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CHAPTER III: FREE TRADE — CHANGES IN THE LEGAL ENVIRONMENT, MÉXICO AND BEYOND

INTELLECTUAL PROPERTY

L. Jana Sigars-Malina[1]

In the *Wall Street Journal*, I recently read that passion is not an emotion normally associated with the General Agreement on Tariffs and Trade (GATT); an international organization with all the glamour and visibility of an accountant's convention. For once, they are not picking on attorneys. The same might be said of the North American Free Trade Agreement (NAFTA). However, the GATT rules being negotiated will affect the fate of nearly every company in the world that does international business or faces international competition. Therefore we must all be familiar with, and be able to determine for our clients, the effect these rules — whether the GATT, the NAFTA or any other bilateral or multilateral agreement — will have upon our client's ability to do business in the next decade and the twenty-first century.

For those of you who think intellectual property issues are cut and dried and easy to resolve, I offer you the following. Let us say, for example, that a plant was taken by a developed country from a developing country in Latin America. Further, let us say that recently the developed country, by reengineering some elements of the patent, created a new highly advanced medicine from the plant. The advanced medicine also is highly successful. In fact the indications for the medicine were, and are, in the treatment of cancer, heart disease and aging. Obviously, a dilemma has been created. Many international intellectual property experts are now questioning to what extent, if any, the developing country from which the plant originated is entitled to some type of payment or share of the success created from the indigenous species.

While an answer to this question of biodiversity is still being debated, at the other end of the spectrum is the fact that according to

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trade officials United States companies worldwide lose over $43 billion United States dollars annually through violations of patents, trademarks, copyrights and other forms of intellectual property. The challenge, therefore, for all of the intellectual property sections of trade agreements, is to create harmony or fairness in the laws and uniform enforcement in the courts.

One should understand that the success of the GATT/Uruguay Round would set the base line for the NAFTA and the Enterprise of the Americas Initiative negotiations. If the Uruguay Round is unsuccessful, then the NAFTA can be interpreted as a fallback position which protects, at the very least, most United States sectoral interests. Having a fallback position may be the genius of what the United States has been able to accomplish. The existence of a fallback position may encourage Latin American countries to accept the GATT agricultural negotiations because if they do not accept these negotiations, only the NAFTA would remain.

If the GATT/Uruguay Round is unsuccessful, the new Mexican law for the promotion and protection of industrial property and the amendments to the existing copyright law, as well as the tone of enforcement of these laws, become key elements in attracting and guiding foreign investment in México. If the Uruguay Round Trade Related Intellectual Property (TRIPs) section is implemented in the current draft, the intellectual property laws of certain signatories may take years to be strengthened. For example the draft allows countries, depending on the circumstances, one to ten years to legislate patent protection.

On the other hand, the NAFTA negotiations do not contemplate this sort of delay. Article 66 of the GATT further allows indefinite extensions of this deadline for the least developed countries, such as India. This is a proposition, of course, with which the United States negotiators do not agree.

As a basis for discussing the NAFTA, let us first look at the relationship of the United States and México to the Enterprise for the Americas Initiative. The Enterprise for the Americas Initiative is fundamentally dependent upon the NAFTA. It is designed to benefit both the United States and Latin American countries. However, structural and economic reforms to liberalize a country's economy and open its market must be undertaken in order for a country to enjoy the benefits of the Enterprise for the Americas Initiative.

Many Latin American countries have implemented, and continue to implement, significant reforms to achieve these goals. In the area of intellectual property rights, for example, Brazil has developed a new industrial property code to strengthen intellectual property rights protection and to provide patent protection for pharmaceuticals. The

National Institute of Intellectual Property (INPI) is reported to have instituted new measures to reduce trademark piracy. INPI will not grant forfeiture of marks for non-use when registrants have been closed out of the Brazilian market by previous import restrictions. Further, INPI is reportedly conducting an internal audit of its trademark registration procedures to insure compliance with the law for current and previously registered marks. Numerous multi-nationals might have avoided costly litigation if they had the benefit of the newly enacted measures.

Chile is another example of a country that has made significant structural reforms and has strengthened intellectual property legislation. Chile has reduced import tariff rates, thereby improving its climate for foreign investment.

Where then does the future lie? The answer is an entire north/south free trading block. A good first step toward integration into an eventual north/south free trading block is MERCOSUR, the southern cone common market.

Needless to say, the protection of intellectual property rights is crucial to and should be a priority of MERCOSUR's ongoing development. However, before that step is taken, it is hoped that NAFTA will be realized. As with the GATT, stronger intellectual property rights protection has been stated to be a major goal of the United States position in the NAFTA negotiations. The new Mexican Law of Promotion and Protection of Industrial Property became effective in June of last year. It now goes a long way towards addressing United States concerns with regard to the protection of intellectual property rights. The NAFTA negotiations are working to solidify these gains and further strengthen protection and enforcement.

Some organizations, such as the United States Council for International Business, believe inclusion in the NAFTA of comprehensive intellectual property protection is vital. To be effective NAFTA must address all forms of intellectual property protection, include a binding international dispute settlement mechanism, apply principles of national treatment and commit each party to effective enforcement of intellectual property rights.

Upon a brief comparison between Canada and México, it becomes clear there still exist continuing problems with Canada's intellectual property rights. For example, compulsory licensing provisions for pharmaceutical patents has been an issue for over twenty years. Robert Sherwood was quoted in the *International Trade Reporter* as saying that Canada will come under pressure in NAFTA negotiations to remove the provisions of the Patent Act, forcing lower prescription pharmaceutical prices for consumers. In addition, among the United

States, Canada and México, Canada is the only country that does not offer copyright holders a rental right.

By far the most significant change in a government's attitude toward intellectual property has been that of México. This country has gone from a virtually meaningless intellectual property law to a law that appears to now be held out as a model for future trade relations between countries. This change might be called the "1991 Intellectual Property Revolution of México." President Salinas signed México's new industrial property law on June 26th of 1991. Moreover, certain amendments to the copyright law were published on July 9th of the same year. The Industrial Property Law replaces the Law on Inventions and Marks of February 9, 1976 and abrogates the Law on the Transfer of Technology of January 11, 1992, as well as the regulations that were issued pursuant to that law.

Although there are obvious areas for improvement, the World Intellectual Property Organization (WIPO), a U.N. agency, has been reported to have signed off on the new patent law, calling it a milestone and a model for other developing countries struggling to rewrite their own laws in an effort to lure investment and technology. The law is based upon principles developed by the WIPO as well as principles developed under the Uruguay Round's recent negotiations. These new legal events should foster the development of indigenous technology.

A few of the high points of the new industrial property and copyright law amendments include the law's definition of the process foreign companies and patent holders must follow to insure protection of their intellectual property, industrial secrets and copyrights. Further, the law significantly strengthens the foreign patent holder's ability to seek prosecution of those who violate the law. This law will allow, for example, United States businesses to more freely enter into the Mexican market. Practically speaking because México is one of our largest trading partners, this law may mean a great increase in exports of high tech items offsetting the fear of many in the United States that we will lose manufacturing jobs to México.

The law also provides a new registration process for companies interested in buying patents and safeguarding their inventions and trade secrets. The law creates the Mexican Institute of Industrial Property which will centralize the filing of patent and trademark assignments and licenses within the patent and trademark office for enforcement against third parties. It expands the definition of intellectual property to include patents, trademarks, industrial secrets, production processes and transfers of technology. In addition, the law provides for the protection of distribution methods and lending or borrowing of industrial services.

The old law did not delineate protection for many areas of intellectual property and transfer of technology. Further as the law concerning the transfer of technology has been abrogated, it is no longer necessary to register technical license agreements with the National Registry of the Transfer of Technology which of course has ceased to exist. The law creates rights in a patent holder or in an owner of an industrial secret to share patented information with the third party and prohibit the dissemination to others by that third party. Violations are considered a crime, and stiff penalties provide that violators can be jailed for two to six years and ordered to pay fines comparable to damages.

Emphasizing its commitment to an internationally recognized system of patents and industrial property, México's new law grants a patent term of twenty years from the date of filing. Patent protection for pharmaceutical and agrochemical products is now provided along with such protection for most biotechnology products. The law establishes a well-defined compulsory patent licensing provision. These provisions are in some ways superior to those of the pharmaceutical licensing provisions in the Canadian statute. For example, the Canadian provisions allow some drugs developed in Canada to be exempt from some types of compulsory licensing while foreign-invented drugs do not benefit from these same provisions.

While in the old law trade secrets were barely given the time of day, the new law provides explicit protection for trade secrets. However trade secrets can only be protected, as such, when they are committed to writing. They must be contained in a document, electronic or mechanical means, an optical disk, a micro film or the like. Transition protection, for products under patent in other patent cooperation treaty countries, is provided in the new law. The law also establishes the opportunity to exclude parallel imports of patented products.

The law's trademark and servicemark protection is comparable with most developed countries and has been increased from five to ten year renewable terms. The law provides that a trademark registration shall expire when not in use for more than three consecutive years. In the case of such non-use, an interested party may challenge the validity of the registration even when the renewal notice is not due. This welcome change is meant to help correct some of the problems with pirating. It is also recommended that a declaration of use be filed every three years. Furthermore, three dimensional marks are now protected. However, scent and auditory marks are not.

The new copyright amendments passed in July extend explicit protection to computer programs, sound recordings and satellite retrans-

missions. The amendments dramatically raise the level of civil and criminal penalties for infringement. Sound recordings were not previously covered by Mexican copyright law.

