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Country Updates in Emerging Capital Markets: Andean Pact Countries

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I. TRADE WITH LATIN AMERICA: CONSIDERATIONS IN EXPORT TRADE

A. *Country Updates in Emerging Capital Markets: Andean Pact Countries*

1. Legal Aspects of Doing Business in Ecuador: Update

L. JANÁ SIGARS

I would like to introduce Bruce Horowitz. He is an Ohio lawyer and the Managing Partner of Paz, Horowitz & Romoleroux in Quito, Ecuador. His firm serves national and foreign clients, particularly in the areas of foreign investments, natural resources, and IP law. Mr. Horowitz served in the Peace Corps in the Amazon region of Ecuador. He has even produced a film for the Shuar Indian Federation and has contributed to the book, *Tropical Deforestation*.

BRUCE HOROWITZ

One of the few things that I remember from my high school statistics class is that if you have approximately thirty-three people in a room, two of them will have a fifty percent chance of having the same birthday. When I look at this room, I have a corollary, which is that if you have about 100 people in a room, at least one has a 100% chance that someone in his immediately family has a birthday during the conference, and consequently, he will not be able to be at the birthday. I am that one in one hundred. Last weekend, because I was going to be here today, I took my daughter, Esther Maria, who is turning six today, to the movies, and we saw a movie called *Ricky Ricone*, which is Spanish for *Richie Rich*. When we were at the movie, of course, people were laughing; it is a funny movie, if you are six years old. At one point, the evil mastermind, whose name is Van Dough, maybe it is Vincent Van Dough, thinking that he has taken over the rich industrial empire, turns to one of his cohorts with a great smile on his face and says, "The first thing I want to do is to buy one or two countries. Just a little country. One like Ecuador." Of course, everybody who had been laughing in the audience in Quito, Ecuador stopped laughing. That typifies the relationship between the United States and Ecuador. Ten minutes later, of course, everybody was laughing again; and that also reflects the relationship between Ecuador and the United States.

Ecuador, despite its present border conflict with Peru, which seems to be resolving itself, traditionally has been a peaceful, stable country. It is part of the Andean Pact, which includes Ecuador, Venezuela, Colombia, Peru, and

Bolivia.⁷ These countries encompass approximately 100 million people, 100 million people who could be doing business internationally. In this presentation, I am going to talk about four things: importing goods into Ecuador, investing in Ecuador, some “do’s and don’ts” about doing business in Ecuador, and the border conflict with Peru.

First, there are a number of considerations in export trade issues. In the past, there were very high import tariffs, up to 100% and sometimes even more, for goods coming into Ecuador. In 1991 at this conference, all of the speakers were saying that those tariffs were going to be lowered, and now they have been lowered. In the Andean Pact, there is a unified external tariff policy, so that any goods coming into any of the countries of the Andean Pact will have a maximum tariff of twenty percent.⁸ And as that goes down, mostly, to fifteen, ten, five, and zero percent, exporters from this country have much better opportunities for exporting to the countries in the Andean Pact.⁹

Ecuador, in particular, has been given the right to charge lower tariffs, and they are making use of that right. There is a five percent tariff on raw materials that are not produced in the region, and there is a zero percent tariff on things that are needed such as medicines and books. In regards to unprocessed or semi-processed materials that come into Ecuador, if Ecuador sells to any of the other countries in the Andean Pact, there is a zero tariff because inside the Andean Pact we have now a free-trade region. In other words, it is a common market within the Andean Pact. Therefore, as with NAFTA, you have the issue of semi-processed goods coming into one country, and whether there is a tariff on those goods going into another country. In the case of Ecuador, unprocessed or semi-processed goods can come in and then be resold to the other Andean Pact countries if there is only thirty percent additional work added to the product. So again, that is a great opportunity for exporters of raw materials or semi-processed materials into Ecuador, because there only has to be a thirty percent change in the product before it can be sold to the rest of the 100 million people of the Andean Pact.

In the future, now that there is an internal zero tariff policy and an external maximum twenty percent tariff, Ecuador is in a position where it can negotiate trade agreements. Ecuador is presently negotiating to enter the free-trade pact agreement between the Group of 3 (G-3), which is composed

7. Established by the *Acuerdo de cartagena* (Cartagena Accord), the Andean Pact is a regional economic unit and an outgrowth of the Latin American Free Trade Association.

8. 1995 USTR, NAT’L TRADE ESTIMATE REP. ON FOREIGN TRADE BARRIERS 67 [hereinafter USTR REP.].

9. *Id.*

of Colombia, Venezuela, and Mexico.¹⁰ Also, Ecuador is negotiating with Mercosur to become a trading partner. On January 3, 1995, Ecuador signed a free-trade agreement with Chile, which provides that, effective immediately, ten to fifteen percent of all products between those two countries have a zero tariff, and within six years in portions of increasing dimension, they will have free trade. Finally, Ecuador continues to negotiate to join GATT.

The second point covers investment opportunities in Ecuador. As Ambassador Moss has said, all the countries in Latin America have opened up. In 1991, we were talking about the opening up of investment opportunities. Ecuador is very open to investments. It has free money exchange, free repatriation of profits, and 100% of any Ecuadorian company, except in certain strategic areas, can be owned by a foreign individual or company. In terms of privatizations, the government is selling some of its companies, including industries such as the cement industry. At present, probably within a month, there will be a buyer for the Ecuadorian national airline, *Ecuatoriana*. The train system also is up for sale. In terms of concessions, there is greater opportunity to become involved in what would otherwise be called privatizations. A large part of the highway system in Ecuador is going to be run by private companies, and many of those are going to be foreign. The sanitation systems in the major cities already have begun to be run by private companies, both national and international. The telecommunications and the power systems also will involve private and foreign investment and ownership.

Additionally, the mining industry and the petroleum industry related to it are completely open. In terms of the petroleum industry, there are concessions now where the private sector can become involved from exploration through distribution. The seventh round of oil concessions was just concluded. There will be a new trans-Andean pipeline, which will be the largest economic benefit to the country during the next two years. A concession on electrical power, with a 230-megawatt hydro project going to the private sector, was recently authorized.

I would like to offer some tips on doing business in Ecuador. The main caution I want to give to you has to do with an old decree on the protection of agents, representatives, and distributors in Ecuador who deal with foreign companies. Under this law, if foreign companies make a deal with an agent, a representative, or a distributor, whether it is or is not in writing, it can never be unilaterally terminated unless the agent has seriously violated a very substantial contract clause and failed to cure after written notice. The distributor will from then on have a lifelong relationship with you or your company. Once a company has an exclusive relationship or even a non-

10. G-3 was established in 1990, as a mechanism for policy coordination.
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exclusive relationship with an agent or representative in Ecuador, it can never be terminated. Foreign companies need to be very careful; this is definitely the area where they would need to talk to an Ecuadorian lawyer. For instance, if you start an exclusive relationship, even if the contract contains a specific fixed "date of termination" clause, it does not matter because of the law. The violation has to be extreme because the law is liberally interpreted in favor of local distributors.

The second point I want to make on this issue has to do with choice of law and choice of forum clauses. If it is written in the contract that any disputes regarding the contract will be taken care of by a Florida court under Florida law, this will not help you if any of the parties to the contract have signed the contract within the boundaries of Ecuador. Under the Ecuadorian Constitution, if the contract is signed in Ecuador, then Ecuadorian law holds in Ecuadorian jurisdiction. If the person who signed the contract wishes to make a complaint against you, the judicial proceedings must take place in the city of domicile of the Ecuadorian party. So be very careful. If you want to avoid Ecuadorian law or Ecuadorian forums, everyone must sign the contract outside of the boundaries of Ecuador.

