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The New Legal Framework for High Technology Industries in Latin America: Country Updates Part II

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II. THE NEW LEGAL FRAMEWORK FOR HIGH TECHNOLOGY INDUSTRIES IN LATIN AMERICA: COUNTRY UPDATES PART II

A. Introduction

DAVID L. TEICHMANN[8]

We are going to have a panel now on the New Legal Framework for High Tech Industries in Latin America. One could ask whether there is actually a new legal framework, so maybe it should not be put forth as a statement but as a question. Hopefully, by the end of the panel we will have a better sense of whether that should be a statement or a question.

Certainly, high technology is a growth industry not only in the United States, but also in Latin America, many parts of the developing world, and in Europe. There are a lot of different opportunities depending upon the market you are in. I am sure we will hear of some of the opportunities through the presentations of our speakers. One of the main reasons it is important, however (and remember high technology does tend to be a growth industry in areas like Latin America and Mexico), is that it is necessary for infrastructure. In order for a country to move ahead and progress as a society, it has to have the requisite infrastructure to enable that growth. We have in the areas of computers and software a multitude of issues: piracy issues, failed market reserves, internal development plans, and so on. In the area of telecommunications, we will hear about cellular networks and satellites and microwaves. In biotechnology, we will hear about new medicinal uses for plants that will be taken out of the Amazon, hopefully to be used for worldwide benefit. We will hear about some of the other areas that touch upon these technologies, such as aerospace, robotics, and advanced materials. We will hear a little bit about television and cable and video transmission. You may even hear about automation of banks and stock exchanges and things of that nature.

What we really want to think about as we hear the panel is: do we expect Latin America and the countries of Latin America to end up, as Alvin Toffler says in his book *Power Shift*, as fast economies or slow economies, and how will high technology play a role in that? How will technology be used to improve living standards for more than the elites within these countries? And, what will the impact be on integration of these economies, such as in the area of NAFTA and other trade agreements? Certainly there is a need for a creation of centers of educational excellence to tap the extensive creativity

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which exists within Latin American societies.

Personally, as someone who works a lot with software developers, I believe that the creativity that is part of Latin American culture provides a certain competitive advantage to Latin America in an area like software development. What is perhaps lacking, although there are pockets of excellence in this area, is a general reputation for software engineering excellence throughout the region. I would particularly encourage those of you who come from these countries to exert your influence upon local governments and municipalities and educational centers to put resources into developing these human capital resources.

So the challenge is to invest in the future, with scarce current resources, in countries with deficits and sometimes serious social inequities. But we are going to talk about high technology right now and how that all falls together. I will ask each of today's panelists to share his predictions, to the extent he wishes, on whether the rest of 1993 will show positive changes, negative changes, or perhaps no changes at all in the areas he addressed. And, hopefully, each will to elaborate a bit on what incentives may exist to encourage foreign technology transfers and attract these new high technology industries.

Without further ado, I would like to pass the mike to the first speaker, to my immediate right, Jay Andrews.

B. Developments in Computer Law and Related Intellectual Property Rights

JAY ANDREWS[9]

It is a real pleasure to be here and see so many of you with whom I have worked in the past. It is going to be hard for us this afternoon to cover this subject matter in a very comprehensive way. Therefore, I am going to stick with the topic of recent developments and assume that you have a pretty good handle on existing laws and existing regulations and policies regarding computers. Specifically, we are going to deal with computer software because that is the area where there have been a lot of recent developments. In Brazil, there are some developments, but Robson Barreto is going to be speaking to you about those, and so I am not going to spend much time on Brazil.

You know, if you have been to very many conferences in the Interamerican arena over the last several months, that one of the topics that is always at the top of the list is the North American Free Trade Agreement.

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9. William P. "Jay" Andrews, Jr. is a partner in the North Carolina office of the law firm of Graham & James. He practices international trade and intellectual property licensing and computer law. He is the head of his firm's Latin America practice group.

