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CAPITAL MARKETS ISSUES AND CORPORATE GOVERNANCE A PANEL DISCUSSION

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ROGERS: One of the issues that comes to mind when talking about the potential disenfranchisement of holders of ADRs[1] is how that actually functions in practice. If I have invested in the Mexican company, I have an ADR, and I want to participate and attend a shareholders meeting, how do I go about doing that? As a practical matter, how do I convert my ADR into a share that entitles me to attend the shareholders meeting, participate, and hear directly from management what is going on? As we know, the published agendas for shareholders meetings are fairly bare bones. The agendas do not disclose much about what may actually be discussed at the meetings. I wonder if David and James could tell us how an ADR holder might become able to actually physically attend a shareholders meeting in Mexico.

HUNTINGTON: Typically, what the ADR holder has is an agreement with the depository, which is a U.S. commercial bank, Bank of New York or Morgan Guarantee Trust. The depository agreement can say a variety of things. There is actually a range of different formulations on this particular topic. One thing it can say, more often than not, is that the depository, because it holds the shares through a custodian in Mexico, will have notice of shareholder's meetings and will provide notice to the ADR holders. Also, the ADR holders have the ability to come in and tell the depository how they want the depository to vote on their behalf. Another thing that is typical in these agreements is a provision as to what happens in the event that the holder does not respond. In such a case, the depository can either give a proxy to management or not vote the shares at all.

There are also deposit agreements that don't provide rights to U.S. ADR holders, and I think what you are getting at is that, as a practical matter, quite often ADR holders do not end up participating. It can be quite important. For example, there is a case involving a Chilean company that held a very important shareholder's vote. The depository, one of the principle U.S. holders of ADRs, did not get the notice in time and came in one day after the deadline. The depository still would have had the chance to make a vote in Chile, but because they were worried about their liability and the process, they did not end up voting. Unfortunately, that block of shares would have changed the outcome of the decision.

However, I do not think this is actually something that the Mexican companies are particularly worried about. As mentioned before, many companies listed in New York are still controlled by Mexican controlling shareholders. So, in many of these cases, these types of votes do not matter very much. Even where they do matter, the disenfranchisement of U.S. holders is not viewed as something that the issuer is going to worry about too much.

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* A summary of the background of each of the participants in this panel follows on the last page of the panel discussion.

1. American Depository Receipts.

ROGERS: Let us suppose, then, that an ADR holder does want to participate and gives instructions to the depository to have a proxy issued to that shareholder. What would happen then?

HUNTINGTON: That is a bit of an unusual situation and I have not heard of such a situation.

JÁUREGUI: If for any reason the shareholder wants to participate in a meeting, how should we go about it? This is something that in practice that one seldom sees. Usually, one would go through the depository to exercise any voting rights.

HUNTINGTON: Speaking technically, it depends on the timing. However, the ADR holder could convert the ADR into shares and then attend the shareholders' meeting.

LUBRANO: I think David was talking about a situation involving Templeton[2] in Chile. He actually was very generous in describing why the custodian of the depository did not respond in time. In fact, in the end, they had to call a second vote because of a great deal of pressure. When Mr. Mark Mobius[3] did vote the shares, the outcome was reversed.

Nevertheless, as we have already discussed in this forum, there is an investor task force group that includes CalPERS[4] and TIAA-CREF[5]. They are going to start voting their ADRs because they are under pressure from their shareholders, their own governance, to treat their ADRs just like they treat other investments, such as their U.S. and European investments. It becomes a large issue when you have a major corporate event, such as a merger or the sale of a principle asset. Those are becoming more common in the region; such was the issue in the Chilean case. There, they required a super-majority that the family-owned or group-controlled companies may not have. Most of the companies, the institutional investors, like Templeton, hold both underlying and ADRs so they can just combine them. They have somebody there. The reasons for holding the local shares vary from time to time. It is a question of liquidity. They are playing the local markets as well. They are trying to become more active, regardless of what the families that own the companies think.

JÁUREGUI: When you are talking about voting in Mexico, you have to think of the evolution of voting in the scenario of shareholders meetings or in debt equity situations. That is, basically, that the Mexican companies were accustomed to receive financing from banks. So, we had a few people that we talked about. We only had negative and affirmative covenants. We lived very happily and, if we went sour, we would just talk to a few. Then, we decided that we would go into the public market and get involved in the ADR business that we are discussing right now, the result of which has been that you basically have absent voters.

