LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE FIELD OF COMPUTER TECHNOLOGY IN BRAZIL.

(Working paper for ICSID Review, Foreign Investment Law Journal - World Bank)

IVES GANDRA DA SILVA MARTINS,

Professor of Economic Law of the Law School of the Mackenzie University and President of the Lawyers' Institute of São Paulo.

1. THE CONSTITUTIONAL SYSTEM AND THE ECONOMIC ORDER

It is necessary to draft a brief summary on the economic and social order as shaped in the Federal Constitution so that we can confront the problem concerning foreign investment as determined by the Brazilian Law.

The Brazilian "Carta Magna" is dated 1967, has already received 27 amendments and should be re-written, in a large part, in the next four years, by the new Congress, that received constituent powers derived from a larger extension than those powers granted to previous Legislative Powers (1).

---

(1) Constitutional Ammendment N. 26, dated November 27, 1985, is thus written:

"Art. 1st - The Members of the Chamber of Deputies and of the Federal Senate will convene, unicamerally, in a free and sovereign National Constituent Assembly, on the 1st February, 1987, at the Seat of the National Congress.
Art. 2nd - The President of the Federal Supreme Court will install the National Constituent Assembly and will preside over the session of the election of its President.
Art. 3rd - The Constitution will be promulgated after the approval of its text, in two shifts of discussions and suffrages by the absolute majority of the Members of the National Constituent Assembly".

The most important amendment among those in force is that of N. 1, promulgated in 1969, that reformulated the Constitution in its entirety.

The Brazilian "Carta Magna" is divided into 4 large Chapters, as follows: 1. The National Organization. II. Bill of Rights; III. Economic and Social Order; and IV. Family, Education and Health.

The Chapter of Economic and Social Order is written in Arts. 160 through 174, although other provisions are interlaced in the remaining Chapters.

The Economic and Social Order is stated in the Constitution according to a neo-liberal model, and its most relevant articles are those of Nos. 160, 163 and 170 (2).

The first of them delineates the six dominant principles and is thus written:

---

(2) Celso Seixas Ribeiro Bastos, in his book "Curso de Direito Constitucional" ("Course of Constitutional Law") (Ed. Saraiva, 8th Edition) emphasizes that this is the dominant characteristic of the Federal Constitution.

"Art. 160: The economic and social order aims at performing the national development and social justice, based on the following principles:
I. Liberty of initiative;
II. Valorization of work as a condition of human dignity;
III. Social function of property;
IV. Harmony and solidarity among social categories of production;
V. Suppression of abuse of economic power, characterized by market domination, the elimination of competition and the arbitrary increase in profits; and
VI. The expansion of opportunities of productive employment".

It should be emphasized that the liberty of initiative, on the one hand, and the suppression of abuse of economic power, on the other one, represents the dominant key-notes of the economic process, which, therefore, adheres to the market economy, with instruments to control pathological deviations (3).

Furthermore, the "Magna Carta" privileges private initiative, in another provision, that of N. 170, which is written as follows:

---

(3) The "Caderno N. 1 de Direito Econômico" ("Book N. 1 of Economic Law"), Ed. Resenha Tributária e Centro de Estudos de Extensão Universitária-CEEU, 1983, a compilation of studies dedicated to juridical regime of economic initiative, by its authors Attila de Souza Leão Andrade Júnior, Edvaldo Brito, Eros Roberto Grau, Fábio Nusdeo, Geraldo de Camargo Vidigal, Ives Gandra da silva Martins, Jamil Zantut, José Carlos Graça Wagner, José Tadeu de Chiara, Luiz Felizardo Barroso, Raimundo Bezerra Falcão, Roberto Rosas e Washington Peluso Albino de Souza, demonstrates that the Brazilian economic model has a neo-liberal basis.

> "Art. 170: Private enterprises should preferably, with the incentive and support of the State, explore economic activities.
> § 1st - Only in order to supplement private initiative should the State directly explore economic activities.
> § 2nd - In the exploration, by the State, of an economic activity, public enterprises and corporations of mixed economy will be ruled by the norms applicable to private enterprises, including those regarding Labour Laws and obligations.
> § 3rd - The public enterprise that should explore activities not monopolized will be subject to the same tributary regime as that applicable to private enterprises" (4).

From the above, we can clearly perceive that the economic initiative will be undertaken by the private sector, and the State will merely be a complementary and subsidiary element, whenever the participation of private enterprises is insufficient.

---

(4) In our book "Direito Empresarial" ("Enterprise Law") (Ed. Forense, 2nd Edition, 1986, pages 16/52), we confronted the problem of interpretation of this legal article, trying to demonstrate that such provision is the most representative of the economic model, under the light of jurisprudence and of the known precepts.

Moreover, the State, as a competitor of private initiative, may only thus operate under the same conditions and without special privileges, and should support and offer incentives to private enterprises.

Thus, Art. 170 of the Federal Constitution is the rule that expresses the constituent's intention where the economic and social order are concerned.

However, the "Magna Carta" admits exceptions to this principle, and the exceptional rule is expressed in Article 163, written as follows:

> "Art. 163 - The intervention in the economic domain and the monopoly of a determined industry or activity, are authorized through a federal law, when indispensable by reason of national security or to organize a sector that cannot be efficiently developed under the regime of competition and of freedom of initiative, being the individual rights and guaranties assured.
>
> Sole § - In order to attend to the intervention, subject of this article, the Union may institute contributions aimed at providing means for the respective services and charges, as provided by law"-(5).

---

(5) On the same subject, Professor Washington Peluso Albino de Souza writes: "Thus, in a general way, the term "intervention" is instilled with a high load of "sense of exceptionality" and of "Intrinsic censorship". As a result of this guiding spirit, other valorization effects are suggested and appear as semantic components, such as the fundaments and the intensity in which the interventions is practiced, the Individual-State relationship, the economic progress vis-à-vis individual liberty, and so on" ("Caderno N. 1 de Direito Econômico" ("Book N. 1 of Economic Law") Ed. Resenha Tributária and CEEU, 1983, pg. 144).

By same, may the Union, through a federal law, intervene or create a monopoly, by reasons of national security or when private initiative is insufficient for the development of certain activities (6).

Such provision has allowed two kinds of interpretations by the Courts and professors, without a definitive jurisprudential solution.

---

(6) Minister Carlos Mário Velloso, of the Federal Court of Appeals, in his initial address to the 4º Simpósio Nacional de Direito Econômico ("4th National Symposium of Economic Law") understands that such provision is exceptional, representing a regulating mechanism of the economy to be utilized in its insufficiencies ("Caderno N. 4 de Direito Econômico" ("Book N. 4 of Economic Law"), Ed. CEJUP/CEEU, 1986, pages 121/122). "The Brazilian economic model, and also the economic model adopted by the Constitution, intends to reach economic development and to bring about social justice, this considered as the constant and perpetual intention to offer to everyone what corresponds to him by right, a precept that is originated in Roman Law and that was exposed by Ulpiano. These two goals would be reached through the achievement of certain principles, which are mentioned in the Constitution under Art. 160, sections I through VI. The fundamental principle is the liberty of initiative, as inscribed in section I strengthened by what is disposed under Art. 170, which intends to make clear that the economic model renders important the free enterprise and only admits the participation of the State in the economic sector, in a suppletive character, in order to offer incentive or to help private economy.
This intervention, according to Minister Carlos Mário Velloso, may be negative, as may be the orientation to discipline the economy and to repress abuses of economic power, which is another principle sanctioned in Art. 160 of the Constitution, or is even positive, when the State, in cases where certain constitutional prerequisites occur, assumes a sector of the economy, as its title-holder or as an exploring agent".

Some people understand that the guaranty to the rights of the individuals and the supplementation of the economic performance would only be a restriction imposed to monopoly, considering that the constitutional dissertation is expressed in the singular and not in the plural, and others understand that such prerequisites refer to the monopolizing process as well as to the interventionist process.

Those that advocate the first interpretation understand that no constitutional restriction exists regarding intervention, if decreed by federal law, representing its decreeing the practice of the discritionary power of the Government, in an authentic "Act of Prince". In this case, Art. 170 would be subordinated to it and it would no longer represent the rule, only an exception, while Art. 163, under the light of a state intervention, would be the rule (7).

Those that advocate the second interpretation, understand that the State may only intervene to repress the abuse of economic power in a question of national security, linked to what is disposed in Art. 89 or to supplement the inefficiency of private enterprise, and in no case could it reach the individual right or the constitutional guarantees granted to its citizens or residents.