Some issues that have yet to be addressed by legislation, and which still present areas of concern, include México's lack of protection for semiconductor mass works, which of course is a key industry for the United States. México will be encouraged to introduce strong protection for such semiconductor chip layout designs. The protection of trade secrets and biotechnology needs further expansion as well as effective and timely enforcement of intellectual property rights.

Unlike the United States and Canada, México does not have legislation dealing with compulsory licensing of cable retransmissions. Other issues to be considered include how the new law and amendments may effect the rest of Latin America's expansion of intellectual property rights. Further issues include the question of how technology will be influenced by México's broader recognition and protection of intellectual property rights.

For example, I have heard that some people think Venezuela, (not to single out any specific countries) may not want to follow the lead of México. They may want to write their own laws. If México's law is being held out as a model, they may say, "No, we're going to do our own law." The Recording Industry Association of America also expects that the new copyright law amendments and effective protection of copyrights and sound recordings will increase United States investment in the creation and distribution of recorded materials.

In the final analysis, enforcement issues create the greatest challenges. A significant part of the intellectual property negotiations of NAFTA will be based upon the differences between the countries, specifically those of México and the United States. Enforcement is one of the key differences. For example, in the United States in certain instances, injunctions may be imposed against infringers to prevent irreparable harm. The Mexican system, on the other hand, is an amalgam of administrative, civil and criminal procedures. Pre-trial remedies significantly differ from the United States and Canada. No injunctive relief, temporary or permanent, is available. Administrative seizures of infringing merchandise after a judgment has been rendered can be blocked if the owner of the articles requests a constitutional review of the judicial decision. You have probably heard of this review, called an *amparo* action. Because of this, and the fact that recovery of damages is very difficult in México, preference is often given to use of the criminal law vehicle for intellectual property enforcement issues. While there will not be any compensation, at the very least if successful, you can stop the infringement.

Ultimately, complete harmonization of the laws of the United States, Canada and México may not be achievable. Nevertheless, the new Mexican intellectual property laws render substantive intellectual property rights in the three countries similar and can therefore provide a foundation for free trade discussions. With more favorable intellectual property laws, distribution and licensing of technology will become easier. At that point, economic issues may become more significant. For example, proximity to your customer will become more important than proximity to a geographical border. Further, it is likely that more profitability will be possible to international companies because of the increased flexibility in the choice of marketing strategies.

In conclusion, I would like to tell a story that I have seen occur more than once. One of my clients has been debating for years whether to enter the Mexican market. Due to the nature of the products that he manufactures and his past fears of inadequate Mexican intellectual property protection, he has refrained from entering the Mexican market. With the new law, he is now proceeding with his marketing plans in México. He feels that his potential profits outweigh the lesser risks he will now encounter under the new law. With progress being made in the NAFTA negotiations perhaps this type of reevaluation and entry into the Mexican market, as well as other Latin American markets, will be the norm.

Labor Issues

Oscar de la Vega Gomez[2]

In order to understand the legal aspects of the Mexican Revolution as they relate to labor law, we must look to its historical roots. This examination will help to explain why labor law overprotects employees.

Historically, Mexican labor law was the result of an armed revolution that expressly recognized a basic inalienable right of workers. In 1910, México was the first country to include labor rights in its constitution. As you can imagine, therefore, change is a very touchy issue in México.

When you look at labor law in México it appears to be directed mainly at the protection of employees rather than the facilitation of commercial relationships. In 1931 México, as part of a civil code system, enacted the first federal labor law. In 1970, as a result of the workers' absence during the 1968 social movement, the federal government granted a political reward to workers; an overprotective labor law.

The Mexican economy is on its way to recovery. México has acknowledged that it needs to adapt its labor law to the country's modernization process. Experience has shown that legislative protection takes place when the economy as a whole is solid.

Nevertheless, México is changing and modernization in the labor environment is expected. New rules have been implemented. Conciliation has played a major role in recent years. We have a new program of nation-wide agreements called Economic Solidarity Pacts (PSE). One of these agreements was called the Economic Stability and Growth Pact (PECE). As a result of these national agreements, new rules were established regulating collective labor relations. In fact, policies of wage increases have been adopted by unions, the government and employers.

México's inflation rate has dropped from 50% per month in 1983 to 0.7% per month in September 1991. It is informative to compare this drop in rate to the change in wage increase.

It is important to know about wage increases in order to know about the labor environment. In 1988, when México worked on the

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inflation process, México's minimum wage increase was 87.2% as a result of collective bargaining. In 1989, this wage increase was lowered to an average of 12.7%. In 1990, this increase was lowered to 14.9%, and in 1991 there was only a 12% increase. As you can see, wage increases are being lowered at the same pace as the inflation rate is being lowered. This reduction gives you a more established environment in order to decide upon further investment.

México's domestic gross product grew 4% from January to August 1991 — a rate unheard of since 1981. Direct foreign investments in 1991 exceed $9 billion United States dollars. México is on its way to recovery.

Nevertheless, one must be aware of the restrictions and the rules of the law to advise clients. I recently met with a major client, a Los Angeles advertising firm. At the meeting, two L.A. lawyers were talking about liabilities under Mexican labor law. When they told me they thought they had no liabilities because the client only used part-time workers, I just looked at them and said, "You are in big trouble." Mexican labor laws should not be overlooked.

LABOR ISSUES

Mark Zelek[3]

The rules of the game are entirely different in México than they are in the United States, where employment at will is the rule. In México, for example, you cannot have part-time workers; workers are expected to work forty-eight hours per week. Moreover, it is assumed that if you hire an employee in México it is for an indefinite term. You may only hire someone for a temporary period if the specific job requires a temporary worker. For instance, one may hire a temporary worker for a single specific construction project. Otherwise, it is assumed under Mexican labor law that you have hired that worker indefinitely.

It also is assumed workers have the right to keep their jobs indefinitely. An employer may only terminate a worker in México without liability if there is "just cause." It is very difficult to establish "just cause" in México, and it is the employer's burden to establish it. Article 47 of the Mexican Labor Law gives examples of what the legislature believes is "just cause." These include dishonest or violent conduct against the employer, threats against the employer or his family, immoral behavior on the job, disclosure of trade secrets or confidential information, intoxication at work and being thrown in jail. Obviously, these are rather egregious violations of corporate policy. Unless the employer can establish such a violation, the employer cannot terminate a worker without suffering penalties.

If a worker is discharged and wants to appeal the discharge, the worker would file a complaint with the conciliation and arbitration board in México. This board is an administrative agency charged with handling all labor cases, whether in the union or individual context. The worker may request either reinstatement to the job or a constitutional indemnification, which is three months salary plus all of the worker's benefits. The worker also is entitled to back pay through the date of the decision. Further there is no set-off for interim earnings, as there typically is in the United States.

In addition, the worker is entitled to a seniority severance payment of twelve days for each year of seniority the worker has. In other words, if the worker worked ten years he would be entitled to 120 days wages. There is one limitation on this -- the wages cannot exceed

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twice what the minimum wage is in the area in which you are operating. The minimum wage in México City is only equivalent to $4.00 per day. So although this amounts to only $8.00 per day, when you combine the indemnity and back pay without any setoffs and the seniority payment, it may cost the employer a great deal of money to terminate a worker. The employer must, therefore, be very careful.

Fringe benefits represent another big difference between the United States and México. In the United States fringe benefits are generally left for the employer and the employee to negotiate; in México they are covered by the federal labor law. One of these fringe benefits is a year-end bonus of at least fifteen days pay, which must be paid by every December 20th. The employer also must give its employees a vacation, the duration depending on seniority. After the first year employees must be given six days vacation, and this duration grows every year. When employees are on vacation, in addition to paying them for their vacation time, the employer must also pay them a vacation premium of an additional 25% of their wages.

Another benefit in México is profit sharing. Workers in México are entitled to 10% of the employer's pretax profits. All workers, aside from CEOs, are entitled to this benefit. This rule has a few limited exemptions: during their first year of operation newly incorporated corporations in México do not have to pay profit sharing, and newly incorporated manufacturers of a new product do not have to pay profit sharing for the first two years. The federal labor law does make clear that simply because the workers are entitled to participate in the profits of the enterprise does not mean that they have a right to participate in the management of the enterprise.

Another difference between México and the United States is the concept of "substitution of employer." Where there is a sale of assets, there can be no change in the labor relations. If there was a union before, there has to be a union afterwards. The successor company is liable for all of the labor obligations of the predecessor company. In the first six months after the sale there is joint liability, but from that point on the successor is liable for any labor obligations which the predecessor had incurred.

I would briefly like to touch on collective labor law in México. Mexican workers can, through unions, enter into collective bargaining agreements that provide more than what the labor law requires. However, collective bargaining agreements cannot decrease or remove any benefits that are given under the federal labor law. If there is a collective bargaining agreement, the workers are entitled to renegotiate wages every single year if they give the proper notice, and they can renegotiate the entire collective bargaining agreement every

two years. It is therefore hard to get any comfort in México, because these issues come up year after year. Collective bargaining agreements cover all employees, including non-union employees. However collective bargaining agreements may provide, as most typically do, that confidential employees are not covered.

While Florida is a right to work state, everything in México is a closed shop. Employees are required to join the union to have a job. In México the right to strike is constitutionally protected, but there have not been many strikes in México recently because of a number of barriers. There are numerous procedural requirements that must be met before a strike may commence. Moreover the unions do not pay strike benefits in México as they do here, so it is difficult to sustain a strike for very long. Another point to note is that employers are not allowed to operate during a strike; the entire operation must be shut down. The employer cannot hire permanent replacements, as has become the vogue in the United States.

