bill replacing the 1987 Software Law. This initiative was provoked not so much by the intellectual property chapter of the law, but by its commercialization chapter, which contains the double market reserve discussed in Part II above. The Bill also improves the intellectual property portion of the 1987 Software Law. The main foreign criticism in this area relates to the term of protection, since the Bill maintains the 25-year term inscribed in the present Law. Some observers believe that this term should be at least 50 years, to be consistent with the present GATT draft and a proposed WIPO (World Intellectual Property Organization) Protocol.

93. The sixth area of concern is the legal treatment of trade secrets and INPI's administrative attitude toward agreements involving trade secrets. Trade secret protection is the third pillar of intellectual property protection, following copyright and patents. But unlike these, trade secrets do not grant their holders exclusive rights. While patents and copyrights are legal monopolies, a trade secret is a "de facto" monopoly.

94. The new and non-obvious product or process which is the object of a patent may not be used by a third party even if the latter has, in good faith, without knowledge of the
pre-existent patent, reinvented it. The object of a trade secret, on the other hand, if obtained by proper means (for instance reverse engineering), may be used and disclosed by third parties. For this reason, legal scholars often refer to trade secrets as imperfect intellectual property. However, despite this limitation, trade secrets are possibly the most widely used and the most encompassing form of intellectual property, since, unlike patents, they can theoretically last forever, are not subject to severe standards of novelty or originality and do not require registration with any governmental agency.

95. Protection of trade secrets is recognized by law solely in an indirect manner, in the area of unfair competition. While not very different from that of many other Civil Code countries, Brazilian jurisprudence on the matter is incipient, a fact that justifiably concerns holders of valuable unpatented technology.

96. In addition, INPI's attitude toward international technology transfer agreements, which involve unpatented technology, has not helped to soothe foreign concerns. For 17 years until very recently, INPI's policy toward these agreements was to greatly interfere a priori in the parties' relationship, imposing an extensive list of mandatory provisions and an equally extensive list of prohibitions.

97. No reference to the word "license" or other similar words or related concepts was allowed, since INPI did not wish to acknowledge that trade secrets may be entitled to any kind of proprietary protection. In fact, INPI would seldom agree to approve contracts which imposed restrictions on the use of the technology after the agreement expired. Technology transfer was really synonymous with sale of unpatented know-how.

98. This policy was abandoned by the Collor Administration, albeit not entirely. Under the current rules, the parties may agree that the trade secret be kept confidential and non-assignable even after termination or expiration of the technology contract. Approval of a license, however, is yet to be allowed, since that would entail recognition of the proprietary nature of trade secrets, a concept with which INPI continues to feel uncomfortable.

99. Some further features of the current policy toward technology transfer are as follows:

(a) INPI must approve or reject contracts within a maximum of 45 days. In the past, INPI took many months for examinations.

(b) The scope of government intervention in the contractual relationship has been significantly reduced.

(c) Nonetheless, INPI still reserves the right to decide which technology is necessary for the country. As a result, even if the contract formally meets INPI rules, it may be rejected if INPI decides that its does not "stimulate technological innovation." Likewise, INPI continues to reserve the right to interfere in the price to be paid for the technology, taking into account prices charged locally and internationally for similar technologies. In addition, though a priori contractual interference has diminished, INPI may, a posteriori, at any time and at its sole discretion, suspend or even annul the registration of a contract if it concludes that it violates the law. This suspension or cancellation would make
hard currency payments and the deduction of operational expenses impossible. In the past, registration would often be preceded by exhaustive negotiations with INPI bureaucrats, but INPI would not touch the contract after the successful conclusion of negotiations. Under the new rules, time-consuming negotiations have been restricted in scope and time. But the parties to the contract are threatened with a permanent risk of future sanctions, especially as INPI’s reading of the law quite often defies prevailing legal interpretation. INPI has so far not exercised its prerogative to suspend or annul registered contracts.

(d) INPI requires that patent licenses, trademark licenses, technology transfer contracts and service contracts be filed separately. As a result, franchising agreements, which are complex deals, often containing elements of each of these categories, were not recognized by INPI until very recently. INPI has now regulated registration of Franchise Agreements, thus enabling the remittance of fees abroad, in anticipation of the approval by Congress of a Bill regulating these Agreements.

100. Finally, it should also be mentioned that Brazil does not possess legislation specifically protecting the topographies of semiconductor chips. A Bill on this subject is, however, pending before the Senate.
VI. OTHER INHIBITING FACTORS

101. This paper is not intended to contain an exhaustive list of legal or other factors that inhibit foreign investment in Brazil. But in addition to the legal obstacles already discussed, foreign investors recurrently voice a range of concerns, some of which we discuss below.