The last of the do's and don'ts have to do with registration of foreign loans, royalty licensing agreements, trademarks, and certain other agreements in Ecuador. Before 1993, most of these had to be approved by the government of Ecuador. This is no longer necessary, but these agreements still need to be registered. Although there is no published penalty for nonregistration, and some companies have determined that they could save money by not registering, you will face some side effects if you don't. For instance, if a trademark license is not registered, it is valid but you cannot prove use. If you cannot prove use, somebody else can take your trademark; and if you try to oppose their use of your trademark, they can cancel yours because you do not have a registered license in Ecuador. Without registration, the government deems that you have not used the product formally in the last three years, and therefore, you will lose your own trademark. If you have not registered a license, the local licensee has no legal capacity to pay any royalties associated with the license. If the local licensee does pay the royalties, they are not looked at as expenses for income tax deduction. Sometimes royalties are used exactly for that purpose. If a royalty is not registered, then you cannot take it as an income tax deduction.

The last point has to do with the purchase, control, or shared control of real estate within fifty kilometers of the borders or the coast of Ecuador. If a foreign company is involved in a business deal where it is investing in real estate, it needs to check very carefully to make sure that if it is within the fifty-kilometer zone, it has received permission from the National Defense Council. If you purchase it without that authorization, then the purchase could be in trouble later on. Someone could bring it to the attention of the

proper authorities, and then you could have major problems.

Another point that I would like to mention concerns when to make telephone calls to Ecuador. Ecuadorian businesses and law offices tend toward a long working day, from around 8 AM to 6 PM, with lunch from 1 PM to 3 PM. Of course, if you call on a Monday or a Tuesday before Lent and nobody answers the phone, then it is probably during Carnival. Most people take off those two days. Also, when do Ecuadorian attorneys go on vacation? It is during the two judicial holidays in the first two weeks of August and at the end of December and beginning of January when judges go on vacation.

The last thing I wish to discuss is the conflict with Peru, not really about the conflict itself, but about a just solution to the border issue. In 1941 and 1942, there was a war by which the Shuar Indians, with whom I used to work in the Peace Corps, were separated into two groups: half are now in Peru, half are now in Ecuador. Several years ago, they suggested turning the disputed part of the border into an international park, which the Shuar would run. At the time, people laughed at the idea. But just before I came here, there was an article in the economic section of one of the Quito newspapers headlined, "Bi-national Park Between Ecuador and Peru." It has support from both sides as a way to settle the dispute, to help the ecology, and to help the economy of both countries. It has international support at the United Nations and may become a reality. It would be the best thing for both sides.

QUESTION:

Does Ecuador recognize arbitration laws?

ANSWER:

Ecuador does recognize arbitration. It is a member of several international arbitration groups. The Chamber of Commerce does a lot of commercial arbitration in Ecuador. The only issue of concern is the location where the document was signed. If the contract states that arbitration will be in Miami but the contract was signed in Ecuador, there will be a problem if the other party decides to fight it. If you want arbitration in Ecuador, there will be no problem, but in order for the arbitration to be outside Ecuador, the agreement must be signed outside Ecuador by all parties.

QUESTION:

Is it possible to set up a franchise in Ecuador?

ANSWER:

There is a specific law on franchising all moveable goods and services, but not real estate. Franchising in the food industry has grown tremendously in Ecuador in the last three years. There is a great opportunity in Ecuador for franchising.

QUESTION:

What if you have a problem with your distributor?

ANSWER:

If a problem with a distributor arises, it is best to have a written contract that says it is not an exclusive contract. The contract should also say that it is not a distribution or an agency or a representative contract. The particular words that you use are very important. You should have local advice before you write it. One of the things you can do is to have the contract signed and the time limit done outside Ecuador. However, if the person on the other side tries to bring the action or defense in Ecuador, you will probably have two things on at the same time, one inside and one outside.

QUESTION:

What were the economic consequences of the border conflict with Peru?

ANSWER:

The immediate economic consequences were a doubling of interest rates on credit and a temporary closing down of credit for local businesses. However, interest rates are already going back down. Probably in the long run that will not hurt. However, the resulting unification of the country, socially, politically, and economically, during the border conflict will probably have a longer-lasting effect and will help the economy.

QUESTION:

Can you avoid Ecuadorian jurisdiction by entering a contract by mail and having one person sign here?

ANSWER:

No, not if any of the parties have signed in Ecuador. They have to be physically outside of Ecuador and sign the contract outside of Ecuador.

QUESTION:

What is the position of Ecuador on polygamy in the instance where, if you are married to one distributor instead of getting a divorce, you just marry another one?

ANSWER:

The first distributor can require that you pay both past and future profits.

2. Investing in Colombia: The Enabling Legal and Policy Environment

L. JANÁ SIGARS

I would like to introduce Eduardo A. Wiesner. He practices law in Bogota, Colombia. His law firm handles large projects involving thermoelectric power plants, privatization of the state gas transporting companies, and syndicated and integrated loan facilities, which are made by foreign banks to the Bank of Colombia or for state entities. They also do aircraft financing and public services law.

EDUARDO WIESNER

Perhaps most of you associate the word Colombia with drug trafficking.

This is quite natural due to what is reported in the news. However, today I would like to steer away from that topic, which is quite delicate, and concentrate on how you should advise your clients on doing business in Colombia.

I will deal with four topics: (1) the governing principles that apply to foreign direct investment in Colombia, (2) the exchange-control regime of Colombia, (3) the privatization issues that have been constant in Colombia for the past four to five years, and (4) the status of Colombia's trade negotiations, both in the region of the Andean Common Market and in the rest of the Western Hemisphere.

Colombia's economic performance has been characterized by steadiness and resiliency. All throughout the debt crisis of the 1980s, the country's GDP never ceased to grow, averaging 3.7% per year since 1980. Colombia, furthermore, has never rescheduled its debt. In 1994, the economy grew by 5%, and for 1995, it is expected to reach 5.8%. Colombia's average growth rate between 1981 and 1992 was 3.3%, compared to 1.7% for South America and 2.4% for most of the Organization for Economic Cooperation and Development (OECD) member countries.¹¹ Today, Colombia has better sovereign ratings than either Venezuela or Mexico, and Standard & Poors recently gave Colombia a Triple-B investment grade rating, allowing Colombia's companies to access the international capital markets, especially institutional investors, as in the case of the United States.

Colombia has undergone fundamental political and economic changes in the past few years. On the political front, there has been a new constitution and a renewed commitment to decentralizing public administration. On the economic front, the government has abandoned the inward-oriented development model of the past and has begun to redefine the role of the State in the economy. The liberalization of our economy has led to fundamental changes in our business environment that, among other things, have made it easier for foreigners to invest in and do business with Colombia. The results are illustrative of these changes. Excluding petroleum and portfolio investment, net foreign investment in Colombia grew from \$102 million in 1991 to \$802 million in 1994. If we include petroleum and portfolio investment, investment grew to \$1.7 billion in 1994. This new political philosophy has led to the reduction of tariffs, the encouragement of inward foreign investment, the welcoming of new technology, the enactment of legislation protecting intellectual property, the simplification of bureaucratic procedures, deregulation, more efficient labor relations, and an active privatization program.

11. OECD is comprised of 24 of the 34 developed countries and the European Community and Yugoslavia.

Most of you have heard of the differences between our legal system and the U.S. legal system. The U.S. legal system stems from common law, whereas Colombia's comes from the Napoleonic Code, which we inherited from Chile, who had inherited it from France's civil law system. As I understand it, under the common law system, U.S. lawyers operate by applying an inductive process, moving from instances to hypothesis. In the civil law system, we reach the same destination, but we use a totally different road. We use what is called a deductive process, moving from concepts to applications. This perhaps will help you understand how our system differs from yours, although we both intend to reach the same destination.

First, I will briefly describe the governing principles of foreign investment in Colombia: equal treatment, universality, and automaticity. Equal treatment means that except for the area of tax treatment, foreign investment is awarded the same treatment as Colombian investment. Discriminatory conditions or treatment are expressly prohibited by Colombian law. Foreign investments need only be registered with the Banco de la República, which is our central bank, in order to have foreign exchange rates.

The second principle governing foreign investment is universality, which means that foreign investment is permitted in all but a few sectors of the Colombian economy. Those sectors in which it is not permitted are security, national defense, and the disposal and discharge of toxic, hazardous, or radioactive wastes not produced in Colombia. The other sectors in which investment is limited or not permitted are real estate companies and the purchase of securitizations derived from real estate processes.