---

(7) The Attorney General, Dr. José Paulo Sepúlveda Pertence, advocates this interpretation in his defense to the argument of inconstitutionality of the law that prohibits foreign capital of participating in the informatic market in Brazil and addressed to the Federal Supreme Court by 54 Brazilian Members of Parliament.

Such controversy, not yet solved, has contributed with no few problems to the discussion of the rôle of the State in the Economy. At this moment, the most acute field of debates is that concerning the market reserve created for the national industry of informatic, with serious restrictions to the presence of foreign capital, as we shall see later on.

2. CONSTITUTIONAL DISTINCTION BETWEEN NATIONAL AND FOREIGN PERSONS.

The Brazilian "Carta Magna" recognizes four types of natural individuals: Brazilian born, naturalized Brazilians, residents foreigners and temporary foreigners, being the "displaced persons" subordinated to the regime of foreign residents or temporary residents (8).

The naturalized Brazilians suffer certain restrictions to which the Brazilian born citizens are not subject, in accordance with what is disposed in the sole § of Art. 145 of the Constitutional Amendment N. 1/69, written as follows:

---

(8) Alberto Xavier in his book "Direito Tributário Constitucional do Brasil" ("Constitutional Tax Law in Brazil") (Ed. Resenha Tributária, 1977) emphasizes the differences but demonstrates that for the 3 first classes of people the obligations and duties are equivalent.

> "Art. 145 .....
> Sole § - The offices of President and Vice President of the Republic, Minister of State, Minister of the Federal Supreme Court, of the Electoral Supreme Court, of the Superior Labour Court, of the Federal Court of Appeals, of the Federal Court of Audit, the Attorney General , Senators, Federal Congressmen, Governor of the Federal District, State and Territory Governors and Vice Governors and its deputies, Ambassadors and Members of Diplomatic Carreers, of Officer in the Navy, Army and Aronautic, are privative of Brazilian born citizens".

On the other hand, the most relevant article is that of N. 153, of which the "caput" is thus written:

> "Art. 153: The Constitution ensures to Brazilian born citizens and to foreign citizens residing in the country, the inviability of the rights concerning life, liberty, security, and of property, in the following terms: ....." (the underlines are ours),

ensures to Brazilian born or Brazilian naturalized citizens and to foreign citizens residing in the country equal rights and guaranties, without any restrictions.

The foreign temporary residents have identical constitutional guaranties, whenever the law so permits, but they can, however, lose such guaranties, without the necessity of altering the higher law, whenever internal or external circumstances so advise.

Thus, they are in a personal transitorily legal situation, contrary to that of foreign resident citizens, that enjoy an assured definitive constitutional statute.

However, the law imposes some restrictions to the resident foreigner as, for example, limitations to the extension of land they may acquire, being, thus, in a legal condition which is inferior to that of the Brazilian naturalized citizen, as the latter is in relation to the Brazilian born citizen, who can reach all the offices in the Public Administration, that are not open to the former (9).

However, the interesting aspect is that the juridical person, contrary to the natural person, does not suffer, except for rare and express cases, larger restrictions under the light of the Constitution, if established in Brazil, although with external control or with control of foreigners resident in the country (10).

---

(9) Paragraph 34 of Art. 153 for Constitutional Amendment N. 1/69 is thus written:
§ 34: The law will rule the acquisition of rural properties by Brazilian and foreign citizens residing in the country, as well as by natural or juridical persons, establishing conditions, restrictions, limitations and other requirements, for the defense of the integrity of the territory, the security of the State and the equitable distribution of property".

(10) Áttila de Souza Leão Andrade Júnior has written an opus, already in its 2nd edition, of particular interest, regarding foreign investment under the title "O Capital Estrangeiro no Sistema Jurídico Brasileiro" ("Foreign Capital in the Brazilian Juridical System") (Ed. Forense), where he emphasizes the distinction between national and multinational enterprises, if established in Brazil, under the light of Brazilian law.

This is so that Art. 153 § 23 of the "Carta Magna", equally applied to foreign residents and to Brazilian citizens, principle integrated in § 1st, both written as follows:

> "§ 23: The practice of any work, workmanship or profession is free, once the conditions of capacity established by law are observed";
>
> "§ 1st: All people are equal before the law, without distinction of sex, race, work, religious denomination and political convictions. Prejuidice regarding race will be punished by law",

does not distinguish between the holder of control vis-à-vis its nationality, once he is domiciled in the country.

However, what offers the exact dimension of the principle that enforces the law of domicile over the law of nationality, regarding juridical persons, is that the law of nationality can only be called upon to restrict rights when explicitly

entioned in the Federal Constitution (11).

Thus, Art. 174 states:

> "Art. 174: The property and administration of journalistic enterprises, of any nature, including those of television and broadcasting, are prohibited:

---

(11) Hely Lopes Meirelles, in a non published opinion, but attached to the mentioned representation of the Members of Parliament to the Federal Supreme Court, declares: "In view of such dispositions, it is verified that before the Brazilian positive Law, the nationality of Corporations and of limited liability companies are determined exclusively by the conjunction of these two elements: organization according to our laws and administrative seats in Brazil, being irrelevant the nationality and or the residence of its partners and shareholders, or the origin of its capital.
It is observed that the guiding line followed by the ordinary legislator was outlined by the Federal Constitution when, taking over the principle that the mineral resources and the potentials of hydraulic energy can only be explored by the State or its nationals, it mentiones Brazilian citizens (physical persons) and societies organized in the country, without taking into consideration the nationality of its partners or shareholders (Art. 168 § 1st.). It cannot be seen in this, an oversight of the constituent because, following immediately, the same Constitution, intending to create larger restrictions to the control of journalistic television and broadcasting enterprises, prohibits its property and administration to societies that should list foreign citizens as its partners or shareholders (Art. 174, III), which means that, even if they are national, such juridical persons are prohibited to own or to administer such enterprises.
We permit ourselves to anticipate that such impediments and others of the same nature, can only be contrary to the Constitution itself, when dealing with Brazilian juridical persons, considering the inviolability of rights ensured in its Art. 153, especially that of equality before the law (§ 1st)" (pages 5/6).

I. To foreigners;

II. To societies of bearer sharers; and

III. To societies that have, as shareholders or partners, foreigners or juridical persons, exception made to political parties.

§ 1st: The responsibility and intelectual and administrative guiding lines of the enterprises mentioned in this article will pertain only to Brazilian born citizens.

§ 2nd: Without prejudice to the liberty of thought and of information, the law may establish other conditions for the organization and the functioning of journalistic , television and broacasting enterprises, in the interest of the democratic regime and to the fight against subversion and corruption" (underlines are ours),

adopts the law of nationality over the law of domicile to turn into national the journalistic press, being identic the spirit of Art. 173 (12):

"Art. 173: Coasting navigation for the transportion of merchandises is exclusive for national vessels, exception made in cases of public necessity ,

---

(12) Wilson de Souza Campos Batalha ("Comentários à Lei das Sociedades Anônimas" ("Comments to the Corporation Law") Rio, 1977, III/1.238) to adopt identical doctrinary attitude, brings in his support the opinions of Martin Wolff, José Rovira y Ermengol, Lerebours-Pigeonnière, Batiffol, Arthur Nussbaum, Alberto D. Schoo, Ernst Jsay, and, among us, J.X. Carvalho de Mendonça, Spencer Vampré, Trajano de Miranda Valverde, Eduardo Espínola, Espínola Filho, Pontes de Miranda, Oscar Tenório and Waldemar Ferreira.

> § 1st: The proprietors ship-owners and commanding officers of national vessels, as well as at least two-thirds of its crew, must be born Brazilian citizens.
> § 2nd: The disposed in the previous paragraph is not applicable to fishing vessels, that are subject to ruling in federal law" (underlines are ours).

This is the reason why law 4.131/62, that disciplines foreign capital in Brazil, in its Art. 2nd, did not allow differences between the enterprise established in the country, independently of its control, being thus written:

> "Art. 2nd: To the foreign capital invested in the country, the juridical treatment that will be given will be identical to that offered to national capital under equal conditions, being prohibited any discrimination not foreseen in the present law" (we underlined),

this article maintained by law 6.404/76, Art. 299, that is thus written:

> "Art. 299: The dispositions over corporations, as stated in the special legislation regarding the application of tax incentives in the areas of SUDENE, SUDAM, SUDEPE, EMBRATUR and Reforestation, as well as all the dispositions under laws N.s 4.131, of December 3, 1962, and 4.390, of August 29, 1964", are maintained (underlines are ours) (13).

