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***RECENT CHANGES IN THE BRAZILIAN  
CONSTITUTION: FROM REFORM TO GROWTH***

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## **I - INTRODUCTION**

It is a tradition in countries from a Roman-Germanic law background to have their constitution as a long document although much of it is not necessary. This is quite common among many western nations. However, in countries from Anglo-Saxonic heritage, where laws are clear result of consolidated values of society, they do not necessarily have to be written.

Brazil is a good example of the former group of countries and, unlike the US which have historically developed a more shrunken Constitution, Brazil has in the core of its constitution a historical framework wide enough to affect the economy.

The idea of the State influencing many aspects of people's lives is not new in Brazilian society. The State not only has determined the past, but also is influencing the current thought of many sectors of society. Consequently, the acceptance of State interference is widely taken for granted in Brazil. The liberal thought that had emerged in Europe due to the French Revolution, and that much earlier had been cultivated by the English, did not seem to have affected Brazil where aspects of the State political organization have a profound effect in other areas, such as the economy. For this reason, a thorough study of the Constitutions necessary for the understanding of the Brazilian Constitution and economy.

This paper focuses on the analysis of the title "The Economic Order" in the Brazilian Constitution. A comparison is made among the three last Brazilian Constitutions, written in 1946, 1967 and 1969, and the current Constitution of 1988 and its amendments. This is done in relation to the level of State interference in the economy. Backs and forths of the State intervention in the Economy until 1995 is presented, when five amendments were approved by the Congress, all of them related to changes in the title "The Economic Order". This is considered by many the

turning point in the Brazilian economy that will take the country out of the economic stagnation that it has been facing since the 1980's and bring it back to its historical rates of economic growth.

In 1995 the State began to change its role, from owner to regulator, which is clearly reflected in the content of the amendments of the 1988 Constitution number 5, 6, 7, 8 and 9 (Table 2). This change does not mean that the State is prepared to sell all of its holdings at once. However, the State, which owned production firms in many economic sectors, is becoming primarily a regulating and monitoring agent.

This new status requires a new State structure, but creating this requires an educational process of changing people's views and expectations. Hence a deeper discussion of the above amendments is required as it is important to understand their significance, the context they took place in, and also the procedure required to approve a Constitutional amendment in Brazil. It is important to bear in mind that the close connection between Constitution and Economy in Brazil, was only possible due to the historical context outlined below. In the beginning this connection was very rigid and linear. However, nowadays, due to the complex international changes that drive us to a globalized economy, Brazil has been strongly influenced by a New World economic order. This exogenous pressure was the main reason the amendments mentioned above (Table 2) were approved.

TABLE 1

The State Intervention in the economy shown by the Constitutions of 1946, 1967, 1969 and 1988 - the "Economic Order".

CONSTITUTION OF THE UNITED STATES OF BRAZIL - 1946	CONSTITUTION OF BRAZIL - 1967	CONSTITUTIONAL AMENDMENT N° 1 OF 1969	CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL - 1988
<b>TITLE V</b> <i>The Economic and Social Order</i>	<b>TITLE III</b> <i>The Economic and Social Order</i>	<b>TITLE III</b> <i>The Economic and Social Order</i>	<b>TITLE VII</b> <i>The Economic and Financial Order</i>
			<b>CHAPTER I</b> <i>The General Principles of the Economic Activity</i>
<b>Article 145.</b> The economic order must be organized in accordance with the principles of social justice, conciliating the value of human work and free enterprise <b>Sole Paragraph.</b> It is ensured to everyone work that make possible a life with dignity. Work is a social obligation.	<b>Article 157.</b> The economic order is intended to achieve social justice, founded in the following principles: <b>V</b> - economic development; <b>I</b> - free enterprise; <b>II</b> - the value of human work as a condition of human dignity;	<b>Article 157.</b> The economic and social order is intended to achieve national development and social justice, founded in the following principles: <b>I</b> - free enterprise; <b>II</b> - the value of human work as a condition of human dignity;	<b>Article 170.</b> The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:
			<b>I</b> - national sovereignty; <b>II</b> - private property;
<b>Article 147.</b> The use of property shall be conditioned to social welfare.(...)	<b>III</b> - the social function of property;	<b>III</b> - the social function of property;	<b>III</b> - the social function of property;
	<b>IV</b> - harmony and solidarity among the production factors.	<b>IV</b> - harmony and solidarity among the production factors.	
			<b>IV</b> - free competition; <b>V</b> - consumer protection; <b>VI</b> - environment protection; <b>VII</b> - reduction of regional and social differences;
		<b>VI</b> - expansion of opportunities of productive employment.	<b>VIII</b> - pursuit of full employment;
			<b>IX</b> - preferential treatment for small enterprises organized under Brazilian laws and having their head-office and management in Brazil.

			<b>Sole paragraph.</b> Free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law.
<b>Article 161.</b> The law shall regulate the exercise of liberal professions and the revalidation of diploma expedited by a foreign teaching institution.			
	<b>Paragraph 11 -</b> The production of luxury goods shall be limited for each company, being forbidden the participation of na individual not only in more than one company, but also from one company in the other, as set forth by law. Institutional Act 9/69. (Revoked)		
			<b>Article 171.</b> It is considered: <b>I</b> - a Brazilian company, one that is organized under Brazilian laws and has its head-office and management in Brazil; <b>II</b> - a Brazilian company of domestic capital, one whose effective control is directly or indirectly held permanently either by individuals resident and domiciled in Brazil or by domestic public entities, the effective control of the company being understood as the ownership of the majority of its voting capital and de facto and legal exercise of the decision-making power to manage its activities. <b>Paragraph 1</b> - The law may, with regard to a Brazilian company of domestic capital: <b>I</b> - grant special temporary protection and benefits for the development of activities deemed strategic for the national defense or vital to the development of the country; <b>II</b> - establish, whenever it deems a sector vital to national technological development, the following

			<p>conditions and requisites, among others:</p> <p>a) the requirement that the control mentioned in item II of the caption 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;</p> <p>b) percentages of capital participation by individuals domiciled and resident in Brazil or by domestic public entities.</p> <p><b>Paragraph 2</b> - In the procurement of goods and services, the Government shall give preferential treatment to Brazilian companies of domestic capital, as established by law.</p>
			<p><b>Article 172.</b> The law shall regulate, based on national interests, the foreign capital investments, shall encourage reinvestments and shall regulate the remittance of profits.</p>
	<p><b>Article 163.</b> Private companies have the preferential role of organizing and exploiting economic activities, with support and incentive by the State.</p>	<p><b>Article 170.</b> Private companies have the preferential role of organizing and exploiting economic activities, with support and incentive by the State.</p>	
<p><b>Article 146.</b> The Union shall be allowed, under special law, to interfere with the economic domain and monopolize certain industries or activities. This intervention shall be based on public interest and shall be limited by the fundamental rights ensured in this Constitution.</p>	<p><b>Paragraph 1</b> - The State shall directly organize and exploit the economic activity only to supplement private enterprise.</p> <p><b>Article 157: Paragraph 8</b> - The intervention in the economic domain and also the monopoly of a certain industry or activity is possible under Union laws, whenever needed to the imperative</p>	<p><b>Paragraph 1</b> - The State shall directly organize and exploit the economic activity only to supplement private enterprise.</p> <p><b>Article 163.</b> The intervention in the economic domain and also the monopoly of a certain industry or activity is possible under Union laws, whenever needed to the imperative necessities of national security or to organize a sector that cannot be efficiently developed</p>	<p><b>Article 173.</b> With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law.</p>



