

BRIEF NOTES ON THE ACQUISITION OF PROPERTY BY ALIENS UNDER BRAZILIAN LAW

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I. Human Rights and Fundamental Rights of Aliens in Brazil

Primarily, it should be noted that resident aliens in Brazil enjoy the same rights to life, freedom, security and property as nationals¹. All fundamental rights granted by the Constitution are guaranteed to all resident aliens as well, such as the right to equality of treatment, right not to be tortured, freedom of expression, right to privacy, right to the free exercise of any work, right of association, right to own property, right of access to justice, right to social assistance, and right to education, among many others. The fact that the Constitution guarantees these rights only to resident aliens, however, does not mean that non-resident aliens are left unprotected by the Brazilian legal system². Several times the Supreme Court has extended many of the rights mentioned in the Constitution to all aliens, including tourists and aliens who are not even in the country, such as the right of access to justice, the right to own property, and the right to protection of intellectual property³.

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¹ Constitution of 1988, article 5: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to equality, to security and to property (...)"

² Celso Bastos, *CURSO DE DIREITO CONSTITUCIONAL* 164 (1990). Celso Bastos points out that the Constitution extends all fundamental rights to anyone in the country, reasoning that the drafters of the Constitution, when mentioning resident aliens, did not employ the term in its technical sense of being legally domiciled in Brazil, but intended to extend rights to all those physically present in the country.

³ STF, *DJU* 7 nov. 1957, RE 33.319/DF, Rel. Min. Candido Motta; STF, *DJU* 26 out. 1960, RE 44.621/SP, Rel. Min. Candido Motta; STF, *DJU* 8 out. 1962, RMS 8.844/SP, Rel. Min. Ribeiro da Costa; STF, *DJU* 25 mai. 2001, RE 215.267/SP, Rel.^a. Min.^a. Ellen Gracie.

The guarantee of fundamental rights to all non-resident aliens has not always been the norm. One of the first cases examined by our Courts after the 1891 Constitution, was a writ of *habeas corpus* on behalf of the Portuguese Imperial Family, banned from Brazil after the proclamation of the Republic. Decided by our Federal Courts in 1903, this case held that the 1891 Constitution guaranteed the rights expressed in article 72⁴ only to resident aliens. Because the Imperial Family was not resident in the country and since the remedy of *habeas corpus* was one of the fundamental rights guaranteed in that provision, the Imperial Family had no right to *habeas corpus*⁵.

Some legal commentators argue that the constitutional article granting fundamental rights was a generic provision, and the subsequent provisions to this article could either extend these rights to non-resident aliens or deny them even to resident aliens. Consequently, there are some rights among these provisions that should be granted to any human being⁶. Other commentators reach the same result for a different reason. They interpret the text of the Constitution literally as granting rights only to resident aliens, but they conclude that non-resident aliens are also granted these fundamental rights as a consequence of international human rights conventions, duly ratified by Brazil, that grant these rights to every person⁷.

II. Legal Capacity of Aliens

In general, aliens have legal capacity in Brazil. The alien enjoys the same legal capacity as a national for the great majority of civil acts. Nevertheless, Brazilian doctrine distinguishes between capacity to have rights, capacity to exercise rights, and capacity to have and exercise certain legislatively restricted rights.

Capacity to have a right is the ability to be part of a legal relation, such as the right to own property, to sue, or to inherit. These rights are granted to any individual or legal entity, without exception. All aliens in Brazil have this capacity.

⁴ Constitution of 1891, article 72: "The Constitution assures to Brazilians and to foreigners resident in the Country the inviolability of the rights concerning liberty, individual security and property".

⁵ *Habeas corpus* No. 973, 91 O DIREITO 414,434 (1903).