The third guiding principle of foreign investment is automaticity. In principle, foreign investors need no prior authorization of any government agency to invest in Colombia. All they need to do is register the amount invested with the International Exchange Office of the Central Bank in order to have foreign exchange rates, which are substantial and essential for the financial livelihood of the project. The exceptions are investment in public services, communications, the processing and disposal of nontoxic substances, and investments made under the auspices of some form of guarantee provided by international agreements that have been ratified and are enforced by Colombia. Examples of such international agreements are the Overseas Private Investment Corporation, guarantees issued by the Multilateral Investment Guarantee Agency, the new member of the World Bank family, or any other form of investment guarantee. The idea of the Colombian government is to have some sort of control over an investment that is guaranteed by an agency, which once it has indemnified the effected investor, in turn, will repeat against the Colombian government. It is not a matter of restricting investment but of having some form of control. Another exception is investment in any financial institution. You can own one hundred percent of a financial institution in Colombia, but if you intend to own more than ten

percent, you need the prior approval of the government. Foreign investment is permitted in oil and mining areas with prior approval of the Ministry of Mines and Energy. The final exception applies to carrying out foreign direct investment by way of portfolio investment, which is the purchasing of Colombian stocks and shares traded on the public stock market.

The second topic of my discussion is exchange control. All amounts derived from foreign investment may be remitted abroad without restrictions on time or amount. Exchange rights are guaranteed, provided the amount invested is registered with the Central Bank. Remittances may be done through the ordinary banking system and do not need the prior approval of any government authority.

The exchange regime of Colombia is contained in Resolution 21 of 1993, of the Board of Directors of the Central Bank, which acts like the Federal Reserve Board here in the United States. Since the date of issuance, Resolution 21 has been substantially amended. The most important amendment made to it is as follows: when it was issued, the government decided that, in order to introduce greater competitiveness into the financial markets in Colombia, it had to allow residents to indebt themselves in foreign currency. This meant that as a Colombian national, living in Colombia, I could come to Chase Manhattan in New York and ask for a \$10,000 loan. Or a Colombian company could ask Chase Manhattan for a loan of \$10 million without any restrictions, as it could access the peso market. Unfortunately, this became a very attractive way of financing local companies and created tremendous monetary and fiscal problems, especially affecting the government's desire to control and bring down the inflationary level in Colombia.

As a way to control the negative effect this form of financing had on inflation, the government decided to create restrictions that today make it financial suicide for someone to try to indebt themselves in foreign currency. They did this in order to prevent their being accused of limiting or restricting the liberalization process, which it was so proud of implementing. They established that if you borrow in a foreign currency, you must make a deposit of more than 100% of the value of your loan with the Central Bank, a deposit that is valued for the duration of the loan and does not generate any interest. This is something quite new in Colombia and should give you a hint as to how the three principles might be studied with some sort of benefit.

When I speak about privatization in Colombia, I do so with one caveat. Privatization in Colombia is not the same as the privatization that has taken place in countries like England during the Thatcher years, Argentina, Venezuela, or Mexico, that is, privatization that is the transfer of State property to private hands for the rendering of services that traditionally had been the exclusive province of the government. Colombia has used the word

privatization to make a good appearance in the international market, but it is not a true privatization. What it has done, is allow the private sector to establish enterprises or companies that render services in a parallel manner to those companies owned by the government. The political cost of selling the power company of Bogota and the telephone company of Colombia, Telecom, is far too high for any President to assume. Therefore, the government has decided to allow them to remain and at the same time, allow private capital, foreign or national, to invest in this area and render the same services. This would allow consumers to chose between private services or public services in the same field.

In this our firm had a tremendous experience with the privatization of the government's participation in the largest gas transportation company of Colombia, known as Promigas. Our firm acted as counsel for a large North American gas company, interested in buying the shares that the government was going to sell through public auction on the stock market. Interestingly enough, the government wanted to sell thirty-two million shares, but by the time the bid date came, it was only able to sell one million shares. And it was only able to do so at the minimum starting price in the public auction.

Many potential investors in this process found that although Colombia has undergone a tremendous opening and liberalization process, in the specific area of public services, there is still great uncertainty about how tariffs are established. We had different lines of communication with different government entities. We found that ECOPETROL, who was only interested in Promigas, argued that the tariff for the transportation of gas was set by the government for a fixed period of time, that it guaranteed a fourteen percent rate of return before taxes, and could be adjusted if the investor, in this case the owner of the shares of Promigas, proved that the volume of gas that was going to be transported by the pipeline ended up being less than what they had estimated. Therefore, they could go to the government and say, "Please readjust the tariff for the transportation of gas."

Then we went to the Energy Regulatory Commission, which is the entity in charge of regulating this industry, and asked them the same question. Is this tariff subject to amendments before it expires? They had a different position than ECOPETROL even though they are both government entities. Their position was that the tariff was fixed for a four-year period and guaranteed a fourteen percent rate of return based upon the expectations of the transporter of how much gas was going to be transported through the pipeline, if less ended up being transported, the transporter had to assume this cost. If more gas was transported, then the transporter would have a greater rate of return on investment.

This level of uncertainty in the interpretation by government entities of the regulatory regime applicable to gas transportation caused our client and many other investors interested in purchasing the shares of Promigas not to

bid in the public process. This illustrates how uncertain things can still be in a privatization process that the government intends to make more aggressive with the new administration.

I will now discuss some trade issues. The current economic policy of President Ernesto Samper can be summarized in the following six points:

- (1) economic growth of on-average five percent per year;
- (2) reduction of inflation by means of a prudent macroeconomic policy and *El Salto Social* (The Social Leap), the four-year economic plan whereby production and labor sectors agree with the government to raise salaries by a predetermined amount each year (generating tremendous controversy because experts are of the opinion that you cannot control inflation by agreeing to raise salaries by ten percent, that inflationary pressures are too complex);
- (3) improvement of resource mobilization and the encouragement of private sector participation in infrastructure projects;
- (4) consolidation of the *apertura* process, initiated by former President Cesar Gaviria, today the General Secretary of the OAS;
- (5) maintaining of the stability of the local currency and the real exchange value of the peso. In the last fourteen months, Colombia has undergone an interesting process, that is, not only a strong reduction in the devaluation rate of the peso, but also a very strong appreciation of the peso in real terms, which has negatively affected Colombian exporters while making it very attractive for foreigners to do business in Colombia; and
- (6) keeping strict control over drug trafficking, violence, and moneylaundering, convincing the international community that the problems derived from drug trafficking and drug consumption are not solely the problems of a producing nation or a consuming nation, but are the problems of the international community and, should be addressed as such.

Colombia is a member of Asociacion Latinoamericana de Integracion (ALADI),¹² which originated from the Montevideo Treaty signed in 1980, whereby the Free Trade Association of Latin America was created. During NAFTA negotiations, Article 44 of the Montevideo Treaty gave Mexico the right to negotiate a free-trade agreement with the United States and Canada, and these benefits would not apply to other ALADI members. Today, Mexico is in the process of negotiating what sort of compensation it will grant the other members of ALADI.

Colombia has recently signed a free-trade agreement with Chile. It

12. In English, known as the Latin American Integration Association (LAIA).
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involves a population of close to fifty million citizens with a GDP of close to seventy billion. The free-trade agreement with Chile has several notable characteristics. The crux of the agreement provides that both countries eliminate tariffs on all goods traded between them by no later than January 1999. However, from the side of Colombia, some agricultural products such as oils, cereals, and livestock; some agro-industrial products such as fruit preserves; and some industrial products such as wood, paper, and copper are excluded from the zero-tariff scheme. From the side of Chile, textile products, clothes, synthetic fibers, security glass, cotton fabrics, and some chemical products are excluded from the zero-tariff scheme. All other products will be subject to a zero tariff by 1999. According to the treaty, the local content requirement is fifty percent as is the case with all of ALADI. As a consequence of the signing of this agreement, since January 1994, trade between Colombia and Chile has grown by thirty-nine percent to \$236 million and is expected to reach \$500 million by the end of 1995.