	necessities of national security or to organize a sector that cannot be efficiently developed in a competition and free enterprise basis, being ensured individual rights and guarantees.	in a competition and free enterprise basis, being ensured individual rights and guarantees.	
	<b>Paragraph 9</b> - In order to answer the intervention in the economic domain, referred in the previous paragraph, the Union shall establish contributions aimed at the settling of costs and charges, as set forth by law.	<b>Sole paragraph.</b> In order to answer the intervention in the economic domain, referred in this article, the Union shall establish contributions aimed at the settling of costs and charges, as set forth by law.	
	<b>Article 163:</b> <b>Paragraph 2</b> - In the exploitation of economic activity by the State, the public companies, the mixed-capital companies, and other public entities engaged in economic activities are subject to specific legal systems governing private companies, including labour liabilities and obligations.	<b>Article 170:</b> <b>Paragraph 2</b> - In the exploitation of economic activity by the State, the public companies, the mixed-capital companies, and other public entities engaged in economic activities are subject to specific legal systems governing private companies, including labour liabilities and obligations.	<b>Paragraph 1</b> - The public company, the mixed-capital company and other entities engaged in economic activities are subject to the specific legal system governing private companies, including labour and tax liabilities.
	<b>Paragraph 3</b> - The public company that exploits a non-monopolized activity shall be subject to the same tributary system liable to	<b>Paragraph 3</b> - The public company that exploits a non-monopolized activity shall be subject to the same tributary system liable to private companies.	<b>Paragraph 2</b> - The public companies and the mixed-capital companies may not enjoy fiscal privileges which are not extended to companies of the private sector.

	private companies.		
			<b>Paragraph 3</b> - The law shall regulate the relationships of public companies with the State and society.
	<b>Article 157.</b> The economic order is intended to ensure social justice, with due regard for the following principles: <b>VI</b> - repression of the abuse of economic power characterized by the domain of markets, the elimination of competition and the arbitrary increase of profits.	<b>Article 160.</b> The economic order is intended to ensure national development and social justice, with due regard for the following principles: <b>V</b> - repression of the abuse of economic power characterized by the domain of markets, the elimination of competition and the arbitrary increase of profits; and	<b>Paragraph 4</b> - The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits.
			<b>Paragraph 5</b> - The law shall, without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the citizens' general interests.
			<b>Article 174.</b> As the normative and regulating agent of the economic activity, the State shall, in the manner set forth by law, perform the functions of control, incentive and planning, the latter being binding for the public sector and indicative for the private sector.
<b>Article 205.</b> It is established the National Economy Board, whose organization shall be set forth by law. <b>Paragraph 1</b> - Its members shall be appointed by the President of the Republic, after their choice have been approved by the Federal Senate, among citizens with notorious competence in economic subjects.			

<p><b>Paragraph 2</b> - It is incumbent upon the Board to study the economic life of the country and to suggest necessary measures to the due Power.</p>			
			<p><b>Paragraph 1</b> - The law shall establish the guidelines and bases for planning of the balanced national development, which shall embody and make compatible the national and regional development plans.</p>
			<p><b>Paragraph 2</b> - The law shall support and encourage cooperative activity and other forms of association.</p>
			<p><b>Paragraph 3</b> - The State shall favor the organization of the placer-mining activity in cooperatives, taking into account the protection of the environment and the social-economic furthering of the placer-miners.</p>
			<p><b>Paragraph 4</b> - The cooperatives referred to in the preceding paragraph shall have priority in obtaining authorization or grant for prospecting and mining of placer resources and deposits in the areas where they are operating and in those established in accordance with article 21, XXV, as set forth by law.</p>
			<p><b>Article 175.</b> It is incumbent upon the Government, as set forth by law, to provide public utility services, either directly or by concession or permission, which will always be through public bidding.</p>
<p><b>Article 151.</b> The law shall provide for the operating rules for the federal, state and municipal public service concession holding companies. <b>Sole paragraph</b> - It shall be established the control and review of the tariffs of services exploited by concession, so that the concessionaries's profits, not outnumbering the fair capital remuneration, allow</p>	<p><b>Article 160.</b> The law shall provide for the operating rules for the federal, state and municipal public service concession holding companies, establishing: <b>II</b> - tariffs that allow fair capital remuneration,</p>	<p><b>Article 167.</b> The law shall provide for the operating rules for the federal, state and municipal public service concession holding companies, establishing: <b>II</b> - tariffs that allow fair capital remuneration, expansion and improvement or the</p>	<p><b>Sole paragraph.</b> The law shall provide for: <b>I</b> - the operating rules for the public service concession- or permission- holding companies, the special nature of their contract and of the extension thereof, as well as the conditions of forfeiture, control and termination of the concession or permission; <b>II</b> - the rights of the users; <b>III</b> - tariff policy;</p>