⁶ Pontes de Miranda, 4 COMENTÁRIOS À CONSTITUIÇÃO DE 1967 COM A EMENDA N°1 DE 1969 695-6 (1974). Along the same lines Jacob Dolinger, COMENTÁRIOS À CONSTITUIÇÃO DE 1988 (1997), classifies the fundamental rights as *generic*, to be granted to anyone, *specific*, to be granted to Brazilians and resident aliens and *restrictive*, granted only to Brazilians.

⁷ J. Afonso da Silva, CURSO DE DIREITO CONSTITUCIONAL POSITIVO 173 (1989); Baptista, *O Estrangeiro: Reflexões para a Constituinte*, A NOVA CONSTITUIÇÃO E O DIREITO INTERNACIONAL 135, 137 (J. Dolinger ed. 1987).

Capacity to exercise a right is the capacity to act in his or her own name in the legal arena. For all those domiciled in the country⁸, regardless of their nationality, all but the following persons have the capacity to exercise rights: those below 18 years, the mentally deficient that do not have enough discernment to practice the acts of the civil life, those who can not, even because of a transitory reasons, express their will, the eventually inebriated ones, the drug addicted, those that, by a mental deficiency have their discernment reduced, the ones without a complete mental development and spendthrifts⁹. These incapacity rules are only for those who are domiciled in Brazil; if an alien is domiciled abroad and needs to exercise a right in Brazil, his capacity to do so is governed by the rules of the country where he is domiciled. Thus, any alien domiciled in Brazil, over 18 years of age and under none the incapacities listed above, may, without any other formality, sign a contract, marry or hire someone.

Finally, someone having both the above legal capacities may be prevented from having certain rights in Brazil because of a specific prohibition in the Constitution or ordinary legislation. Thus the alien may suffer some limitations regarding the acquisition of real property in rural areas¹⁰, of Brazilian ships¹¹, or the communications media¹².

There is a lively debate among Brazilian constitutional scholars as to whether ordinary legislation may add further distinctions between resident aliens and nationals. Some believe that apart from the distinctions or allowances made in the constitutional text for enactment of implementing ordinary legislation, no other distinctions are possible¹³. Other authors take

⁸ In Brazil, the capacity to exercise a right is regulated by the law of the domicile of the person involved (Introductory Law to the Civil Code): "Art. 7^o. The law of the country where the person is domiciled determines the rules about the beginning and the end of the personality, the name, the capacity and the family rights."

⁹ Civil Code, articles 5 and 6.

¹⁰ Constitution of 1988, article 140: "The Directing Board of the National Congress shall, after hearing the party leaders, designate a Committee comprised of five of its members to monitor and supervise the implementation of the measures concerning the state of defense and the state of siege"; Law .5709 of 1971; Decree 74.965 of 1974.

¹¹ Constitution of 1988, article 178, sole para: "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".

¹² Constitution of 1988, article 222: "The ownership of journalism firms and radio and television broadcasting firms is restricted to native-born Brazilians or those naturalized more than ten years ago, or to legal entities constituted under Brazilian laws and that is headquartered in the Country".

¹³ Carmen Tiburcio, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* (2001).

the opposite position¹⁴. Those who contend that ordinary legislation cannot discriminate against resident aliens without express constitutional authorization base their position on the principle that expressly prohibits discrimination based on origin, one of the objectives of the Federal Republic of Brazil, according to the constitutional text¹⁵. Likewise, Article 5 of the present Constitution assures in general terms to Brazilian and resident aliens the right to life, freedom, equality, security and property, which according to at least one author are the bases for all fundamental rights¹⁶. Since aliens are guaranteed the constitutional right to be treated equally¹⁷, ordinary legislation not expressly authorized by the Constitution, that establishes discriminatory treatment, will be considered unconstitutional.