There will be many opportunities for private investment in infrastructure projects in Colombia. Today, Colombia is recovering from the blackout of 1991. We had tremendous deficits in power generation, and the government has intensified its strategy to allow and encourage private investment in the building and implementation of infrastructure projects. Colombia has liberalized the regime that allows Colombian companies to access the international capital markets. Today, it is much easier today for a Colombian company to access U.S. capital markets than it is for a Colombian to obtain financing through a syndicated or an integrated loan agreement or through access to Colombian capital markets. Investment by U.S. companies in the real sectors will take advantage of the Andean Trade Agreement, G-3, ALADI, and Columbia's free-trade agreement with Chile.

I see that we will gradually adopt the World Bank's guiding principles for the treatment of foreign investments, meaning a minimum standard of treatment; not the standard of treatment that the country gives but an international minimum standard of treatment. There also will be a uniform method of dispute resolution on an international level, free convertibility of the currency, and uniform treatment for compensation in cases of expropriation.

QUESTION:

Would you address the problem of laundering of drug-trafficking profits?

ANSWER:

Basically, with regard to money laundering of drug-trafficking profits, President Samper has shifted his energies and attention from the creation of an international tribunal to the creation of a committee that will deal with the money-laundering problem. The emphasis of the current government is that the problem can be best attacked by affecting the monetary or the economic interests of those involved in the trade. They are trying to create a consensus

in the international community to sign a treaty for the control of money laundering derived from drug trafficking.

B. *Assisting the U.S. Business in Entering
the Latin American Market*

L. JANÁ SIGARS

Our next speaker is Peter Alois. He is the Director of the U.S. Export Assistance Center with the U.S. Department of Commerce in Miami. He joined the U.S. Department of Commerce in 1973, went overseas in 1980 to Germany, and then to Costa Rica, Ecuador, and Italy. He came to Miami in August 1994 for a three-year assignment. Miami feels very lucky to have him. His languages include French, Italian, Thai, Spanish, German, and English. I hope he will speak to us in English.

PETER ALOIS

I have been with the federal government since 1973. I would like to give you an idea as to how the federal government is integrating itself to be more responsive to U.S. companies and to attorneys and their U.S. and foreign clients. The U.S. government very recently has realized that the system for U.S. exporters was terribly complicated, with no less than nineteen federal agencies involved in international trade. This was very complicated for those of us inside the system as well.

In 1992, the federal government started to pull that together and in 1993, established a trade promotion coordinating committee, which at the end of 1993 put together a document called, *Toward a National Export Strategy*. This document made sixty-three recommendations for the federal government to combine, integrate, cooperate, and coordinate. One of the recommendations was to establish what is perhaps clumsily called "a one-stop shop" for exporters. Nevertheless, it is very effective. In 1994, four prototype one-stop shops were established in Miami, Baltimore, Chicago, and Long Beach. The one-stop shop has brought together the U.S. Department of Commerce, with its international marketing expertise, the Small Business Administration (SBA), and the Export Import Bank of the United States (Exim): money on one side and marketing on the other. This is the combination that you and your clients need in order to successfully enter the overseas market.

These organizations are micro-oriented. We look at companies and associations, but we are not interested in policy. We do not do foreign relations, visas, or military activities. Rather, we look at businesses to help you and your clients penetrate markets around the world. In essence, we are trade consultants. These three agencies are represented in some two hundred cities in some seventy countries, including the United States. It is a global operation with roughly 1600 employees.

Domestically, the impact of these changes has been more coordination, more working together. These one-stop shops went into place in 1994; eleven more will come into place in 1995 in the United States and probably another five in 1996. Ideally, by the end of 1996, this system will be across the United States, with the three agencies working together. I would be delighted to see more agencies join, for example, the Department of Agriculture and the Agency for International Development. There is a wide variety of business organizations, and it would be a wonderful idea if they were brought together.

In fact, another recommendation was to establish these prototype offices with important partners. For instance, in Miami the agency is by the airport; we are intentionally located with the State of Florida's Department of Commerce. We also are located with the Florida Trade Data Center and the Florida Export Finance Corporation. In other cities in the United States, the agencies are being located with major chambers of commerce, trade associations, or state entities. There is noticeable cooperation between federal, state, and regional organizations. It is definitely a major step forward for those on the outside. Nevertheless, you need to come and educate us as to what you are interested in doing.

Additionally, there is much greater cooperation overseas. In the embassies and consulates around the world, there are country commercial teams, headed up by the ambassador, who is the Chief-of-Mission. Consequently, the entire mission and the entire system overseas responds to U.S. companies. Someone in the commercial office can go and talk to the Minister of Trade, the U.S. Information Service or the media. Perhaps the ambassador might speak with the President of that country, and the military attache might speak with the Department of Defense. Depending on your needs, we can put together a package and speak to the host government about a company situation or a government procurement. There is a system in place that is indeed becoming ever more coherent.

Senator Jesse Helms has proposed that our particular slice of the Department of Commerce go back to the Department of State. However, prior to 1980, we were with the Department of State, and then we were shifted. Historically, the Department of State has not focused on business but on politics. The *Journal of Commerce* reported that Senator Dole wanted to establish a Department of International Trade. This notion has been knocked around Washington for probably fifteen to twenty years. It makes a lot of sense to put all the business people in one department. If you can have the Pentagon with all the five military branches, it certainly makes sense to have a Trade Department with all the business-oriented departments. However, to paraphrase Ron Brown, Secretary of Commerce, eliminating the Department of Commerce would be tantamount to unilateral disarmament in the fight for U.S. competitiveness and leadership in the global marketplace. We need to

be integrated, the federal agencies need to work together and with the private sector.

Now, as far as these export assistance centers go, let me touch lightly on trade financing with the SBA and Exim bank. In essence, the two agencies are offering a variety of guarantee programs for up to ninety percent of the loan that you or your clients might need. The threshold is roughly \$750,000. If your client needs less than \$750,000, you probably will have to talk to SBA. If your client needs more, you probably will go to Exim. Obviously, there are very specific and critical nuances. The SBA typically does not think about the particular market but looks at the deal and the particular company. They would look at your financial statement. Are you profitable? Have you been in existence for one year? Is the company owned by a U.S. citizen or by a legal resident with a green card? Whereas, Exim, under certain circumstances, is on-cover or off-cover. Given the country, it can be on-cover for the private sector but off-cover for the public sector. Exim is on-cover for the public sector in Brazil but off-cover for the private sector in Brazil. It is entirely off-cover in Haiti for the moment. We hope that changes because the United States has a tremendous interest in supporting Haiti. But I do not believe that decision has been made. Getting back to the financial side, they are banks, and they are lenders. They want to see that your company is profitable. They will want to see a good financial statement, done by a certified public accountant (C.P.A.). There are fees at different points. There is an application fee based on the transaction. They can help you identify commercial lenders in the community who are more familiar with business and are willing to export. They can help you find a lender who will respond to you or your clients' needs.

We are happy to brainstorm as well. Typically, people always ask about letters of credit, irrevocable, confirmable, transferable, and so forth. Are you aware of the fact that roughly seventy percent of the all letters of credit that are processed or are initiated are in error at some point? And that is just one error. Roughly thirty percent have two errors. Consequently, the deal suddenly freezes, and your client does not get paid and that may even imply you do not get paid. Maybe a letter of credit is not always the best way to go. You may want to do cash in advance, if you can persuade the foreign buyer to pay in advance. Perhaps you can do it on open account. You could use a "swift collection," which apparently is some sort of immediate wire transfer. When your client is well-known to the buyer in Brazil, for instance, and the Brazilian trusts your client, this could be a possibility.

Now on the marketing side, some of our services are free and some have charges. Quite a number are free. However, let me start with one that has charges. We have a publication, which comes out once a month, called *Business America*. It has information on marketing, IP rights, trade, contacts, and some of the philosophy. This particular edition features the World Trade

Organization (WTO), which in 1995 will supersede GATT.