<p>them to answer demands of expansion and improvement of these services. The law shall be applied to the concessions made in the previous regime, of determined tariffs for the whole duration of the contract.</p>	<p>expansion and improvement or the services, and that ensure the economic and financial balance of the contract; <b>III</b> - permanent control and periodical review of tariffs, even if they were determined in a previous contract.</p>	<p>services, and that ensure the economic and financial balance of the contract; <b>III</b> - permanent control and periodical review of tariffs, even if they were determined in a previous contract.</p>	
	<p><b>I</b> - the obligation of maintaining adequate service.</p>	<p><b>I</b> - the obligation of maintaining adequate service.</p>	<p><b>IV</b> - the obligation of maintaining adequate service.</p>
<p><b>Article 152.</b> Mines and other subsoil resources, as well as water falls, for the purpose of exploitation or industrial use, form a property separate from that of the soil.</p>	<p><b>Article 161.</b> Mineral deposits, mines and other mineral resources and hydraulic energy potentials form, for the purpose of exploitation and industrial use, a propriety separate from that of the soil.</p>	<p><b>Article 168.</b> Mineral deposits, mines and other mineral resources and hydraulic energy potentials form, for the purpose of exploitation and industrial use, a propriety separate from that of the soil.</p>	<p><b>Article 176.</b> Mineral deposits, under exploitation or not, and other mineral resources and the hydraulic energy potentials form, for the purpose of exploitation or use, a property separate from that of the soil and belong to the Union, the concessionaire being guaranteed the ownership of the mined product.</p>
<p><b>Article 153.</b> The utilization of mineral resources and hydraulic energy may take place with authorization or concession by the Union, in the manner set forth by law. <b>Paragraph 1</b> - Authorization or concession shall be exclusively assigned for Brazilians or form for firms organizes in the country, being ensured to the owner of the soil preferential participation in the exploitation. The soil owner's preferential rights, regarding mines and mineral deposits, shall be regulated following their nature.</p>	<p><b>Paragraph 1</b> - Exploitation and use of mineral deposits, mines and other mineral resources and the utilization of hydraulic energy potentials may take place with authorization and concession by the Union exclusively by Brazilians or firms organized in this country, in the manner set forth by law. <b>Paragraph 2</b> - The owner of the soil is ensured of participation in the results of the mining operation; regarding mines and mineral</p>	<p><b>Paragraph 1</b> - Exploitation and use of mineral deposits, mines and other mineral resources and the utilization of hydraulic energy potentials may take place with authorization and concession by the Union exclusively by Brazilians or firms organized in this country, in the manner set forth by law. <b>Paragraph 2</b> - The owner of the soil is ensured of participation in the results of the mining operation; regarding mines and mineral deposits whose exploitation constitute Union</p>	<p><b>Paragraph 1</b> - The prospecting and mining of mineral resources and the utilization of the potentials mentioned in the caption of this article may only take place with authorization or concession by the Union, in the national interest, by Brazilians or by a company organized under Brazilian laws and having its head-office and management in Brazil, in the manner set forth by law, which law shall establish specific conditions when such activities are to be conducted in the boundary zone or on Indian lands.</p>

	deposits whose exploitation constitute Union monopoly, the law shall regulate the form of damages.	monopoly, the law shall regulate the form of damages.	
	<b>Paragraph 3</b> - The participation referred in the previous paragraph shall equal a percentage of the unique tax over minerals.	<b>Paragraph 3</b> - The participation referred in the previous paragraph shall equal a percentage of the tax over minerals.	<b>Paragraph 2</b> - The owner of the soil is ensured of participation in the results of the mining operation, in the manner and amount as the law shall establish.
			<b>Paragraph 3</b> - Authorization for prospecting shall always be for a set period of time and the authorization and concession set forth in this article may not be assigned or transferred, either in full or in part, without the prior consent of the conceding authority.
<b>Paragraph 2</b> - Exploitation of an energy potential of small capacity shall not require authorization or concession.	<b>Paragraph 4</b> - Exploitation of an energy potential of small capacity shall not require authorization or concession.	<b>Paragraph 4</b> - Exploitation of an energy potential of small capacity shall not require authorization or concession.	<b>Paragraph 4</b> - Exploitation of a renewable energy potential of small capacity shall not require an authorization or concession.
<b>Paragraph 3</b> - The states shall be in charge of the attribution referred in this article whenever their technical and administrative services satisfy the conditions set forth by law.			
<b>Paragraph 4</b> - The Union in the general cases of interest indicated by law shall help the states in studies related to termomineral waters with medicinal application and in setting facilities aimed at their use.			
	<b>Article 162.</b> The prospecting and exploitation of deposits of petroleum and	<b>Article 169.</b> The prospecting and exploitation of deposits of petroleum and	<b>Article 177.</b> The following are the monopoly of the Union: <b>I</b> - prospecting and exploitation of deposits of petroleum and natural gas and of other fluid

	natural gas and of other fluidhydrocarbons are monopoly of the Union, as set forth by law.	natural gas and of other fluidhydrocarbons are monopoly of the Union, as set forth by law.	hydrocarbons;
			<p><b>II</b> - refining of domestic or foreign petroleum;</p> <p><b>III</b> - import and export of the products and basic by-products resulting from the activities set forth in the preceding items;</p> <p><b>IV</b> - ocean transportation of crude petroleum of domestic origin or of basic petroleum by-products produced in the country, as well as pipeline transportation of crude petroleum, its by-products and natural gas of any origin;</p> <p><b>V</b> - prospecting, mining, enrichment, reprocessing, industrialization and trading of nuclear mineral ores and minerals and their by-products.</p>
			<p><b>Paragraph 1</b>- The monopoly set forth in this article includes the risks and results deriving from the activities mentioned therein, and the Union is forbidden to assign or grant concessions of any kind of participation, either in kind or in legal tender, in the exploitation of petroleum or natural gas deposits, excepting the provisions of article 20, paragraph 1.</p> <p><b>Paragraph 2</b> - The law shall provide with respect to the transportation and use of radioactive materials within the national territory.</p>
			<p><b>Article 178.</b> The law shall provide for:</p> <p><b>I</b> - the regulation of air, ocean and ground transportation;</p> <p><b>II</b> - the predominance of domestic ship owners and ships of Brazilian flag and registration, and of those of the exporting or importing country;</p> <p><b>III</b> - bulk transportation;</p> <p><b>IV</b> - the use of fishing and other vessels.</p> <p><b>Paragraph 1</b>- The regulation of international transportation shall comply with the agreements entered into by the Union with due regard for the principle of reciprocity.</p>

<p><b>Article 155: Sole Paragraph.</b> The captains, at least two-thirds of the crew, as well as those who won and exploit domestic vessels shall be Brazilian (articles 129, numbers I and II).</p>	<p><b>Article 165: Sole Paragraph.</b> The captains, at least two-thirds of the crew, as well as those who won and exploit domestic vessels shall be Brazilian by birth.</p>	<p><b>Article 173: Paragraph 1 -</b> The captains, at least two-thirds of the crew, as well as those who won and exploit domestic vessels shall be Brazilian by birth.</p>	<p><b>Paragraph 2 -</b> The captains, at least two-thirds of the crew, as well as those who own and exploit domestic vessels shall be Brazilian.</p>
		<p><b>Paragraph 2 -</b> The content referred in the previous paragraph is not applicable to Brazilian fishing vessels, which are subject to federal law regulation.</p>	
<p><b>Article 155.</b> Coastal navigation with the purpose of goods transportation is restricted to Brazilian vessels, except in the event of public necessities.</p>	<p><b>Article 165.</b> Coastal navigation with the purpose of goods transportation is restricted to Brazilian vessels, except in the event of public necessities.</p>	<p><b>Article 173.</b> Coastal navigation with the purpose of goods transportation is restricted to Brazilian vessels, except in the event of public necessities.</p>	<p><b>Paragraph 3 -</b> Coastal and internal navigation are restricted to Brazilian vessels, except in the event of public necessity, as established by law.</p>
			<p><b>Article 179.</b> The Union, the states, the Federal District and the municipalities shall afford micro-enterprises and small enterprises, as defined by law, differentiated legal treatment, seeking to further them through simplification of their administration, tax, social security and credit obligations or through elimination or reduction thereof by means of law.</p>
			<p><b>Article 180.</b> The Union, the states, the Federal District and the municipalities shall promote and further tourism as a factor of social and economic development. <b>Article 181.</b> Compliance with request for a document or for information of commercial nature, made by a foreign administrative or judicial authority to an individual or legal entity residing or domiciled in the country shall depend upon authorization from the competent authority.</p>

## **II- THE DECISION TO CHANGE THE 1988 BRAZILIAN CONSTITUTION**

### ***a) HISTORICAL FRAMEWORK***

As alluded to above, the 1988 Constitution reflected the historical moment Brazil was facing at the time. There were two major issues that may have decisively influenced the National Constituent Assembly during 1987 and 1988.