Deficiencies in the Legal System

102. Laws and regulations relating to foreign investments and intellectual property protection and technology transfer, among others, delegate a great degree of discretionary powers to nationalistic third-tier bureaucrats. In addition, many laws and regulations, which flagrantly affront the 1988 Constitution, continue to be regularly applied (see examples described above). Other laws are simply unclear or contradict each other, such as those governing exchange operations.

103. Even though Brazil possesses a relatively sophisticated and well-designed body of laws, the public's exercise of its rights under these laws is frequently undermined by the excessive formalism that largely comes from procedural laws.

104. In addition, the Judiciary is clearly underfunded and obsolete; it lacks specialized commercial and intellectual property courts. In fact, few courts have access to information technology (to retrieve jurisprudence, for example) few judges possess a computer. Moreover, lower court judges in the Federal Court System are often burdened with more than a thousand undecided claims. As a result, it is not uncommon for decisions to take six to eight years to become final (that is, unappealable). At the State Court level the picture varies from state to state but, in general, it is not much rosier. Court enforcement of collection of checks, promissory notes and bills of exchange is more effective and is essentially in accordance with the main international treaties regulating these matters.\(^\text{125}\)

105. Though Brazilians are not known to be specially litigious, a number of factors have flooded the courts with claims in recent years. Former Administrations, as well as the Collor Administration under Finance Minister Zélia Cardoso de Melo, were prodigal in enacting unconstitutional laws and unconstitutional or illegal regulations whose main purpose was to relieve chronic deficits and/or to combat inflation through heterodox mechanisms. These measures included illegal taxes, price freezes, the "temporary confiscation" of monies invested in money market, savings even current accounts, as well as the indexation of these monies at rates below inflation. The 1988 Constitution also raised many doubts regarding its application -- since it is not always clear which of its provisions require regulation by law and which are self-enforcing\(^\text{126}\) and how pre-existing legislation is to be re-interpreted.

106. Moreover, inflation, coupled with past policies that manipulated official monetary correction to provide for indexation below the true devaluation of the currency, sometimes in the past made breach of contract a profitable strategy.

107. Arbitration could be an alternative to many of the problems of the legal system. But arbitration is seldom used in Brazil. This reflects several factors. First, arbitration clauses in contracts are not enforceable as such. As a result, if one of the parties to a contract wishes to
bring a matter to arbitration, the other may simply refuse to sign the "compromissum," an
essential requirement for the enforceability of the decision.\textsuperscript{127} Second, foreign arbitration awards
are subject to double confirmation before they may be executed in Brazil: they must first be
confirmed by the court of the country in which they were rendered; then they must be confirmed
either by the Brazilian Supreme Court or by the competent local lower court judge (which of the
two is a controversial issue). These and other obstacles to arbitration are well known to
specialists. Addressing them would require amendments to the 1973 Code of Civil Procedure.
In fact a Bill pending before Congress proposes new arbitration rules.\textsuperscript{128} In addition, Brazil’s
adhesion to the 1958 New York U.N. Convention for the confirmation and execution of foreign
arbitration awards is regarded by specialists as an important step toward stimulating international
arbitration. Practically all of Brazil’s major business partners are party to this convention.

Economic Obstacles

108. \textbf{Over-extended state ownership}. State monopolies, quasi-monopolies and many
other activities which the state could delegate to private business by means of concessions,
permissions or authorization are still fully or partially enjoyed by the Union, State or
Municipalities. The privatization program, the \textit{Emendão} and even a recent local privatization
initiative in the State of São Paulo represent positive steps that promise a diminution of the
State’s role in the economy.\textsuperscript{129}

109. \textbf{Cost of capital}. Low internal savings and the absence of long-term financing
constitute obvious obstacles to industrial growth. The cost of capital in Brazil is among the
highest in the world. In addition, official long-term financing has traditionally been reserved for
companies under the control of local residents. Statutory provisions regulating the policies of
BNDES (the National Bank for Economic and Social Development) were, however, amended in
1991 to include Brazilian companies under foreign control among those eligible to receive official
financing, provided, however, that funds from foreign sources were available. In any event,
capital goods and high-technology products financed by BNDES must comply with minimum
local content requirements fixed by the Government -- currently 60 percent.\textsuperscript{130}

110. \textbf{Cost of construction, equipment and materials}. Foreign investors consider these
costs very high compared to similar business opportunities in other countries. The import
substitution strategy of past decades is certainly a major culprit.

111. \textbf{Cost of labor}. Salaries in Brazil are low, but the cost of labor is not. Social
security charges and other labor costs are substantial.\textsuperscript{131} Moreover, specialized labor in almost
any field of activity is scarce, due to an increasingly deficient educational system.