However, soon we saw an evolution in the Mexico-related securities markets that stemmed especially from the holders. The bondholders are now changing the manner in which you are going to be doing business with Mexico. They are voting, they are very preoccupied, they are establishing committees, they are trying to get into governance, and they are trying to impede things from divesting. This is a

2. Franklin Templeton is an international investment fund.
3. Franklin Templeton's "Emerging Markets" president.
4. California Public Employees Retirement System.
5. Teachers Insurance and Annuity Association College Retirement Equities Fund.

feature that is in transition, which we are seeing now because of the very extensive debt securities that we have placed in the market. You can principally see it in the infrastructure of companies and, therefore, you see an evolution towards a more active participation of purchasers and intermediaries in helping to make the purchase.

CARRILLO: I would like to add a couple of things. First, I understand that it is usually problematic for ADR holders to participate in capital increases. Mexican corporate law allows you the preferential right to participate and maintain your percentage ownership in a capital increase. In comparison, I understand that U.S. securities law generates a whole bunch of issues in terms of general registration and solicitation for those purposes. So, generally, for the Mexican, in prospectus of Mexican issue and register offerings especially, the actual exercise of that right by the ADR holders may be difficult to do.

A second thing that I wanted to comment on deals with what Miguel was discussing. That is, as a result of the recent distress of many Mexican companies that have publicly traded debt and equity securities mostly in the debt area, the committees of bondholders have become very active. Many funds have bought a lot of distress bonds making it another very important player in restructuring, in the monitoring of compliance of covenants, and in the equity area when there is talk about possible bankruptcy, suspension of payments, etcetera. More and more, we are seeing the aggregation of foreign shareholders monitoring their investment, which was not very common before the distress.

ROGERS: We have been talking mostly about equity securities. However, Mike, with respect to debt securities, could you say something about how some of these principles of corporate governance might be applied to the debt security context?

LUBRANO: We are mostly debt holders at IFC and only a minority of our assets are in equity. That sometimes creates an issue when we are both debt and equity holders in the company and appoint a director to the board. It may not always be clear whom he is looking out for: the shareholders or the larger portion of money that we hold of the debt. Even in the United States that can be a serious problem and present a potential conflict of interest. The directors are supposed to be responsible to the company when, in fact, they represent the people who appointed them. So those are very complicated issues. What we focus on in the work of a Global Corporate Governance Forum is real transparency for the debt holders. Of course, they have their own private structure of the indenture and the bondholders meeting, but we focus mostly on the issue of transparency. I did not get a chance to mention this, but some of the new markets that are being set up for equities have mandatory arbitration of disputes between shareholders and the company. This is a good thing because the legal process of enforcement is much too complicated and time consuming. It is much harder to transfer that into the debt side where you are still stuck with courts.

ROGERS: With respect to arbitration, Francisco was talking about the documentation used in some of these private equity transactions; many of the documents are governed by New York law, New York jurisdiction or subject to arbitration. He also talked about the interplay between the shareholders agreement and the bylaws of the Mexican company. I recently saw a set of proposed bylaws of a Mexican company that had an arbitration clause in the bylaws. Francisco, would you comment on how the arbitration clause works in the context of Mexican bylaws? Certainly, one would assume that it works in a shareholders agreement or a subscription or share purchase agreement.

CARRILLO: Yes, that is a very interesting question. In connection with the bylaws of the company, the bylaws set forth the basic agreement between the shareholders. In my opinion, the bylaws is a document that has to be subject, basically, to the Mexican corporate law, and also to Mexican courts because that is where you enforce the basic rights of shareholders as commercial shareholders. If you submit it to arbitration, there is the possibility that a minority shareholder could challenge the validity of the arbitration clause because they can invoke the principle that they do not have access to the judicial remedies in order to enforce their corporate rights through the Mexican legal forum.

ROGERS: There is the theory that the bylaws are simply a contract between investors and, therefore, the investors can agree to whatever terms they wish.

CARRILLO: Yes, but the bylaws are the principle. From the bylaws you have concepts like liability, accountability of directors, liability of directors, liability of officers, and that is something that you would normally have to bring legal actions against in order to enforce those claims, even though it is a contract. Furthermore, the law provides that shareholders' rights must be enforced through the Mexican court system, not through arbitration. So, although you can provide an arbitration clause in the bylaws, I question that such a clause would be enforceable.

