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.
A. Anti-trust laws: Does such acquisition diminish competition or tend to create a monopoly?

B. Securities laws:

1) How to acquire — cash (public tender offer, stock market purchase, or privately negotiated purchase) or stock and/or securities (private placement or listing with the Securities and Exchange Commission)?

2) Rule 10b-5 with respect to fraudulent practices in the purchase or sale of stock or securities ("insider information").

3) Use of credit in the acquisition of securities ("margin rules").

4) Filing and reporting requirements involving publicly-held companies — the Securities and Exchange Commission; the Investment Company Act of 1940; the New York Stock Exchange.

5) The Foreign Investment Study Act of 1974 with respect to "direct" (more than 10% of the voting power or equivalent economic benefits of an enterprise) and "portfolio" (less than 10%) investment.

6) State securities laws on acquisition of stock control.

C. Tax laws:

1) Tax treatment of the purchaser: Deductibility of start-up costs; manner of acquisition [purchase of stock or assets; for cash or transfer of stock or securities; depreciation considerations ("stepped-up basis")]; form of operation (subsidiary or branch).

2) Tax treatment of the seller: "Tax-free reorganization," "Section 367 ruling," "installment sale method."

3. Operation in the U.S.

A. Form: subsidiary or branch — limitation of liability; sources of financing; tax considerations (federal, state and municipal)?

B. Where to establish — management flexibility (for example, the State of Delaware); operational costs (taxes, resident agent,
qualification, etc.); local commercial and industrial requirements (licenses, registrations, etc.); local incentives?

C. “Doing business” within the U. S. — concepts of jurisdiction (capacity to sue or be sued in state courts, requirements of qualification, subjection to state and local taxes).

D. Tax treatment (federal, state and municipal):
   1) Source of income (“income effectively connected with the conduct of a trade or business”);
   2) Tax treaties between the U.S. and the investor’s country.
   3) Advantages of special entities— Western Hemisphere Trade Corporation (“WHTC”); Domestic International Sales Corporation (“DISC”).
   4) Advantages of creating an off-shore base company.
   5) Consequences of a dissolution of reorganization.
   6) Effect on foreign individuals of estate and gift taxes.

   A. Requirements to prevent fraudulent practices (“disclosure,” “material information,” etc.).
   B. “Blue Sky Laws.”

5. Foreign Investment in Real Estate in the U.S. — Tax Effects.
   A. Individual or entity?
   B. Type of investment and source of income: “engaged in a United States trade or business;” “income effectively connected with a trade or business;” unimproved property, income-producing property or property acquired for development.
   C. Election of tax basis (“net basis”).
   D. Advantages of creating an off-shore base company in a tax haven or in a country that is party to a tax treaty with the U.S. (for example, the Netherlands Antilles).
      1) Effect upon individuals of estate and gift taxes.
2) Tax situation in the country of origin of the investor.

3) Effect of U.S. withholding tax on the "effectively connected income" of a foreign corporation owning income-producing property or property acquired for development in the U.S.


A. Applicability of state regulation [e.g. N.Y. Banking Law §§200-209 (McKinney, 1971)].


7. Immigration Laws:

A. Requirements for obtaining visas for foreign personnel in the U.S. ("intra-company transferee," "trainee," "treaty-trader", etc.).

B. The foreign investor who wants to become a permanent resident.

8. Exportation of Goods to the U.S.

A. Laws applicable to countervailing duties and "dumping."

B. Restrictions on importation — the prohibition of certain products, safety requirements, shipping and classification prerequisites, etc.

C. International treaties (for example, "GATT").

D. Trading With The Enemy Act.


10. Miscellaneous:

A. Antitrust laws — Sherman Act, Clayton Act, Robinson-Patman Amendment, etc.
B. Civil liability — tort, in general; product liability, in particular.

C. Laws restricting bank secrecy — Title II — Reports of Currency and Foreign Transactions — Federal Deposit Insurance Act — currently being reviewed on appeal.

February, 1976

COMMENTS AND OBSERVATIONS REGARDING THE JUICIO DE AMPARO AND ARBITRATION PROCEEDINGS IN MEXICO

1. The procedural remedy of *amparo* in Mexico is established in Art. 103 and 107 of the Federal Constitution and, consequently, forms part of the highest level within the hierarchy of “positive” law in Mexico and cannot be superseded by other treaties, laws, codes and rules. Such Art. 103 and 107 are regulated by the *Ley de Amparo*, inter alia, which apparently also enjoys precedence over other local and federal laws (“La Ley de Amparo, por ser reglamentaria de los artículos 103 y 107 constitucionales, está colocada en un plano superior de autoridad, respecto de cualesquiera otras leves de carácter local o federal . . .”Semanario Judicial de la Federación, Appendix to Volume CXVIII, p. 1420).

Briefly, the remedy of *amparo* is a petition by an aggrieved party to obtain the review by federal courts of an alleged violation of individual rights. Such remedy may be petitioned only by individuals against the acts of legislative, administrative or judicial “authorities” (*autoridades*) concerning “final judgments” (*sentencias definitivas*). The court hearing the *amparo* petition will only decide the issue of whether there has been a violation of individual rights and will not make a general declaration regarding the legal provision or act underlying any such alleged violation.

2. Although all Mexican States have their own Code of Civil Procedure and most of such codes contain provisions governing arbitration (the major exception being the Federal Code of Civil Procedure), the majority of such code provisions have been either modeled after or are similar to the applicable text of the Code of Civil Procedure for the Federal District (the “Code”), which will be used herein when referring to Mexican local law governing arbitration (Art. 609 through 636) and the recognition of foreign judgments (Art. 599-608).