112. \textbf{Taxation}. Taxes in Brazil can make returns on investment unattractive and have a
negative impact on the final price of products. A government Commission prepared a significant
tax reform proposal which was forwarded to Congress in 1992 in the form of a Constitutional
Amendment. Among other things, the Commission proposed that several dozen taxes and
contributions that exist today be reduced to less than ten. This would probably also reduce
bureaucracy.\textsuperscript{132}

113. \textbf{Price controls, inflation, recession and uncertainty}. Though price controls are
currently almost non-existent, decades of governmental intervention has left profound wounds.
Many still fear the reintroduction of price controls if inflation gets out of control. Double-digit monthly inflation, coupled with a long drawn-out recession and uncertainty about the stability and outcome of present economic policies, are obviously major deterrent factors to foreign investment.

114. **Infrastructure.** The recent lack of state investments in infrastructure is eroding a comparative advantage that Brazil clearly possessed in the past in relation to other developing nations. Telecommunications and the port system are dramatic examples of fields dominated by obsolete policies, where deregulation and privatization are fiercely opposed by interest groups.\(^{133}\)

115. **Foreign exchange.** The lack of free convertibility and constant governmental manipulation of exchange rates jeopardize the transactions of those who possess hard currency credits or debts.

116. **Government procurement.** The 1988 Constitution requires the Government to give preferential treatment to Brazilian companies of national capital in the procurement of goods and services.\(^ {134}\) Though the constitutional provision still awaits implementing regulation, many fear that if applied rigorously it could exclude foreigners from a significative part of the economy.\(^ {135}\) Corruption in government bids, a constant preoccupation to the foreign participant, was also a major concern to the Collor Administration as a result of the significative amount of recent political scandals in this field. A Bill awaiting approval in Congress establishes new rules for government bids. Moreover, a recent law provides rules for the application of penalties to corrupt public servants and connected persons.\(^ {136}\)

117. **Bureaucracy.** Excessive regulation and excessive freedom of interpretation in the hands of an often retrograde bureaucracy have made Brazil a difficult place to do business for both locals and foreigners. So far governmental attempts to deregulate (Central Bank, INPI, the Secretariat of Science and Technology, etc) have produced only timid results.
VII. CONCLUSION

118. Decades of statism and restrictive economic policies have created a complex legislative and administrative mosaic which unquestionably undermines the Collor Administration’s efforts to implement structural changes, even though these reforms are necessary to redefine the state’s role in the economy and to create a truly open market.

119. In this regard, Congressional approval of the Emendão and several other Bills identified in this paper would remove many of the major prohibitions, limitations and other red flags that still impede foreign participation and investment in the Brazilian economy.

120. On a final note of caution: it is likely that the Collor Administration will come to a premature end in the next few days. Accusations of corruption might lead to the President’s impeachment or resignation. Whether, under these circumstances, the new Administration, headed by the present Vice-President Itamar Franco, will continue to pursue the policies of its predecessor is, at this time entirely unpredictable.

1. Some of the applicable provisions of the 1988 Constitution are: Article 5 (listing individual and collective rights); Article 6 (listing workers' rights); Articles 145 to 162 (regulating the National Taxation System); and Article 192, Paragraph 3 (regulating limitation on interest).


4. Article 177, Paragraph 1 and Article 20, Paragraph 1, of the 1988 Constitution and Article 45 of the Transitory Constitutional Provisions.


7. Constitutional Amendment Proposal No. 51 of 1991 (known as the Emenda) was split into five proposals, each regulating specific issues. Constitutional Amendment Proposal No. 56, 1991, proposed the deregulation of the economy, including a reduction of the Union's monopoly.


10. Articles 199 and Paragraph 3 and 209 of the 1988 Constitution.

11. TELEBRAS, for example, has its shares traded on the stock exchange.

12. Article 21, Sections XI and XXIII, and Article 25, Paragraph 2, of the 1988 Constitution.

13. Article 21, Section XI, and Article 25, Paragraph 2 of the 1988 Constitution expressly require that the Union and the member States of the Union undertake the listed activities directly or through State-controlled companies, while the activities listed in Article 21, Section XII, letters "a" to "f", and in Article 21, Section XXIII, letter "b", of the 1988 Constitution may be undertaken by the Union or by private business by means of a concession, permission, or authorization.

14. Article 21, Section XII, letters "a" to "f", and Article 21, Section XXIII, letter "b" of the 1988 Constitution.

15. On May 8, 1992, the Governor of the State of Sao Paulo signed Law No. 7,835, which regulates concessions and permissions of public services and works which, up to this date, were restricted to the public sector. It is believed that this new Law will accelerate the voting of Bill No. 202, 1991, which treats this same issue at the federal level, allowing private enterprise to participate in bids to provide public services. According
to this Bill, however, under equal conditions preference shall be given to Brazilian companies of national capital.