JÁUREGUI: I agree with Francisco. I think that, per se, you can include an arbitration clause in your charter and bylaws, but it will only work to the extent that public policy allows it. Objective law applicable to the case deals with court procedures rather than arbitration procedures, like responsibility actions against general directors, and CEOs.

ROGERS: We were also talking about the extent to which the Mexican Bolsa may disappear and the extent to which investors and issuers will rely much more on the money center markets. There has been some talk about the possibility of an interim step. That is, the Bolsa merging with one or more other stock markets. Does anyone have anything to tell us about that?

LUBRANO: All I can add is that, throughout the region, there are the beginnings of efforts to merge exchanges. Trading on the Buenos Aires Stock Exchange has dropped off dramatically. All the stock exchanges in Brazil were closed this past year except for the São Paulo Stock Exchange, the Bovespa. So, there have been talks of alliances between OECD and the exchanges throughout the region because otherwise the volume is not there to support the staff.

UNIDENTIFIED SPEAKER: I am aware that the Mexican stock exchange is having discussions with a number of other exchanges to try and figure out whether a merger would make sense. However, this is within the larger topic of the modernization and the real future of the Mexican stock exchange.

LUBRANO: One issue that we are presented with in looking at the region's exchanges and trading systems is that there are restrictions on the principle investors investing in the other Latin countries. For example, if you had a Latin American medium-size exchange, which might not be a bad idea, the analysts could be regional and could cover the small and medium-sized companies. You would find that the pension funds would be the biggest investors, but that Peruvians would not be able to invest in Bolivian securities, nor Mexicans invest in Argentine securities. That would be a major obstacle.

JÁUREGUI: Also, the issue of Internet securities dealings may be the de facto consolidation of the stock market globally. They are principally driven by the central money markets of the world and are all coming together through broker dealers and through portals of broker dealers and other related financial institutions offering securities worldwide. The effect of this could basically reduce or eliminate many of the costs.

ROGERS: I think one of the theories behind Star Media, based in New York, was that because it had a regional center it could focus on the entire region. However, I do not think that that model is working out as well as people had envisioned, but I do think there may be a turn away from that to focus on specific e-commerce situations in individual countries.

HUNTINGTON: I wanted to mention one other initiative that I think is related to this discussion, which is the concept of universal shares. I think that about a year and a half ago, Daimler Chrysler was the first company to issue its share on the New York Stock Exchange in the same forum that they are listed in Frankfurt and London. The share is quoted in dollars in the United States, but it is, for all intents and purposes, fungible with shares that are traded in Frankfurt. One of the questions that I have been thinking about whether we are likely to move in this same direction in either the Mexican or Latin American context. Generally, because there are certain costs, there are costs to investors for having the ADR system. While there are also benefits, there are by products of the system including costs and some of the voting procedures. What you would have to do is not quite merge the stock exchanges, but you have to get the exchanges and the clearance and settlements system to interface. This is what happened in the German clearing system, where they set up a link with the Depository Trust Company (DTC) so that the shares could trade across those borders in a pretty fungible manner. I think the sense that we have is that the first company to do this is going to have a real headache just in figuring out how this is going to be done. No company presented with this choice would take it. They all would choose to do ADRs because that is what everybody else does. In my opinion, going in that direction would ultimately have beneficial consequences for the Bolsa and the liquidity of the Bolsa.

JÁUREGUI: The Mexican Securities Commission recently issued a Circular allowing for the registration of non-Mexican securities in Mexico. It is a very general Circular but it still has to address the issue of linking of clearance and settlement systems, etcetera. Or, it just may be another part of the puzzle to establish some sort of link between markets. However, it is all part of the global project.

ROGERS: I would like to go back to the issue of disclosure and ask our panelists if they can point to specific issues or areas of concern that have proven to be difficult for Mexican issuers to make disclosures about. We know we have different standards of disclosure with respect to different types of issues, but what are the kinds of concerns that you have seen in terms of issues, questions or areas of activity that issuers have been reluctant to make full disclosures about? Perhaps this would be a more appropriate question for those of you who represent issuers.

JÁUREGUI: Let us discuss a conceptual issue here. First of all, the scenarios where you would have complications disclosing something are scenarios where you are either on the brink of bankruptcy or in liquidity for whatever reason, and it captures you between one and the other reporting periods. Or, perhaps you have come into an agreement whereby the banks will be paid with the results of the sale of the controlling interest in the company. How do you handle what you, your employees and your advisors disclose of that? That is certainly going to be an issue that has tripartite complications from a legal point of view. There are insider trader issues, there are disclosure issues, and there is the famous Circular that I was referring to. Then, by the same token, there are negative covenants, affirmative covenants and the confidentiality clause within a restructure agreement. How is that dealt with?