The same argument can be used with respect to the right to work, guaranteed to both Brazilians and resident aliens¹⁸. Some contend that understanding that any legislation establishing limitations on the right of aliens to work is unconstitutional¹⁹. Consequently, proponents of this view consider unconstitutional the statute that conditions the practice of the law by aliens on reciprocity²⁰, all the provisions of Aliens Act prohibiting the exercise of functions not expressly mentioned in the Constitution²¹, and all

¹⁴ See J. Dolinger, *DIREITO INTERNACIONAL PRIVADO: PARTE GERAL* 228 (2005), 1 O. Tenório, *DIREITO INTERNACIONAL PRIVADO* 268, 269 (1976); 2 W. Campos Batalha, *DIREITO INTERNACIONAL PRIVADO* 28, 29 (1977).

¹⁵ Constitution of 1988, article 3, IV: "The fundamental objectives of the Federal Republic of Brazil are: IV – to promote the well being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination".

¹⁶ M. Gonçalves Ferreira Filho, *COMENTÁRIOS À CONSTITUIÇÃO BRASILEIRA* 586 (1984).

¹⁷ Constitution of 1988, article 5, I: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: I – men and women have equal rights and duties under the terms of this Constitution".

¹⁸ Constitution of 1988, article 5, XIII: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: III – the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish".

¹⁹ This position is defended by Carmen Tiburcio, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* (2001) and by H. Valladão, 1 *DIREITO INTERNACIONAL PRIVADO* 424 (1980); Soares, *Os estrangeiros e as Atividades a eles Vedadas ou Restringidas Proibição Constitucional a Discriminação pela Lei Ordinária de Brasileiros Naturalizados*, *A NOVA CONSTITUIÇÃO E O DIREITO INTERNACIONAL* 118, 123 (1987).

²⁰ Estatuto da OAB, Law No. 4.215 of 1963, articles 48, 49 and 51. This law was revoked by Law No. 8.906/1994, which does not mention the exigency of reciprocity.

²¹ Aliens' Act, articles 106, VI, VII, VIII and IX.

prohibitions to exercise some professions such as public interpreter²², customs dispatcher²³, as well as the Labor Laws provision²⁴ that requires that two-thirds of all workers be Brazilian nationals²⁵.

This argument has been urged since the beginning of the century when the question was raised whether it was constitutional to expel resident aliens by means of the assimilation provision of the 1891 Constitution²⁶, and the silence of the constitutional text to admit expulsion. Pedro Lessa, Ruy Barbosa and Germano Hassloser, very known Brazilian legal commentators, believed that since the Constitution established completely equal rights between resident aliens and nationals, and since nationals cannot be expelled, resident aliens could not be expelled either without an express authorization in the Constitution²⁷.

III. Acquisition of Immovable Property

The 1988 Brazilian Constitution mandates that:

“Article 5- Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and aliens resident in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:

XXII- the right of property is guaranteed.”

This is the rule which contains the principle of equality before the law to nationals and resident aliens. According to this provision, nationals and aliens residing in the country should be treated alike. As one of the paragraphs guarantees the right to property, so aliens and nationals alike have the same rights regarding property. As a conclusion to this provision, ordinary legislation cannot discriminate where the Constitution does not.²⁸

²² Decree No. 13.609 of 1943.

²³ Decree Law No. 4.014 of 1942, article 19.

²⁴ Art. 354 of the Consolidação das Leis de Trabalho (The Code of Brazilian Labor Law).

²⁵ While the 1969 Constitution, article 165, XII expressly admitted proportionality of Brazilian workers, the present Constitution is silent on this point.

²⁶ Constitution of 1891, article 72.

²⁷ See Dolinger, *Das Limitações ao Poder de Expulsar Estrangeiros*, ESTUDOS EM HOMENAGEM AO PROFESSOR HAROLDO VALLADÃO (1983).

²⁸ Legal commentators are not unanimously in accordance with this statement. This idea is defended by Carmen Tiburcio in a previous article, *Nationality and the Status of Aliens in the 1988 Brazilian Constitution*, PANORAMA OF BRAZILIAN LAW (ed. Jacob Dolinger and Keith Rosenn, 1992) and in *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* (2001). Also by Haroldo Valladão, *1 DIREITO INTERNACIONAL PRIVADO* 424 (1980) and Guido F.S. Soares, *Os Estrangeiros e as*

Thus, the only distinctions which should be deemed valid in accordance with the Constitution are the ones included in the text of the Constitution itself. So, as a general rule, the right of property cannot be denied.