First, after twenty years of military rule, the re-democratization process allowed many political leaders that were in exile to return to Brazil and continue their political lives. It is noted that, according to the military that governed Brazil from 1964 to 1984, the purpose of the military coup of 1964 was to avoid the growth of communism. The majority of exiled political leaders supported the idea of not only having the State strongly interfering in the economic issues, but also of having something close to a State economy.

The other important issue was the fact that after the 1964-1984 military dictatorship, Brazilians may have become afraid of not only having their rights disrespected, but also of having them suddenly changed. Consequently, the general social thought was that if rights were thoroughly present in the Constitution, that fear could be minimized. This perspective is clear in the Constitution of 1988, which was the first one since Brazil started developing a democratic regime. The members of the 1988 National Constituent Assembly, reflecting that same social fear, decided to bring many issues to the shelter of the Constitution. Due to social demands, they wrote the longest constitution ever and probably the longest among contemporary constitutions all over the world.

The present Constitution of Brazil has more than three hundred articles organized in nine titles as displayed below:



- I - The Fundamental Principles;
- II - Fundamental Rights and Guarantees;
- III -The Organization of the State;
- IV - The Organization of the Powers;
- V -The Defense of the State and Democratic Institutions;
- VI - Budget and Taxation;
- VII - The Economic and Financial Order;
- VIII -The Social Order;
- IX - General Constitutional Provisions and Temporary Constitutional Provisions.

The general opinion in Brazil is that the 1988 Constitution has led to great improvement in both social and individual rights. However, this is beyond the scope of the current paper and will not be discussed any further.

Before 1995, major revisions had been made to the title "Economic Order". Most of them were related to strong State intervention in the economy, State monopoly in some industries, and some measures to keep out foreign investments, like different treatment to foreign owned companies.

The current Constitution was signed in October 1988 following the re-establishment of democracy in 1985. Approximately a week later, the first attempt to change the Constitution was taking place. Nowadays, about two hundred new amendment proposals are introduced every year in the Chamber of Deputies, not taking into account the proposals that are introduced in the Senate. That is the price that is paid for having such a wide Constitution and a clear sign that wrong decisions were made .

Had the members of the National Constituent Assembly decided to write a concise document, Brazil would not be facing this problem. The longer the Constitution, the less it will last. This statement is easily supported by the American Constitution. The secret of its stability remains in its conciseness. In a very simple way, it not only determines the Organization of State, emphasizing the Federative Principle, but also lists the fundamental human rights and guarantees against the undue intervention of State into private issues.

President Fernando Henrique Cardoso was first elected end of 1994 to a four-year term (1995-1998). One of his first acts was related to a significant change in the title "Economic Order". He sent to the Congress five messages with proposals of amendment suggesting the end of State monopoly in areas such as telecommunication, energy, gas, mineral resources, and oil industry. Other important measures were proposed, like the one that ensured the same treatment to Brazilian and foreign owned companies and the possibility of transportation of goods by foreign vessels both in coastal and internal navigation. Each of these amendments is discussed in the following chapter .

"In order to consolidate economic stability and to settle the social justice material bases, it is essential to delete from the Constitution items that improperly restrict national and foreign private capital in investments essential to the Country's development", President Cardoso announced to the country soon after being elected.

The following summary of the message President Cardoso sent to the Congress in the beginning of his first term reflects his feelings about the 1988 Constitution:

*"The Constitution of 1988 was elaborated in circumstances that stimulated the constituents to incorporate to the constitutional text*

everything that could have *been* incorporated. For practical reasons it was easier, according to the legislative procedures of the Constituent Assembly, to approve a constitutional amendment than an ordinary bill of law. Moreover, memory of the recent military period led to considerable efforts to restrict the Executive's powers and to establish, in a permanent way, guarantee of individual *rights* and the social demands assistance. Consequently, *the* Constitution imposed undue *restrictions* to Government *actions*. *The* truth is that *the* Constitution of 1988 is more concerned about government's policies than the Organization of the State and the citizens' rights.

*The excessive level of detail present in* the Constitution brought about two immediate consequences: first, it took politics into a judicial realm; and second, decisions lost the political element. Instead of the independence and harmony *that* represent the basis of a democratic government, *it established* the impasse *between* constituted Powers. An impasse of disastrous consequences particularly for fiscal and financial matters, as the natural oscillations of the national economy clash with *the* rigidity of the constitutional order.

The inclusion of vast areas of social and economic life carries the emptying of parliamentary activity, relegating the Legislative Power to a mere reproduction of the rules *already* included in the Constitution.

In order to revert this *preoccupying picture* it is mandatory to re-empower the political *class with the* capacity to govern the Country. That is, dictating with *the* necessary flexibility, immediate goals and the ordinary instruments of Government *action* through majorities and by the democratic vote of the Legislative, in its *relations* to the Executive.

*This is the reason why the Government's constitutional*

*amendment proposals aim to exclude rules from the body of the constitutional text, as they should not be there. They have more to do with government policy matter, and consequently subjected to treatment by legislation in ordinary law.*

*The pure and simple suppression of these articles would create, however, serious juridical and political uncertainties. To avoid this, the Government proposes the adoption, when applicable, of amendments to the Constitution with a threefold effect :*

- 1) change, when applicable, the items on a given subject **that must remain in the Constitution body**;*
- 2) delete from the Constitution items related to the same subject **that must be treated in the ordinary legislation**;*
- 3) **keep in force as a transitory rule, with the modifications when applicable, the items deleted from the body of the Constitution, until ordinary corresponding legislation is enacted.***

*As a result, this will avoid the **legal vacuum that** would be created in case of suppression of some constitutional items without the simultaneous approval of ordinary rules.*

*At this point, the following quote from **Ralph Dahrendorf**, in a reflection on the future of Central Europe, **after** the collapse of communism, is illustrative: "In constitutional politics **matters there are only two ways: the closed society or the open society**, while, in the normal politics, a great number of options can **be offered**, and three or four generally **are**".*

*Brazil should take **this** opportunity to consecrate **the open society***

— *the Constitution of freedom — returning to the normal political scope and to the ordinary legislative activity the hundreds of options that the everyday social life usually demands.*

*Such is the spirit of the proposed constitutional amendment that the Government will send to the National Congress as from tomorrow”.*

It is important to note that all the Constitutional Amendments related to the “Economic Order” went through both Houses of Congress in less than a year. Such legislative efficiency is rare in Brazil. Taking into account the Constitution and the internal rules of the Chamber of Deputies and the Senate, the difficulties involved in making changes to the Constitution in such short period of time would have surfaced had there not been consensus among the parties. For instance, the Social Security Reform bill, although considered by the Government the most important bill, has been debated in Congress since 1995 and it is still not close to a final conclusion.