If a union is going to strike, it must give six days notice to the employer. Then the conciliation and arbitration board, which handles both individual and union disputes, tries to mediate the dispute. After the strike has commenced, the employer may request that the conciliation and arbitration board declare the strike nonexistent. The conciliation and arbitration board will consider the strike nonexistent if the strike does not have majority support of all employees in the enterprise, if the union is pursuing an unlawful objective or if the many procedures required under Mexican labor law were not followed. If the conciliation and arbitration board declares the strike to be nonexistent, the workers have twenty-four hours to return to work. If they do not return within twenty-four hours, the employer has the absolute right to terminate any worker.

STRUCTURING FOREIGN OWNERSHIP INTERESTS IN LATIN AMERICAN COMPANIES

Saturnino E. Lucio, II[4]

The original topic of my talk was foreign participation in local corporations. For reasons I will present in a little while, I thought that topic perhaps might not be the best angle into this problem. Therefore, I changed it to the notion of structuring ownership in Latin American companies.

This time is indeed one of great change in Latin America — as the program title implies, the doors are opening, and the rules are being relaxed. Although some problems still remain, there is economic growth in many Latin American countries. As a result, there has been an increase, substantial at times, in the amount of foreign investment that is pouring into Latin America. Many companies from all over the world are considering investing in Latin America.

The question that lawyers are usually asked by their clients is, "How should the investment be structured?" In particular clients will usually ask if they may own up to 100% of the local company, or if they are limited by local law to some lesser percentage. This topic remains a concern despite the liberalization, since there are still vestiges of control and regulation of foreign participation and ownership in local companies. The purpose of this presentation is to discuss some of these aspects, perhaps to think of a somewhat more creative approach and to challenge certain conventional assumptions that we all might otherwise tend to make.

As an initial matter, it is important to note that the relaxation of investment rules and regulatory ownership rules has made the issue of majority versus minority ownership irrelevant. In many countries now, it is permitted for you to have up to 100% ownership in a company. This topic is therefore of less concern to international lawyers and their clients. This liberalization is probably due to a variety of different factors which are very interesting in and of themselves. The first factor is the natural evolution in economic sophistication of Latin American leadership and the recognition that the rules must be modernized to be internationally competitive, and attractive, to foreign companies. A second factor is the recognition that the world is growing

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increasingly economically interdependent and a desire to integrate into that mainstream of economic activity. A third factor is the need to attract foreign capital at a time when it is difficult or, in many cases, still impossible to get access to some of the western world credit markets.

Let us not forget the lost decade of the 1980s and the problem of the debt crisis. I would submit to you that a lot of the changes, particularly with foreign investment, have occurred because of the difficulty Latin American countries have in borrowing the capital they need for their development. Their only alternative is to turn to foreign investment as a source of the much needed flow of funds.

A fourth factor likely is the anti-communist revolutions in Eastern Europe and the USSR. The Soviet Union had provided, in a way, the intellectual inspiration for some of the Latin American leaders who tried to restrict investment. The collapse of communism in Eastern Europe has challenged the basic assumptions that many people used to have, and has brought into question the ideas of Raul Prebisch and others who have been very influential in fashioning the intellectual underpinnings of foreign investment restrictions. As a result, the very nature of foreign investment restrictions has been called into question.

More recently a fifth factor is the whole notion of the Enterprise of the Americas Initiative, and in particular the North American Free Trade Agreement. There is a sense that Latin American economies can now become part of an overall American market. In this regard, Latin American countries are concerned with how they can configure themselves for maximum advantage and for greater integration — how they can fit their little piece into the overall jigsaw puzzle.

Since the early 1980s all of these factors have acted in confluence. There has been gradual drainage in some cases and accelerated drainage in other cases, but always a continuous and persistent change in liberalization of Latin American investment laws.

I would submit that the trend in Latin America today is the following: Firstly, 100% foreign ownership in local companies, whether new or acquired, will become the norm. We are certainly approaching this direction. Secondly, participation in virtually all industrial and commercial sectors of the economy will become the norm. Any requirement for prior approval would be on the same basis as the prior approval required for a domestic investment. This trend does not mean you can come in and own a bank, or an atomic power plant, any more than a local person could. There will still be some sort of local approval required for sensitive industries, but supposedly on an equal treatment basis. There is also, of course, always the need to register the investment. Again however, this requirement is becoming more of a statistical requisite than anything else.

What I would like to do now is discuss a spectrum of countries and what is going on with them. First, the case of Argentina. At this time, Argentina is probably the country with the most liberal investment laws in Latin America. Argentina permits foreign control of virtually any company in almost any sector and the company can be new or old, formed or acquired. For instance, we have a client who is becoming involved in providing security for national power plants in Argentina — service which before was the function of the military in that country. Privatization and entry into foreign investment is something that is being totally opened in Argentina. Again although you have to register the investments, you do not really need prior approval except if the transaction involves a debt-equity swap, some incentive program or if approval would be required of local investors.

The next example in this spectrum is Chile. Chile has declared for quite some time that 100% ownership is permitted in virtually all sectors of the economy. Chile, however, still requires foreign investment approval. The requirement may be the signing of a contract, registration before a notary public, etc. The point is that there is a bit of paperwork involved that Argentina for example, does not require, and this implies Chile still has vestiges of some of the older thinking. For example, I believe Chilean law basically says that as a condition of foreign investment a foreign investor may be restricted in his access to local financing. Although this law may not have ever been enforced, a foreign investor would have to bring all of the funds into the country from abroad. So Chile is very good, but it is not the most liberal.

The attitudes towards foreign investment elsewhere in Latin America vary. El Salvador, for example, has a very interesting approach. It permits 100% foreign ownership in all economic sectors open to foreign investment, but it has what I call a "small shopkeepers and farmers protection act" which basically says that foreign investors cannot participate in any commercial, industrial, service or fishing activities if the activity will operate at the small scale retail level. The notion is to keep these areas of the economy for the locals.

Colombia has also gone through transitions. Along with other Andean Pact nations, as we all know, Colombia had some of the most restrictive laws dealing with foreign investment pursuant to Decision 24 of the Andean Pact. These required investments to fall under various categories. For example, "national investment" required 80% or greater local ownership; "mixed investment" required a local ownership of between 80% and 50% and "foreign investment" was something that was 50% or less in the hands of locals. The sectors which were previously denied to foreign investment have slowly been opened.

Today, as I understand, restrictions are very limited, and only apply to sectors involving national security, disposal of toxic and radioactive waste not originated in Colombia and operation of atomic energy facilities. These laws are a far cry from Decision 24, and a far cry from the transformation rules that required one, over a certain period of time, to devolve control back to nationals. In Colombia now you only need to register the investment, and prior approval is not needed except in very special areas.

Venezuela has probably exhibited the greatest liberalization among the Andean Pact countries. In general, foreign investments are deemed to be approved whether in new companies or by acquisition of stock. There is no restriction on access to local financing whether it be short-term, medium-term or long-term. Up to 100% ownership is permitted in all sectors of the economy, except those reserved for national or mixed companies. The reserved sectors comprise a limited group — basically security services, television, radio, Spanish language newspapers (*i.e.*, professions governed by national laws) and coast watch trade. The President has the power to reserve other sectors at any time, but this power has not been used in recent memory. There are other sectors reserved for mixed companies, but there is the impression that restrictions are falling.

Perhaps as a ploy for negotiating North American Free Trade Agreement (NAFTA), México has enacted some of the most complex rules governing foreign investments. Again, this situation might change. Currently however, the investor must be aware of ownership requirements for a number of sectors such as the banking sector. There are some complex rules, but again these rules will probably slowly give way as part of this negotiating package.

Brazil has one of the most restrictive and complicated systems in Latin America, particularly since the adoption of the recent constitution. There are a myriad of laws, regulations and administrative practices which prohibit or restrict foreign investment. The curious thing about Brazil is that it uses a functional definition to determine if a company is "national." A national company is not just one with 51% nominal Brazilian ownership, but also one with *de facto* Brazilian control. As is typical of Brazil, there are usually loopholes to everything. In Brazil you can create very complex structures with devices such as preferred stock. You could create a company, through a series of sales, where the Brazilians actually own only 3% of the company, but nevertheless it is considered a national company by having preferred stock held by the hands of foreign investors.

The preceding is a general compendium of where we are. It is clear that things have really been advancing. It is important to recog-

nize that, as was true even during the bad old days, whether or not there are local law restrictions on foreign ownership is fairly irrelevant. With legal ingenuity, you can achieve objectives for your client no matter what the rules are. Restrictions on ownership have, frankly, never been something that I have worried about. We have always been able to find very legitimate ways around these rules.

You really do not need 50% or more ownership of a company to have control — it is not necessary. There are many techniques for exercising effective control despite owning a minority interest in the company. The following delineates some techniques, but there are probably 150 more that a creative lawyer may come up with.

I would group into a first category the obvious practice of using devices that hide ownership. You can in many cases, for example, have a company held by another company with bearer shares, and those bearer shares could be held in deposit by a foreign investor. You can have nominee stock arrangements — straw man type of devices. For example, in many cases in México, you have a foreign investor who owns 49%, his attorney who owns 2%, and the local Mexican owns 49%. In some countries these devices may be of doubtful legality. Certainly for any United States purposes (and there are some United States implications) these devices would not work at all.

I prefer the more clever types of devices. One of these, for example, is the use of a binding, irrevocable management contract between the local company and the foreign investor or an affiliate thereof that then takes decisionmaking control from the board of directors. The exclusive management of the company or the enterprise would then be in the hands of the foreign investor. You can always have a right to veto certain decisions. You can have provisions requiring consensus in decisionmaking, and thereby block all activities despite actual percentage ownership unless there is a general consensus among the owners. Another of my favorites is to be able to control strategic resources in the field, and threaten to cut them off if things do not go your way. Such strategic resources include financing, technology, knowhow, marketing contacts or basically anything you can use as a lever.