---

(13) Maria Elizabeth Vilaça Lopes, when commenting Art. 299 of the Corporation Law, in the fifth volume of "Comentários à Lei das Sociedades por Ações" ("Commentaries to the Corporation Law") Ed. Resenha Universitária/Instituto dos Advogados de São Paulo, 1986, pg. 461), edition coordinated by Geraldo de Camargo Vidigal and by us, writes: "6. LEGISLAÇÃO PRETÉRITA SOBRE O CAPITAL ESTRANGEIRO E REMESSA DE LUCROS EXPRESSAMENTE MANTIDA ("PRETERIT LEGISLATION OVER FOREIGN CAPITAL AND REMITTANCE OF PROFITS EXPRESSLY MAINTAINED"). In the second part of Art. 299, the Law states that all provisions of Law 4.131/62 and of the Law 4.390/64 (which altered some provisions of the latter) are in force.
Also here, only the excessive care with clarity would justify the inclusion of the precept. These are special laws, that would continue to live together with the general diploma".

The Federal Constitution does no. create, in the computer sector, any kind of restriction to the presence of foreign capital, to the market reserve, or to the establishment of national companies under external control, the reason for which the computer sector was ruled by the Corporation Law up to the enactment of Law 7.232/84. The constitutionality of this Law has been the subject of not yet solved polemic, whose economic consequences are offering no few problems to the relationship Brazil-United States of America.

3. JURIDICAL REGIME GOVERNING INTERNATIONAL INVESTMENT

The basic statute governing foreign investment in the country is Law N. 4.131/62, which still rules its fundamental lines (14).

Under this statute, there are three forms of external inversions admitted in the country, as follows: through financing, through the transfer of technology, and through the investment of risk capital.

---

(14) Art. 1st of the referred to Law states: "Art. 1st: Under the terms of this Law, we consider as foreign capital the possessions, machinery and equipment, that entered the country without initial disbursement of foreign exchange, aimed at the production of goods or services, as well as the financial or monetary funds introduced in the country for application in economic activities, provided that, in both cases, they should belong to physical or juridical persons, resident, domiciled or with seats abroad".

Law 4.131/62 was promulgated under the light of the Constitution of 1946, and received by the new "Carta Magna" (1967), presently in force, because its provisions did not conflict with the new legal system.

The principle of reception, which is fundamental under the national Law that already had 6 Constitutions since brazilian independence in 1822 (1824, 1891, 1934, 1937, 1946 e 1967) determines that all the legislation promulgated under the light of the previous major law and that should not conflict with the new lines of the "Carta Magna", should be received by the new juridical order, as if they were distributed by same (16).

Thus was Law 4.131/62 received, without inconveniences or modifications, by the new constitutional order, because it was integrated in the philosophy displayed under the Title "Social and Economic Order".

---

(16) Luciano da Silva Amaro writes: "Our feeling is that the conduction of the question is based in the principle of reception, studied in Comparative Constitutional Law. By this principle, when a new juridical-political fundamental order is created (a new Constitutional), the pre-existent juridical order where it does not conflict, materially, with the previous one, continues in force and is accepted, disconsidering the process of its elaboration (provided that it conforms with what was foreseen at the time of its elaboration because, should this not be the case, the invalidity should have reached the legislation, already since its origin)" ("Direito Tributário" ("Tax Law"), 5a. Ed. Bushatsky, 1976, page 288, several authors, under the coordination of Hamilton Dias de Souza, Henry Tilbery and the writer).

On the other hand, the Brazilian system to control foreign exchange does not allow incoming and outgoing of foreign currency without authorization by the Central Bank, an organ that is equivalent to the Federal Reserve System of the U.S.A.

The difference which exists is that the FRS is an independent entity, in its 11 Districts, of the Secretariat of the Treasury, while the Central Bank is an organ of the Finance Ministry, under the Brazilian system, thus submitted to the formulation of a macro-economic policy (17).

For this reason, it is not always that the monetary policy frees itself from the other problems inherent to the macro-economic or to the financial policy of the Government, because the juridical discipline of money and credit is not formalized with the independence that the FRS achieved in the U.S.A., but is a mere instrument of support of the global financial policy of the Treasury Ministry.

---

(17) Laws 4.595/64 and 4.728/65 determine the juridical discipline of money and credit in the country, examined by the authors of "Caderno N. 2 de Direito Econômico" (Book N. 2 of Economic Law") (Ed. COAD/CEEU, 1984) namely: Agostinho Toffoli Tavolaro, Carlos Renato de Azevedo Ferreira, Dejalma de Campos, Eurico Korff, Geraldo de Camargo Vidigal, Ives Gandra da Silva Martins, Jamil Zantut, Luiz Felizardo Barroso, Luiz Olavo Baptista and Wagner Pires de Oliveira.

Laws 4.131/62, 4.595/64 and 4.728/65, enacted before the present Constitution, as Complementary Law N. 12, resulting from Art. 69 of Constitutional Amendment N. 1/69, the legality of which has been contested, grant excessive powers of interference to the Finance Minister in the definition of the lines and alterations of the monetary system, without the necessity of consultating the Legislative Power (18).

Such delegation of legislative competence has been contested under the light of Art. 6th of the Constitutional Amendment N. 1/69, thus written:

> "Art. 6th: The Powers of the Union, independent and harmonic, are the Legislative, Executive and Judiciary.
> Sole §: Safe for the exceptions foreseen in this Constitution, it is forbidden to any of the Powers to delegate attributions; whoever is invested in the function of one of them cannot exercise that of the other",

that prohibits such delegation, and this matter has no exceptions in the constitutional text (19).

---

(18) Article 69 of the Constitutional Amendment N. 1/69 is thus written: "The operations of redemption and allocation of notes of the National Treasury, related to the amortization of internal borrowings not foreseen in the annual budget, are regulated in a complementary law".

(19) Wagner Pires de Oliveira also understands that the delegation of competentece, besides being illegal, is the origin of financial blunders, when he states: "Thus, the Complementary Law 12/71 established that the operations of allocation and redemption of notes of the National Treasury resulting from the turnover of the internal public debt, could be realized independently of the estimation of receipts and of the determination of expenses in the Union's Annual Budget. Not counting, as a consequence, with the appreciation of the National Congress.
31. The referred to Complementary Law delegated normative powers to the National Monetary Council, consisting of: (a) to exempt the assignment of budgetary provisions necessary to attend to the expenses with interests, discounts and commissions regarding notes of the National Treasury, allowed, in this case, the inclusion of the value of such charges in the turnover of the debt; (b) to determine the amount of the notes of the National Treasury in circulation to execute the monetary policy, including monetary correction, when such notes are subject to this clause" ("Caderno N. 2 de Direito Econômico") ("Book N. 2 of Economic Law") Ed. COAD/CEEU, page 84).

In this way, the foreign investment, although ruled by law, is submitted to a regime of a doubtful delegation of competence granted to the Central Bank, the sole organ capable of turning it legitimate and that "legislates" through Resolutions, without consulting the National Congress.

The first form of investment (financing), to allow the return of interests and of capital must necessarily be made under the control of the Central Bank, through Law 4.131/62 or through financial agents supervised by the Central Bank, under the system of the "BACEN Resolution N. 63". The difference between the rates of the official US dollar and the one of the black market, that has been varying between 25% and 100%, brings not few times disturbances to borrowers of funds or to bankers. The fear of mini-devaluations or of maxi-devaluations should be borne in mind -despite the excessive external debt of Brazil (100 billion dollars), undertook, however, in 4/5 by the Public Powers for the execution of good and of bad official projects-, with the result that private enterprise does not wish to be exposed to the risk of requesting financing from abroad (20), even should it have its own economic density to contract loans from abroad.

---

(20) In our book with Alberto Xavier "Estudos Jurídicos sobre o Investimento Internacional" ("Juridical Studies on International Investment") (Ed. Revista dos Tribunais, 1980, we tried to alert the Brazilian authorities to such factors of commotion in the financial market regarding external relationships.