16. Law No. 6,538 of June 22, 1978, introduced a postal monopoly in favor of the Federal Government under Article 163 of the 1969 Constitution. At present, the provision of postal and national airmail services by the Union is provided for in Article 21, X, of the 1988 Constitution, and the Union's monopoly after enactment of the Constitution was questioned through the Writ of Mandamus No. 89.0036971-7/RJ. A tax reform proposed by the Federal Government suggests the alteration of Article No. 21, X, of the 1988 Constitution to establish that the organization of postal services and national air mail services will be incumbent upon the Union.

17. Article 21, Section XI of the 1988 Constitution. This Article, however, allows private companies to provide information services through the public telecommunications network provided by the Union.

18. Article 21, Section XII, of the 1988 Constitution.


20. Law No. 4117 of August 27, 1962, implemented by Decree No. 52,026 of May 20, 1963, as thereafter amended and complemented by specific administrative acts.

21. Legislative Decree Bill No. 103 of 1991 proposed annulling the effects of Decree No. 177 of July 17, 1991, which established guidelines for dedicated-line services (one type of limited service that may be provided by private companies). Furthermore, two political parties (PT and PDT) lodged with the Supreme Court a direct claim of unconstitutionality against this Decree.

22. Ordinance No. 882 of November 8, 1990, enacted by the Minister of Infrastructure; Decree No. 177 of July 17, 1991; Ordinance No. 308 of December 2, 1991, enacted by the National Secretary of Communications; Ordinance No. 230 of October 1, 1991, enacted by the National Secretary of Communications.


24. Article 3, Paragraph 4, of Law No. 5,250 of February 9, 1967, as amended by Law No. 7,300 of March 27, 1985, equated news agencies with newspaper companies for civil and criminal responsibility purposes only.


31. Article 168, Paragraph 1, of the former Constitution only required that the company benefitting from this authorization or concession be incorporated in Brazil.


33. Article 44, Paragraphs 1 and 2, of the Transitory Constitutional Provisions.

34. Article 44, Paragraph 3, of the Transitory Constitutional Provisions.

35. Article 176, Paragraph 1, of the 1988 Constitution, with the wording proposed by Constitutional Amendment Proposal No. 56 of 1991.


37. Article 52, "Caput", Sections I and II, of the Transitory Constitutional Provisions. Complementary Law Bill No. 47 of 1991, regulating the National Financial System and foreign participation in financial institutions, awaits approval by Congress. Bill No. 56 of 1992 proposes that foreign participation in commercial banks be limited to 50 percent of the total capital and to one third of the voting capital.

38. Article 52, Sole Paragraph, of the Transitory Constitutional Provisions.

39. IRB defends the legality of its monopoly by referring to the "official reinsurance organ" in Article 192, Section II, of the 1988 Constitution.

40. Article 199, Paragraph 3, of the 1988 Constitution.

41. Article 190 of the 1988 Constitution.

42. Law No. 5,709 of October 7, 1971, regulated by Decree No. 74,965, of November 26, 1974.

43. Articles 1, 3, 5, 7, and 12 of Law No. 5,709 of October 7, 1971, which was regulated by Decree No. 74,965 of November 26, 1974. Bill No. 11 of 1991 imposes the limitations of Law No. 5,709 of October 7, 1971, on the leasing of rural land by foreign residents and foreign legal entities authorized to operate in Brazil and establishes additional rules for authorizing the acquisition and lease of rural land by foreign residents and foreign legal entities.

44. Article 60 of Decree-Law No. 2,627 of September 26, 1940.

45. Article 15, Paragraph 2, of Law No. 6,404 of December 15, 1976 (the Corporation Law). The Brazilian Securities and Exchange Commission is proposing an amendment to this law, which provides among other issues, for the reduction of the proportion established in Article 15.

47. Law No. 8,248 of October 23, 1991, Article 1, Paragraph 1, and Article 14, Sole Paragraph.


49. Article 3 and its Paragraphs 1 and 2 of the General Agreement on Tariffs and Trade -- GATT -- (which became effective in Brazil through Law No. 313 of July 30, 1948, as amended, and Legislative Decrees No. 43 of June 20, 1950, 76 of December 20, 1951, and 80, of December 15, 1952) prohibits the concession of any beneficial treatment, relative to internal taxes, that puts a foreign product in a less favorable position than a national product. The only barrier permitted against foreign products is an import tariff. The Supreme Court has already upheld this provision by determining that goods imported from countries which are signatories of the GATT or members of the Latin American Association for Free Trade (ALALC, now the Latin American Association for Integration -- ALADI) are subject to a sales tax exemption similar to that granted national products (Abridgement of Supreme Court Decision No. 575).