Embassies around the world produce a *Country Commercial Guide*. All the different agencies used to produce their own separate reports and analyses, all appearing at different times. It was a nightmare inside the embassy. Finally, there is a combined report bringing all these reports together. We have that for some seventy countries around the world, representing the seventy major markets. A mini-version is done for the remaining countries. You can buy all the data for \$360 on CD-Rom. Once a month you would get two CDs, one with a tremendous list of companies with some company detail, the second with market research, for example, one has roughly 16,000 market research reports from around the world. You can retrieve data by country and industry. There are trade, commerce, state, CIA, and more data than you can probably digest.

We also do background checks on companies for one hundred dollars. We contact the company and the particular Chamber of Commerce, since to be a legal company in many Latin American countries, you are required to join the local Chamber of Commerce. Also, we might contact the trade association, which may or may not be a voluntary entity. We talk to the particular bank with which the company does business. We read the local newspapers. We build up files on some of these people. Within forty-five days, we can give you a company analysis. It is a light financial statement that is marketing-driven. Are there any debts against the company? Is it well-known? Are there other companies that already represent the product line? Finally, we would give you a delicate summary statement, either saying that we believe that this company is a good trade partner or we know they are a horrible trade partner and you should not do business with them.

In addition, for two hundred and fifty dollars, we can give you a list of candidates for agents or distributors. Again, there is forty-five day lead time. When we receive your company literature, we send it out to candidates who are in our particular market in that particular country. They look at it and may decide that it is fine. They either call us or we call them to nag a little bit. We pass back to your client whether they say yes or no and why. We give you feedback. We usually prescreen between three and ten candidate companies.

We have a variety of action programs. At some point you or your client must go to the market. You cannot do international business by remote control. We have a particular appointment service called the Gold Key in most of our sites around the world. The Gold Key gives you a series of prescreened candidates on a day that you and I picked. You arrive, and the next day you come to my office. We will have a list of appointments, with a profile on each. We probably could do somewhere between five and ten prescreened appointments for you everyday. The price of that varies from market to market. In Milan, it was \$500 a day; in Japan, approximately \$800

a day; and in Costa Rica, \$300 a day. You also can do this procedure in a group. You can go overseas with a mission. And again, the prescreened appointments are on a day that you pick. For example, we took a mission of twenty-two companies to three countries in Central America. We charged those companies \$2900 for airfare from Miami to the three countries, hotels for five nights, reception at each site, ground transportation, promotion, and finally, the prescreened appointment system. We are not in this to make money but we do have to cover our operating costs. At the end of this particular mission, we expect to be able to refund five hundred dollars to all twenty-two companies.

We are tremendous advocates overseas. If you have a problem, we can go and address the particular government or agency on your behalf. You might need a building permit overseas or need to clear local customs. Perhaps, you are trying to get a visa for your client to visit you in Miami, Chicago, or San Francisco. We will go to the appropriate department, such as the commercial, agricultural, or consular section, to see if your client has presented the appropriate bona fides, so that state can issue indeed a legitimate visa. The U.S. government loves people to visit the United States, but we want them to go home again, too. We have support for all kinds of companies. Big companies may need pressure to repatriate capital, repatriate dollars. Small, medium, and big companies may have a trademark problem. We can talk to the host authorities; sometimes they are amenable, sometimes they are not. However, we can try to influence them a little. Sometimes somebody does not get paid. If you inform us and give us some documentation, we will call up the foreign company and ask them if they have received your product. Was it correct? Are they going to pay? Often there has just been a breakdown in communication.

Also, there is the International Organization for Standardization (ISO) 9000 series,¹³ which is particularly useful if you want to export to Europe. There are important standards around the world. ISO 9000 is important and critical. For instance, there is a company in Houston that can give ISO 9000 certification for industrial machinery and for medical equipment destined for Europe. Although ISO 9000 has been promulgated by Brussels, the simple reality is that the different countries in Europe are implementing ISO 9000 and replacing regional standards at different rates for different industries. For instance, Germany implemented these standards last year for one particular

13. International Organization for Standardization (ISO) was established in 1947 to promote the development of international standards. The ISO 9000 series is a set of voluntary international standards that set a quality management system for organizations involved in manufacturing products or providing services. The ISO 9000 series guides organizations to create effective quality management systems. In certain industries, ISO registration is widespread and has become a virtual requirement for doing business.

industry, but for other industries still applies their own standard, while for some sectors, there is no standard at all. Thus, it is not safe to assume that your client is complying with all the necessary standards simply because it has followed the ISO 9000 standards. Depending on the particular market, that product's standards may be in advance of what is needed, behind what is needed, or totally irrelevant, and then you will have a completely separate product for that particular market. It is a very complicated situation.

Let me also touch lightly on policy. It is an interesting notion that perhaps NAFTA is the forerunner of some sort of United States of North America. Let me remind you that the European Common Market actually started in 1951 with the European Coal and Steel Commission.¹⁴ It was very technically oriented. Also, the Treaty of Rome was signed in January 1957 with only six countries and today it has twelve, with others knocking on the door. Who knows where it is going to go? Likewise, who knows where the United States of North America may wind up? Also, regarding GATT, the WTO is going take over. It is headquartered in Geneva. Optimistically, tariffs will be reduced, and there will be more open markets with opportunities to export agriculture. Agriculture is the United States biggest export.

We are constantly looking for partners with whom to work. We have worked with the State of Florida, the Economic Development Council in Orlando, small business development centers, and foreign consulates. There are roughly thirty to forty consulates in Miami. Maybe, you or your clients should get to know them a little bit. There are roughly fifty bi-national Chambers of Commerce in Miami, such as the Italian American Chamber of Commerce and the Ecuadorean American Chamber of Commerce. We also are happy to work with other federal agencies. U.S. Customs has many free seminars for exporters and importers as well. They astutely believe that if you or your clients understand what they need from an administrative standpoint, then you will help them by filling out their forms better. They are glad to help you do your business faster, and consequently, you will get paid faster. Our department works overseas. For example, we are having a light industrial show in May in Kuwait and a mining show is coming up in Mexico. There are many opportunities. You can work directly with the embassy or with my office. Finally, let me give you a useful number in Washington, D.C.. It is 1-800-872-8723, at the Trade Information Center. If you have a question on a government service, or more to the point, a source of tariff, a country's background, a visa issue, or financing, they can

14. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 167 [hereinafter ECSC TREATY], as amended in TREATIES Establishing the European Communities (EC Off'l Pub. Off. 1987).

get you pointed in the right direction.

If you are doing a lot of international business, you may want to buy the Key Officer's Guide. This has the names of all the Agency heads in every Embassy and Consulate around the world, with the address, the telephone number, and the FAX number. It will tell you who to call for visas, who is the ambassador.

QUESTION:

What is the number in Miami?

ANSWER:

It is 526-7425.

L. JANÁ SIGARS

Several of my clients have used the Gold Service very successfully around the world and are doing business with the clients that they have met through the Gold Service in countries such as Brazil and England. This guide is very useful.

*C. Market Access: Barriers to Trade and the Impact of
 Bilateral and Multilateral Agreements*

L. JANÁ SIGARS

I would like to introduce Ambassador John Biehl. He is the Ambassador from Chile to the United States, and we are fortunate to have him with us today. He is a consultant to many international organizations. He is a prolific writer on political science issues and frequently contributes to numerous publications. He was appointed ambassador approximately one year ago and given the importance of the upcoming NAFTA negotiations, is very busy.

His Excellency is accompanied today by Alberto Labé, the Consul General, Luiz Eduardo Fellinas-Ruiz of the Chilean Consular Office in Miami, and Luiz Montero, Chile's Trade Commissioner in Miami.

AMBASSADOR JOHN BIEHL

I am very happy to be here in this city where more and more we all feel at home, whether we are from the north or from the south. I also want to thank Ambassador Moss for his kind words and the organizers for their invitation.