The second form of investment permitted is the transfer of technology. In order that such type of investment is accepted, it is necessary its previous acknowledgement by the Instituto Nacional de Propriedade Industrial ("National Institute of Industrial Property") for ulterior registration at the Central Bank. The types of transfers permitted are, according to Normative Act N. 15, N. 32 and ulterior regulation, the following, with their due explanation:

> "1. The license is the contract aimed specifically to authorize the effective exploration, by third parties, of the subject of the patent regularly deposited or granted, under the terms of the Code of Industrial Property.
> 2. The license is too the contract aimed specifically to authorize the effective utilization, by third parties, of the mark or propaganda, regularly deposited or registered, under the terms of the Code of Industrial Property.
> 3. It is considered the supply of industrial technology, the contract that aims specifically at the acquisition of knowledge and of techniques not supported by rights of industrial property, deposited or granted and to be applied in the production of consumer goods or of raw materials in general.
> 4. It is considered of technical-industrial cooperation, the contract that aims specifically at the acquisition of knowledge, the techniques and services required for the production of industrial units and sub-units, of machinery, equipments, the respective componentes and other capital goods, under order.
> 5. It is considered as of technical services, the contract that specifically aims at the planning, the programming and the elaboration of studies and projects, as well as at the execution or the rendering of services of a specialized nature, that the productive system of the country requires" (21).

---

(21) Waldemar do Nascimento, in debates regarding the matter, in a specific lesson on "Transferência de Tecnologia" ("Transfer of Technology") in a Seminar on the "Juridical Regime Governing Foreign Investment" at the Centro de Estudos de Extensão Universitária-CEEU ("Center of Studies of Post-Graduation Course-CEEU") September, 1977.

The difficulty to avoid the flight of exchange in the acquisition of disguised technology, brings about identical difficulty to its approval by the National Institute of Industrial Property, of any investment in this area, there existing processes that move through the proper channels during years, many times with tecnology already surpassed at the time of its approval (22).

The last and best form of investment, according to the doctrine, is the direct investment, which registration is made only at the Central Bank, with the right to repatriate capital and to remit profits. Despite of being liberal, the national policy concerning direct investment, today of around 26 billion US dollars, there has been a reduction of investors.

In the field of informatic, only the first type of internacional investment is free of restrictions.

---

(22) We dealt with the matter in the study published by Marchmont Taxation Group Limited - London (Conference Notes - International Tax Planning Conference - 1979), under the title "Tax Aspects of Technology Transfers within/into/out of South America".

4. THE TRIBUTARY SYSTEM REGARDING FOREIGN INVESTMENT

The Brazilian Tributary System is rigid. It is composed of 5 tributary kinds: Taxes, duties, special contributions (contributions for improvements) and compulsory loans. The most important among them are the taxes.

Brazil is a Federation. The Union (Central Power) is the great beneficiary of the discrimination of revenues, since it detains 9 taxes, it may create compulsory loans, war loans, special contributions and has the right to the so-called residual jurisdiction, i.e., the right to create new taxes, whose basis for calculation and generating fact, should not be equal to the State and municipal taxes (Art. 21 of the Constitutional Amendment N. 1/69).

The Municipalities detain the constitutional authoritative jurisdictions over

two taxes (Art. 24) and the States, over three (Art. 23) (23).

---

(23) From their "caput", articles 22, 23 and 24 are written as follows: "Art. 21: It is the jurisdiction of the Union to institute taxes over: I. Importation of foreign products, being the Executive Power authorized, under the conditions and the limits established by law, to alter their aliquotes of their bases of calculations; II. The exportation abroad, of national or nationalized products, observing what is disposed at the end of the previous item; III. Rural territorial property; V. Income and revenues of any nature, except those of allowances and per diem paid by the public treasury under what is established by law; V. industrialized products, also observing what is indicated at the end of section I; VI. credit operations, exchange and insurance or those related to notes or securities; communication services, except those of a strict municipal nature; VII. production, import, circulation, distribution or consume of lubrificants and liquid or gassy combustibles and electric energy, which tax will incide only once in any of such operations, excluded the incidence of another tribute over same; IX. The extraction, circulation, distribution or consume of minerals in the country, enumerated in the law, tax that will incide just once over any of these operations, being observed what is indicated at the end of the previous section; and X. Transportation, except those of a strictly municipal nature.
.....;
Art. 23: It is the jurisdiction of the States and of the Federal District to institute taxes over: I. Transmission, under any title, of real estate properties by nature and physical acession and of actual right over real estate, except those given in guaranty, as well as over the transfer of rights at the time of its acquisition; II. Operations relating to the circulation of goods carried through by producers, industrialists and businessmen, a tax that will not be cumulative and over which it will be discounted, according to a complementary law, the amount charged over such articles in the same or in other States. The exemption or non-incidence, except determination in contrary, by the legislation, will not imply in a credit of the tax for discount in the following operations; and III. property of automotive vehicles, being forbidden the collection of tributes or taxes inciding over the utilization of vehicles.
.....;
Art. 24: It is the jurisdicton of the municipalities to institute taxes over: I. Urban territorial and house tax; II. Services of any nature not included in the tributary jurisdiction of the Union or of the States, as defined in a complementary law".

Where international relations are concerned, taxes over foreign trade (import, export and financial operations), turnover taxes (industrialized products, circulation of goods - Tax over services) are utilized; however, the most relevant is the income tax.

The import duties, being a taxes for a macro-economic control, are bound to be altered without respect to the anuality principle, e.g., it can be modified in the same fiscal year in which the modification was introduced, in accordance with the necessities of the balance of trade. The export duties are mainly imposed over agro-cattle raising products, considering that in order to offer incentives to the export of Industrialized products, same is not imposed over the majority of industrialized products.

The Tax over industrialized products incides only over the importation of foreign products under the same rules of incidence over national products, the same occuring with the tax over operations relating to the turnover of goods; and the income tax over Services since the enactment of Decree-law 1.418, is determined by the law of the nationality of the paying source, i.e., Brazil, even if the service is rendered abroad, with the reformulation of Summula 575 of the Highest Court, which is written as follows:

> "585. Income tax is not incident over the remittance of exchange for payment of services rendered abroad by a company that does not operate in Brazil".

In the rendering of services abroad, the payment of TOS in the seat of the establishment that rendered the service prevails, except in such cases where services were rendered abroad by Brazilian companies of civil construction.

Tax incentives are offered, however, to exporters of Brazilian products or over the rendering of services, in the level of exemption of TCG, TIP and, mainly, over income tax (24).

However, income tax is the principal tribute regulating foreign inversions. It is incident at the aliquote of 25% in the remittance of interests, dividends and royalties abroad, depending upon the form of the investment, i.e., financing, risk capital or transfer of technology, except for rare exceptions (25).

---

(24) We have examined this matter in our book "Teoria da Imposição Tributária" ("Theory of Tributary Imposition") Ed. Saraiva, 1983).

(25) Art. 554 of the Income Tax Regulation in its section I states the following: "Art. 554: In accordance with what is disposed under this Title, the following operations are subject to the payment of income tax at source: the revenues and capital gains originated from sources situated in the country, when received: I. from physical or juridical persons residing or domiciled abroad; .....";
Art. 555: Section I, states the following: "Art. 555: The following operations are subject to the discount of with holding taxes: I. Aliquote of 25% (twenty-five per cent) over revenues received by physical or juridical persons to which the previous article refers, including those received in short-term operations and capital gains relating to investments in foreign exchange, excepted those of which sections II and III deal with; .....".

However, dividends and royalties are limited to a percentage of the capital invested or of the turnover resulting from the utilization or marks, techniques or patents. The first is limited to a maximum annual remittance of 12% over the capital invested and the seconds to a percentual that varies from 1 to 5% over the turnover obtained (26).

In relation to loans, however, the right to the remittance of interests, as contracted, prevails, and the paying source may support the tribute, and in this way, the foreign entity that supplies the money received the total amount referred to interest tax-free and the paying source will have its income tax due increased from 25 to 33%.

Regarding dividends, however, the enterprise may pay them in a percentage higher than 12% but will be subject to a supplementary income tax of 40% between 12 and 15%; 50% between 15% and 25%; and of 60% over 25% of remittance over capital (27).

---

(26) The matter is yet regulated by Ordinance MF 436/58, that limits the deduction of profit to the remittance of royalties abroad.