52. Articles 3, 22, 29 and 30 of Law No. 8,401 of January 8, 1992, as regulated by Decree No. 567 of June 11, 1992.

53. Decree No. 567 of June 11, 1992, regulated Law No. 8,401 of January 8, 1992. A Decree dated June 30, 1992, determined that the public showing of Brazilian motion pictures had to occur for 42 days during the period from July 1, 1992, to December 31, 1993. A similar Decree should govern Brazilian home audiovisual and videographic works to be distributed in the country.

54. Article 1 of Law No. 6,813 of July 10, 1980.

55. Article 3, Section I, of Decree No. 99,471 of August 24, 1990, and Article 2, Sole Paragraph, Section I, of Ordinance No. 879 of November 6, 1990, of the Infrastructure Minister.

56. Article 11 of Law No. 7,102 of June 20, 1983, and Article 30, Paragraph 1 of Decree No. 89,056 of November 24, 1983. Article 16 of Law No. 7,102 also determines that only Brazilians may be hired by these security and transportation-of-values companies.

57. Ordinance No. 91 of February 21, 1992, enacted by the Minister of Justice.


60. Article 17 of Bill No. 997 of 1991 which, if approved, would replace Law No. 7,646 of December 18, 1987, the present Software Law.
61. Decree No. 96,000 of May 2, 1988, covering research and investigation of the Brazilian coastal platform, requires prior approval of the Navy Minister and other governmental agencies, where applicable, and compliance with a number of requirements when foreigners are involved. "National Security" interests are taken into account when granting such approval. Law No. 6,634 of May 2, 1979 and Decree No. 85,064 of August 26, 1980, subject activities in the frontier strip undertaken by foreigners to the prior authorization of the National Defense Council and other competent authorities, depending on the activity. When legal entities with foreign partners are included, certain limits on equity participation are imposed which do not now conform with the definition of a Brazilian company of national capital. Decree-Law No. 221 of February 28, 1967, Decree No. 68,459 of April 1, 1971, and Decree No. 78,402 of September 10, 1976, among other acts, regulate fishing activities. The exercise of these activities depends on approval by the applicable navy authorities. In addition, certain areas of Brazil's territorial sea and certain activities are reserved for Brazilian vessels. When owned by legal entities, 60 percent of the latter's voting stock must be held by Brazilians, as provided for in Article 7 of Law No. 7.652, of February 3, 1988. Law No. 7,652 of February 3, 1988 determines (Article 6) that registration of vessels will only be granted to legal entities if 60 percent of their stock is held by native-born Brazilians. Article 21, Section XXI, "c", of the 1988 Constitution determines that air navigation is incumbent upon the Union which may fulfill its responsibility either directly or through authorization, concession, or permission. Authorization for commercial domestic flights, in case of legal entities, may only be granted if, among other requirements, four fifths of their voting capital is owned by Brazilians, as provided for in Article 181 of Law No. 7,565 of December 19, 1986. Law No. 5,709 of October 7, 1971, and Decree No. 74,965 of November 26, 1974, impose restrictions on the acquisition of rural land by foreigners, branches of foreign companies, and Brazilian legal entities whenever residents and those domiciled abroad hold the majority of the equity. A Decree of May 14, 1991 revoked Decree No. 64,345 of April 10, 1969, Decree No. 66,717 of June 15, 1970, Decree No. 66,864 of July 10, 1970, and Decree No. 73,685 of February 19, 1974, all of which contained rules relative to the contracting of engineering services aimed at protecting local construction companies. Notwithstanding, tenders still continue to contain discriminatory provisions. Moreover, the Federal Council of Engineering, Architecture and Agronomy continues to insist on the validity of its Resolution No. 209 of September 1, 1972, which requires that foreign companies and Brazilian companies controlled by foreign capital, in these fields, enter into consortia with Brazilian companies of national capital and submit a request for registration with the local Council as a requisite for market access.

62. Article 5, Section LXIX, of the 1988 Constitution, and Law No. 1,533 of December 31, 1951, as amended.


64. Articles 102 and 103 of the 1988 Constitution.

65. See Note No. 22 above.
66. Ordinance No. 230 of October 1, 1991, enacted by the National Secretary of Communications.


68. Bill No. 4,647 of 1990. A Substitute Bill prepared by Manoel Castro (House of Representatives) is also being examined and discussed.