The last report of the U.N. Economic Commission for Latin America and the Caribbean (ECLAC) states that 1994 produced new evidence of the consolidation of a more dynamic economic performance in Latin America and the Caribbean. The growth rate of the gross domestic product in the region rose from an average of 3.2% a year in 1991-1993 to 3.7% in 1994, the second highest level in the last fourteen years. Per capita income rose by 1.9%. Average inflation fell to 16%, a record low in recent decades. Latin America and the Caribbean countries continued to attract large amounts of

foreign capital, nearly US\$57 billion in 1994 alone, which financed the growing deficit in the current account.

In addition, the U.S. Trade Report commented on how well things are going and that so much has happened in the intervening year it is hard to know where to begin. The hope was that NAFTA would usher in a new era in which many nations would be attracted to the successful model of growth and prosperity associated with free trade and market liberalization. The results have not been disappointing. The benefits to the United States, Canada, and Mexico have exceeded expectations. With NAFTA as a beacon, the United States hosted the Summit of the Americas in Miami last December to give momentum to the concept of free trade in this hemisphere and to yield closer cooperation on issues ranging from strengthening democracy to connecting telecommunications networks from throughout Latin America. There has been tremendous progress in individual countries, such as Brazil, where an election for change has led the way to the path-breaking economic reform program. The entire Western Hemisphere is alive with a new view of itself and new initiatives. A gigantic custom union, Mercosur, was formally established, with over 200 million consumers and a combined GDP of US\$550 billion, another US\$10 billion of integrated regional trade. On a global scale, the Uruguay Round and the creation of the WTO has given us a new institutional framework, our strongest ever, for expanding world trade. The report concludes that many of the most innovative concepts in the Uruguay Round were first agreed to in NAFTA.

These statements can be multiplied tremendously. At the Summit, there was a tremendous optimism throughout the Western Hemisphere about what we could do in the future. The question today, after the Mexican crisis, is: Can we still be optimistic? Can we change completely from one moment seeing everything going in a good direction to today seeing everything going in the wrong direction, where we begin to doubt everything. A few years ago, we were still in the middle of the Cold War. We also were in a North-South conflict, rich countries versus poor countries. It was an economic conflict that we thought had no solution; we thought there was going to be a confrontation. In addition, we had an East-West conflict, which was an ideological conflict that we thought could not be reconciled. The world was preparing for atomic war. Billions of dollars were being spent everywhere preparing for that nuclear war. That was our reality.

In Latin America, we lived the Cold War period for many decades, almost half a century. Our political parties were created along the lines of the Cold War. We had confrontations, civil wars, and many human rights violations. We have been governed more times by authoritarian regimes than by democracies, which is absolutely the opposite to what you know in this country. This country has never known a dictatorship.

What happened? Suddenly that world is over. It is not easy to change from that Cold War period to immediately building up on the opportunities that freedom offers. This is not a unique although not every country in Latin America has the same starting point. I would like to invite you very briefly to reflect on this. Mexico, for example, is trying to make the most of its opportunity to develop freedom from its own historical starting point. For more than fifty years, it has had a one-party system. It is from there that Mexico is trying to create a pluralistic system, to allow for an opposition party to come to power, to change their economy from a state-controlled to private enterprise one. It is traveling a Mexican road.

If you look at Guatemala, however, the road is completely different. The elected president there tried to have a self-coup and failed mainly because of international pressure that did not want to allow that. A man that was working in his office in favor of human rights was suddenly appointed President of the Republic, and now he is attempting the Guatemalan way. For the first time in many years, the Guatemalan government is trying to bring together the armed forces, the entrepreneurs, the workers, and the indigenous population to find a way in this new era. It is a Guatemalan way that has nothing to do with Mexico.

For eleven years, Salvadorans were killing each other, the same people who are now talking to each other. Through Parliament, they are trying to make the best of their opportunity after the Cold War. They want to build an El Salvador of economic opportunities. El Salvador is different from all the other countries we have seen. It is pursuing the Salvadoran way.

Look at Nicaragua, again, as part of a peace process. They have a different situation. It is probably the only country in the world, where at one point a Marxist regime handed over power through an election to the opposition. It is a very peculiar situation. The army followed another ideology and started their own process. Perhaps, a couple of weeks ago, we heard of the resignation of Ortega's commander-in-chief of the army. Very few believed that this political process, this dialogue, would be possible. The Nicaraguan way, against many odds, is working. It is working toward freedom, strengthening democracy. The army has been reduced. The history of Nicaragua is different from all the others we have seen. We have a country that has never known democracy. It is a beginning, and they are doing their best.

Costa Rica is an exception. It has a long-standing democratic tradition and is an example to us all. They are struggling with old-fashioned economic problems and dealing with a monetary fund. Their problems are not the problems of the other countries I have mentioned.

Panama's opportunity started with an invasion, where the President was taken prisoner and now is being tried in Florida. But even so, Panamanians are making the best of their new opportunities. Recently, they had one of the

best elections they have ever had in their history. They are trying to do their best.

It is different in Peru. They have their own history; they have their own shining past with the kind of violence that is so brutal that even by brutal standards it is unusual. They need to find the Peruvian way of dealing with this problem. Whatever the judgment you may have, they have their own model; there is a kind of a Peruvian road. How can they make the best of this new opportunity? How to move away from the Cold War period?

Look at what is happening in Venezuela and in Brazil. For the first time in the Latin American history, we have two Presidents who were ousted and jailed because of corruption. All sorts of crises were predicted; the long-standing democracy of Venezuela was going to collapse. However, they found the Venezuelan way out. They are making proposals. The same is true for Brazil. They had an excellent election, and the President has made changes for the better. There is a tremendous stability there; a new face is emerging. This is a road that is only Brazilian.

In Argentina, their big opportunity to build democracy emerged from the war in the Malvinas or the Falkland Islands. They made the Argentinean road. How quickly they have moved to recover their values and their old culture, and to make the most of freedom.

In Paraguay, you might say that it was almost a family quarrel at one point that started the changes. In the military family, there was very little hope that there was going to be an opportunity for Paraguay. But there was, and they are trying to make the best of that opportunity.

Finally, we must look at Chile. There is a Chilean road. There is a Chilean road after a seventeen-year authoritarian regime. There was an agreement between what happened during that regime and the political establishment. To look at the future, to make the best of the opportunities for freedom. And it is a Chilean road. I do not think we have a particular role model. It is unfair when looking at Latin America to say that every country should solve its problems and go the Argentinean, Chilean, or Peruvian way. Often today, we think that everything can be done in the same way; there is a model for everything that makes things simpler for us. But that is not true. We have a duty, especially after the Miami Summit, to understand that each country's situation is different.

What is important is that all over the continent, against many odds and the difficulties of changing the inertia from the Cold War period, the common factor in Latin America is that we are trying to do the best with our opportunity to build on freedom. We are trying to build democracies, stronger democracies. We want to have better judiciary powers, better control over the army, and less corruption. We want to use freedom for free trade. We want to get away from big state ownership. We have an experience all over Latin America that that did not work. The World Bank

has shown in a very interesting study that is very little known, that what we have lost in Latin America in mismanagement of public enterprises could account for the solving of all the poverty we have in the region. We want to make the best of private initiative and the creativity that is in there.

I fully agree with what Ambassador Moss said about the Summit of the Americas. I think the Summit of the Americas is a turning point, where we have an agenda. We have for the first time an agenda to look at the future in the post-Cold War era. This does not mean we can automatically get rid of the inertia we have accumulated, but we are trying. We will have many failures. But for the first time we are saying, "Look, we have a road where we can cooperate in many things." There is no longer any reason to have a division between North and South. There is no longer any need for ideological confrontation. This is an era where we do not have given answers. Freedom obliges us to be creative in finding solutions. We have to be more democratic and try things. To get away from the past, we no longer want leaders who personally have the solution for a country. We want solutions that are agreed upon, institutions, and civil organizations.