First of all, aliens are assimilated to nationals as regards acquisition of property *mortis causa*. Consequently, the fact that the heir is an alien will not *per se* prevent acquisition. Notwithstanding, the Brazilian Constitution has a rule which states that: "*inheritance of aliens' assets located in the Country shall be governed by Brazilian law, for the benefit of the Brazilian spouse or children, whenever the personal law of the deceased is not more favorable to them.*"²⁹

This rule is a tradition in the Brazilian civil system, which has the objective of protecting the Brazilian family of the deceased, having as its origin the Consolidation of 1890, soon after Brazil became a Republic.³⁰ Consequently, Brazilian legislation comprises a certain contradiction. It does not establish

Atividades a eles Vedadas ou Restringidas Proibição Constitucional a Discriminação pela Lei Ordinária de Brasileiros Naturalizados, A NOVA CONSTITUIÇÃO E O DIREITO INTERNACIONAL, 118-23 (ed. J. Dolinger 1987) and by Jacob Dolinger, 2 COMENTÁRIOS À CONSTITUIÇÃO, 114-119 (1991). In contrast, Oscar Tenório, 1 DIREITO INTERNACIONAL PRIVADO, 268-69 (11th ed. rev. J. Dolinger 1976); 2 Wilson de Souza Campos Batalha, DIREITO INTERNACIONAL PRIVADO 28-29 (1977) defend the opposite viewpoint.

²⁹ Constitution of 1988, article 5, XXXI. This rule was also contained in the 1969 Constitution, article 153, para. 33 and the Constitution of 1967, article 150. The 1946 Constitution, article 165; the Constitution of 1937, article 152; Constitution of 1934, article 134 also adopted the same rule, with minor distinctions. The Introductory Law to the Brazilian Civil Code, dated 1942, also contains this rule, at article 10, para. 1. Therefore, after 1942, this rule protecting the Brazilian family existed both in the constitutional text and in ordinary legislation. The previous Introduction to the Brazilian Civil Code of 1917, article 14, did not establish the possibility of choice between Brazilian law and the personal law of the deceased, but determined the applicability of Brazilian law in the case of a Brazilian family. Brazilian legislation also protected the Brazilian widow, married to a man under a different regime as community property. According to Decree Law No. 3200 of 1941, the Brazilian spouse has a right to the usufruct for life of 1/4 of the marital property, if there are Brazilian children of the marriage, and to 1/2, if there are no children. Historically, this rule was necessary because, according to our legislation, the spouse was not necessarily an heir, and could be excluded in the event that the deceased spouse made a will benefiting another person, or if he had children or parents. Presently, it is controversial whether this provision is still in force, mainly because of article 226, para. 5 of the Brazilian Constitution, which assimilates women to men. Anyway, nowadays, the spouse is necessarily an heir, as per article 1.829, III of the New Civil Code of 2002. The rule mentioned above can be explained by the American theory of interest analysis in conflicts of laws, elaborated by Brainerd Currie, for the Brazilian widow, as a rule, living in Brazil, if left without anything, may become a public charge. As for the interest analysis doctrine see Brainerd Currie, *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, Duke University Press, North Carolina (1963).

³⁰ Compilation of Carlos Augusto de Carvalho, dated 1890, article 31 sole para.

any prohibition to aliens as regards acquisition by inheritance, but it does contain a rule of conflict of laws that favors Brazilian heirs.

Regarding this matter, the Civil Code of 1916 affirmed that: “[the] law does not distinguish nationals and aliens in the matter of acquisition and fruition of civil right.” This article 3rd, however, does not have any correspondent provision in the current Civil Code.