It is also important to discuss the global changes that so drastically influenced Brazilian politics. Brazil had always been known as a closed economy, justified by a strong nationalistic thought. It is a large country with plenty of natural resources. The political project before the Cardoso era was based on an ideology that constructed a generalized belief that self-sufficiency could be promptly achieved. Globalization is the key word that made Brazil change its historical position and it will be the main focus of the proceeding section.

According to J. Luis Guash and Pablo T. Spiller (1999): “...At the same time, developing countries, complementing their far-reaching privatization programs, are engaged in deregulating various sectors of their economies and devising new regulatory frameworks for others, particularly the utilities sectors. This trend toward economic regulatory reform is likely to continue as a result of the increased

questioning of the need for regulations, the globalization of markets, and the ongoing privatization of the utilities sectors. Historically, regulatory interventions were often motivated by economic conditions no longer applicable, or by political considerations and interest group pressures to secure transfer of rents. Many sectors were viewed as either natural monopolies or as being of vital social or strategic interest, requiring significant regulations, if not direct public ownership. These rationales in many sectors are no longer considered valid. Changes in technology and experience, and the more organized voice of consumer groups, have called into question those arguments. Regulatory reform is also driven by the recognition that many existing regulations have become obsolete and even harmful to economic growth. In addition, government failures may be as capable of creating inefficiencies as market failures. As such, the consequences of that type of regulation were an increase in the cost of goods and services and an overall significant welfare loss, as reported below. As economies become more open, pressures on countries to become more competitive drive the call for regulatory reform to reduce costs and foster increased productivity, competitiveness, and growth" (page 01).

### ***B) PROCEDURE TO CHANGE THE BRAZILIAN CONSTITUTION***

Discussion of the procedure required for amending the Brazilian Constitution is necessary for understanding the overall approach of the Congress towards the "Economic Order". Developments in the following of such procedure can be used as an indicator of the level of compromise between the Executive and the Legislative on

reforms to the "Economic Order". This procedure also provides the legitimate instruments to be used in case the 1988 Constitution requires further improvement.

A Constitution should have in its core enough flexibility to allow for a certain degree of change in order to be able to evolve alongside major thoughts of society. Otherwise, the necessity to change a single article of the Constitution could result in the end of the Constitutional Order. The level of difficulty that is imposed to change a Constitution determines its rigidity. The easier the procedure to change a Constitution, the less rigid it is.

In a theoretical model to measure flexibility written constitutions would vary from totally flexible to totally rigid ones. In one extreme there would be the type of constitution that could be changed the same way that an ordinary law could and on the other side there would be the constitution that cannot be changed at all. The Brazilian Constitution would be placed on the rigid side of this scale. In Brazil it is more difficult to materialize constitutional reforms than it is to reform ordinary law. As previously mentioned, the 1995 amendments were approved in an unusually short period of time only due to strong support from both, the Executive and the Legislative.

The procedure to change the 1988 Constitution of Brazil are disposed, first of all, in the article 60, then in the regiments of the Chamber of Deputies and Federal Senate, as described below:

*Article 60. The Constitution may be amended on the proposal of:*

*I - at least one-third of the members of the Chamber of Deputies or of the Federal Senate;*

*II - the President of the Republic;*

*III - more than one half of the Legislative Assemblies of the units of the Federation, each of them expressing itself by the relative majority of its members.*

*Paragraph 1 - The Constitution shall not be amended while federal intervention, a state of defense or a state of siege is in force.*

*Paragraph 2 - The proposal shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members.*

*Paragraph 3 - An amendment to the Constitution shall be promulgated by the Directing Boards of the Chamber of Deputies and the Federal Senate with its respective sequence number.*

*Paragraph 4 - No proposal of amendment shall be considered which is aimed at abolishing:*

*I - the federal form of State;*

*II - the direct, secret, universal and periodic vote;*

*III - the separation of the Government Powers;*

*IV - individual rights and guarantees.*

*Paragraph 5 - The matter dealt with in a proposal of amendment that is rejected or considered impaired shall not be the subject of another proposal in the same legislative session.*

The restricted authorship method present the Brazilian Constitution prevents changes.. Most of the amendment proposals currently in the Congress have been introduced by Deputies (there must be a minimum of 171 Deputies supporting the proposal out of 513). There are also the proposals drafted by the Senators (27 out of 81 Senators) and the ones drafted by the President of the Republic. Although it is



possible for the majority of the Legislative Assemblies to draft a proposal of amendment (there are 26 States and the Federal District in the Brazilian Federation), there is no such proposal currently in Congress.

Interestingly enough, out of the 26 amendments approved by the Congress since 1988, the majority of them, or at least the most important ones, were introduced by the President. This reflects the political power of the past three Presidents of Brazil who had strong support from the Congress. Had it not being the case, specially regarding President Cardoso, the rules in the article 60, paragraph 3 would have made it impossible to amend the Constitution in relation to the "Economic Order" like it happened in 1995., Five amendment proposal, regarding such sensitive theme, like the "Economic Order", were discussed, voted upon and approved in both Houses of the Congress by three-fifths of the votes of their respective members in two readings.

Although it is not clear, according to the Constitution, whether the discussion and voting of an amendment proposal should begin in the Chamber of Deputies or in the Senate, the President has always introduced these proposals to the Lower House. This is probably due to a similar rule that is currently applied to the bills of ordinary laws (article 64 of the Federal Constitution). Therefore, most amendment proposals are first debated and voted upon in the Chamber of Deputies, except for the ones introduced by one-third of members of the Federal Senate.

The regiments of both Houses of the Congress state the procedure to be followed to amend the Constitution. Only the procedure from the Chamber of Deputies is discussed in this paper. However, it should be noted that this procedure is not too dissimilar from the one used by the Senate. Amendment proposals from the Chamber of Deputies go to the Chairman of the Directing Board, who then refers the proposals to the Committee of Constitution and Justice, where they are

checked for compliance with the rules of article 60 (see above). The former is done in five sessions. The members of the National Constituent Assembly have imposed restrictions to constitutional reforms, therefore amendment proposals must be drafted accordingly, otherwise they cannot be discussed in the House. These restrictions stated in article 60 are related to authorship, procedures, extraordinary circumstances that make it impossible to change the Constitution until they are over, and matters that are considered to be the core of the Constitution therefore shall not be touched. For instance, proposed changes that restrict the individual rights and guarantees cannot even be discussed. The role of the Committee of Constitution and Justice is to select those amendment proposals that are in accordance to these regulations and, therefore can be submitted to the floor of the Chamber of Deputies.