ROGERS: Actually, I was thinking about a recent case where the company had been negotiating with a perspective investor partner, a fact that was well known to the public. The fact that negotiations had broken down, however, was not immediately disclosed. Was that because of reluctance to give the bad news or were there confidentiality restrictions that were preventing it?

RITCH: It is very difficult to describe general areas of concern for disclosure of a particular company, but I have had a couple of cases that deal with this issue. One was a bond deal by a sugar company in Mexico that is now in financial distress. It is a very complex industry, and we had to go into great depth - talk to the chamber of the sugar industry, etcetera- to try to cover absolutely every risk factor possible. This was a difficult task because, of course, the issuer thought that the U.S. underwriters were exaggerating.

Another area of concern in another transaction involved a family company that was about to go public. There were some disputes among family shareholders on a second level and we had to go in. It was a due diligence matter. We identified a couple of potential claims that could eventually, theoretically, go against the validity of the shares being offered. There was a lot of insistence on disclosing this appropriately. It finally was disclosed, but some Mexican companies that are closely held are not sophisticated and fail to understand that the disclosure is for their protection. In Mexico, part of the effort by Mexican lawyers is to make them understand that it is not just about gossip or whatever, but it is to really help them out and I think that that culture is starting to be understood.

HUNTINGTON: I have a couple of general comments. There are two general areas that, in terms of basic disclosure, you must do annually and at the time of a public offering. One is compiling the financial statements. Getting the financial statements in good enough shape is always a problem. The other general area is a kind of transaction with affiliates which is something that has come up in lots of different contexts. I also have had some similar experiences where, just prior to a restructuring or a bankruptcy, a publicly listed company was in default under registered bonds. They were reluctant to disclose the default and their reaction was to fix the default. It was a real task persuading them that it was in their interest to disclose the information, and convincing them that the market would react favorably to full disclosure and negatively to nondisclosure.

ROGERS: What about things that under U.S. rules might have to be qualified as forward-looking statements? What is the rule in Mexico with respect to those kinds of projections or predictions of how the business is going to develop over time?

RITCH: I think that there is no specific rule as is the case with the Securities and Exchange Commission (SEC) regulation. But it is also something that is not looked upon favorably by the Securities Commission in Mexico. It has not really developed as a statute, or as a specific restriction, but they review the prospectus and when they see those sorts of statements, they ask for support. If they feel that there are no reasonable facts to support it with, then they strike it out.

CARRILLO: In particular, in the case of financial projections, there is one specific case in accordance with the internal rules of the Mexican Stock Exchange that has to do with a change in the financial projections of the company. It is not a forward-looking statement in the sense that you are not going to disclose your projections, but if you previously disclose projections and there is a change, such change can constitute information you must disclose. However, as Jim said, we do not have any specific standard in the Mexican stock market.

ROGERS: Finally, one more issue before we open it up to questions. Returning to the general issue of shareholders rights, if, for example, I bought a private placement in the United States of an issue by a Mexican company, and something went wrong and the shares become worthless, what would the remedies be for the disaffected investor in the U.S.?

EVERETT: Assuming that there is an enterprise there that has any ability to respond to a claim and damages, which, if the shares are worthless, there probably is not such entity. However, assuming there was such entity, a U.S. investor could bring an action in the U.S. as long as the offer and sale occurred in the U.S. Of course, you will always have the issues of whether you will be able to enforce those types of judgments.

There are also issues if the company does not have the capability and knowledge to try to attack the control persons or other people who are usually down in Mexico. They are not quite as concerned or troubled by those issues as U.S. directors would be. So, it is a fairly difficult situation, particularly if there is just an outright fraud because, generally, the real issue is to whether the SEC will proceed to bring an enforcement action and try to litigate jurisdiction. This would leave you with a civil action and there are real issues as to whether you could push for a class action or not, depending upon the circumstances. So, it really is a buyer beware situation. If you are making those types of investments, you had better be clear that you are dealing with reputable people and that you understand the transaction or that you have got a high enough premium to take that type of risk.