In addition, it is important to remember that, according to the Statute of Aliens (Law No. 6.815/1980), article 6, “[the] possession or the property of goods in Brazil does not give the alien the right of obtaining a visa of any nature, or the authorization to stay in national territory”.

IV. Rural Immovable Property

Article 190 of the Constitution reads:

“The law shall regulate and limit the acquisition or leasing of rural property by foreign individuals or legal entities and shall determine which cases shall require authorization from the National Congress”.

As the Constitution itself admits that ordinary legislation may establish criteria for alien ownership in the rural area, laws which create distinctions against aliens regarding this subject are considered constitutional.

The article referred to above is related to Law No. 8629/1993, which mentions, in its article 23, Law No. 5709/1971, determining that it will define the requirements that must be met by an alien who plans to acquire immovable properties in Brazil.

In the article 3rd of the Law of 1971, the acquisition of rural immovable property by a foreign natural person is restricted. It cannot exceed 50 modules of undefined exploitation (MEI), in a continuous or discontinuous area. A Brazilian married to an alien in community of property is also submitted to the restriction of article 3rd. After all, the acquisition benefits the spouse, who becomes, automatically, co-owner. The authorization of INCRA³¹ (Instituto Nacional de Colonização e Reforma Agrária), then, in such hypothesis, remains essential³².

The National Congress shall authorize the acquisition or the leasing that goes beyond these fixed limits and, in relation to legal entities, the acquisition or the leasing of any area superior to 100 MEI³³.

³¹ National Institute of Colonization and Agrarian Reform, which is responsible for the implementation, in Brazil, of the agrarian reform and to carry through the national agrarian system, contributing to the sustainable agricultural development. (Source: <www.incra.gov.br>)

³² STJ, DJU 22 abr. 1997, RMS 5831/SP, Rel. Min. José Delgado.

³³ Law No. 8.629 of 1993, article 23, § 2nd.

Article 5 of the same law refers to foreign legal entities as well. The rural immovable properties acquired by them shall be destined to specific activities: implementation of agricultural, cattle-related, industrial, or colonization projects, linked to its statutory objectives. In order to implement them, the projects must be approved by the Ministry of Agriculture or by the Department of Commerce and Industry of Brazil.

In case the immovable property is situated in an area essential to national security, the acquisition by a foreign natural person or legal entity depends on the previous permission of the General Secretariat of the National Security Counsel (CSN). Besides, the deed is essential to this act³⁴.

In rural lots implemented by private companies of colonization, the acquisition and the occupation of, at least, 30% of the total area shall, necessarily, be done by Brazilians, as disposed in article 4. According to article 60 of the Law No. 4.504/1964 (Statute of the Land), "*the private companies of colonization are the natural people, national or foreign ones, resident or domiciled in Brazil, or legal entities, constituted and headquartered in the country, whose objective is to execute a program of valorization of the area or the distribution of lands*".

The sum of rural areas which belong to foreign natural people or legal entities has a limit as well. They cannot exceed a quarter of the surface of the counties (*Municípios*) where they are located³⁵.

Law No. 5.709 modified what was expressed in article 1 of the Complementary Act No. 45, which allowed the acquisition of rural property in the national territory only by Brazilians or by a foreign resident in the country, except in case of transmission *mortis causa*.

The establishment of a colonial nucleus is regulated by the Decree-law No. 9.760/1946. To such finality, lands of the Union are reserved, as per the Ministry of Agriculture's choice. These lands are divided into lots, which are sold to nationals and to aliens who want to dedicate themselves to agriculture, pending approval, according to the legal requirements, by the Ministry of Agriculture³⁶.

In brief, the free acquisition of rural immovable property by a foreign natural person should meet the following requirement: its area must be smaller than 3 MEI³⁷. In the case of legal succession, the restrictions to which Law No.

³⁴ Law No. 5.709 of 1971, articles 7th e 8th.

³⁵ Law No. 5.709 of 1971, article 12.

³⁶ Decree law No. 9.760 of 1946, arts 149 e 150.