When an amendment proposal complies with the regulations, and therefore can be discussed and voted in the House, the Chairman of the Director Board sets up a temporary Committee titled "Special Committee" to discuss the merits of reforming the Constitution. The Chairman of the Director Board determines how many members are to take part in this committee taking into account the relevance of the matter to be discussed. Each party is represented in ratio to its representativeness in the House.

The special committee must discuss and vote the amendment proposal within forty sessions. The first ten sessions are aimed at proposing amendments. The same number of Deputies that is required to propose an amendment to the Constitution is required to propose an amendment to the proposal of amendment at the Special Committee, i.e. 171 Deputies. After the deadline date for the amendments, the Chairman of the Committee chooses a member to write a report in order to provide the committee with a deeper analysis of the subject matter.

Afterwards, this report is taken into consideration by the Special Committee that will then debates and votes on amendment proposal. If proposal is rejected, the "Substitute Reporter" writes a new report stating the general opinion of all parties represented in the Committee. It requires a great deal of negotiation for this report to be approved. The next step is to debate and vote on the amendment proposal on the floor of the House. However, it is important to describe the role of the Chairman of the Director Board. The Chairman holds a lot of power in terms of determining the future of the proposals. For instance, he decides which Special Committee is given priority, as there are hundreds of amendment proposals waiting for the creation of these committees. The Chairman of the Director Boarder also decides which bill or proposal of amendment will be included in the agenda of the Chamber of Deputies, although the regiment states that the Leaders of the parties represented in the House should be consulted.

The full procedure to be followed on the floor of the House is a complex one and it is beyond the scope of the current paper. An overview only on the procedure for debating and voting on amendment proposals is provided below.

Again, Article 60, Paragraph 2, of the Constitution of 1988 states that: "the proposal shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members". This process can take several months or years, depending on the level of divergence among the Deputies.

As soon as the proposal of amendment is included in the agenda of the Chamber of Deputies, there is a four-session period, at most, to debate it. After that, the proposal of amendment must be voted upon in the House, which can take a long period, depending on whether the voting is split or not. Each party is allowed to put in one or more application in order to split the voting process, according to the

number of members. After this phase, the parts of the proposal that obtained three-fifths of the votes of the members of the House are considered approved in the first reading and then discussed and voted upon one more time, after a five-session break, in the so called "second reading". This means that the process of debating and voting starts again, with the possibility of split voting and the necessity for three-fifths of the vote from the members of the House to approve the proposal of amendments. Items rejected in the first reading are not submitted again and it is not possible to re-include them in this phase. Then the Senate reviews the proposal , where a similar procedure takes place.

Last but not least, if the proposal of amendment is not equally approved in the other House of the Congress (the Senate in the present case), the changes made are treated as a new proposal and have to be reviewed, restarting the procedure from the beginning in the Chamber of Deputies.

### III - THE IMPORTANCE OF THE AMENDMENTS APPROVED BY THE CONGRESS IN 1995.

This chapter discusses the content of the five amendments approved in 1995, which broke the monopoly of the State in important industries, and made possible the increase of foreign investment leading Brazil in the direction of a much more competitive and open economy. The original wording of the articles of the Constitution that were changed is displayed making it easier to compare the old text with the new one. A table containing a summary of these amendments is also presented and comments are made regarding their importance and the expectations of the Brazilian Government.

#### **CONSTITUTIONAL AMENDMENT NO. 5, 1995**

*Alters paragraph 2 of article 25 of the Federal Constitution.*

*The Directing Boards of the Chamber of Deputies and of the Federal Senate, under the terms of paragraph 3 of article 60 of the Federal Constitution, promulgate the following Amendment to the constitutional text:*

**Sole Article.** *Paragraph 2 of article 25 of the Federal Constitution shall henceforth be in force with the following wording:*

*“Article 25. ....  
Paragraph 2 - The states shall have the power to operate, directly or by means of concession, the local services of piped gas, as provided for by law, it being forbidden to issue any provisional measure for its regulation.”*

*Brasilia, August 15, 1995.*

**ORIGINAL WORDING**

Art. 25:

*“Article 25. ....  
.....Pa  
ragraph 2 - The states shall have the power to operate, directly  
or by means of a concession to a state-owned company, with  
exclusive rights of distribution, the local services of piped gas.”*

**CONSTITUTIONAL AMENDMENT NO. 6, 1995**

*Alters item IX of article 170, article  
171, and paragraph 1 of article 176  
of the Federal Constitution.*

*The Directing Boards of the Chamber of Deputies and of the Federal  
Senate, under the terms of paragraph 3 of article 60 of the Federal  
Constitution, promulgate the following amendment to the constitutional text:*

*Article 1. Item IX of article 170 and paragraph 1 of article 176 of the  
Federal Constitution shall henceforth be in force with the following wording:*

*“Article 170.....  
.....*

*IX - preferential treatment for small enterprises organized  
under Brazilian laws and having their head-office and  
management in Brazil.”*

*“Article 176.....*

*Paragraph 1 - The prospecting and mining of mineral resources  
and the utilization of the potentials mentioned in the caption of  
this article may only take place with authorization or  
concession by the Union, in the national interest, by Brazilians*

*or by a company organized under Brazilian laws and having its head-office and management in Brazil, in the manner set forth by law, which law shall establish specific conditions when such activities are to be conducted in the boundary zone or on Indian lands.”*

*Article 2. The following article 246 shall be included in Title IX - “General Constitutional Provisions”:*

*“Article 246. The adoption of any provisional measure for the regulation of any article of the Constitution the wording of which has been altered by means of an amendment enacted as of 1995 is forbidden.”*

*Article 3. Article 171 of the Federal Constitution is hereby revoked.*

*Brasilia, August 15, 1995.*

***ORIGINAL WORDING***

Art. 170:

*Article 170:*

*“IX - preferential treatment for small Brazilian enterprises of national capital.”*

*Article 171:*

*“Article 171. It is considered:*

*I - a Brazilian company, one that is organized under Brazilian laws and has its head-office and management in Brazil;*

*II - a Brazilian company of domestic capital, one whose effective control is directly or indirectly held permanently either by individuals resident and domiciled in Brazil or by domestic public entities, the effective control of the company being understood as the 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 domestic capital:*

*I - grant special temporary protection and benefits for the development of activities deemed strategic for the 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 caption 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 by domestic public entities.*

*Paragraph 2 - In the procurement of goods and services, the Government shall give preferential treatment to Brazilian companies of domestic capital, as established by law.”*

*Article 176:*

*“Article 176. Mineral deposits, under exploitation or not, and other mineral resources and the hydraulic energy potentials form, for the purpose of exploitation or utilization, a property separate from that of the soil and belong to the Union, the concessionaire being guaranteed the ownership of the mined product.*

*Paragraph 1 - The prospecting and mining of mineral resources and the utilization of the potentials mentioned in the caption of this article may only take place with authorization or concession by the Union, in the national interest, by Brazilians or by Brazilian companies of domestic capital, in the manner set forth by law, which law shall establish specific conditions when such activities are to be conducted in the boundary zone or on Indian lands.*