With regard to repatriation of profits, you can siphon off profits via devices such as marketing agreements, consulting agreements, licensing agreements and representation agreements. You can also have corporate buy-sell or put and call types of provisions. This may be like dropping a nuclear bomb on a relationship, but you could use it as a threat to say "well, things have not been going my way for a while, so you buy me out" — and make it an enforceable agreement. This could put pressure on your local partner who may not have the resources of the foreign investor.

You can also do split tandem operations. This involves the foreign investor and the local investor participating together in both onshore and offshore ventures. The foreign investor would have control of the offshore venture, and as a result have bargaining power with the local investor by controlling some aspects of the operation offshore and use those aspects to gain leverage against the operation onshore. It is important to note that Latin Americans are often willing to keep some funds outside the country.

One could probably come up with another 100 of these things on one's own. The point is that whether you own 30%, 49%, 51% or 100%, it really makes no difference. With a little more creativity, a little more work and a little more sweat, you could probably come up with something that essentially gets you very close to where you want to be regardless of the local law.

Let me now challenge conventional assumption by saying that in certain cases you may want to have a minority interest. This device may be heresy, but there could be various factors that compel you to have a minority interest. For example, sometimes a national company may have preferred access to local financing, in México for example. You might be able to participate in local government procurement bids if that is the type of business you are in. You might have local development incentives, or you may have flexibility in site location. For example, you are not restricted from establishing an operation in México City or Guadalajara.

On the United States side, there are a couple of issues that are important. Controlled foreign corporations provisions of the Internal Revenue Code, for example, may make it worth your while to have 50% or less ownership in order to achieve tax deferral. This plan would require having a foreign partner who truly owns at least 50% of the company. With regard to the United States Foreign Corrupt Practices Act there are various ways you can avoid, even as a public company, some of the accounting implications of that law by structuring yourself to have a minority interest in a foreign company.

In conclusion, any rules restricting foreign ownership are in essence just a point of departure. As intelligent and creative lawyers that we all are, we ought to take a look at those rules and be able to mold the situation to the client's objective, or perhaps modify the objective if necessary. I have never really encountered any particular problem in structuring acquisitions in various countries throughout Latin America, and have always been able to come up with something that in the end fully satisfies the client.

ENVIRONMENTAL LAW: MÉXICO AND BEYOND

Kenneth N. Frankel[5]

Now the title of this talk is "México and Beyond," and I will first address the beyond part. The beyond part is that environmental law in Latin America is much more important than it has been in the past and will become increasingly important. Environmental law is going to effect how you do business, it is going to effect how you make purchases and it is going to effect what your responsibilities are as shareholders, directors, officers and the like.

A number of Latin American jurisdictions have some form of environmental law or piecemeal legislation; Argentina has some, Brazil has a program. Even the smaller countries have some form of legislation. Peru enacted something in September 1990, I believe it was, which although may not be the best drafted document in the world, is relatively comprehensive or at least makes an attempt at being comprehensive. Venezuela has had legislation pending for the last couple of years which provides, among other things, criminal penalties for violations. When it will pass I do not know, but it will pass sooner or later. Will it be enforced? We will see. Chile has made more noises about getting on the environmental bandwagon. Chile has an atmospheric problem in Santiago. Even in Central America you hear more about environmental legislation.

There is a U.N. conference coming up in June of 1992 that is dedicated to the environment. There is some thought that countries are going to try and get ahead of the curve a little bit by enacting legislation or beefing up their enforcement procedures. Enough of the beyond, let me just say again that environmental legislation is important and it is going to become increasingly important.

Now for the Mexican part of the presentation. Miguel Noyola and Fausto Miranda discussed yesterday that México has greatly liberalized its foreign investment and trade restrictions, making it a lot easier for non-Mexicans to invest and do business in México. The statistics bear out what the economists are saying: foreigners are indeed taking advantage of the liberalization and investing in México more than they have in the past.

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5. Kenneth N. Frankel until recently practiced with the law firm of Baker & McKenzie in Chicago. He now is International Counsel of Alcotel Standard Electric, Madrid, Spain. Mr. Frankel received his B.A. in Latin American Studies from Dartmouth College and his J.D. from Northeastern University.

The increased investment and strengthened relationship between the United States and México has brought new attention and more vigorous enforcement of México's environmental laws. This new attention and enforcement has in turn underscored the importance to foreign investors of complying with and understanding the environmental laws at the time the foreign investors are making the investment. This attention and enforcement has led to some very lucrative business opportunities for people who are involved in environmental consulting, evaluation, disposal and recycling facilities. I have seen this effect in my own practice with clients trying to get into this business in México.

How serious is México about enforcing its environmental laws? Also, how serious is the United States about helping México enforce its environmental laws? I will illustrate by touching on a few recent events.

In September 1991, there was a filing of lawsuits by the EPA against eight United States companies for the illegal export of hazardous waste into México. We are not talking about the Mexican agency filing these lawsuits; we are talking about the EPA. The second event is the completion of the drafting in August of 1991 of an integrated environmental plan for the Mexican/United States border by the United States and Mexican governments. This plan serves as a basis for joint action by both countries and it will be gone over and revisited in the future.

The third event which has received a lot of press attention is the closing of a large petrochemical plant last April in México City. It was closed for emitting unacceptably high levels of air pollution. This closing resulted in the loss of what I would estimate to be 5,000 jobs; Pedro says 6,000, and I have seen 4,000. The figure depends on what newspaper you read. Regardless of what the number is, that is a lot of jobs in any country. In México eliminating jobs is a very, very sensitive thing to do and you do not undertake it lightly. The government did not undertake it lightly.

Let me give you a few statistics to illustrate this point. From March 1988 to the end of 1990, the Mexican government inspected 5,045 plants throughout México which resulted in 980 partial or temporary closings and three permanent closings. From only January 1, 1991 to May 15, 1991, there were 275 plant inspections in México City alone which resulted in a temporary or partial closing of more than 102 facilities and two permanent closings. The audit and the events that Pedro is going to talk about when I am done came in this environmental enforcement frenzy, for a lack of a better word, in 1991. He can attest to the fact that when the Mexican government is going to enforce these laws; they are serious about them.

The fourth event is the establishment of an office in México City by the United States Environmental Protection Agency for the purpose of assisting the Mexican government in enforcing México's environmental laws and in coordinating cross border enforcement of each country's environmental laws. There is a fifth event, which is not particularly an event, but which is the increase in the budget that the Mexican government has allocated for the enforcement of environmental laws. There are more statistics there, but suffice it to say that the funds have grown and the outlays have grown exponentially in the last few years.

Why the rush in México to enforce these laws? The Mexican government is acting in response to a series of developments and catastrophic predictions about the ecological future of México City. These events include: the report of widespread abuses particularly in the transport and disposal of hazardous waste in the border area, domestic political pressure in México to become more aggressive about the enforcement of environmental laws; and pressure from United States environmental groups which have taken on a tactic of publicizing the names of "corporate polluters." There have been a number of multinationals that have had their names bandied about in the press for various alleged polluting activities in México.

What does this mean for the investor who wants to go to México and set up a plant? Companies operating in México which are not aware of their responsibilities under México's environmental laws which have relied in the past on an absence of effective enforcement, a largess if you will, are running a much greater risk than they ran before. What do these risks include? I talked about being bandied about in the press as being a corporate polluter, which certainly has a deleterious effect to your company's business, but you also could be subject to civil and criminal penalties or even a temporary or permanent shutdown. A final danger is that the EPA and Department of Justice are both currently studying a possible jurisdictional basis for prosecuting United States companies operating on the Mexican side of the border for violating United States environmental laws. This basis is something that has come up in the North American Free Trade Agreement (NAFTA) discussions. While the proposals are all over the lot in Washington, they are things that are being talked about and studied.

Now if all these events that I just mentioned leave you with the idea that Draconian measures are awaiting all of your clients who invest in México, let me assure you that is not the case. I do not believe Pedro is going to make that case either. I do again, however, raise these events to point out that a lot of these headaches that

companies have encountered can be avoided if you consider the environmental regulations at the time you are making or converting your investment. A number of companies are making these considerations at this point. These considerations will certainly save a lot of headaches down the road.

Even though I am outlining the legal side, I can throw in my own little war story to underscore the importance of considering the environmental aspect up front. We were recently retained by a company that wanted to purchase a plant in México City. Everything was proceeding, but we went through with due diligence and really started to bear down on the environmental aspects. Low and behold the company was under an order from the Secretariate of Urban Development and Ecology (SEDUE) that they had to drastically reduce their emissions or face permanent shutdowns. We did further analysis and determined that the cost of converting the plant to make it environmentally sound, or at least within SEDUE's parameters, would have been prohibitively expensive. The investment was dropped. Had we not gone through that procedure our company would be sitting with a tough investment in México and essentially facing a shutdown.

Having gone through some of the major events, let me just discuss a few of the facets of México's environmental laws. I want to talk a little bit about the legal regime and the licensing requirements, including the Environmental Impact Statements and the various licenses. I will touch a little bit on the hazardous waste requirements as well. Let me also note that the environmental regime is going to apply to maquiladoras. Maquiladoras also have additional environmental regulations which folks should be aware of if in fact you have maquiladora plants or are considering investing in one.

First I will discuss the legal regime. México's environmental framework is somewhat similar to the United States' framework. The requirements may not be as onerous, but if you have a basic understanding of how the United States environmental scheme works, especially the permitting process, you will have some idea of how the Mexican process works. The backbone of the Mexican legislation is the 1988 law called the General Law of Ecological Equilibrium and Environmental Protection. We refer to it as the General Law.