70. In this regard, the Central Bank has recently published several Ordinances, for example: Circular-Letter No. 2,161 of April 18, 1991 which provides rules to authorize remittances of profits abroad in cases of capital acquisition or increase under the registration process with Central Bank; Circular-Letter No. 2,165 of May 13, 1991, regulating capital payment with imported goods without exchange coverage; Circular No. 1,969 of June 6, 1991, regulating the issuance abroad, in foreign currency, by Brazilian companies of debentures convertible in shares, revoked and substituted by Circular No. 2,199 of July 16, 1992, regulating the issuance and placing abroad of titles convertible into shares of companies and institutions headquartered in the country; Circular-Letter No. 2,198 of August 15, 1991, regulating advancements for future capital increase with resources proceeding from abroad; Circular-Letter No. 2,266 of March 13, 1992, providing rules for profit and dividend remittances and registration of foreign participation resulting from capitalization of profits and reserves; Circular-Letter No. 2,282 of June 2, 1992, regulating conditions for payment of capital with patents and trademarks; and Circular-Letter No. 2,313 of September 1, 1992, regulating corporate reorganizations and capital reductions.

71. Article 2 of Law No. 4,131 of September 3, 1962.

72. Article 1 of Law No. 4,131 of September 3, 1962.

73. The floating exchange rate market was created by Central Bank Resolution No. 1,552 of December 22, 1988, amended by Central Bank Resolutions Nos. 1,600 of April 20, 1989, and 1,671 of December 12, 1989, regulated by Central Bank Circular No. 1,402 of December 29, 1988, and subsequent updating, recently consolidated by Central Bank Circular No. 2,202 of July 22, 1992. (Software payments are referred to in Chapter 2, Title 13, item III; payments of certain consulting services are referred to in Chapter 2, Title 13, item IV; and payments with credit cards for import of certain goods and services are regulated in Chapter 2, Title 14, item II).

74. Consistent with the interpretation given by the Central Bank to "foreign capital," the Bank did not for many years authorize the registration of foreign investments in the stock exchange, alleging that they were essentially speculative. The organization of investment companies held by foreign investors for the purpose of subscribing to primary issues of
publicly-held Brazilian companies was authorized in the mid 1970s, but still in a restrictive manner. Recently, Brazilian governmental authorities have created several vehicles for the purpose of stimulating foreign investments in the Brazilian stock exchange, to wit: Foreign Capital Investment Companies; Foreign Capital Investment Funds; Foreign Capital Securities Portfolios; Managed Portfolios - direct investment; Debt Equity Conversion Funds; Privatization Mutual Funds and Venture Capital Companies. The formation and operation of these entities is subject to several rules issued by the National Monetary Council, the Central Bank, and the Brazilian Securities and Exchange Commission.

75. In the case of foreign investments in services companies, the Central Bank requires information on the origin of the income, granting registration only to the results of services effectively rendered by the company to third parties, and provided that the respective agreements conform with requirements of the applicable legislation. By adopting this policy, the Central Bank intends to avoid registration of reinvestment and remittance of profits abroad on amounts charged from Brazilian third parties which would not be entitled to direct remittance.

76. FIRCE Service Instruction No. 85/81.
79. Article 1 of Central Bank Circular-Letter No. 2,266 of March 13, 1992. This Article, in its Sole Paragraph, excludes from the limitation provided therein rights granted to shares of companies which are traded on the stock exchange, as well as of financial institutions, provided the issuance was previously approved by the Brazilian Securities and Exchange Commission or by the Central Bank after the date of issuance of this Circular.
81. With respect to the payment of capital with software and other intangible goods, most Central Bank technicians believe that the respective credits can only be converted if the assignment contract is duly filed with INPI. Direct payments of capital with intangible goods is a matter of concern to the Central Bank in view of the difficulties in appraising their market value, although Central Bank officers are open to discussing the issue on a case by case basis.
82. INPI's Resolution No. 22 of February 27, 1991; Ordinance of the Ministry of Finance No. 436/58, as amended; Article 30, Sole Paragraph; and Article 90, Paragraph 4, of the 1971 Industrial Property Code.
83. Income and capital gains paid by Brazilian sources to those domiciled abroad are subject to income tax withholding. As of the enactment of Decree-Law No. 1,418 of September 3, 1975, the general principle of territoriality in taxation (based on the source of the income) was replaced by the principle of the source of the payment relatively to income due to those domiciled abroad, for technical services and technology fees. These rules
were consolidated in Articles 554 and 555 of the Income Tax Regulations approved by Decree No. 84,450 of December 4, 1980.