*Paragraph 2 - The owner of the soil is ensured of participation in the results of the mining operation, in the manner and amount as the law shall establish.*

*Paragraph 3 - Authorization for prospecting shall always be for a set period of time and the authorization and concession set forth in this article may not be assigned or transferred, either in full or in part, without the prior consent of the conceding authority.*

*Paragraph 4 - Exploitation of a renewable energy potential of small capacity shall not require an authorization or concession.”*

**AMENDMENT NO. 7, 1995**

*Alters article 178 of the Federal Constitution and provides for the adoption of Provisional Measures.*

*The Directing Boards of the Chamber of Deputies and of the Federal Senate, under the terms of paragraph 3 of article 60 of the Federal Constitution, promulgate the following Amendment to the constitutional text:*  
*Article 1. Article 178 of the Federal Constitution shall henceforth be in force with the following wording:*

*“Article 178. The law shall provide for the regulation of air, water and ground transportation, and it shall, in respect to the regulation of international transportation, comply with the agreements entered into by the Union, with due regard to the principle of reciprocity.*

*Sole Paragraph. In regulating water transportation, the law shall set forth the conditions in which the transportation of goods in coastal and internal navigation will be permitted to foreign vessels.”*

*Article 2. The following article 246 shall be included in Title IX - “General Constitutional Provisions”:*

*“Article 246. The adoption of any provisional measure for the regulation of any article of the Constitution the wording of which has been altered by means of an amendment enacted as of 1995 is forbidden.”*

*Brasilia, August 15, 1995.*

**ORIGINAL WORDING**

*Article 178:*

*“Article 178. The law shall provide for:*

- I - the regulation of air, ocean and ground transportation;*
- II - the predominance of domestic shipowners and ships of Brazilian flag and registration, and of those of the exporting or importing country;*
- III - bulk transportation;*
- IV - the use of fishing and other vessels.*

*Paragraph 1- The regulation of international transportation shall comply with the agreements entered into by the Union with due regard for the principle of reciprocity.*

*Paragraph 2 - The captains, at least two-thirds of the crew, as well as those who own and exploit domestic vessels shall be Brazilian. Paragraph 3 - Coastal and internal navigation are restricted to Brazilian vessels, except in the event of public necessity, as established by law.”*

**AMENDMENT NO. 8, 1995**

*Alters item XI and letter “a” of item XII of article 21 of the Federal Constitution.*

*The Directing Boards of the Chamber of Deputies and of the Federal Senate, under the terms of paragraph 3 of article 60 of the Federal Constitution, promulgate the following Amendment to the constitutional text:*  
*Article 1. Item XI and letter a of item XII of article 21 of the Federal Constitution shall henceforth be in force with the following wording:*

*“Article 21. The Union shall have the power to:*

*.....*

*XI - operate, directly or through authorization, concession or permission, the telecommunications services, as set forth by law, which law shall provide for the organization of the services, the establishment of a regulatory agency and other institutional issues;*

*XII - operate, directly or through authorization, concession or permission:*

*a) the services of sound broadcasting and of sound and imagebroadcasting;*

*.....”*

*Article 2. The adoption of any Provisional Measure for the regulation of the matter set forth in item XI of article 21 with the wording given by this constitutional amendment is forbidden.*

*Brasilia, August 15, 1995.*

**ORIGINAL WORDING**

*Article 21:*

*“XI - operate, directly or through concession to companies with the majority of voting shares under state control, the telephone, telegraph and data transmission services as well as other public telecommunications services, provided that information services may be rendered by private legal entities through the public telecommunications network operated by the Union;  
XII - operate, directly or through authorization, concession or permission:  
a) the services of sound broadcasting and of sound and image broadcasting as well as other telecommunications services;”*

**AMENDMENT NO. 9, 1995**

*Gives new wording to article 177 of the Federal Constitution, altering and inserting paragraphs.*

*The Directing Boards of the Chamber of Deputies and of the Federal Senate, under the terms of paragraph 3 of article 60 of the Federal Constitution, promulgate the following Amendment to the constitutional text:  
Article 1. Paragraph 1 of article 177 of the Federal Constitution shall henceforth be in force with the following wording:*

*“Article 177. ....  
.....*

*Paragraph 1 - The Union may contract with state-owned or with private enterprises for the execution of the activities provided for in items I through IV of this article, with due regard for the conditions set forth by law.”*

*Article 2. A paragraph shall be included, to be numbered as paragraph 2, with the following wording, the present paragraph 2 becoming paragraph 3, in article 177 of the Federal Constitution:*

*“Article 177. ....  
.....Pa  
ragraph 2 - The law referred to in paragraph 1 shall provide  
for:*

*I - a guarantee of supply of petroleum products in the whole  
national territory;*

*II - the conditions of contracting;*

*III - the structure and duties of the regulatory agency of the  
monopoly of the Union.”*

*Article 3. The issuing of any provisional measure for the regulation of the matter set forth in items I through IV and in paragraphs 1 and 2 of article 177 of the Federal Constitution is forbidden.*

*Brasilia, November 9, 1995.*

**ORIGINAL WORDING**

*Article 177:*

*“Paragraph 1- The monopoly set forth in this article includes the risks and results deriving from the activities mentioned therein, and the Union is forbidden to assign or grant concessions of any kind of participation, either in kind or in legal tender, in the exploitation of petroleum or natural gas deposits, excepting the provisions of article 20, paragraph 1.”*

*“Paragraph 2 - The law shall provide with respect to the transportation and use of radioactive materials within the national territory.”*

Below there will be presented a table with the resume of the principal changes in the economic order.

**TABLE 2**

**Approved Constitutional Amendments**

<b>CONSTITUTIONAL AMENDMENT</b>	<b>SUMMARY</b>	<b>PROMULGATION</b>
Termination of Piped Gas Monopoly	Relaxes the state government monopolies, allowing private companies to participate in distribution services	August 15, 1995
Redefinition of Brazilian Firm	With passage of the amendment, a Brazilian firm is defined as being any company established in Brazil, regardless of the source of its capital	August 15, 1995
End of the Petroleum Monopoly	The Government will be able to contract private companies for the exploration and exploitation of petroleum and natural gas deposits	November 9, 1995
Inland and Coastal Cabotage Shipping	The market reserve for national companies was ended	August 15, 1995

Liberalization of the Telecommunications Sector Through concessions, the Government can contract private companies to operate telephone, telegraph and other communications services

*Source: Central Bank*

Reforms approved include amendments to the Federal Constitution regarding the elimination of restrictions to foreign capital and the breakage of some State monopolies. The elimination of differentiated treatment between “national capital Brazilian companies” and Brazilian companies, approved by the Congress, extinguishes the preferential treatment to national capital in the privatization process. This allows for the participation of foreign companies in the mining, energy, and

telecommunication industries.