(27) Art. 559 of Income Tax Regulations, and its 1st § are written as follows: "Art. 559: The amount of profits and net dividends effectively remitted to physical and juridical persons resident or with seats abroad, is subject to a supplementary income tax, whenever the average of remittances in a 3 years term exceeds 12% (twelve per cent) of the capital and reinvestments registered at the Central Bank of Brazil, exception made to what is disposed in §§ 10 to 12.
§ 1st - The supplementary tax subject of this article, which will be debited to the beneficiary abroad, for discount on occasion of subsequent remittances, will be collected in accordance with the following table: a) between 12% and 15% of profits over capital and reinvestment - 40%; b) between 15% and 25% of profits - 50%; c) over 25% of profits - 60%.
.....".

Such supplementary income tax is calculated starting from a 3 years period, which means that the amounts considered for the calculation of the excess are for a 3 years period, being each remittance composed by 3 triennials. If we consider a remittance in 1984, such remittance will compose the triennials 82-83-84, 83-84-85, 84-85-86, and whenever the supplementary tax incides over a triennial, the percentage over 12%, will be reduced to 12% to compose the next triennial (28).

Whenever international interests are high, multinational companies prefer to lend money than to apply directly, even because loans are deductibe expenses with a lesser tributary charge and dividends, besides not being deductible, may be charged a higher tax because of the supplementary income tax.

Brazil has 16 treaties against double taxation, molded in the pre-project of the Organization for Cooperation and Economic Development, where the aliquotes agreed upon are lower, all of them excluding

---

(28) We have analysed this matter in articles published in the "Bulletin for International Fiscal Documentation" (vol 37 N. 1, 1983, Amsterdam, pg 30 and vol 38, N. 8-9, pgs 395/404), under the title "The supplementary income tax on the remittance of dividend income - legal nature and computation".

treatments regarding the supplementary income tax (29).

The tributary system that offers protection mechanisms to the Brazilian Government, is useless where new products in the area of informatics is concerned, being of value only for products or for technology previously produced by foreign enterprises.

---

(29) Tax treaties against double taxation are the following:
a) West Germany (Legislative Decree 92/75; Decree 76.988/76; Ordinances 43/76, 469/76 and 313/78; PN 52/77);
b) Argentina (Legislative Decree 74/81; Decree 87.976/82; Ordinance 22/83);
c) Austria (Legislative Decree 95/75; Decree 78.107/76; Ordinance 470/76);
d) Belgium (Legislative Decree 76/72; Decree 72.542/73; Ordinances 271/74 and 71/76);
e) Canadá (Legislative Decree 28/85; Decree 92.318/86);
f) Denmark (Legislative Decree 90/74; Decree 75.106/74; Ordinances 68/75 and 70/76);
g) Ecuador (Legislative Decree 4/86);
h) Spain (Legislative Decree 62/75; Decree 76.975/76; Ordinance 45/76);
i) Finland (Legislative Decree 86/72; Decree 73.496/74; Ordinance 223/74);
j) France (Legislative Decree 87/71; Decree 70.506/72; Ordinances 287/72 and 20/76; PN 55/76);
l) Italy (Legislative Decree 77/79; Decree 85.985/81; Ordinances 203/81 and 226/84);
m) Japan (Legislatives Decrees 43/67 and 69/76; Decrees 61.899/67 and 81.194/78; Ordinance 92/78; PN 38/70 and 662/71; ADN 2/80);
n) Luxembourg (Legislative Decree 78/79; Decree 85.051/80; Ordinances 413/80 and 510/85);
o) Norway (Law Decree 501/69; Decree 66.110/70; Legislative Decree 50/81; Decree 86.710/81; Ordinances 25/82 and 227/84);
p) Portugal (Legislative Decree 59/71; Decree 69.393/71; Ordinance 181/73; PN 132/73 and 105/74);
q) Sweden (Legislative Decree 93/75; Decree 77.053/76; Ordinances 44/76 and 5/79; PN 37/74; ADN 28/78).

5. MARKET RESERVE FOR THE COMPUTER SECTOR

After the 1964 Revolution, when the Military Governments assumed control over the country, the strategy for the development was defined, which was that the State would gradually control all the vital sectors of the Economy, besides the already controlled sector of the industry of petroleum exploration, its improvement and distribution (30).

In this way, organisms were created to gradually transfer private controls to the public sector, as it occurred with Eletrobras in the field of electric energy, Telebrás, in the communications area, Portobrás, Embratur and many other official entities, for the direct exploration and/or through concession or authorization for determined activities, under a rigid state control.

---

(30) We have examined the matter in our book under the title of "Desenvolvimento Econômico e Segurança Nacional - Teoria do Limite Crítico" ("Economic Development and National Security - Theory of the Critical Limit") with an introduction by Roberto de Oliveira Campos (Ed. Bushatsky, 1971).

Thus, the "Carta Magna", in its article 8th, Section XV, written as follows:

> "Article 8: It is in the sphere of the Union:
>
> .....
>
> XV. To explore, directly, or under authorization or concession:
>
> a) telecommunication services;
>
> b) services of installation of electric energy of any origin or nature;
>
> c) aerial navigation; and
>
> d) transportation between maritime ports and national borders or those that traverse the borders of States or Territories;
>
> .....,

reserves specific areas for the presence of the State in those areas, directly or indirectly.

It is curious to notice that the strategy defined and practiced by the Military Governments, concentrated on art. 8 and on the already commented Art. 163 of the "Carta Magna", offer the State enterpreneur conditions to detains over 60% of the Brazilian GNP. In spite of this the Constitutional Amendment N. 1/69 introduced the neo-liberal economic philosophy, to the point of admiting, through the already commented art. 170, only suppletively the presence of the State as an enterpreneur (31).

---

(31) The "Caderno de Direito Econômico N. 3" ("Book on Economic Law N. 3") (Ed. COAD/CEEU, 1985) with publications by Alberto Venâncio Filho, Almir de Lima Pereira, Attila de Souza Leão Andrade Júnior, Carlo Barbieri Filho, Carlos Francisco Magalhães, Ives Gandra da Silva Martins, Luiz Felizardo Barroso, Luiz Olavo Baptista, Marcos Paulo de Almeida Salles, Sérgio Marques da Cruz and Sinval Antunes de Souza, dedicated to the theme "Disciplina Jurídica da Concorrência" ("Juridical System of Rules regarding competition"), contains serious criticisms to the participation of the Brazilian State in the economic process.

All the doctrinaires are under the impression that the governmental strategy of the Military Governments was, in a first instance, to offer foundations for a solid economic development and, on a second stage, to open to private enterprise such exploration, in the same way as the regime of democratic exception was oriented to the political overture, that was made without any traumas or institutional ruptures.

Where the economic aspect is concerned, an unforeseen phenomenon occurred, the association of technocracy with politicians in the creation of state enterprises, in a way, as the disestatization conceived or the privatization desired by the last military Government found unsurmountable obstacles, despite the generalized recognizance that the level of external debt and the problems of the present Brazilian economy are a result of the public deficits created by the inefficient presence of the State in the Economy (32).

---

(32) The newspaper "O Estado de São Paulo", through the following enterpreneurs, economists and lawyers: Antonio Ermírio de Moraes, Roberto Teixeira da Costa, Roberto Campos, Alain Belda, Ivan Muller Botelho, Cyro Penna César Dias, Guilherme Afif Domingos, Jorge Simeira Jacob, Jorge Gerdau Johannpeter, Ives Gandra da Silva Martins, Paulo Rabelo de Castro and Luís Paulo Rosenberg, offered to the Federal Government a project for the rapid privatization of the deficient state companies and todate, one year and a half after its disclosure, has not received an official definition regarding the acceptance or not of the propose offered.

In the collision of the controversy raised over state enterprises versus privates enterprises for the steady evolution of the economy in the 80's, the Government stategists understood that the most crucial area for development in the future would be that of informatics and should the country not detain its control, it would be doomed to remain in a primitive stage of technological progress.

In this period, the national technocracy understood that the best way to obtain independence in relation to foreign groups and to multinational companies that controlled the on "end technology" in the computers' area, woud be: a) to control, in a federal level, all the proper development of the area; b) to definitely remove the influence of foreign enterprises that "would not be interested in developing their technology in the country" but only in selling closed parcels; c) to avoid the dependency in relation to foreign technology; d) to develop, through tax incentives and limited authorizations, the national industry capable of offering, through its own experience, the technological development that the country would need.

As a consequence, Law N. 7.232/84 was enacted, that, simultaneously, consolidated the Secretaria Especial de Informática ("Special Secretariat for Informatic"), linked to the Conselho de Segurança Nacional ("Council for National Security"), established the Conselho Nacional de Informática ("National Council for Informatic"), an organ with legislative delegated function, and removed the possibility of foreign

companies to participate in the area reserved for national industry and created tax incentives to permit the increase of the area through companies exclusively with national control (33).