ROGERS: In the case of one of these private equity transactions where the controlling shareholder has submitted to the jurisdiction of the New York court, such as in the case of a share purchase or subscription agreement, if a suit is brought in New York and a judgment is obtained based upon a misrepresentation in the agreement, how can that judgment be made real as a remedy against the Mexican controlling shareholder?

RITCH: Number one, as I understand, it would be a remedy granted under contractual law and not under securities laws because we are talking about a private placement. So, we would not apply the remedies granted under the Securities Act. We would need to enforce it under New York contractual law and, if the Mexican controlling shareholder has assets in the United States, we would use an order to seek a judgment and litigate directly in U.S. courts. If there are no assets in the United States like bank accounts, equity interests or other real estate, we will have to use regulatory letters to Mexico to litigate in the United States. Or, if there is a process agent, we could try to seek the whole procedure in New York. Finally, once there is a judgment in the United States, it would need to be enforced in Mexico through diplomatic channels. There have been recent cases where I have participated in international litigation where the Mexican government has cooperated with the U.S. government to enforce such judgments.

AUDIENCE MEMBER/OWEN: My name is Mike Owen of Paul Hastings in Los Angeles. First of all, in connection with the protection of minority shareholders rights, Mexico actually has a vehicle that we do not have in the U.S., which is the "comisario." I have always been kind of interested as to why minority shareholders do not make more use of the *comisario* to protect their rights. As I understand it, they have a lot of power and the cost of the *comisarios* and the investigations by the *comisarios* have to be born by the company.

My second question is really for Francisco with respect to Cintra.[6] You mentioned various committees that have been set up and I wanted to zero in on the audit committee. Is your audit committee made up entirely of independent directors and, secondly, does the internal auditor of the company report to the auditing committee of the board of trustee rather than to the CEO?

CARILLO: In the case of Cintra, the audit committee is composed totally by independent directors. The audit committee has to review, among other things, the compliance to the code and to the other self-regulatory rules that Cintra issued. The audit committee also reviews the financial statements that go to the Mexican stock exchange on a quarterly basis. Also, the audit committee reviews any particular requests made by the inspector, by the *comisario*, regarding self-interest dealing, duty of care, duty of loyalty and compliance with disclosure liabilities. The internal controller reports directly to the audit committee.

Now, your first question is a very interesting one with respect to the *comisario*. The *comisario* in Mexico actually is the individual, not the auditor, but an accountant, normally, that represents the financial interest of the shareholders. The *comisario* has broad rights under Mexican law. It has the right to call shareholders' meetings. It has the right to request that the financial statements be prepared in accordance with the financial accounting and principles. It even has the right to object to the financial statements. It also has certain rights such as the ability to propose to the shareholders the imposition of liability on the shareholders, subject to the directors, and subject to shareholders' votes. The *comisario* can even call a shareholders' meeting and go to a shareholders' meeting and propose that a vote on liability be brought to the directors. The reason that it has not been enforced is that,

6. Corporación Internacional de Aviación, S.A. de C.V. Cintra was incorporated at the initiative of creditor banks in order to put Aeroméxico and Mexicana's finances back on sound footing. Following the acquisition, Cintra would strictly be a holding company, registered with the Mexican Stock Exchange. The corporate purpose of Cintra, in addition to solving the two airlines financial problems, involved acting as a common ground between both companies' shareholders and creditors and promoting the injection of fresh resources into the airlines. *The Annual Economic Competition Report 1995-1996* (Report 11/1996 The Federal Competition Commission).

normally, the *comisario* is a partner of the auditing firm. The auditing firm is, obviously, very close to the closely held corporation of the controlling shareholders.

UNIDENTIFIED SPEAKER: Do the minority shareholders have the right to appoint their own *comisario*?

CARILLO: Yes, to the extent that there are three or more *comisario.*

ROGERS: You mean three or more shareholders?

CARILLO: No. If the company is going only to have *comisario* by shareholder resolution, they do not have minority rights. Minority rights must provided for in the bylaws, and state that the minority shareholders will have the same rights to appoint *comisario*, or cast votes in shareholders' meetings and state that there will be three *comisario.* Therefore, the minority shareholders will have the right to appoint one *comisario* if they have 10% of the equity if it is a listed company, or 25% of the equity otherwise.