³⁷ Law No. 5.709 of 1971, article 3rd, § 1st.

5.709³⁸ refer only apply when the matter concerns an alien resident in Brazil, as expressed by a decision of the Federal Supreme Court³⁹.

V. Urban Immovable Property

In the case of urban real state, it is important to take into account Decree-Law No. 9.760/1946, which refers to immovable property owned by the Union, amongst other things. Article 205 prohibits the alienation, the concession or the transfer of Union owned real state to aliens, natural person or legal entity, whenever it is located in zones mentioned in article 100, letter a:

“Art. 100. The application of the regimen of lease to Union lands, whenever authorized according to this Decree-law, is submitted to competence of the S. P. U. and must be subjected mandatorily to the previous hearing;

a) of the Ministries of War, by dint of the Military Regions Commands; the Navy, by dint of the Capitancies of the Harbours; of the Air Force, by dint of the Aerial Zones Commands, when the land parcels are located inside the borders strip, inside the strip of 100 (one hundred) meters alongside the shore or inside a circumference of 1.320 (one thousand three hundred and twenty) of radius around the fortifications and military facilities.” (Highlighted by the author)

There is one exception to such restriction: when the President of the Republic authorizes the operation. The authorization, however, may be unnecessary when *“it is an autonomous condominium unit, regulated by Law No. 4.591/1964, as long as the property is located in an urban area, and its intended ideal fractions, in its ensemble, do not exceed 1/3 (one third) of its total area.”*

VI. Immovable Property in the Border Area

The border area is 150 kilometers wide at most along the border and is considered fundamental to the defense of the national territory. That is how it is defined by the Constitution, in the 2nd § of the article 20, where it also establishes that its occupation and utilization must be regulated by law.

³⁸ Law No. 5.709 of 1971, article 1st, § 2nd; “The restrictions established in this Law do not apply to the cases of legal succession, except in the hypothesis described in article 7th”; article 7th. “The acquisition of immovable property located in an essential area to national security by an alien, natural person or legal entity, depends on the previous authorization of the General Secretariat of the national Security Counsel”.

³⁹ STF, DJU 7 nov. 1986, MS 20544/DF, Rel. Min. Octavio Gallotti.

Law No. 6.634, promulgated on May 2nd, 1979, focuses on the border area. It prevents an alien from obtaining the domain, the possession or any other right *in rem* related to immovable property located on the border area, except when there is a previous permission from the National Security Counsel (CSN). It also prohibits the participation, of any sort, of foreign natural person or legal entity, as a legal entity that possesses right *in rem* on any rural immovable property in that area.

Decree No. 85.064/1980 regulates the law mentioned above, concerning the participation of aliens in different activities related to lands located inside the border area.

Chapter III is about radio diffusion services. The previous consent of the National Security Counsel will be necessary to install the means of communication designated to this service, whose generating stations are located in the Border⁴⁰. In such hypothesis, the companies shall express in their statutes and social contracts that the social capital, in its totality, will always belong to natural Brazilian people and that the parts or representatives shares of the social capital will be inalienable and cannot be pledged to aliens or legal entities⁴¹.

Chapter IV is about mining activities. In Article 15, the mining company is defined, for the effects of the regulation. It is the "*firm or society constituted and domiciled in the Country independently of its juridical form and amongst its other objectives are research, exploitation, exploration and use of the mineral resources in the national territory*". Its components may be natural people or legal entities, nationals or aliens, once they are nominally represented in the constituent act of the company. However, in the case of a natural person or an individual company, the establishment or the exploitation of the activities described on the referred chapter is only allowed to Brazilian nationals.

The subject of colonization and of rural lots is on Chapter V. Such activities, inside the Border, in the case of an individual company or of a natural person, will only be allowed to Brazilian nationals, as described in the § 1st of the article 23.

