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## Brazil's Proposed Corporations Law

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## LEGAL MEMORANDA

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EDITOR'S NOTE: The legal memoranda in this issue comprise three reports received from yet another law firm which has joined the ranks of our cooperating law firms. In welcoming *Gerber & Skola* of New York City to the ranks, the Editor expresses his gratitude for the firm's enthusiastic response to the plea to "join up" in the February, 1976 issue.

### BRAZIL'S PROPOSED CORPORATIONS LAW

- A. **CURRENT STATUS.** Much discussion and debate has accompanied the proposed draft bill of the Brazilian Corporations Law following its submission to the Treasury Department (*Ministério da Fazenda*) in April, 1974 by a specially appointed Legal Commission (Alfred Lamy Filho and José Luiz Bulhoes Pedreira, *Rapporteurs*). Brazilian sources indicate that the draft bill is presently undergoing further modification and probably will not be acted upon by the Brazilian Congress and Executive Branch until the second quarter of 1976. The Present text stipulates that the provisions thereof will enter into effect sixty days following publication in the *Diario Oficial Da União*.
- B. **OBJECTIVES.** Although the final text of the new Corporations Law will remain uncertain until it has been duly promulgated, the objectives thereof should survive substantially as set forth in the original *exposição de motivos*, to wit:
  - 1. To create an adequate model for the organization and operation of the large private enterprise required by the present development of the Brazilian economy.

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2. To improve the model corporation (*sociedade anônima*) used by small and medium companies in order to facilitate joint ventures.

3. To establish the legal regime which shall govern publicly-held companies.

4. To preserve, whenever possible, the legal regime in effect since 1940, to which entrepreneurs and investors are already accustomed.

5. To make available more options to the entrepreneur regarding the issuance of securities and bonds, for purposes of aiding the capitalization of the company and facilitating flexibility in its financial structure.

6. To define the duties of directors and "controlling shareholders", both national and foreign, and to establish a system of effective and appropriate responsibility of the entrepreneur *vis-à-vis* the minority shareholders, the company, its employees and the applicable community.

7. To maintain traditional Brazilian concepts in this material, which have their origin in European law, while accepting the useful solutions provided by the Anglo-American legal system, which because of the accelerated nature of international trade are more and more instilled in Europe and adopted in Brazil.

8. To bring Brazilian legislation more in line with current practices and institutions in international markets, for purposes of providing the Brazilian entrepreneur with a legal basis for his negotiations with foreign enterprises.

9. To treat (although only in a preliminary manner, due to the rapid socio-economic transformation in which Brazil finds itself) such new and important phenomena as the association and creation of economic groups and the public transfer of corporate control.

C. **INNOVATIONS.** Some of the principal innovations contained in the current draft bill are summarized below in comparison with the Brazilian Corporations Law presently in force (*Decreto-Lei* No. 2,627 of September 26, 1940).

1. The draft creates two new general categories of companies: the publicly-traded company (*companhia aberta*) and the privately-held company (*companhia fechada*).

2. It presumes that the so-called "*Comissão de Valores Mobiliários*", based in principle on the Securities and Exchange Commission of the United States and created by separate legislation (also presently under discussion), will be operating with full powers to regulate the Stock Market, including, among others:

a. The supervision of public offerings and trading on the stock exchanges.

b. The organization and administration of brokers and mutual and investment funds.

c. The protection of investors from illicit or fraudulent securities issuances and the unlawful acts of directors and "controlling shareholders" of publicly-traded companies.

d. The stimulation of public savings for utilization in the purchase of debentures and bonds.

3. The draft establishes and clarifies a series of rights for minority shareholders, including, among others:

a. The right (unless otherwise stipulated by all the shareholders) to a minimum dividend distribution equivalent to one-half of the net annual profits of the company.

b. The right of a dissident shareholder to be reimbursed for the value of his stock in the company at book value within ninety days in the event of merger, assimilation, deadlock, transfer of controlling interest in a publicly-traded company, or certain other material changes to the by-laws (*estatutos*) of the company.

c. The procedures to be followed in any transfer of the controlling interest in a publicly-traded company are set forth in detail in order to give the minority shareholders timely notice thereof and permit them to object thereto. Nevertheless, one point of much continued discussion, which many commentators argue is highly detrimental to minority shareholders, is the concept that "control" of a publicly-traded entity has its own particular value and should be included in the price established by the majority shareholders for their controlling interest.

d. "Monetary correction" principles are applied to distributions of dividends and reimbursements of capital.

e. The preferential right of shareholders to subscribe to new capital issues of the company is extended to issues of convertible debentures, as well as convertible *partes beneficiarias* (conferring the right to participate in the profits of the company) and so-called *bonus de subscrição* (conferring the right to subscribe to the capital stock of the company).

4. It establishes limitations on remuneration which the company may pay to its directors.

5. Bearer shares remain permissible, but may have no voting rights related thereto.

6. The responsibilities of directors, as well as “controlling shareholders”, are set forth in considerable detail.

7. In addition to the foregoing, other material innovations have been introduced in such areas as financial reporting requirements and procedures to be followed in dissolution, liquidation, transformation and merger, and in such concepts as “controlling or controlled affiliated companies”, “integral subsidiaries” (*subsidiária integral*: a company that has as its only shareholder another Brazilian entity), consortia and “company groups” (*grupo de sociedades*).

January, 1976

## INVESTMENT IN THE UNITED STATES OF AMERICA: LEGAL CONSIDERATIONS

The foreigner, individual or company, when dealing with investments or commercial activities in the United States of America (“U.S.”) must be aware of various legal aspects — often unique to foreigners — which may assume importance. As an aid to the foreign lawyer, businessman, or individual in his consideration of such investments or activities, we offer below a checklist of some of the legal aspects which are most often relevant.

1. Restrictions and Prohibitions Imposed by the Federal Government and the States with Respect to Foreign Investment in such Areas as Insurance, Banking, National Security, Aviation, Mining, Maritime Transport, Communications and Real Estate.

2. The Acquisition of American Companies by Foreign Investors.