84. Brazil has executed treaties to avoid double taxation with the following Countries: West Germany (approved by Legislative Decree No. 92/75 and brought into effect by Decree No. 76,988/76); Argentina (approved by Legislative Decree No. 74/81 and brought into effect by Decree No. 87,976/82); Austria (approved by Legislative Decree No. 95/75 and brought into effect by Decree No. 78,107/76); Belgium (approved by Legislative Decree No. 76/72 and brought into effect by Decree No. 72,542/73); Canada (approved by Legislative Decree No. 28/85, and brought into effect by Decree No. 92,318/86); Korea (approved by Legislative Decree No. 205/91, and brought into effect by Decree No. 354/91); Denmark (approved by Legislative Decree No. 90/74, and brought into effect by Decree No. 76,975/76); Philippines (approved by Legislative Decree No. 198/91, and brought into effect by Decree No. 241/91); Finland (approved by Legislative Decree No. 86/72, and brought into effect by Decree No. 73,496/74); France (approved by Legislative Decree No. 87/71, and brought into effect by Decree No. 70,506/72); Hungary (approved by Legislative Decree No. 13/90, and brought into effect by Decree No. 53/91); India (approved by Legislative Decree No. 214/91, and brought into effect by Decree No. 510/92); Italy (approved by Legislative Decree No. 77/79, and brought into effect by Decree No. 85,985/81); Japan (approved by Legislative Decree No. 43/67, and brought into effect by Decree No. 61,899/67 - as amended by Decree No. 81,194/78); Luxembourg (approved by Legislative Decree No. 78/79, and brought into effect by Decree No. 85,051/80); Norway (approved by Legislative Decree No. 50/81, and brought into effect by Decree No. 86,710/81); Portugal (approved by Legislative Decree No. 59/71, and brought into effect by Decree No. 69,393/71); Netherlands (approved by Legislative Decree No. 60/90, and brought into effect by Decree No. 355/91); Sweden (approved by Legislative Decree No. 93/75, and brought into effect by Decree No. 77,053/76); Czechoslovakia (approved by Legislative Decree No. 11/90, and brought into effect by Decree No. 43/91).


88. Article 4 of Law No. 4,131 of September 3, 1962, and Article 10, Paragraph 1 of Decree No. 55,762 of February 17, 1965.

89. Article 35 of Law No. 7,713 of December 22, 1988, as amended.

90. Article 75 of Law No. 8,383 of December 30, 1991.


93. Articles 75, 76 and 77 of Law No. 8,383 of December 30, 1991.


95. Foreign loans may be basically classified as follows.

(a) Foreign Loans regulated by FIRCE Communiqué No. 10 of September 12, 1969, and complementary rules. These are loans granted to Brazilian companies directly by the foreign lender and which remain with the initial borrower during the entire period the funds remain in Brazil.

(b) Foreign Loans regulated by Central Bank Resolution No. 229 of September 1, 1972, and complementary rules. These are loans made by foreign lenders directly to Brazilian companies which may be renewed, at the creditor's discretion, with the same or different borrower, at terms shorter than that for the final amortization abroad, provided foreign resources remain in the country for the minimum period stipulated by the Central Bank at the time of authorization of the loan.

(c) Foreign Loans regulated by Central Bank Resolution No. 63 of August 21, 1967, as amended, and complementary regulations. These are loans granted by foreign lenders to Brazilian financial institutions to be passed on to Brazilian companies to finance their fixed or working capital.

Under foreign loans carried out under Communiqué FIRCE No. 10 of September 12, 1969, and Central Bank Resolution No. 63 of August 21, 1967, foreign currency may enter the company as a result of issuance of commercial papers, floating rate notes, fixed rate notes, floating rate certificates of deposit, fixed rate certificates of deposit and publicly and privately issued bonds. Currently, remittance of interest, commissions, and expenses related to these titles are not subject to income tax withholding, provided that the average amortization period of the operation is at least 60 months. (Central Bank Resolution No. 644 of October 22, 1980, Central Bank Resolution No. 1,734 of July 31, 1990, Central Bank Resolution No. 1,853 of July 31, 1991, Central Bank Circular No. 2,134 of February 12, 1992, Central Bank Communiqué No. 002759 of March 19, 1992, and Central Bank Circular-Letter No. 2,269 of April 24, 1992.)

96. Article 14 of Law No. 4,131 of September 3, 1962; Article 71 of Law No. 4,506 of November 30, 1964, and Article 20 of Decree No. 55,762 of February 17, 1965.

97. Article 52 of Law No. 4,506 of November 30, 1964.


100. Articles 231 to 234 of the Income Tax Regulations (Decree No. 84,450 of December 4, 1980), which consolidated the applicable legislation; Ordinance of the Ministry of
Finance No. 436/58 (as amended); and alterations introduced by Article 50 of Law No. 8,383 of December 30, 1991.