The General Law contains specific chapters concerning air, water, soil, hazardous waste, noise, vibrations, thermal energy, lighting, odor and visual pollution. It also sets out enforcement procedures and other provisions concerning the respective responsibilities of federal and state government. Unlike the United States environmental scheme, it does not have superfund type legislation. Therefore if you were buying a piece of property you will not generally, although it is under

consideration in México, be responsible for pollution or a spill that happened before you bought the plant, as would be the case in the United States except under very narrowly defined exceptions.

SEDUE is the Mexican ministry that oversees all of these regulations. Some of México's states do have environmental legislation, many of them do not, and up until now the enforcement in the Mexican environmental arena has been by the federal government. As is the case under United States environmental laws, the General Law establishes a licensing system based upon specific discharge limitations for air emissions, waste water discharges and for the generation, transportation, handling and disposal of hazardous waste. All companies operating in México must limit the amount of their discharge to within the specific ranges that have been decreed by SEDUE, and to its various technical norms and regulations which it issues periodically.

For instance, concerning air pollution, there are certain limits on the amount of carbon dioxide which a plant can emit. There are also, in the realm of waste water limits, certain specific industry limitations, that is to say the technical norms. They say you must limit your discharge to certain levels if you are engaged in the following industries: glass, textile, petroleum, construction, synthetic rubber, tire, upholstery, sealant, sugar cane, carbonated beverage, sawmill, meat packing, leather, fertilizer, plastic, beer, milk, metal, paper, food packing, iron and steel. If any of you are involved in those industries in México, you may want to pay specific attention to these limitations.

I turn now to the licensing situation in México. Depending on your operations you may have to file for an operating license, a residual water discharge license, or an air discharge license. You may have to file an Environmental Impact Statement or register and file documents concerning hazardous waste. I do not expect people to memorize what I am saying right now, but I am just merely trying to pinpoint and raise some of these issues. Start to think about these issues if you have operations in México.

Let me say a few words about the licensing requirements and run through some of the dry legal part of it. The Environmental Impact Statements must be filed if a proposed activity falls within either of the two following categories: 1) if it may cause ecological imbalance, or 2) if it involves certain industries including some of the industries I have previously mentioned. SEDUE has taken the informal position that the best way for a company currently operating, or contemplating future operations in México, to ensure compliance with the General Law is, in fact, to file an Environmental Impact Statement. Now the Environmental Impact Statement in México is not as onerous as, and does not look like, the Environmental Impact Statement that you may

file, or you may have seen filed, in the United States. It is nonetheless a document which has to set off certain information about the obvious impact of your proposed activity, or your current activity, on México.

There is also an operating license. All manufacturing plants which emit smells, gases, solid particles, etc., that is to say, all plants, must obtain an operating license from SEDUE. SEDUE may grant or deny the license or require modifications to be made to the plant before granting the license. Plants are required to file annual reports each year in February and outline the changes that occurred during the previous year.

If you read the law, it says that you should file for this operating license before you commence operations. Practicality makes it hard to file for a license when you are listing what your plant's emissions are if you have not started the plant. Generally what happens is you will have discussions with SEDUE and you will draft most of the license except for what the emissions levels are. You will next start the plant and let it run for a month or two months, depending on the negotiations you have with SEDUE, and then supplement your license application once you have determined what those levels are.

If you want to dump any emissions or pollutants into water, there are also waste water discharge registrations which I am not going to go into. There is hazardous waste registration which gets to be more serious. The General Law and its regulations establish numerous licensing requirements which cover various phases of the generation, handling and storage of hazardous waste. If you look at what was and is going on in the environmental sweep, a major concern in the border areas is the dumping of hazardous waste.

How is hazardous waste defined? As in the United States, it is defined in terms of certain characteristics: toxicity, reactivity, explosivity, inflammability and corrosiveness. Regulations also list certain substances which are, by definition, considered to be hazardous.

If you are involved in hazardous waste, what do you have to do at a minimum to satisfy documentary requirements? If you handle hazardous waste, you must submit an Environmental Impact Statement along with an application to obtain a generator's number from SEDUE. A plant may not generate hazardous waste until it receives approval from SEDUE. You also must be involved in ecological weigh bills. Those of you who have been involved in ecological weigh bills in the United States understand a little bit about how that works. You have to fill those out for the importation, exportation, transportation or any handling that you may have of hazardous waste. If you are a hazardous waste generator, you must maintain a monthly log detailing all hazardous materials in the possession of the company and you have to file a series of reports with SEDUE.

I mentioned earlier the maquiladora plant being subject to all the environmental regulations and there are also additional ones for maquiladoras. The one I just want to touch on now is if you have a maquiladora and you produce hazardous waste, you must export the hazardous waste to the country from which you imported the raw materials which produced those hazardous wastes. Are all the maquiladoras complying with this? No, they are not. Are most of them complying with it? According to the statistics they are, but there is a lot of hazardous waste that has not been processed according to the regulations and this is one of the areas that SEDUE is bearing down on. It is the one area, again as I mentioned, that is getting the most attention from environmentalists in México and the United States.

I talked briefly about the sanctions a few minutes ago. Let me say in addition to the penalties I talked about, and Pedro's examples I think will bear this out, SEDUE has wide latitude to fashion a remedy and to get you to comply with what they perceive to be the environmental law and regulations. When I say "perceive to be" I do not mean to say that in a derogatory way, but there is agency discretion there.

Every company that operates should have an audit. Every company should also look at other aspects of health and workplace safety rules. These rules are connecting a bit with the environmental laws. Companies should do things including posting proper signs and providing ventilation if certain materials and chemicals are used in the plant. Again these issues may be raised by SEDUE in an audit even though it is theoretically not in the daily work of SEDUE.

Let me conclude by saying that I believe that the factors and the pressures which have caused the Mexican government to step up its enforcement program are not going to subside. Increased discussion focused on the environmental issues in México and the Mexican/United States border during the free trade talks has brought the environmental issue to the forefront and captured the attention of all sorts of people on all sides of the issue. This issue is hot. They have not gotten to the point of writing this down in the draft agreement of NAFTA. This issue is something that the parties are sort of dancing around and looking at because they are not exactly sure how they are going to attack. The environmental groups certainly have their opinions about how they are going to do it. There are a number of issues involved, it is out there and it is not going away.

Again the expanded business and market relationship between the countries means more pressure will be brought on the environments of both countries. Let me again repeat that for the prudent investor or purchaser the requirements need not be that onerous, particularly if considered ahead of time. As I think Pedro's discussion will illustrate

it is much easier and less costly to consider the environmental aspects at the time you are making the investment and to take certain steps, than to wait for SEDUE to come and to tell you what to do. If SEDUE does tell you what to do, it will cause you to go through some engineering gymnastics, in many cases, to try to bring your plant up to conformance levels.

ENVIRONMENTAL LAW — MÉXICO AND BEYOND

Pedro A. Freyre[6]

I want to discuss three things with you. First, I want to tie into the comments that Ken made and perhaps elaborate on some of the general comments on the importance of environmental regulation in Latin America, and some of the things that you are going to be seeing on the front page of the newspaper in the coming months and years. Second, I want to give you two specific case histories in México which may give you some practical insight into the Secretariate of Urban Development and Ecology's (SEDUE's) agenda, how to negotiate with SEDUE, and what to expect from their environmental enforcement efforts. Third, I will draw some basic conclusions that may serve as practical lessons that you can share with your clients as you advise them on the increasingly complicated environmental regulatory environment.

I will not belabor the General Law Ken described. Suffice it to say that its application is broad in spectrum. However it is not nearly as comprehensive, in its application and enforcement, as the environmental laws of the United States and Canada. That, in fact, creates the first bone of contention. México, as all of you know, is currently negotiating a North American Free Trade Agreement (NAFTA) with the United States and Canada. One of the key negotiating issues is the apparent imbalance in enforcement actions by México in the environmental field. You can expect to see a continuing discourse and dialogue in the negotiations surrounding NAFTA involving specific environmental issues.

The second point I wanted to mention within that context is about the 1992 conference in Rio de Janeiro, also known as the World Environmental Summit. This conference will take place in early June of 1992. We believe it is going to be a media circus. Approximately 20,000 participants are expected in Rio de Janeiro and environmental activists are already beginning to arrive at the city; Greenpeace is sending the Rainbow Warrior. You can expect to see a lot of activities surrounding that conference.

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6. Pedro A. Freyre until recently was Director of Legal, Government and Public Affairs for Dow Latin America. He is now General Counsel and Vice President of Mapfra U.S. in Miami, Florida. Mr. Freyre received his B.A. in Latin American Studies and his J.D. from the University of Miami.

The thing that I wanted to highlight for your attention is that most folks in the United States focus on the "E" when you look at UNCED, United Nations Conference on the Environment and Development. However, we are beginning to perceive in Latin America that the "D" element is of tremendous importance; that is development. We are beginning to see the battle lines being drawn as a North/South dialogue. The official position of the Brazilian government, in terms of environmental regulation, is that the Northern Hemisphere started the world on this slippery slope of pollution and should therefore it bear the burden of cleaning up the environment and helping the Southern Hemisphere in its development efforts. These are some items of sensitivity that you should keep in mind as this course progresses.