In Chile, we think that things are going well, utilizing more and more freedom all the time. We are now in our eleventh consecutive year of economic growth, at an average of over six percent a year gross national product (GNP). For the eighth consecutive year, we have savings of a fiscal budget. For the fourth year in a row, we are breaking records in terms of saving and investments, both internally and externally. Last year, the rate of investment in Chile reached twenty-seven percent of GNP. Our predictions are that we will continue to grow in the coming years at about the current rate. By the year 2000, we expect to have the same per capita and purchasing power as Spain and from then on, we expect to continue to do so.

More and more, we believe in the tremendous trends of political stability, where the rules of the game have to be absolutely clear and can only be changed by a very large agreement. It does not pay to have revolutionary changes promoted by a powerful minority or by a small majority. We believe in free trade. Perhaps we are among the very few countries in the world that approved the Uruguay Round in our Congress unanimously; among all political parties, including our ex-Marxist and right wing parties, there was not a single vote against. This shows a belief in free trade. We do not think that free trade is to be blamed for any of the problems we are now facing in Latin America. We are members of APEC. We want to become members of NAFTA. We were invited at the Miami Summit by the President of Mexico, the President of the United States, and the Prime Minister of Canada to become members of NAFTA.

Those negotiations are going according to schedule, exactly as was agreed in Miami. In spite of the deep monetary crisis, nothing has changed. Already two meetings have taken place, one in Mexico, another in Canada.

At this moment, lawyers from all three NAFTA partners are getting together to see exactly how and what we are going to discuss at the first technical meeting with Chile, scheduled within the next fortnight. That is a technical discussion on how this will be done, and once that is agreed, we have already scheduled for May the formal opening of the negotiations for the Chilean entrance into NAFTA. The Mexican government has made a tremendous effort to respect this commitment, saying, "Business as usual." It is not free trade or NAFTA that has caused the problems we are now facing. This has been the attitude of the United States and Canada.

Negotiations will start without fast-track authority. Rather, we want that authority for the moment when negotiations are finished. I have been visiting the U.S. Congress a great deal, and in both the Republican and Democratic parties, I have found a tremendous sympathy in favor of free trade. Many people say, "We will continue but we have to wait a little bit for the air to clear, so we can really go through approving legislation for fast-track in Congress after the Mexican crisis." Everybody is saying, "Well, once we know what the bottom line is, this is going to be much easier." However, many say that they voted against GATT and against NAFTA. But now they say, "Well, we find when negotiating with Chile, we find an opportunity to demonstrate that we are not against free trade, because we think that is a good thing; it is a good signal for the future of Latin America." So this is coming. Most of those who opposed NAFTA before, still do. Part of the debate has been, "We were right. The Mexican crisis has been caused by NAFTA. This is the proof that we should never have gone into this." Now that is a minority, as I see the U.S. Congress at the moment. I think that there is today perhaps the largest bipartisan possibility in the U.S. Congress in favor of free trade, in spite of the many doubts of those who do not clearly understand the Mexican crisis.

Chile also wants to become partners of Mercosur; currently, we are associate partners. We believe in the GATT philosophy. Chile believes in free trade and thinks that all these markets will come together. Eventually, if we are successful with what we have agreed in the Miami Summit, by the year 2005, we should have that Common Market of the Americas. Mercosur, the Andean Pact, and others will all come together. We do not see this as a rejection of different philosophies for at the end we are getting together in the same way.

I am very optimistic about the future in spite of the odds against success. If we judge what is happening in this tremendous political and economic process of trying to build freedom in Latin America, which has almost no parallel in history, by a Dow Jones type system, it is a mistake. However, we must have a medium-term, longer perspective. We must refine our confidence in the tremendous power of freedom once it is established in business and in politics, thereby strengthening our democracy.

I think the Summit was about compromising on how we are going to understand each other more and looking at the future of sharing values, which we did not share necessarily in the Cold War period. I want to end my opening remarks by saying that, against all the odds I have mentioned, I am extremely optimistic that we are on the right course and are going to be successful.

QUESTION:

What do you see in the future for Chile?

ANSWER:

The ideal situation for Chile would be a world that has free trade. We are a small country, with fourteen million people at most, and we think that to build an economy of opportunity for everyone, we will need a world free market. Now, we know that is too idealistic, too far away, but all these different markets are steps in the right direction. We want to take advantage of each one of these opportunities. We are a small country but by entering negotiations in agreements such as NAFTA, Mercosur, APEC, and the European Community, we are fighting for a principle. Obviously, we cannot sell to all those markets. However, it is a principle in which we very strongly believe.

*D. Venezuela Country Update: Recent Legal and
Political Changes*

L. JANÁ SIGARS

Now I would like to introduce Ariel Bentata. He has been very active with this conference. He was on the steering committee and was a great help. He is counsel with the international practice group of Steel, Hector, & Davis, and a junior partner with the Venezuelan law firm of Bentata Hoet & Asociados. He specializes in corporate and international legal affairs and matters involving assisting North American clients to structure their operations in Latin America. He has represented various business interests in Venezuela in the financial trade and tourism areas. He has advised clients regarding the establishment of distribution agreements throughout Latin America.

ARIEL BENTATA

I am very honored to be a part of this interesting conference, and I am thankful to The Florida Bar for allowing me to provide you with a country update of Venezuela. As most of you know, Venezuela went through one of the worst financial crises ever in 1994 when more than fifty percent of our financial system collapsed. That in turn created many other problems such as high inflation and high devaluation. We had a dramatic decrease in international research, which caused the government to adopt certain measures, such as price controls and exchange controls. I will be speaking

about them today. I am not going to advance any opinion on whether these measures are good or bad for the country. They are in and are here to stay for at least a couple of years. One of the duties of attorneys and counselors to U.S. firms is to help you work with this system.

Exchange controls are in many countries, even industrialized countries, where they are not such an issue. But for Venezuela, it is a new system and very complex. It is rapidly changing, and we have to adapt to it as time progresses. Some of the other issues in the legal agenda for 1994 were price controls, which also were a reaction of the government to the high inflation that had originated from the financial crisis, and the imposition of new taxes to try to offset the huge fiscal deficit, which was caused by several factors, including high inflation. Additionally, Venezuela has the wholesales tax, which replaced the value added tax (VAT), and a bank debit tax, which has created huge amounts of money. Consequently, the government is reducing the fiscal deficit.

The Concessions Law is a very important law, creating important opportunities for infrastructure companies that are going into the region. It is a new law that allows private investors, both national and foreign, to come into the country and that creates clear rules for companies willing to invest in concessions in Venezuela. Most of these are highway concessions, in addition to other infrastructure projects.

The G-3 is an agreement between Mexico, Venezuela, and Colombia. It is probably the most comprehensive agreement in Latin America. It took much from the NAFTA negotiations and the issues covered by it. It is a step forward toward integration with NAFTA and the United States, since Venezuela is a partner with Mexico in the G-3. It is a signpost that says we are committed to free trade, even though we had to adopt some measures because of our financial crisis.

Besides all of these agreements and statutes, there have been some other enactments in 1994, especially in new copyright law, covering many issues of intellectual property, but mainly advancing protection for foreigners and nationals of their IP marks and patents.

Exchange controls are here to stay. The most regulated areas are repayment of private debts, and foreign investment and trade. These areas are important for you when representing foreign corporations. These three areas should be viewed from two perspectives. One is the regulatory legal requirements perspective. What do the regulations say? What is the law? Perhaps more important is the administrative perspective. What has been implemented? What is in there? It is very important to provide you with current information on what is happening and what we are seeing our clients and companies face.

In terms of trade, which is a very complex system, the general rule for imports is that you need a registration as an importer. It is an easy

registration. You also need import authorization before shipment for the goods you bring into Venezuela. The exception to that rule is that if you post a bond with the Venezuelan Exchange Control authorities or you are trading from a country that has certain integration and central bank agreements with Venezuela, such as Ecuador, Colombia, Jamaica, you can ship your goods before obtaining authorization.