6. LEGAL PROBLEMS RESULTING FROM THE ENACTMENT OF LAW 7.232/84

The enactment of law 7.232/84 creating the market reserve for the national industry and considerably enlarging the area for performance of State intervention in all economic segments, directly or indirectly controlled by the Government, provoked a pronounced internal reaction of multinational companies excluded from the privilege and from Members of Parliament, because it created an area of ponderable dissention in the commercial relationship with the U.S., that understood that market reservation, in a country with a superavit in its trade balance with the U.S.A. (5 billion dollars annually) would contravene the principles of free trade between the countries in detriment

---

(33) Article 1st of Law 7.232/84 is written in the following way: "This law establishes principles, objectives and directives of the National Policy on Informatic, its aims and formulation mechanisms, it creates the Conselho Nacional de Informática e Automação-CONIN ("National Council for Informatics and Automation-CONIN"), it disposes over the Secretaria Especial de Informática-SEI ("Special Secretariat for Informatics-SEI"), it creates the Distritos de Exportação de Informática ("Districts for Export of Informatics"), it authorizes the creation of Fundação Centro Tecnológico para Informática-CTI ("Technological Center Foundation for Informatics-CTI"), it institutes the Plano Nacional de Informática e Automação ("National Plan for Informatics and Automation") and the Fundo Especial de Informática e Automação ("Special Fund for Informatic and Automation").

to one of them (34).

As a result of its promulgation, a group of Members of Parliament, unresigned, submitted a representation to the Attorney General requesting that the inconstitutionality of that Law should be argued at the Federal Supreme Court.

---

(34) Art. 2nd of Law 7.232/84 is thus written: "Art. 2nd: The National Policy on Informatics has as its objetive the national qualification in informatics activities, for the progress of the social, cultural, political and economic development of the Brazilian society, being attended the following principles: I. Governmental action in the orientation, coordination and incentives to activities in the informatics area; II. Participation of the State in the productive sectors in a suppletive way, when dictated by national interest and in the cases where private enterprise should not have conditions to act or should not be interested in same; III. State intervention aiming at insuring balanced protection to national production of determined classes of goods and services as well as to an increasing technological qualification; IV. prohibition to the creation of monopolistic situations, of right or in fact; V. continuous adjustment of the process of informatization to the peculiarities of the Brazilian society; VI. orientation of a political character of activities in informatics, that should bear in mind the necessity to preserve and improve the cultural identity of the country, the streategic nature of informatics and its influence in the effort developed by the Nation to achieve better levels of social well-being; VII. Guidance to all the national effort in the area with the aim to attend to priority programs for the economic and social development and for the strengthening of the National Power, in its various fields of expression; VIII. Establishment of legal and technical mechanisms and instruments for the protection of the secrecy of the data stored, processed and transmitted, of interest of privacy and of security of physical and juridical persons, private and public; IX. The establishment of mechanisms and instruments to ensure to every citizen the right of access and the retification of information existing regading him in public or private data; X. the establishment of mechanisms and instruments to ensure the balance between gains of productivity and levels of employment in the automation of productive processes; XI. Governmental promotion and protection directed to the development of national technology and to the economic financial and commercial strengthening as well as an incentive to the reduction of costs of products and services, ensuring to them a greater international competivity".

Art. 119, Section I, item I of the Constitutional Amendment N. 1/69, is thus written:

> "Art. 119: It is the competence of the Federal Supreme Court:
> I. to process and judge ordinarily:
> .....
> l) The representation to the Attorney General, for inconstitutionality or for interpretation of the law or for federal or state normative act;
> .....",

it grants to the Attorney General the function to direct or not such arguments, being the regulation, however, of restrict utilization, in the measure in which the subordination of the Attorney General to the President of the Republic has led him to seldom send arguments against federal laws or decree-laws, filing them summarily (35).

---

(35) In the "Curso sobre o Modelo Político Brasileiro" ("Course on the Brazilian Political Model") edited by the "Instituto dos Advogados de São Paulo" ("São Paulo Lawyers' Institute") and the Federal Government (PNDR), the matter was treated in the fourth book ("Separação de Poderes") ("Separation of Powers") with a proposal of a constitutional reformulation in order to offer a better defense to the citizens (Ed. Forense, extra volume, "Revista de Direito Constitucional e Ciência Política", 1986) ("Magazine of Constitutional Law and Political Science", 1986), being their authors: Francisco de Assis Alves, Maria Garcia, Celso Bastos, Ives Gandra da Silva Martins, Toshio Mukai and Gastão Alves de Toledo.

In the case under examination, however, the representation was signed by 10 Senators and 44 Deputies, with a power to obstruct governmental projects at the National Congress, the reason for which the Attorney General was forced to send the argumentation, although contesting the fundaments in which it was based.

The argument is based in 6 inconstitucionalities, such as: 1) it hit the constitutional principle of free enterprise; 2) it hit the principle of juridical equality before the law; 3) it hit the acquired right; 4) it hit the non-delegation of legislative competence; 5) the matter does not refer to the question of national security; 6) it hit the principle of legality.

The articles of the law and its regulations considered as infringed were: Articles 2nd, 3rd, 9th, 10th, 11th, 12th, 13th, 14th, 7th, 6th § 2nd, 17th, 19th, 20th, besides Law 2.203/84 and the regulating Decree 90.754, 90.755, 90.750/84 and 91.146/85 (36).

---

(36) Article 9th is thus written:-"In order to ensure adequate level of protection to national enterprises while they are not ready to compete in the international market, being observed differentiated criteria according to the peculiarities of each specific market segment, periodically revaluated, the Executive Power will adopt restrictions of a transitory nature to the, production, operation, commercialization and importation of technical goods and services in the field of informatics.
§ 1st: Taking exception to what is disposed of in Art. 10, restrictions or impediments cannot be adopted to the free exercise of production, commercialization and the rendering of technical services in the area of informatics against national companies that should utilize national technology, where they do not enjoy tax and financial incentives.
§ 2nd: Equally, restrictions will not apply to the "caput" of this article, to the goods (vetoed) of informatics, with national techonology, the production of which independs from the importation of parts, portions or components of external origin".

The referred to diploma, where it refers to foreign capital, is thus written:

"Art. 12: For the effects of this law, national companies are juridical persons established and with their seats in the country, whose control should be, in a permanent character, exclusive and inconditional, under the registration, direct or indirect, of physical persons resident and domiciled in the country, or of entities of internal public right, being control understood as:
I. Control over decision power: the exercise, by right and in fact, of the power to elect the company's administrators and to guide the function of the company's organs;
II. technological control: the exercise, by right and in fact, of the power to develop, generate, acquire and transfer and modify the technology of the product and of the production process;
III. Capital control: the detention, direct or indirect, of the totality of the capital, with effective or potential right to vote and of a minimum of 70% of the share capital.
§ 1st - In the case of corporations of open capital, shares with voting right or with the right to fixed dividends should correspond, at least, to 2/3 of the share capital and my only be owned or subscribed or acquired by:

a) physical persons domiciled in the country, or entities of internal public right;
b) juridical persons of private right, constituted and with seat and forum in the country, that should conform with the requirements defined in this article for its possibility of being considered as a national enterprise;
c) juridical persons of internal public right.
§ 2nd - Shares with right to vote or to dividends fixed or minimum will be nominative".

For the effects of the present article, it is of lesser importance the alleged inconstitutionalities referred to the principle of legality and of non-delegation of authority of legislative competence, considering that it only affects indirectly the inversion of foreign capital, affecting, in the same way, national and foreign enterprises excluded by such delegation of authority (37).

However, we have mentioned the question because such delegation of legislative competence may invalidate all the regulation of the matter, should the Federal Supreme Court consider law 7.232/84 inconstitutional.

In effect, both the law regarding CONIN (Conselho Nacional de Informática) (National Council for Informatics), received legislative powers not foreseen in the Federal Constitution, being it clear that the sole paragraph of art. 6th of the Federal Constitution, that only permits the attribution of functions in cases expressly foreseen in the Constitution, was not respected. Thus, having the Executive Power the right to formulate and to reformulate special situations, broadening or reducing areas of actuation, reducing or increasing tax incentives, it is evident that it has now legislative powers not foreseen in the Constitution, being such point of crucial analysis on the part of superior judges. It must be added the fact that, under the principle of legality molded in paragraph 2nd of art. 153 of the Constitutional Amendment N. 1/69, only the law may impose, being the principle written as follows:

---

(37) In our book "Direito Econômico e Empresarial" ("Economic and Enterprise Law") (Ed. CEJUP/IASP, 1986) in the opinion under the title "Incentivos Fiscais na Área da Informática" ("Tax Incentives in the Informatics Sector") (pgs 49/71) we discussed some of the inconstitutionalities of the referred to legal diploma, however, as far as it concerns the restrictions to national enterprises installed in the Amazon area.