One issue that you face, and something that you may want to alert your multinational and transnational clients to, is the issue of the double standard. We are beginning to see the environmental groups come up with the argument that the multinational corporations do not apply the same environmental efforts to their plants in the Northern Hemisphere as they do in the Southern Hemisphere. Having to justify your position before environmental activists or the media as to what your level of enforcement is and whether your plant complies with a given standard or not, is becoming more and more of a topical issue. The chemical industry, in particular, has reacted to the pressure. In the United States, and now on a worldwide basis, they are coming up with a campaign called Responsible Care, where they are engaging in a dialogue with communities and opening up plants for inspection, or engaging the environmental activists to come up with a consensus on what environmental standards are to be applied.

Finally, focusing on México in particular, the issue of the maquiladoras is a very hot topic. Something that you may want to alert your corporate clients to, particularly those who are publicly held, is that we are beginning to see some activity on the part of activists and church groups on something called the "maquiladora principles." Basically this is a set of stockholders' resolutions that are presented at annual stockholders' meetings that call for compliance with very tough self-auditing and regulatory environmental standards and labor practices for corporations. These are just some things that I wanted to tell you to give you the flavor of development in the environmental field as it applies to Latin America in general, and México in particular.

Let us turn our attention now to México and the two events we experienced in 1991 as part of the enforcement frenzy of SEDUE in April of 1991. This campaign started, and we do not believe it is a coincidence, at the same time that a United States congressional de-

legation that was looking into NAFTA was visiting México City. It carried with it a tremendous amount of publicity in the media — newspapers, radio and television. The talk shows dedicated the entire week to the issue of environmental pollution in the valley of México. Specific companies, which had been targeted for enforcement actions, were called to task in the call-in shows.

The entire atmosphere of México City was very heavily weighed with the issue of the environment. The issue was raised to a higher level of public awareness than had been previously seen. One thing that we found out is that SEDUE, as regulators, had visited California in the previous months and had been trained by the California Environmental Protection Agency which is one of the toughest, if not the toughest, regulatory body in the United States. When these folks went out in the field, they knew what they were about and did a very competent job. I will not give you all the numbers that Ken gave you as to the targeting of firms, but certainly after the refinery in the México valley was shut down the Mexican government felt like it had set the right tone and it started all these tough enforcement actions.

As part of that campaign, our subsidiary in México received a visit. We have a small plant in an industrial site known as Tlalnepantla in México City. We have a plastic clad metal production facility there. A full environmental compliance audit was conducted by SEDUE and we were found to be in full compliance with all the emissions and regulatory permits. Upon arriving at our warehouse, SEDUE determined that we had stored a number of toxic waste drums so that they would be properly disposed of eventually. We had put the drums in a corner of one of our warehouses. Our heart was in the right place, as SEDUE knows, but we were ignorant of the fact that we had to obtain a specific permit for storage. We had not wanted to dispose of that improperly so it had been set aside. As it turned out under SEDUE's regulation, the storage of hazardous waste requires a specific permit which we did not have.

At the time the audit was done on April 7th, the initial position of SEDUE was for us to apply for the permit, obtain the permit and the restriction on the use of our warehouse would be lifted. What they did was seal the warehouse. As we engaged SEDUE in discussions, it became evident that their agenda was a little broader than that. We engaged in a lot of ongoing discussions which is very much the Mexican flavor of doing business. You engage SEDUE in discussions, they are very professional, but they will try to expand their endeavors and try to get you to commit to other things.

We finally reached an agreement with them that contained five basic provisions. One, a commitment that we would update all

documentation that we had filed with SEDUE in reference to that site. Two, a commitment on our part to maintain and update our log books regarding to the generation of waste. Three, a commitment that we would provide further training to our employees at the site on the handling of hazardous waste. Four, a commitment to update and create further security measures where the hazardous waste was stored. Finally five, an ongoing commitment to maintain the discharge of affluent waters within given parameters under the General Law of the Environment. The agreement further stipulated that all the actions had to be completed by October of 1991. This is the type of agreement that SEDUE will be looking for when they visit your clients. It will be not only compliance with the letter of the law, but perhaps the agenda will extend to other ongoing commitments.

Coincidentally with the visit by SEDUE at our Tlalnepantla site, which is in the valley of México, we received a visit at another site we have at Tlaxcala which is 150 kilometers outside of México City. Tlaxcala is a new grass roots site that we are building to contain the facility that we have in Tlalnepantla. It is also a pesticides, solid epoxy and polyurethane systems plant. This plant has all the latest Dow environmental control technology. It is a grass roots effort, as I mentioned, and one of the things we are contemplating doing once we get the necessary permits is getting a state of the art incinerator at that site to deal with the hazardous waste problem.

In an apparently unrelated move on April 7, which happened to be the same day the audit was happening in México City, we received a visit from the local SEDUE organization. This organization, by the way, is a separate group and entity. It is a state level SEDUE entity that was policing our activities in Tlalnepantla. Much to the surprise of our project managers, that group issued a cease and desist order and shut down the construction of our site. The reason for our surprise is that we had been receiving these same folks on almost a weekly basis and updating them on all of our activities and the progress of construction. We had filed for all the necessary permits and we had obtained a verbal go ahead, particularly on the Environmental Impact Statement, from SEDUE in México City. There we learned a very valuable lesson. You should write this one down in red letters. The day of verbal permits in México is gone! The order of the day is you must fully comply with environmental regulations and you have to obtain written authorization to proceed or you are open to enforcement actions by SEDUE.

We went through the same negotiating process that we went through in México City. The team was a mixture of both the local SEDUE folks and the México City folks; very reasonable, very profes-

sional, very well trained and very competent people. Finally, on April 17th, this same date, we arrived at a satisfactory conclusion and coincidentally five points were agreed upon. First, we agreed to strictly comply with SEDUE decrees on environmental impact. Second, we would mitigate and compensate any environmental impact that was done at the site. A particular concern were the arbolitos. We apparently, or allegedly, uprooted a thousand arbolitos. We have stated and committed to replanting the arbolitos. Third, we agreed that we would not have any further impact on the environment outside of the regulations. Fourth, we also committed and it is an important commitment because it is open-ended, that we would remodel or relocate parts of our plant for future compliance with environmental regulations. Fifth, and the one that scared us the most, we were required to post a bond to ensure that this plan was completed. Their initial request was a bond of $1 million United States dollars which would be forfeited in the event we did not comply with the five points. A million dollars sounds like a nice round number. I do not know where the number came from, but it caught our eye. We negotiated again with SEDUE, which is very professional and very pragmatic, and we explained the parameters of what we had to do. We first got it down to $330,000 United States dollars and finally we settled on $50,000 United States dollars, which is a number that somebody can live with and also a nice round figure.

What I wanted to do here is to give you a flavor for the new reality in México of environmental compliance. The day of lax enforcement is done, the day of amigos and socios who will be friendly and take care of you on a personal basis is done. You are looking at a new cast of technocrats; professionals who know their business, who have been trained in the United States and who fully intend to make you comply with the letter of the law.

The other thing that I wanted to conclude with, other than the admonition that the day of verbal permits is done, is that United States investors must now catch up on learning about Mexican regulations. We found out, much to our surprise and chagrin, that although we pride ourselves on our technical expertise and knowledge, in particular in the area of environmental regulation, we were way behind the learning curve in Mexican environmental regulation. I will reiterate that one of the growth industries in Latin America is Mexican environmental consulting. Those folks are making money hand over fist. It is better than being a United States Senator. We need to make sure that when we advise our clients we tell them that they must learn the law, they must comply with the letter of the law and they do need to have an environmental attorney or an environmental consultant

readily available at all times. Just like we comply with the Superfund Amendments and Reauthorization Act (SARA), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RECRA) in the United States, the General Law is something that you have to comply with in México.

Finally, and I will reflect again what Ken was saying, as the NAFTA negotiations continue and as the efforts for a hemispheric free trade zone continue, the emphasis on environmental regulation will grow. We fully believe that it is the wave of the future. The day where small corporations, even small local corporations without multinational ties, could live as they please in the Latin American environment are done. The public is much more aware. We are dealing with a society in Latin America that is moving very very quickly, evolving, changing and getting a global perspective on this issue. Finally, a word to the wise. When you are counselling multinational clients, they are big targets for environmental activists and nothing can please an environmental activist more than to find a big United States multinational who complies fully with United States law, but ignores the laws in developing countries.

DISPUTE RESOLUTION

David Wippman[7]

I have been asked to talk about dispute resolution. As you can imagine, dispute resolution is typically the last thing that any group of business people want to talk about or even think about when they are in the process of negotiating a deal. In many respects, it is a little bit like trying to negotiate a prenuptial agreement just before the wedding. You really do not want to think about what will happen if the relationship goes sour. Of course as we all know in the real world, business deals do sometimes fall through and it can be crucial to your client if you have considered in advance the possible results if the deal does go bad.

It is generally accepted that a reasonable degree of predictability is essential to the success of any kind of foreign investment or other agreement. Before companies are willing to commit the kinds of resources in terms of capital, technology and time that are necessary to a major investment, they want to know in advance what will happen if the deal goes bad and they have to resolve disputes. Indeed, many companies will try to structure their trade agreements in a way that will give them some certainty as to the form in which disputes will be resolved.

Typically, there are three general modes of dispute resolution, whether we are talking about Latin America or anywhere else. The first, of course, is that the dispute may be litigated in the courts of one of the parties to the trade or investment transaction. If we are talking about an agreement between the United States and México, it could be resolved in the courts of either the United States or México. As an alternative the parties may prefer to find a neutral forum in a neutral geographic locale, in which case they may opt for international arbitration. There are also alternative forms of dispute resolution. Indeed, this is a booming area both in the United States and abroad. It may take the form of mediation or conciliation or sometimes even diplomatic intervention.