There is also a chapter entirely dedicated to transactions with rural immovable properties involving aliens. Article 29 of Chapter VI affirms:

"The legal transactions that, direct or indirectly, imply the obtention of the possession, of the domain or of any other right in rem on rural immovable property situated on the border area, will depend on the previous consent of

⁴⁰ Decree No. 85.064 of 1980, article 9th.

⁴¹ Decree No. 85.064 of 1980, article 10, clauses I and IV.

the CSN and the process will begin in the National Institute of Colonization and Agrarian Reform (INCRA), whenever the acquirer of the title of those rights is a:

I – foreign natural person resident in Brazil;

II – foreign legal entity authorized to function in the Country; or

III – Brazilian legal entity in which, under any title, the majority of the social capital is owned by a foreign natural person not resident in Brazil or a foreign legal entity headquartered abroad”.

The mentioned legal entities in the two last clauses, however, will only be able to get the previous consent when the immovable property is destined to the implantation of agricultural, cattle, industrial or colonization project, tied to its statutory objectives.

The procedures of transactions of rural immovable properties with aliens shall be submitted through the INCRA before being sent to the SG/CSN, with the respective opinion, and are returned to that autarchy after being appreciated.

Finally, chapter VII regulates the participation of aliens in a Brazilian legal entity. This participation will depend on the previous permission of the CSN, whenever this Brazilian legal entity detains rights *in rem* on rural immovable property located in the border area.

VII. Mineral Resources

The Constitution, in its article 176⁴², considers the mineral deposits and other resources and the potentials of hydraulic energy as a property distinct from the ground, for the effect of exploitation or use. Therefore, they belong to the Union, but the property of the product of the exploitation belongs to the concessionaire.

The research and the exploitation of those resources, beyond its use, will have to be authorized or granted by the Union, in the national interest, but only to Brazilians or to companies constituted under the Brazilian laws and with headquarters and administration in the Country.

According to the *Código de Minas* (Mining Code)⁴³, the right to research or to exploit mineral resources can only be granted to a Brazilian natural

⁴² Constitution of 1988, article 176: “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”.

⁴³ Decree Law No. 1985 of 1940.

person or to a Brazilian legal entity constituted by Brazilian partners or stockholders⁴⁴. In some cases, the President of the Republic may authorize, by decree, alterations, fusions or incorporations of mining companies, in order to allow participation of foreign capital in those activities⁴⁵.

VIII. Property of Means of Communication

According to article 222 of the Federal Constitution of 1988, modified by the 36th Constitutional Amendment, the ownership of journalism, radio or television firms is restricted to Brazilians by birth or to those naturalized for more than 10 years. Legal entities constituted under Brazilian law and with head office in the country, however, have this right as well.

Law No. 10.610 was promulgated in 2002, which allowed companies controlled by foreigners or by Brazilian who have been naturalized for more than 10 years, via enchainment of companies or any other indirect mean, to have a maximum share of 30% in the social capital, total and voter, of the radio diffusion journalistic companies⁴⁶. This was an advance in relation to Decree No. 236 of 1967, which prohibited foreigners and legal entities from being partners or from participating in partnerships that executed such service, not even exercising indirect control. It is curious that, on the other hand, such restrictions did not comprise the national political parties⁴⁷. The same occurred with article 3 of the Press law (Law No. 5.250/1967), which prohibited the ownership of journalistic companies, both political and newsworthy ones, to foreigners. The 1st paragraph also prohibited foreigners and legal entities (except political parties) from being partners or from participating of partnerships that own journalistic companies and from having upon them any kind of direct or indirect control.

That modification, therefore, only allows the participation of foreign capital through a Brazilian company, not presenting serious risks of denationalization of the area.

IX. Conclusion

In many countries acquisition of property is restricted to aliens in several ways. Some countries determine that acquisitions of immovable property are subject to the prior approval of the competent authorities.⁴⁸ Other countries

⁴⁴ Código de Minas, article 6th.

⁴⁵ Código de Minas, article 76.

⁴⁶ Law No. 10.610 of 2002, article 2nd, §1st.