"§ 2nd - Nobody will be forced to do or not to do anything unless by enforcement of the law" (38).

---

(38) Art. 7th of Law 7.232/84 is written as follows: "It is of the competence of the Conselho Nacional de Informática e Automação (National Council for Informatics and Automation): I. To advise the President in the formulation of the Política Nacional de Informática (National Policy on Informatics); II. To propose, every three years, to the President of the Republic, the Plano Nacional de Informática e Automação (National Plan for Informatic and Automation) to be approved and annually evaluated by the National Congress and to supervise its execution; III. to establish, in accordance with what is disposed of in the Plano Nacional de Informática e Automação (National Plan for Informatics and Automation) (vetoed) specific resolutions of procedures to be followed by the organs of the Federal Administration; IV. Continuously follow the strict observance of these norms; V. Previously opine over the creation and reformulation of organs and entities, in the sphere of the Federal Government oriented to the informatics sector; VI. Offer an opinion regarding the concession of tax, financial, or of benefits of any other nature from organs or entities of the Federal Administration to projects of the informatics sector; VII. To establish criteria for the compatibilization of the policy of regional or sectorial development, which may affect the sector of informatics, with the objectives and principles established in this Law, as well as measures aimed to promote the economic regional disconcentration; VIII. to establish norms and standards for the homologation of informatic services and for the issuance of the pertaining certificates, previosly hearing the proper technical organs; IX. to know the projects concerning treaties, agreements, conventions and international commitments of any nature, whenever they refer to the informatic sector; X. to establish norms for the control of the flux of data over borders and for the concession of channels and means for the transmission of data for connection to data banks and nets abroad (vetoed); XI. to establish measures aimed at the rendering, by the State, of adequate protection of individual and public rights, as far as the effects of information of the company is concerned, being obeyed what is prescribed under Art. 40; XII. To offer an opinion regarding the minimum curricula for the professional development and definition of the careers to be adopted, relating to the activities in the area of informatics, by organs and entities of the Federal Administration, Direct and Indirect and foundations, under a ministerial supervision; XIII. To decide, in a degree of appeal, the questions resulting from the decisions of the Secretaria Especial de Informática (Special Secretariat of Informatics); XIV. To offer an opinion regarding the basic conditions of the acts or contracts (vetoed) relating to activities of informatics; XV. to propose to the President of the Republic the remittance to the National Congress of the complementary legislative measures necessary for the execution of the Política Nacional de Informática (National Policy on Informatics); XVI. In consonance with the Plano Nacional de Informática e Automação (National Plan for Informatics and Automation), create Centros de Pesquisa e Tecnologia e de Informática (Centers of Research and Technology and of Informatics) in any part of the national territory and abroad"

However, all administrative acts that should surpass the limits determined by the law itself, that is, on its side, limited by the Constitution, having then its own authoritative power, hurts the principle of legality, which principle should, on the other hand, be restrictively interpreted, whenever it reduces rights of third parties. It means to say, by the dominant theory in Brazilian Law, that be law that involves restrictions of rights cannot be interpreted extensively or analogically, but always within the strict limits for which it was enacted.

Such point, if accepted by the Supreme Federal Court may reformulate entirely the country's market reserve for informatics.

7. CONCEPT OF NATIONAL SECURITY

Article 2nd of Law 7.232/84 does not mention "national security", but when defining the "política nacional de informática" ("national policy of informatics") it states that same is dictated by the national interest and in the cases where private enterprise should have no conditions to act or would not be interested in same" (Sector II).

Such formulation, according to the largest part of the doctrine, conflicts with the terms of Articles 89, 163 and 170 of the Constitutional Amendment, these two already previously commented (30).

The market reserve represents a restriction of rights in such a manner that its regulations cannot be examined under the extensive interpretation, only under the restrictive one.

However, the ordinary legislator did not utilize the correct expression "segurança nacional" ("national security) but an expression of lesser density, i.e., mere "advantage",

---

(39) Art. 86 of the Federal Constitution is thus written: "Art. 86: Every person, natural or juridical, is responsible for the national security, within the limits established by law".

the reason for which the intervention in the economic domain could not occur, according to the opinion on numerous doctrinaires (40).

In effect, according to the representation of the 54 Members of Parliament, based on opinions of eminent jurists, considering that such intervention was not originated from "national security" but from a simple "advantage", and having the private enterprise conditions to act in the area by national and by multinational enterprises, the Law would be lacking legal support, since Art. 163 of the Constitutional Amendment N. 1/69, which would justify it, could only be utilized should one of the two hypotheses occur.

The Attorney General's office counter-argued, stating that the intervention would prescind of the two prerequisites only applicable to monopolies, but not the intervention. Well, respond the Members of the Parliament, should the two prerequisites be unnecessary, why cite one of them (insufficiency of private enterprise),

---

(40) Manoel Gonçalves Ferreira Filho, in an opinion that based the mentioned representation, declares: "It originates, then, from the presentation and from the Project that the matter is not, in the constitutional sense, of "national security". Thus, it is improper to submit it to the Conselho de Segurança Nacional ("National Security Council"), to the organs attached to same, Comissão Nacional de Informática-CNI ("National Council for Informatics-CNI") Secretaria Especial de Informática-SEI ("Special Secretariat for Informatics-SEI") and Fundação Centro Tecnológico para Informática-CTI ("Foundation Technological Center for Informatics-CTI) (pg 10 of the opinion attached to the representation).

and mention "national interest" as it would have the characteristic of "national security", athough the simple legislative intention does not enact a law, should the law not correctly conform the legislative assumption (41).

It should be added that the concept of national security, in a juridical level, was already configurated by the Supreme Court, in a sentence that reformulated the governmental conception presented by the Superior War School.

Both the concepts are thus presented, in an opinion submitted by the writer:

> "A third aspect respects the concept of national security, that may only be that, less ample, protected by a praetorian decision and thus expressed by its reporter, Minister Aliomar Baleeiro (DOU "Official Journal of the Union", of 28.06.1968, pg 2460, RE 62.731):

---

(41) Hans Kelsen ("Teoria da Norma Pura" ("Theory of Pure Norm"), Ed. Armênio Amádio, Coimbra, 4th edition).

> "The concept of national security is not undefined and vague, neither is it open to the arbitration of the President or of Congress. National Security involves all the matters pertinent to the defense of the integrity of the territory, independence, survival and peace in the country, in the institutions and of material or moral values against external and internal threats, present and immediate or yet potential ones, close or sensible",
> and not that of infinite vastness, as acclaimed by the Superior War School, which is thus written:
> "the relative degree of guaranty that, through political economical, psychosocial and military actions, the State provides, in a determined time, to the nation over which it has jurisdiction, to attain or maintain the national objectives, despite antagonisms or pressures existing or potential" (Revista Brasileira de Estudos Políticos) ("Brazilian Review of Political Studies"), vol. 21, pg. 79).
> By the referred to interpretations, we can perceive, well enough, that the conceptual conformation of the higher law will necessarily have to be juridical, as Aliomar Baleeiro prescribes, and not political, as the Superior War School declares" (42).

It should be noted that the juridical conformation considerably restricts the political comprehension of the national security theory.

---

(42) "Caderno de Direito Econômico N. 4" ("Book of Economic Law N. 4), the writer's study "Disciplina Jurídica do Capital e do Trabalho" ("Juridical Discipline of Capital and of Labour") (Ed. CEJUP/CEEU, pges 100/101).

In this way, the Members of Parliament perceived the restrictive interpretation to the limitation of rights and the already accepted conception of the Federal Supreme Court over national security. Such conception represents a juridical reformulation of a considerable larger extension than "national interest", that would turn inconstitutional law 7.232/84, which offends Article 160, Section I (free enterprise) and 170 (precedence of free enterprise over public enterprise), besides creating the separation between national and foreign companies, prohibited by the "Carta Magna", as we shall see afterwards.