LUBRANO: In the context of the *comisario*, this concept is not unique to Mexico. They are a civil law/company law element that is sometimes called *sindicos* in Mexico and *consejos fiscais* in Brazil. The Latin America roundtable has reviewed the experience. The experience across both Europe and Latin America is dismal. The principle reasons are that those who appoint the members are usually the controlling shareholders, and the *comisarios* receive no resources to do their job. The last reason is that it creates a conflict with the real controllers and they can just refuse to give the correct information or lie to them. What is occurring in the region, with the exception of Brazil for special reasons, is a movement away from these independent organs and a movement towards true audit committees composed of directors. These are real directors of the company who sit on the board as a whole. They have access to the company's information, they cannot have a completely conflicting relationship with the rest of the board, and they have the resources. This is the movement that is beginning. Some countries, like Chile, abolished these things twenty to thirty years ago.

Brazil is the one exception because most of the outstanding shares of the Brazilian companies are non-voting, so they cannot appoint anybody to the board. They are using the *consejo fiscal*, which is the fiscal board. This is usually a three-person body used as a way to permit the non-voting shareholders to appoint, so that they can have a voice or some oversight capacity. However, experience demonstrates that this is not the future. The future is real audit committees composed of independent members of the board.

AUDIENCE MEMBER/PATTERSON: My name is Mike Patterson from Strausberger & Price, Mexico City. I have three questions. The first one is, perhaps, for Miguel Jáuregui. In the U.S., there have been insider-trading laws for some time. However, supporting those laws, we also have the schedule 13 reporting of insiders, and forms 3, 4 and 5 in the market. On the Internet, there is information regarding when directors have sold and bought their shares recently, and for how much they sold and bought it. Hence, there is much information available. It appears to be the kind of culture that supports enforcement against insider trading and, also, devotes tremendous resources to enforcing those laws. The laws that are on the books are going to be broken every day unless significant resources are invested to enforce against it. How much enforcement has there been in the insider area?

JÁUREGUI: Basically, very few resources have been dedicated to that. As far as I am concerned, there are really no standards of investigation according to the authorities regulating this at the National Securities, Banking and Securities Commission. Moreover, you have to remember that the origin of the capital needs of Mexico was families that wanted to go transnational. It grew from families that wanted to expand their companies and went to the public markets because they had no other choice. But they did not go public happily. Therefore, the tradition really has not been to evolve towards a more transparent system. Now, the transparency has been mandated by the lack of liquidity in the market. This is why there has been discussion about the code of best practices, auditing committees and improving, generally, the manner with which insider trading will be dealt. As far as I am concerned, subject to being corrected by my colleagues in Mexico, the Article 16 of the Stock Market Law is more window dressing than it has been substance. Moreover, we don't have a justice department that would go about helping the Securities and Exchange Commission of Mexico, or the equivalent thereof in the U.S., as it does in the U.S., which would help to understand the movements and the consequences of the movements in violation of the law.

AUDIENCE MEMBER/PATTERSON: Have there been any enforcement cases in this area?

JÁUREGUI: Yes, there have been some cases that have kept themselves at the non-disclosure level. However, some regulators take a friendly approach to requesting that they disclose, which is where I have had some trouble.

UNIDENTIFIED SPEAKER: The main problem is that we do not have secondary regulations that define what insider information is, and we do not have case law, as does the United States. Remember that the statute only says that the protected information is material inside information. The only thing that Mexico has regulated is relevant information. Nonetheless, relevant information is the information that an issuer has to disclose immediately to the public.

Another issue is material, non-public information that is a basis for insider trading. I concur with Miguel when he says that, in certain cases, the chairman of the Securities and Exchange Commission (SEC) would call you, you would go with legal counsel and discuss a matter, but there has not been, to our knowledge, any enforcement of this. You can enforce insider-trading laws by bringing a civil action in Mexico and the court would have to request the opinion of the Mexican CNBB.

ROGERS: Mr. Patterson, your second question, please?

AUDIENCE MEMBER/PATTERSON: What has been the history of cases in the area of these 10-B-5 comfort letters for securities offerings in New York or elsewhere in other foreign markets? I know a lot of times those letters are used to share the liability in case a deal goes bad, to put the lawyers on the hook so to speak. What has been the extent to which Mexican firms have been held liable or sued for their opinions, and are those opinions and those cases subject to U.S. law standards of the opinion or subject to a Mexican law standard, in terms of what the attorney should have done in terms of due diligence? Additionally, are the firms who are issuing those caring insurance packages a part of it?