Mediation and conciliation are very much like arbitration, the only difference is that the results of mediation and conciliation are not binding on the parties. Diplomatic intervention, although it was used

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frequently in the past, is less common today, although it still happens. We represented a client who had an experience in Guatemala. There was a dispute between the Guatemalan Power Company and a German construction company. When things appeared to be going a little adversely for the German company, the German government intervened with the Guatemalan government, made some representations about foreign assistance and the dispute was fairly promptly resolved in a manner satisfactory to the German company.

As practitioners you are probably thinking that it would be a pretty easy choice for you if you had your preference. You would rather be in the courts of the United States than in the courts of Latin America. You may even have nightmare visions about bias of home courts, about endless delays and all kinds of other problems that you think you might encounter should you go to the courts of Latin America. Conversely, you might also assume that it would be unreasonable for any party to feel uncomfortable about going to the United States courts. That is we like to think, as practitioners in the United States, that our courts are fair and efficient and that even foreign parties can get an impartial hearing here.

Let me relate briefly one experience that we had in representing a Latin American bank in a lawsuit in the state courts of Texas. Some of you may be familiar with the state courts of Texas. I probably need to say no more, but for those of you who have never litigated there let me describe briefly what happened.

The bank made a series of loans to a national from the same country. This country is in Central America. It was in the late 1970s. When that individual did not repay the loans, the bank brought suit in the state courts of Texas. Why suit was brought in Texas is a long story. It involves the beating up of a process server and various other things, but eventually the woman who was the defendant had moved to Texas and that was the only place the bank could sue her. The bank brought the suit in the state court, in 1981. The case did not go to trial until 1988. It took seven years from the filing of the complaint to trial. In the meantime, the bank found that essentially every ruling went against it.

You may know that in Texas judges are elected and that they get campaign contributions from law firms, which they solicit directly. The defendant in this case was represented by the largest firm in the state. Whether that had anything to do with the outcome I do not purport to say. I will say that in the view of the plaintiff bank every ruling went against it.

I will give you one example of something that happened during the course of the trial. The key issue in the case really turned on the

jury instructions. Just before we were getting prepared to go into the judge's chambers for the charge conference, a senior partner for the defendant's law firm happened to swing by the courthouse, even though that partner had no connection whatever with the case. It did turn out that the partner was the judge's former Army Air Corp buddy. They went back into the judge's chambers and low and behold the judge came out and delivered the charge that was entirely adverse to the foreign bank's interest.

Now you might think you can go up on appeal. We did. Eventually, we got the decision reversed. It took three and a half years. So now, and this happened just a few weeks ago, after eleven years litigating in the state courts of Texas, this plaintiff bank has been returned to the district court in front of the same judge for a new trial. Eleven years later it is back to square one. You can imagine then that parties in Latin America may have the same concerns about United States courts that we might have about courts in Latin America.

I do not mean to suggest that this situation is common in the United States, but simply that you should not consider this a one way street. I am sure you are all familiar with the importance of choosing the forum in the governing law. It has all kinds of substantive and procedural consequences. It may determine what causes of action you can bring, what the elements of the causes of action are, what sorts of discovery you get, what the burden of proof is and so forth. It is something you really want to think about in advance.

Now typically, foreign investors are reluctant to agree to resolution of disputes in the host country of the investment. Conversely, host countries have their own reasons for being suspicious of foreign dispute resolution fora. They may relate to concerns about infringement of sovereignty or maybe simply distrust of procedures that are unfamiliar to parties in the particular country. Certainly in Latin America there has been, in the past at least, a traditional hostility to foreign dispute resolution generally and, in particular, to international arbitration.

What I really want to leave you with today, more than anything else, is the idea that the trend is changing. That it is now becoming possible to be comfortable with international arbitration as a form of dispute resolution in Latin America. It is the trend in Latin America just as it is the trend in most other parts of the world.

Let me do a little bit of a comparison between litigation and arbitration as a means of resolving disputes in Latin America specifically. I will start with the perspective of the United States party. Typically the United States party to a dispute has all kinds of concerns about the possibility of litigating in the home courts of an opposing party. It sees all kinds of problems inherent in such litigation.

Generally, United States parties are unfamiliar with civil law systems which of course predominate in Latin America. Typically a United States party, especially if it is a newcomer to the region, will be unfamiliar with the substantive laws and procedural laws of the country in which it may choose to do business. This unfamiliarity is especially a problem if you are dealing with a complex transaction in which there may be multiple jurisdictions and therefore multiple laws involved.

Also, and very commonly, the United States company will fear that the foreign court is subject to political pressure. In other words, the United States company may feel that the judicial branch is not truly independent of the executive branch in another country. This fear is particularly acute when you are dealing with a government-owned or a state corporation.

In addition, as in the United States, the court dockets in Latin America are often crowded. That means that you can encounter lengthy delays. It may well take five years or more to get your case heard there. Just as it can take many years to get a case decided here.

Another problem for United States companies thinking about dispute resolution abroad is cost. You will have to hire foreign counsel. If a lot of the documents are in English, you will have to get translations and you will have to have interpreters for witnesses. That may not seem problematic at the outset, but if you are talking about a major project, and we have litigated some construction disputes where the documents introduced in the arbitration or in the litigation literally fill filing cabinets, it can be extraordinarily burdensome if you have to translate everything into another language. Keep in mind that your client may not be familiar with the other language.

There may be other problems such as publicity. One difference between litigation and arbitration is that in arbitration everything is kept confidential. The only time arbitration becomes public is if one of the parties challenges the arbitration award in a national court. That may seem like a minor advantage, but if you are representing a client that has done something wrong it might be a very important advantage.

I will give one example of a case where the party which we were opposing was, we alleged, guilty of making payments to foreign government officials to secure the contract it issued. I can assure you that party vigorously insisted on arbitration, as opposed to a court forum, because it did not want its internal memoranda detailing the payments spread all over the newspapers.

In addition, there may be a fear that a court in another country might decline jurisdiction, especially if there are issues of sovereign

immunity or the equivalent of the Act of State Doctrine involved. Accordingly, there may be a number of problems in dealing with litigation in another forum. I do not mean to suggest that these concerns are unique to a United States' party to any kind of investment or trade transaction. Quite the contrary, as I indicated earlier, the Latin American parties may bring exactly the same concerns to the table. As a result it is often possible that both parties will feel more comfortable by agreeing on international arbitration.

If I can, I will talk for just a moment about some of the advantages of international arbitration. First, and most important, the parties are assured, or at least they have a pretty good basis for believing, that they will have a neutral forum. You may not get your own home court, but you have the security of knowing that the other party will not be in its home court either.

Of considerable importance is the fact that the parties also can exercise some control over the selection of the arbitrators. This does not amount to the luck of the draw situation. You can be assured that you will get somebody competent and in a case that involves a great deal of technical data or something particularly complex, it is possible for the parties to choose individuals who have considerable expertise in the area and can greatly facilitate the resolution of the dispute.

In addition, as practitioners it may be important to you that the parties can use their existing counsel. You might want to think, when you are drafting a dispute resolution clause, about whether you want to draft yourself out of a job.

Another advantage of arbitration, of course, is that the awards are intended to be final. They can generally be much more easily enforced than a court decision, particularly if you have to consider pursuing enforcement remedies in more than one jurisdiction. Given the international conventions that now exist, it is often much easier to enforce an arbitration decision than a court judgment.

There also are lots of possible disadvantages to arbitration. First, the arbitrator's decision is largely free from judicial review. That means that the arbitrators can make a clear mistake, whether it is with respect to the facts or with respect to the law, that is essentially unreviewable. There is nothing you can do about it. You cannot challenge the decision.

Second, there is often a fear that arbitration decisions are based on considerations apart from simply applying the law to the facts as you would expect or hope that a court would do. Historically, there is the fear that arbitrators have a tendency to split the baby. I think there is some merit to that assumption, perhaps not as much as is often thought, but if you think about the dynamics of the typical

arbitration tribunal you can see why this tendency might exist. Usually in a complex arbitration each party will pick one arbitrator. The third will either be chosen by the two or picked by an arbitratal institution. In any event what you often find is that you are really competing for the vote of that third arbitrator, that is, the chairperson of the panel. In turn, the chairperson of the panel does not want to be isolated. He or she wants, if at all possible, to get a decision by consensus. That may mean giving something to each of the appointed arbitrators. As a result you can get a decision that splits the baby even if the situation would warrant going entirely to one side or the other.

Another potential disadvantage to arbitration is that discovery is limited. Although this is an advantage in the context of why you might want arbitration, it does cut both ways. If you are a party that needs to prove your case out of the files of your opponent, you may have a tough time in arbitration. On the other hand, your opposing party cannot use the Federal Rules of Civil Procedure to engage on fishing expeditions through clients' files. Therefore it cuts both ways.

Finally, I would like to note with respect to disadvantages, the parties have to pay the arbitrators' fees and they have to pay the cost of the arbitral institution if you are talking about administered arbitration. The fees can be inordinately expensive, much more so than you might think. Although generally arbitration is considered to be faster, more efficient and less time consuming than litigation, that is not always the case. If you are going to think about arbitration, you should look at the fee schedules attached to the institutional rules. You will find that they typically vary depending on the amount in dispute. As the amount in dispute goes up, so too does the cost.

International arbitration is not without disadvantages. From the perspective of Latin American litigants, there is one possibly very serious drawback to international arbitration. It is really the reason that Latin America has so long been hostile to the notion of arbitration. It is the fear that if you are going to arbitrate in front of a large institution, that institution may import various biases in favor of multinational corporations and the industrialized states and against the interest of parties from developing countries. Typically this fear plays out in the choice of the chairperson of the arbitration panel. Since both parties get to choose one arbitrator, you can assume that you are not disadvantaged by your own selection. If the parties cannot agree on the third arbitrator however, the arbitral institution will nominate that arbitrator and they tend to come from a very small circle of prominent business people, law professors and practitioners who may, or are often considered to have, interests sympathetic to

those of multinational corporations. That is the milieu from which they come. That is a potential disadvantage for a Latin American party.