By the interpretation of the referred to Members of Parliament, multinational companies and all national companies would have the possibility of investing in the area, since they are not compelled by an inconstitutional law.

8. RESTRICTIONS TO FOREIGN CAPITAL

Article 2 of Law 7.232/84 is the crucial restrictive provision to foreign capital in the area of informatics.

By the referred to order, all the national companies controlled by foreign investors are excluded from participating in the ample list expressed in Art. 3rd of Law 7.232/84 (43).

There are excluded, inclusively, those that already participated in the market, the reason for which its acquired right might have been affected, according to the representation submitted by the Members of Parliament.

---

(43) Art. 3rd of Law 7.232/84 is written as follows:
"Art. 3rd: For the effects of this law, activities in the area of informatics are those linked to the rational and automatic treatment of information and, specifically, those of: I. research, development, production, importation and exportation of electronic to semiconductors, opto-electronic components, as well as of the respective raw materials of electronic degree; II. research, importation, exportation, production, commercialization and operation of machinery, equipments and devices based in digital techniques, with technical functions of collection, treatment, structuring, warehousing, substitution, recovery and presentation of the information, its respective electronic, parts, (raw materials) portions and physical supporter for operation; III. Importation, exportation, production, operation and commercialization of programs for computers and automatic machinery for treatment of information and respective associated technical documentation ("software"); IV. the rendering of technical services in informatics.
§ 1st (vetoed).
§ 2nd - The structuring, exploration of data banks (vetoed) will be regulated by a specific law".

In effect. Art. 153 § 3rd of the Constitution, established that:

"§ 3rd - The law will not damage acquired right, the perfect juridical act and matters passed judgment",

in such a way that all companies that were installed in the country before the enactment of Law 7.232/84 should have the right to explore activities in the area of informatics, by force of the constitutional guaranty. No enterprise, under foreign control, as a result of the referred to higher principle, could be excluded from the participation in the market, being yet recalled that Art. 163 of the Constitutional Amendment N. 1/69, that permits intervention, states that such intervention can only be effected if the individual rights and guaranties are ensured. This means that the legal provision itself, that facilitates the intervention, also determines that the acquired right be respected (44).

---

(44) We have already written the following regarding this matter: "It is not perceived, on the other hand, that to "ensure individual guaranties and rights" mentioned in Art. 163, this is not restricted to a just indemnity in an intervention or in the monopolization of a determined activity, but, much more than that, the higher norm requires that the rights and guaranties of free enterprise be respected, in the first place.
In other words, the provision determines that the State cannot declare, in the first place, that a sector is not exploitable by private enterprise,because same is insufficient, but should allow that private initiative demonstrates to be incapable to organize and to explore the referred to sector.
We should not even say, in cases of urgency, that the State should not question the capacity or not of the private segment, because, by edicts, it can grant terms for tenders to the private sector, in order to verify if groups would have conditions to attend th essential requirements.
Thus, the guaranty and the individual right, mentioned in Art. 163, are not only of a just indemnity but those of the right itself to explore" ("Curso de Direito Empresarial") ("Course of Enterprise Law") several authors, ed. CEJUP, pgs 18/19).

On the other hand, since the Federal Constitution makes no distinction between national companies of internal or of external control, except the expressed exceptions mentioned therein, the principle of equality of rights would also be hurt, according to the Members of Parliament, since Art. 153 1st states that:

> " Art. 153: The Constitution ensures to Brazilian citizens and to foreign citizes resident in the country the inviolability of rights concerning life, liberty, security and property, in the following terms:
> § 1st: All are equal before the law, without distinction of sex, race, work, religious denomination and political convictions. The bias concerning race will be punished by law.
> ....."

On the other hand, § 23 of Art. 153, written as follows, would also be hurt:

> "Art. 23. The exercize of any work, workmanship or profession is free, once the conditions of capacity established by law are observed",

since the law distinguishes those that may exercize activities, workmanship, work and professions, a distinction that is not expressed in the Constitutional, that limitates the market capacity regarding the absorption of

enterprises, and nothing else (45).

---

(45) Articles 11 and 13 of Law 7.232/84 are thus written: "Art. 11 - The organs and entities of the Federal Public Administration, Direct and Indirect, the foundations instituted or maintained by the Public Power and the other organizations under the direct or indirect control of the Union will give preference in the acquisition of goods and services of informatics to those produced by national enterprises.
Sole § - For the exercize of this preference, it is admitted, besides favourable conditions in delivery terms, a support of services, quality, standardization, compatibility and specification of performance, difference in price of the similar imported in percentage to be proposed by the Conselho Nacional de Informática e Automação-CONIN ("National Council of Informatics and Automation-CONIN") to the Presidency of the Republic (vetoed).

Art. 13: For the achievement of the project of research, development and production of goods and services of informatics that should attent the proposals determined in Art. 19, the following incentives, together or separately, can be granted to national enterprises: I. Exemption or reduction up to zero (0) of the aliquotes of Import Taxes in cases of importation without national similars: a) of equipments, machinery, devices and instruments, with its respective accessories, spare parts and tools; b) of components, intermediary products, raw materials, parts, components and other insumos; II. Exemption of the exportations tax in the case of exportation of correspondent goods; III. Exemption or reduction up to 0 (zero) of the aliquotes of the Tax over industrialized Products: a) over the goods mentioned in item I, imported or of national production, insured to its suppliers the maintenance of the tax credit regarding raw materials, intermediary products, parts and components, and other raw materials utilized in the industrialization process; b) over final correspondent products; IV. Exemption or reduction up to 0 (zero) of the aliquotes over Taxes over Credit Operations, Exchange and Insurance and over Operations Relating to Vouchers and Securities inciding over exchange operations connected to the payment of the price of the goods imported and of the transfer of technology contracts; V. Deduction, up to double, as operational expenses for the effect of the calculation of Income Tax and Revenues of any Nature, of the expenses made in own or third parties programs, previously approved by the National Council for Informatics and Automation, that aim at the research and development of goods and services in the area of informatics or to the upbringing, the training improvement of human resources for the activities in informatics; VI. Accelerated depreciation of the goods aimed to the fixed assets; VII. Priority in the direct financing granted by federal financing institutions, or in the indirect, through the repass of administrative funds by those institutions, for payment of investments in fixed assets, including goods of external origin without national similars".

It would yet hurt Art. 160, Section I, that offers complete liberty of initiative, as was already commented before.

Finally, it would also subvert the constitutional order, under the style of former institutional acts, considering that the Federal Constitution subordinates the law and it is not the law that subordinates the Constitution (46).

Such arguments were contradicted by the Attorney General, always under the light of the doctrine of national security, through which this concept would be ampler than the higher law itself, being, thus, the higher law subject, no to the interpretation in force at the Courts over national security, but subject to the authorities that would determine what would and what would not be the national security.

---

(46) Hely Lopes Meirelles, in an opinion attached to the representation, writes: "As the referred to law could not have made a distinction among national enterprises of only Brazilian capital and national enterprises established with foreign capital and people, but with seat and administration in Brazil, articles 11 and 13 could not discriminate them in the "preference in the acquisition of goods and services of informatics over those produced by national enterprises", as well as in the granting of incentives "for the execution of projects of research, development and production of goods and services of informatics" (page 23).

In view of the foregoing, the polemic will definitely be terminated with the decision of the Federal Supreme Court, and eminent jurists are being engaged to defend one or the other positions.

What is certain is that one cannot foresee a rapid solution for que question: The Federal Supreme Court will resume its activities only in February, 1987 and will only then examine, through its 11 Ministers, the arguments from both sides, when they may or may not declare that the law is inconstitutional.

However, it is expected that the problems inherent to the balance of trade, the external debt, the reactions of the U.S. Government may lead the Federal Government to an attitude of greater flexibility, with eventual remittances of alternative preliminary bills to Congress, in order not to run the risk of a declaration of inconstitutionality with the right to indemnity that the companies hurt will start against the Union.

The complicating element to this question will reside in the discussion, next year, of a new Constitution, that may or not take over an economic neo-liberal model.

One of the bills for the Constitution to be sent to Congress, at least, will have a neo-liberal tonic, i.e., that of the Government of the City of São Paulo, the largest city South America, with a population equivalent to that of two Austrias. We preside over the Commission of Economic and Social Order of the group that is preparing the preliminary bill and the dominant key is the return to an economy of scale and to the rule of the market for the Brazilian economy.

Meanwhile, however, the foreign enterprises are not allowed to act in the area of informatics where new projects and investments are concerned.