HUNTINGTON: I can address a part of that question. I am not actually aware of any action being brought against any Mexican law firm for this. The origin of the comfort letter is that it allows the underwriter, principally the underwriter in the transaction, to establish a due diligence defense in the event that an action has been brought on the basis of a material misstatement in the disclosure. Again, I am not aware of an action being brought on the basis of a Mexican counsel's opinion in this area. However, as an example, a case could be brought into the U.S. enforcement system if someone were to bring an action against Goldman Sachs and Goldman Sachs claims to have performed their due diligence. If they said that they have a comfort letter from a lawyer in Mexico, but it turned out that nobody had ever heard of the lawyer and he does not actually know what a 10-B-5 letter is, then that could be grounds for failing on the due diligence defense.

In my experience, the firms that we deal with regularly in Mexico understand what the letter means. U.S. lawyers take this extremely seriously. You read the letter and it does not appear to say very much, but it is something law firms take really quite seriously. Over the years, we have become comfortable with the lawyers that we deal with in Mexico and know that they, as well as the underwriters, also take the responsibility quite seriously.

RITCH: That is a very interesting issue, which is sometimes a point of tension because U.S. lawyers will sometimes try to place the entire burden on the Mexican lawyer. They may even request the Mexican lawyer to expressly mention in their opinion the Securities Act of 1933 and to mention the magic language of no material statement of omission, etcetera. It seems that they sometimes they want the Mexican lawyer to do all the diligence, for instance. Most firms in Mexico have all worried about this because they want, and have been able, to establish responsibility very clearly. The language of those disclosure letters has been refined over the years. It really has been a long effort with many hours devoted to the letters, but with the intention of defining the role of Mexican counsel. They have been trying to avoid being pinned under laws that they are not qualified to practice under while insisting that the U.S. law firm is also under the obligation to conduct its own independent due diligence review of the Mexican company. Of course, we work together and coordinate our efforts, but it is a very delicate issue. To our knowledge, there has never been natural enforcement action brought based upon a Mexican legal opinion. Still, we do understand very well the risk, the responsibilities and what it means so we are all careful about the assigning our role very carefully and not taking on burdens that we are not supposed to take.

JÁUREGUI: As a complement to what Jim was saying, one must keep two things in mind. First, in many cases you can forget about the Securities Act. They say that the documents as presented are enforceable pursuant to their terms. However, it so happens that they have been drafted in New York by distinguished law firms there and are based on New York practice, New York law and New York experience, not all of which is specifically enforceable. Then you need to say "specifically enforceable pursuant to its terms," which is where there was a collision and a very serious sort of negotiation between, or among, lawyers from the U.S. and Mexico in this particular case.

The second thing to keep in mind is that the Mexican lawyer is changing due to the growing size of transactions that are now common in Mexico, and due to the due diligence responsibility. I think that there is an exaggerated concern that letters of opinion give us now because I believe that we have become very passive with the attorneys in the U.S. in issuing them. I think that we need to start considering carrying liability insurance because the risk without it is growing.

ROGERS: Richard, do you have a question?

AUDIENCE MEMBER/KRUMBEIN: My name is Richard Krumbein, and I am from Dorsey & Whitney. My question relates to disclosure. Earlier, we were discussing the Mexican law on disclosure and the obligation that a company might have, if any, to do a disclosure, especially a public company that is restructuring. What happens when a Mexican public company begins to restructure some of the subsidiaries in order to meet their bond obligations? What are the disclosure requirements in that case? Secondly, are there any possibilities for challenges on the underlying transaction if they do not disclose?

UNIDENTIFIED SPEAKER: From the U.S. side, there is a general rule of disclosure that states that you must disclose events that are material. I suppose the word in Mexico is "relevant," but if something happens that is material to the business of the company, it must be disclosed to the market through a press release. That press release must be filed with the Securities and Exchange Commission. A case of a restructuring where there are outstanding bonds might be something that could trip up some of the covenants in the bonds.

Typically in a bond indenture, there will be an affirmative disclosure requirement to the bondholder. They must be told about anything that is material, which certainly includes telling them about any default. The typical high yield covenant package for a Mexican company, or other emerging market company, intends to bind your hands in as many ways as possible in order to prevent restructuring or, at least, to require consent. It is likely that you would have to disclose in this type of case, too.

UNIDENTIFIED SPEAKER: Additionally, under the Mexican system, anything that is relevant must be disclosed. This can be compared to the United States' requirement that anything that is material be disclosed. Both of these requirements are quite broad. In Mexico, for example, the act of disclosing something might affect the value of the securities. The management is then required to make a judgment call as to whether to disclose it or not. If it is something that is relevant and it is not disclosed, the Commission has the authority to impose penalties and even to order the suspension its securities trading.