In regards to exports, every company is now allowed to keep ten percent of their foreign currency income in foreign currency accounts to pay for some of their costs, what I call petty cash requirements, because ten percent is not much of an allowance. However, it still is money that you can use to pay for the costs of your exports, such as transportation and insurance. The exception to that rule regards companies for whom at least twenty percent of their sales are exports or companies that export at least US\$100,000. These companies are permitted to maintain all of their foreign currency generated by their exports in foreign currency accounts to pay for imported raw materials, parts, services, transportation, insurance, and every other cost necessary for the export of the goods they produce or assemble.

Now, there is a resolution for services. Companies are allowed to pay in U.S. dollars to Venezuelan companies that are providers of services to foreign companies. If we have a Venezuelan provider of services that is providing a service to a U.S. company, those U.S. companies can pay the Venezuelan provider in U.S. dollars, and they can maintain those dollars abroad. But if they bring the dollars into Venezuela, they have to sell them to the Central Bank at the official rate of exchange. That is what I call repatriation, return to the country.

There are certain service industries for which special regimes have been implemented as the need arises. For example, airlines, who have obligations in foreign currency that must be fulfilled on daily basis, had a major problem with not being able to convert currency as fast as other companies. So, the government started to impose some exceptional regimes. The main areas are travel agencies, airlines, and some oil-related companies.

Foreign investors have been assured that their capital may be freely repatriated and their dividends freely remitted abroad. Also, they will be able to receive payment for whatever transfers of technology or licenses they grant and to invest in our capital markets and repatriate their capital. Yet, there are restrictions on and requirements for repatriating or remitting your capital abroad. Every capital investment coming into the country needs to be recorded at the foreign investment superintendency for the purpose of proving that the capital of the company is a foreign investment and thus, may be repatriated and dividends remitted. Once an entity has that registration, it should take certain corporate actions in order to repatriate capital. Such corporate actions include liquidating the company, divesting or reducing its capital, and selling the shares held in a certain company. That, of course, has

to be proven to the exchange control authorities. To that end, you need to submit either shareholders minutes or contracts, proving that the transaction took place. Of course, that is regulated in the resolutions. In cases of remission of dividends, the company must have had profits or retained earnings and must declare dividends through a corporate resolution accepted by a majority of shareholders. The capital that originated the dividends must be from foreign investment. Therefore, you need to have your foreign investment registration.

Licenses, royalties, and technical assistance, are viewed as capital investment under Venezuelan regulations. There is a new special registration required in order to be granted U.S. dollars to pay for licenses and royalties. Presently, it is very difficult to invest in the capital market. It has been one of the areas where more changes are coming because in capital markets you buy and sell stocks on a daily basis. It is different from a set investment where you know how much you are going to invest from the outset. Currently, we have a regime whereby you file quarterly financial statements with the sales and purchases you have made and tender the balance of foreign currency you hold. You can repatriate the balance of bolivars into your foreign currency on that basis. If you sell your stocks or you have a balance of bolivars left over from the purchase and sale of currency, that capital can be repatriated. But again, you should make quarterly filings of your financial statements.

The next issue is repayment of private debts. We need to define private debt as financial assets less financial and commercial liabilities. It does not matter that a company has a loan of x amount of dollars. If it has more than that in financial assets abroad, then the government will not grant U.S. dollars, because the company already has enough foreign currency to pay for its obligations. If, however, the amount of financial assets that a company holds abroad does not suffice to pay for its financial and commercial liabilities, then the government will grant it dollars. You must know what amount of debt you carry in foreign currency. Also, there is a regime for payment of any debts, either capital or interest, that came to the company before June 27, 1994 when the system was implemented. The mandatory registration has already elapsed, but you can still complete that registration process if you initiated it before the lapse of the system and the dollars have not been approved. However, the Venezuelan government has not told investors whether it is going to grant them foreign currency to pay for any debt that came before the implementation of the system.

This is one area from which Venezuela is receiving many claims from international investors, and this should be addressed promptly by the government. Because many investors have capital payments and interest that they have not received before the implementation of the system came about, they have outstanding loans that have not been repaid. The payments of

interest or capital that came to you or were contracted for after the implementation of the system can be made with no problem. There is a registration process, and you need authorization of those payments before the government will grant the dollars. There is an exception to this whereby you post a bond, and if you post that bond with the Venezuelan exchange of authorities, they will grant you the dollars immediately.

One of the main problems with the repayment of private debt is that of the burden. Who has the burden to file? The difficulty is that the debtors have the burden to file. When foreign companies do not receive payment, they call their Venezuelan counterpart for payment. They, in turn, state that they have filed with the authorities and have done everything that is required, yet have not received the dollars. Are we going to believe them or not? The credibility of Venezuelan companies is decreasing because some foreign companies are not aware whether they have filed. Most companies do not know whether they really have received authorization or if there is a problem with the commercial bank that is not paying them the money.

Therefore, foreign companies are hiring either law or accounting firms to oversee the registration process by their local importer or their local debtor to see if they have complied with all regulations in order to obtain their dollars. This does not mean that if a company had dollars or foreign currency in their accounts before the system they can pay foreign companies from those accounts. If someone is not paying a foreign company, notwithstanding the fact that he has foreign currency in an account, the Venezuelan company is not being loyal to his creditor or exporter. Because this is a new system, there are distortions and delays. However, we are adapting to the system. Commercial banks put up exchange control departments from night to morning, and that is very difficult. The system is becoming easier as time progresses, and we hopefully are adapting to the many other exchange control systems in the world.

In terms of trade, regulation and implementation have become more flexible. So importers and exporters now are more comfortable with the system than they were when it was first implemented. Many of our clients have received dollars, are paying for their exports, and are importing. However, many small companies went out of business because they did not have dollars for a few months.

In terms of foreign investment, the rules also have become more flexible. Foreign companies have been assured that capital and dividends can be repatriated and remitted abroad. They have received the authorizations to be granted dollars, but are still in the process of getting their commercial bank to get the dollars from the central bank to pay them. We expect that the government will start to pay those moneys to our clients and other companies investing in Venezuela.

Capital markets have been the area that we have restricted the most. It

is difficult for foreign investors to invest in Venezuela and take their money out. However, if you are planning to invest there for the medium or long term, and you are planning to hold Venezuelan currency and shares, there is not much of a problem. Because you are holding it in Venezuela, whenever you want to repatriate, you make one filing and then you can repatriate.

Rules on repayment of private debt have become more flexible. There is a transitional regime whereby companies can be granted dollars if they post a bond for payments of interest and capital. Many companies are now receiving payments of interest and capital. But we still have a problem with repayment of private debt, because the government has not allowed dollars for interest and capital that came to you before the implementation of the exchange control system. This is something for which we are pushing. The government has not stated directly that it is not going to allow it, but neither has it come up with a resolution saying they are going to do it and how they are going to do it.

It is a complex system, as complex as any other in the world. It is a new system both to Venezuelans and to foreign investors in Venezuela. Therefore, we are receiving a lot of inquiries and requests from clients about exchange controls. Before investing or trading with Venezuela, make sure that every filing is in place. We are still waiting to see what new measures are going to be adopted. Some investors feel fairly comfortable with the new Finance Minister. He has done a good job in implementing the exchange control system. He is looking into stabilization of the Venezuelan economy, selling some of the intervened banks' assets, and reprivatizing some banks. Most of the measures are for first stabilizing the Venezuelan financial system and then for balancing the fiscal deficit.

QUESTION:

Do the same rules apply for repatriation of dividends by subsidiaries?

ANSWER:

Usually, subsidiaries are regarded as a Venezuelan company, so they would need to have their foreign investment registration in place. Then they would need to prove that the foreign company has earnings, that those earnings were declared as dividends, and that they were actually paid. Those three steps are mostly corporate actions taken at shareholders assemblies.

II. UNIQUE OPPORTUNITIES AND CHALLENGES: COUNTRY UPDATES

A. *Recent Developments in Entertainment Law: The Successful Collection of Royalties in Latin America*

TONY SANTOS

Today, we are very fortunate to have with us Leo Strauss, an attorney from New York. Mr. Strauss also is a licensed C.P.A. in New York, New