⁴⁷ Decree law No. 236 of 1967, article 4th, sole paragraph.

⁴⁸ Austria: Michael Geistlinger, Gerhard Lebitsch, Harald Stolzlechner, *Zur Rechtsstellung der Ausländer nach österreichischem Recht*, DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT 1009, 1099 (1987); Brazil:

expressly forbid acquisition in certain areas, such as frontiers or other areas considered important to national security.⁴⁹ Total prohibition of or severe restrictions on alien land ownership is almost non-existent.⁵⁰

Brazil adopts a mixed criteria. As a rule, resident aliens are assimilated to nationals regarding acquisition of property in Brazil.

Carmen Tiburcio, *THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW* 140 (2001) and *Nationality and the Status of Aliens in the 1988 Brazilian Constitution*, *A PANORAMA OF BRAZILIAN LAW* 267 (1992); Denmark: Langkjær & Stumel, *Review of the Principal Features of the Legal Position of Aliens in Denmark*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 257 (1987), India: Singh, *Position of Aliens in Indian Law*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 603 (1987); Poland: Kedzia, *Die Rechtsstellung von Ausländern nach polnischem Recht*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 1238 (1987), Switzerland: Thürer, *Die Rechtsstellung des Ausländern in der Schweiz*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 1404 (1987). In the US there is a special duty to notify the federal government if aliens hold interest in agricultural land. See T. Alexander Aleinikoff, *United States Immigration Nationality and Refugee Law*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 1545, 1621 (1987). In Sweden, see Dennis Campbell and David S. Tenzer, *Alien Acquisition of Real Property: A Practitioner's Perspective*, *LEGAL ASPECTS OF ALIENS ACQUISITION OF REAL PROPERTY* 9 (Dennis Campbell ed.) (1980). The Polish Act of 15th March 1996 concerning amendments to the act referring to the acquisition of real property by aliens sets up some cases in which permission is not required, such as: 1) Acquisition of an independent residential unit; 2) acquisition of real estate by an alien residing in Poland for more than 5 years; 3) acquisition of real estate by an alien married to a Polish national and residing in Poland for more than 2 years; 4) acquisition due to inheritance; 5) acquisition by a legal entity with headquarters in Poland owned by aliens. See Mieczysława Zdanowicz, *Legal Status of Aliens in Poland in the Light of International Obligations*, *22 POLISH YEARBOOK OF INTERNATIONAL LAW* 58-59 (1996).

⁴⁹ Argentina: Maureen Williams, *The Legal Position of Aliens in National and Internatinal Law in Argentina*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 30 (1987); Chile - Mayorga, *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Chile*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 225 (1987); Greece - P. D. Dagtoglou, *Die Rechtsstellung von Ausländern nach Staatlichen Recht und Völkerrecht in Griechenland*, *DIE RECHTSSTELLUNG VON AUSLÄNDERN NACH STAATLICHEN RECHT UND VÖLKERRECHT* 529, 557 (1987). Dennis Campbell and David S. Tenzer, *Alien Acquisition of Real Property: A Practitioner's Perspective*, *LEGAL ASPECTS OF ALIENS ACQUISITION OF REAL PROPERTY* 18n99 (Dennis Campbell ed.) (1980) inform that more than 40% of the countries surveyed had enacted one or more "key sector" restriction.

⁵⁰ Dennis Campbell and David S. Tenzer inform that in 1980 only the Union of Socialist Republic and Yugoslavia were included in this category. See *Alien Acquisition of Real Property: A Practitioner's Perspective*, *LEGAL ASPECTS OF ALIENS ACQUISITION OF REAL PROPERTY* 8 (Dennis Campbell ed.) (1980).

However, in some cases (acquisition of immovable rural property and of immovable property in the border area), authorization of the proper authority (National Congress and National Security Counsel) is required, while in others (property of means of communication and exploitation of mineral resources), acquisition is forbidden.