ROGERS: Our time has run out. Thank you very much to all of the speakers and participants in this discussion.

BIOGRAPHICAL SUMMARIES

Lic. Francisco Carrillo Gamboa is a partner of the law firm Bufete Carrillo Gamboa, S.C. in Mexico, D.F.

Terrence A. Everett, Esq. is a Partner and the Chairman of the Corporate Department of Carlsmith Ball, a full service law firm practicing United States and Mexican law with offices in Los Angeles, Mexico City, Washington D.C.; Hawaii, Guam, and Saipan. Mr. Everett's practice includes both domestic and foreign public and private debt and equity offerings of securities, mergers and acquisitions, infrastructure and other financing of Mexican projects, high technology structuring and financing and general corporate practices. He has lectured on international securities matters and accessing the United States capital markets for the Canadian Institute and actively practices in cooperation with Carlsmith Ball's attorneys in Mexico City in structuring transactions and representing clients with projects in Mexico seeking U.S. financing and Mexican clients with operations or transactions in the U.S. Mr. Everett received his B.A. from UCLA in 1975 and his J.D. from Loyola University in 1978.

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Mike Lubrano, Esq. is Senior Securities Markets Specialist in the Financial Markets Advisory Department of International Finance Corporation. Mr. Lubrano has extensive private sector experience with legal and regulatory issues affecting financial sector development and corporate governance. He currently coordinates IFC's work with the OECD/World Bank's Private Sector Advisory Group on Corporate Governance. Before coming to IFC, he was an associate with the international law firm of Cleary, Gottlieb, Steen & Hamilton, where he represented a number of Latin American issuers and international investors in securities offerings, structured financings and corporate reorganizations. He also worked in Mexico City for the Mexican firm of Ritch, Heather y Mueller, S.C. Since coming to the World Bank Group in 1994, Mr. Lubrano has worked on private sector and securities markets development in Latin America, West Bank/Gaza, Russia, Ukraine, Thailand and elsewhere. He has also advised the Ministry of Finance of Chile on its pending reform of direct responsibility and tender offers legislation and has also advised the Brazilian government on securities and corporate governance questions. He is a past Mexico editor of North American Corporate Lawyers and publishes frequently in other publications. He received an M.P.A from the Woodrow Wilson School at Princeton University and a J.D. from New York University School of Law. He received his B.A. from Harvard College.

Lic. James E. Ritch is a partner in the law firm Ritch, Heather y Mueller, S.C. His practice is principally focused on international securities transactions, mergers and acquisitions, and banking and finance. Ritch, Heathery Mueller, S.C. was founded 25 years ago in Mexico City and it is one of the leading Mexican law firms in the area of finance, banking and mergers and acquisitions. Mr. Ritch received his law degree from the Escuela Libre de Derecho in Mexico City and an LL.M. degree from Duke University School of Law in 1990. Mr. Ritch also was a foreign associate in the New York office of the law firm of Debevoise & Plimpton. Mr.

Ritch has participated in a number of international conferences relating to Mexican securities law.

John E. Rogers, Esq. is a partner in the firm of Carlsmith Ball. Mr. Rogers has been a frequent author of articles on banking and financing law including Mexican Corporate Banking in a North American Market, 2(9) Mexico Trade and Law Reporter (September 1, 1992), "NAFTA Dispute Settlement for the Finance Sector," Business Mexico (June, 1993), "Project Finance Laws 1995: Mexico," Latin Law, (March 1995), The Prospects For Modernization of Financing of Mexican Business (Symposium, 1994 Presentations at the Second Annual Conference of The United States - Mexico Law Institute). 2 U.S. - Mexico Law Journal, 139 (1994), "Reforming the Lending Policy," Business Mexico, (Special Edition 1995), Using the "Brady Bond" Approach in Mexican Corporate Financings, 2(4) Mexico Trade and Law Reporter (April 1, 1992). He is a member of the Association of the Bar of the City of New York (Chair, Committee on Inter-American Affairs, 1984-1986); American and Inter-American Bar Associations; American Society of International Law; and Union Internationale des Avocats. He is also a member of the Vigilance Committee of the American Chamber of Commerce in Mexico. He received the B.A. degree from Harvard College and the J.D. from Columbia University. He was admitted to the New York State Bar in 1971.