Equally important **was the opening** of the telecommunication industry to free enterprise. Telecommunication services were a Federal monopoly restricted to state owned companies only. As a result of this model, **more** than 50 percent of Brazilian localities, 80 percent of residences and 98 percent of rural properties did not have phones at the time the privatization program started. **There** was an esteemed shortage of 10 **million** phone lines. Amendment **08/95** eliminated the exigency of control by a state owned company, so that private companies could also explore the telephone service, **data** transmission, and other public services. This led to an increase in investment making it possible the expansion and modernization of the telecommunication infrastructure. At the same time, keeping the concession regime, **it is ensured** to the Public Power the basic instrument for an adequate inspection of the sector.

It remains the Union's role to authorize, concede or to allow **the** exploration of telecommunication services. The challenge now is to establish a good regulation model which is what the Government has been trying to do in the last few years. Experiences from other countries like The United States has been helpful leading to the creation of specific agencies to regulate the market where privatization has occurred. Such model enables private capital participation in these activities and **the** total restructuring of the sector, keeping in the State's hands the power to concede, **regulate** and control it.

Another important change is the one regarding internal and **coastal navigation**. Only Brazilian **vessels** were allowed to transport **loads** and **passengers**. It was also demanded **that** most of the crew had Brazilian nationality. These exigencies no longer exist after the Amendment 07/95. **The** ordinary legislation may impose eventual **restrictions** to foreign capital in the **coastal** navigation. It did **not**



make sense to keep the "market reserve" for national vessels in the coastal and internal navigation in the Constitution. The old model did not permit a certain level of flexibility in the contract of load transportation service, carrying an increase of costs and to the final prices of goods, specially those where transportation cost is significant.

In the energy field, the National Congress approved the elimination of the monopoly of canalized gas commercialization, exercised before by the state governments, through public companies, making this industry unavailable for private investments. Now, it is allowed the exploration of this service by means of concession and, therefore, private companies can invest in this industry providing they follow rules defined by specific law.

Foreign and Brazilian companies can act with equal conditions in mining. The search for and prospecting of mineral resources and the utilization of hydraulic energy potential can be carried out by means of Federal authorization or concession. This change was also brought about by Amendment 06/95. Specific law will establish conditions in case these activities are carried out in boundary zones or indigenous lands, where some level of control by the State is still required.

Equally important and fundamental was the breakage of the petroleum monopoly. It was prohibited for the Federal Government to give or allow any kind of participation in the exploration of sources of petroleum or natural gas. The State monopoly included the petroleum, gas, natural gas and its derivatives exploration, prospecting, refinement, importation and exportation, as well as their transportation.

After intense negotiations the National Congress approved the elimination of this monopoly allowing for the contracting of private companies for the accomplishment of activities in all areas of the petroleum industry. Free enterprise side by side with State regulations is increasing investment in this industry.

The Concessions Law already approved by the Congress, established the legal basis for the participation of the private sector in the public service rendering. This item, conjugated to the Law of Modernization of Ports, enables the port industry, to receive private, national and foreign investments, by means of concessions and partnerships, for improvement of facilities and equipment and for the construction and exploration of terminals. This was fundamental to a reduction in the costs of our exports.

#### **IV - CONCLUSION**

The objective of the reforms discussed in this paper was to decentralize the Government and to reduce the State's role in the economy. This has successfully been accomplished leading to an increase in the flow of capital to industries that used to be State monopoly. However, the change in the role of the State is not only important to the economy, but also to social policies. It allows for Government spending on social areas rather than on State owned companies.

The privatization program, which was substantially encouraged by the amendments of the Constitution, is an integral part of the reform of the Brazilian State. It aimed to: achieve a lasting fiscal adjustment; to reduce government debt; to concentrate government activities on the social area; to stimulate the modernization of national industry; and to strengthen capital markets by broadening their popular base. One must also consider the indirect benefits resulting from privatization: increased investment by the new private sector owners (including for environmental protection); more tax receipts, as companies that had previously lost money began to generate profits; and improvements in the overall productivity of the economy.

The Constitution of 1988 established a distinction between Brazilian company and national capital Brazilian company and preferential treatment for the latter. This discrimination became meaningless with the advent of economic the opening. The elimination of market reserves lead to larger interconnection between economies and to a greater need to attract foreign capitals in order to complement the internal economy.

In 1996, after the reforms in the Constitution, the country started feeling the impact of these changes. Brazil seems to have turned a leaf, leaving behind protectionism and inefficiency. No doubts there is still a long way to go for Brazil to

meet efficiency and competitiveness and a public sector capable of providing better services and of promoting greater opportunities designed to reduce social and income imbalances. However, the first step has been taken.

These reforms in the Constitution lead to a significant change in foreign investment profile. In 1993 and 1994, nearly all inflow went into the stock market. Since 1995, the majority of the inflow has been going into production. This change is a signal of confidence from foreign investors in the new model of the Brazilian economy.

The excessive detail of the Constitution of 1988 impeded an effective adaptation of the Country's economy to the new economic reality. The Country's modernization and the competitiveness of our economy depend on a number of factors: substantial increase in investment and infrastructure; the restoration, maintenance and enlargement of the national road system; the updating of technology in communications; the improvement of harbors; and the satisfactory supply of electric power in the short and long run, and of other energy sources, like petroleum and natural gas.

The limited capacity of State investment makes it inadequate the exclusive presence of the State in these areas. It is essential to have a larger participation of private, internal and external capital, in investments and in the administration of services in transportation, energy, and telecommunications. This creates the conditions for the drawback of the "Brazil Cost" and for the increase of competitiveness of services and goods produced in the Country.

In order to conclude, we shall not forget the wise and well-known words of **Thomas Jefferson** displayed in his Memorial Building in Washington DC that, due their content, have an extremely importance to the nature of the aim of this present paper:

*"I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors".*

## V - Bibliography

1 - Brazilian Constitutions of 1946, 1967, 1969 and 1988;

2 - Chamber of Deputies' Regiment ;

3 - Guash, J.L. and Spiller, P.T (1999), "Managing the Regulatory Process: Design, Concepts, Issues, and the Latin America and Caribbean Story, in World Bank Publications, Latin American and Caribbean Studies, Washington DC;

4 - Presidência da República Federativa do Brasil. Publicações. Mensagens ao Congresso - 1995/1996.

[Http://www.presidencia.gov.br](http://www.presidencia.gov.br), march 2000

5 - Presidência da República Federativa do Brasil. Publicações. Two Years of Change.

[Http://www. Presidência.gov.br](http://www.Presidência.gov.br), march 2000

6 - Presidência da República Federativa do Brasil. Publicações. The Impact of Globalization on Developing countries: risks and opportunities.

[Http://www.Presidência.gov.br](http://www.Presidência.gov.br), march 2000

7 - World Bank Development Report (2000). Entering the 21 st Century. Oxford University Press, Washington DC