I note another disadvantage that you may not think of. If you are going to enter into arbitration, make sure that you do it right. Litigation over badly drafted arbitration clauses can cause you endless expense and grief. We represented the government of Nicaragua in a dispute with the Standard Fruit Company and its parent company Castle and Cook. Parties in the early 1980s entered into what was called a Memorandum of Intent which provided for the purchase and sale of bananas for a period of five years. At some point, about two years into this arrangement, everything fell through. Nicaragua filed suit in 1986 in federal court in San Francisco and moved to compel arbitration pursuant to an arbitration clause that was in the Memorandum of Intent. Standard responded that the Memorandum of Intent was not a binding agreement; it was just an agreement to agree. Therefore, it argued, the arbitration provision was not binding either. The parties have been litigating this almost six years now. It went through the district court. The district court determined it had to hold an evidentiary hearing. Discovery was granted. Depositions were taken. Nicaragua lost in the district court.

The case was then appealed. The first question was, "Did Nicaragua have a right to an immediate appeal or did it have to await the outcome of the rest of the trial?" After that was briefed and went to the Ninth Circuit, the Ninth Circuit ruled there was a right to an immediate appeal. Then there was the appeal on the merits. In July of 1991, the appeals court reversed the district court in order that the case be sent to arbitration. So six years later, Nicaragua has gone back to square one, it gets to start all over in arbitration. Now Standard Fruit has filed a petition for certiorari.

If you are going to think about arbitration, make sure you have a clear binding commitment to arbitrate. Make sure you name the arbitral institution correctly. The parties did not in this case. Make sure that you take the time to do it right.

Another related problem that can come up in this context is drafting an arbitration clause that is not broad enough. If the clause is too narrow you can have the worst of both worlds. This situation was something that the Philippines encountered, but it could happen anywhere. The Philippines had a dispute against Westinghouse over the construction of a nuclear power plant in Bataan. I recognize that the Philippines is not in Latin America, but the principle could apply anywhere. What happened was the Philippines' breach of contract claims were sent to international arbitration in Geneva. The Philippine

tort claims were left for trial in federal court in Newark. As a result, both parties had to litigate simultaneously in two fora which meant an enormous duplication of effort and considerable expense. You have to think, when you are talking about arbitration, of finding a way to cover all of your disputes in one forum.

I want to talk very briefly about some changes in the laws of arbitration in Latin America. I put in my outline some of the bases for the historical antipathy of most Latin American countries to arbitration as a means of dispute resolution. I will not go into any detail here except to say that this resulted in what is known as a Calvo Doctrine. In so far as that applied to dispute resolution, it held essentially that Latin American countries would prohibit the submission of many kinds of disputes to international arbitration and especially of investment disputes. This doctrine had a relationship to concerns over sovereignty and control of natural resources. Due to this doctrine, however, many Latin American courts simply would not permit many of the kinds of disputes your clients might be interested in having referred to arbitration go to arbitration.

That is changing now, and, in fact, most countries in Latin America have considerably revised their laws governing arbitration. Typically you will find these laws in the codes of civil procedure. There will be a separate chapter dealing with arbitration. Often it goes into great detail on procedural issues. Sometimes, however, it ignores important substantive issues like the issue raised just a little while ago. That issue is whether the arbitration clause can be treated as a contract separate from the contract from which it is found. If you are thinking about arbitration in Latin America, you need to look at these codes pretty carefully. It is clear, though, that throughout Latin America there has been a real trend toward modifying the national statutes governing arbitration to make them much more receptive to international arbitration of disputes. They still have a ways to go before they reach the level of the Federal Arbitration Act in this country, which is enormously pro arbitration.

One of the consequences of this improved climate for arbitration is that some of the problems that you might have encountered in the past you are unlikely to run into now. For example, in the past it was not enough simply to put an arbitration clause in your investment agreement. In fact, many Latin American countries prohibited enforcement of any kind of agreement to arbitrate future disputes. That is, you could only agree after the dispute had arisen. You had to enter into what was known as a "compromiso," an agreement to submit an existing dispute to arbitration.

Now as you can imagine, it becomes a lot harder to agree on anything once the dispute has arisen. Accordingly, if a party refused

to agree to the terms of a compromiso, which can involve naming the arbitrators, setting out the claims of both parties and providing some of the procedural rules to govern the arbitration, it had a perfect vehicle for obstructing arbitration. A party still had a right to go to a national court to try and get specific enforcement of its agreement to arbitrate in the investment agreement, but that could be very time consuming, expensive and might not ultimately succeed. That has now changed. In most Latin American countries, it is now much easier to enforce the initial agreement to arbitrate even insofar as it relates to future disputes.

What has also changed is the receptivity to arbitrating different subject matters that were sometimes prohibited from being arbitrated in the past. Arbitration of foreign investment issues is one example which I already mentioned. It is even possible to arbitrate certain issues relating to state sovereignty now, in a very limited context, whereas it was impossible to do that before. Another change in the attitude of Latin American countries towards arbitration is reflected in the fact that it is now clearly possible in almost all Latin American countries to agree to arbitration in which the arbitrators are not nationals of those countries. In the past a number of Latin American governments, Colombia, for example, had laws on the books that said if a party was going to agree to arbitrate a dispute that would otherwise fall within the jurisdiction of the domestic courts, it could only be before a panel of individuals who were from that country. Certainly there are few multinational companies that would agree to arbitration on those terms.

Now let me jump ahead a moment to the question of recognition and enforcement of foreign arbitral awards, since I just want to touch on that before I conclude. There are a number of international conventions in the area now. The most important, of course, for those who are familiar with the area, is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, more popularly known as the New York Convention of 1958. That is the major convention in the area. At first very few Latin American states, virtually no Latin American states, agreed to sign on when the Convention was first established. More and more states, however, are agreeing to accede to its terms. The New York Convention specifically provides that arbitration agreements, including agreements to arbitrate future disputes, shall be valid and irrevocable. It also provides procedures for facilitating the summary enforcement of arbitral awards. Most developed countries are signatories, and, as I said, many Latin American countries are now signing on.

Another important convention in the area is the Inter-American Convention on International Commercial Arbitration, known as the

Panama Convention. The Panama Convention is essentially the regional analogue to the New York Convention. It also recognizes that arbitration agreements shall be considered valid. It specifically provides that parties can use nonnational arbitrators, so it takes away a couple of the major obstacles that existed in the past in Latin American countries to enforcement of arbitral awards. It also, which is one difference from the New York Convention, has a default setting. That is, if the parties do not agree in their arbitration clause as to the rules that will govern the arbitration or the institution that will administer it, then automatically they will be referred to the Inter-American Commercial Arbitration Commission, which is affiliated with the OAS. That Commission applies the United Nations Center for International Trade Law Rules, which were drafted by the U.N. as a way of trying to come up with a set of procedures that would be more responsive to the needs and interests of developing countries than the rules of some of the major institutions like the ICC and the AAA.

Notwithstanding the existence of this Commission, however, the vast majority of arbitration involving Latin American parties takes place either before the ICC, which is the number one institution in this regard, or before the American Arbitration Association. I think we can expect to see in the future much more arbitration before other institutions, including the Inter-American Commission.

Let me mention one other convention that may be of importance to your clients, that is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, popularly known as ICSID. ICSID is really an arm of the World Bank. It is based in Washington and its purpose was to try and serve as an institution for resolving disputes between states on the one hand and private parties of other states on the other hand.

Most Latin American countries, and most developing countries in general, have been very suspicious of ICSID arbitration. There is some reason for that. First, ICSID has thus far handled only a small handful of cases, although developing country parties often will press for an inclusion of ICSID as the forum for dispute resolution when they are dealing with a foreign government. Second, in one of the more well known ICSID cases, an ICSID panel rendered a decision against a West German Company and in favor of the government of Cameroon and it used some very strong language about the conduct of the multinational company that was the defendant in that case.

Unlike most arbitration institutions however, ICSID has an internal appeal procedure. That is, another panel of arbitrators can review what the initial panel has done. The reviewing panel reversed the decision of the initial panel and used some very strong language of

its own to chastise the first panel for having the temerity to suggest that a multinational corporation might behave in an inappropriate way, at least without compelling evidence. That kind of decision has made a lot of parties, at least in the developing world, leary of ICSID arbitration.

One final topic that I will cover very briefly is that arbitral awards typically are very easy to enforce. There are only a limited number of grounds for a court to refuse an arbitral award. The grounds in both the New York Convention and the Panama Convention are exactly the same on this point. Since most Latin American countries are signatories of either one or the other agreement you can be reasonably confident, although it would certainly bear checking before you enter into an agreement, that only this limited list of grounds for refusing enforcement will be at issue in a case that you might handle. The list includes things like proof of incapacity, invalidity of the arbitral agreement, and public policy considerations. There are some concerns that Latin American countries will interpret the public policy exception a little too broadly, although I do not think that has happened to date.

Let me conclude just by encouraging you if you represent a client that is considering entering into an agreement with a party in Latin America, or any kind of commercial agreement, you feel uncomfortable about litigating in the home courts of that party and you think it will be difficult for that party to agree to litigation here, you really should seriously consider international arbitration as an alternative. For the most part it is quicker and less time consuming. It is probably more easily enforced in many instances. Now that the traditional hostility to arbitration has largely disappeared, I think you will find that it is a good alternative to litigation.