105. Bill No. 824, 1991. The Bill should be voted into Law in 1992. Over one hundred amendments to the Bill have been presented to Congress to date, including an alternative Bill proposed by the Brazilian Association of Industrial Property (ABPI). See Articles 18 and 51.


110. See, among others, Articles 182 to 193 of Bill No. 824 of 1991.


112. The proposed Protocol was discussed in a WIPO Geneva meeting held between November 4 and 8, 1991.


114. INPI Normative Act No. 15 of September 11, 1975, was the main regulation applicable to patent and trademark licenses and transfer of technology and technical services agreements.

115. Articles 4.5.2., "a", and 5.5.2., "a", of INPI Normative Act No. 15 of 1975.

116. The new rules for patent and trademark licenses and transfer of technology and technical services agreements are INPI Resolution No. 22 of February 27, 1991, and INPI Normative Instruction No. 001 of July 2, 1991.


120. Article 12 of INPI Resolution No. 22 of 1991.

121. Article 16 of INPI Resolution No. 22 of 1991.


124. Senator I.E. Vieira presented Bill No. 716, 1992, to Congress. This Bill was drafted by the Brazilian Computer Law Association (ABDI).

125. Brazil is a signatory of the 1930 and 1931 Geneva Conventions for the adoption of an Uniform Law on letters of exchange and promissory notes, and on checks, which were ratified by the National Congress and promulgated by Decree No. 57,663 of January 24, 1966, and Decree No. 57,595 of January 7, 1966, respectively.

126. The 12-percent annual limit on real interest rates is, for example, inscribed in Article 192, Paragraph 3, of the 1988 Constitution and has not yet been regulated.

127. Articles 1,072 to 1,077 and Article 267, Section VII, of the Brazilian Civil Procedure Code.


129. On May 8, 1992, the governor of Sao Paulo sanctioned State Law No. 7,835 which provides the rules for concessions and permissions of public services and works to private entities. Up to this date, these works were restricted to the public sector. It is believed that this new Law will expedite the legislative process of Bill No. 202 of 1991 which deals with the same matter at the Federal level.

130. Amendment to BNDES by-laws was approved by Decree No. 104 of April 22, 1991. Ordinance No. 126 of February 27, 1991, enacted by the Economy Minister (in compliance with Decree-Law No. 2,433 of May 19, 1988, as amended, and Article 74 of Decree No. 96,760 of September 22, 1988) fixed the 60-percent local-content requirement for capital goods and high-technology products to be considered as manufactured in Brazil and, therefore, eligible for official financing.

131. Industrialists claim that in many cases the total cost of labor and social security charges, including the necessary additional medical care, food, transportation and other contributions, exceeds 100 percent of salary costs.

132. The Tax Reform proposal was forwarded by the Executive Branch to Congress on July, 1992, and is structured as a proposed constitutional amendment. Moreover, one of the proposals of the Emenda is a "Fiscal Adjustment Amendment" and provides for rules which are complementary to the Tax Reform (Constitutional Amendment Proposal No. 55 of 1991, substituted by Constitutional Amendment Proposal No. 48/91).
133. Bill No. 8 of 1991 proposes the deregulation of port activities and the opening up of the sector for private enterprise. This Bill has been voted by the House of Representatives. It has generated enormous debate and has been seriously opposed by port workers.

134. Article 171, Paragraph 2, of the 1988 Constitution.

135. Article 3 of Law No. 8,248 of October 23, 1991, regulated preferential treatment in government acquisitions of information technology and automation goods and services. Article 3, Paragraph 3, of Law No. 2,300 of November 11, 1986, as amended, which regulates bids of the Federal administration, determines that preference shall be given to goods and services produced in the country. The São Paulo State Law on bids has a similar provision (Article 3, Paragraph 2, of São Paulo State Law No. 6,544 of November 22, 1989); however the São Paulo Municipal Law on bids determines that national bidders shall have preference over foreigners (Article 59, IV, of São Paulo Municipal Law No. 10,544 of May 31, 1988). The constitutionality of this municipal provision is controversial. Furthermore, Bill No. 1,491 of 1991, (regulating federal bids) -- already approved in the House of Representatives -- grants, ceteris paribus, preference first to goods and services produced by Brazilian companies of national capital, then to goods and services produced in the country, and finally to those produced by Brazilian companies.

136. Bill No. 1,491 of 1991, which has been approved by the House of Representatives, contains rules for bids and contracts to be entered with the public administration. Law No. 8,429 of June 2, 1992, provides for special penalties to be imposed on public servants in case of corruption.
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