When talking about recent developments in the area of computer law, I think from my perspective that is an area that is a good road map for us as attorneys. We should consider what it is going to take to become a player in the free trade game for Latin American countries and for countries that are not part of NAFTA at this point in time. So I want to identify for you some specifics in that agreement, assuming that it will pass, and I think we are all assuming that it will pass in some form similar to what it is right now. There are several things you might want to look at. I hope this responds to Dave's request that we give a little prediction about where things might be going, because I think this is the direction that you are going to see regulations headed and that you are going to see new laws headed regarding intellectual property in general.

Getting back to the North American Free Trade Agreement, on the patent side — and this does not specifically deal with computers, but it does deal with the changes in the intellectual property laws, although it does not explicitly say so — NAFTA will cause the United States to adopt a "first to invent rule." If you are not a patent lawyer that does not mean anything to you, but it basically means that not only Mexico and not only Canada will be required to change their laws in order to conform. The United States is also going to have to make some changes, and I would put joining the Bern Copyright Convention in 1989 on the list of things that the United States understood that it had to do in order to reach agreement on an international standard for intellectual property protection.

On the copyright side, specifically dealing with computer software, NAFTA requires that software be protected as a literary work under the Bern Convention. Protection as a literary work is something only copyright lawyers really get excited about. However, it is one of the things that you need to look at when you are looking at some of the new legislation that is coming out of South America and various countries, because if that is not in there, it is going to be a bone of contention for future agreements regarding copyright protection.

The trademark provisions are pretty straightforward; trademark law is something that everyone understands and has understood for years. The only thing that is unique in the trademark section is that several Latin American countries, including Mexico, had used some restrictions on royalties as a way to deal with money flight, and as a way to deal with putting arms around certain kinds of agreements. NAFTA says that you cannot do that, at least not with regard to trademarks. So caps on trademark royalties are not going to be acceptable anymore, at least not currently under NAFTA.

With regard to trade secret protection, again most countries understand trade secret protection in a relatively common way. What is not really common is the way it is enforced. The enforcement provisions that you find under NAFTA are very similar to the Uniform Trade Secrets Act that we

have in the United States and that most states have adopted. I do not know if Florida has adopted this, but we have in North Carolina. If you are familiar with that, you are somewhat familiar with the standards that are established under NAFTA.

There are several other points, but, in very broad terms, those are the main ones as I see them that are going to be the points of negotiation, if a country other than Mexico wants to become part of what we are now calling the American Free Trade Agreement or the Free Trade Agreement of the Americas. I have no idea if that is ever going to happen. But there is an awful lot of rhetoric about it and on the intellectual property side, those are the things at which you might be interested in looking.

In terms of a country-by-country survey, the changes that are being enacted right now are relatively significant. When you are looking at intellectual property law, particularly copyright law, you have to look at two things: first you must look at the changes in the legislation and the changes in the regulations; second, you must look at how that legislation and those regulations are being enforced. One of the big problems has been that some of the laws have been on the books for many years but they have never really been enforced. We are seeing a real change in that area in several countries: there are cases being brought; enforcement is actually happening; companies are actually being fined; and people are actually being put in jail for infringement of intellectual property rights, specifically for infringement of copyright violations in the area of software. I think this is a welcome change, at least from the perspective of U.S. copyright owners and copyright owners from many countries. Frankly, I think it is something that had to happen before some countries' intellectual property laws were taken seriously. Now that it is happening, I would like to go through and let you know on a country-by-country basis where things stand.

Argentina has a copyright law that has been in existence since 1933. It is very comprehensive. Although it does not specifically cover software, since 1988 the Argentine courts have enforced it as if it did. I believe there is a bill in Argentina's Congress — I think there may actually be two of them — that deals with copyright protection. The difference between the two is whether or not software would be protected as a literary work. But apart from that, the copyright regulations and the copyright enforcement provisions that exist have been enforced against copyright owners in Argentina, pretty much successfully. The latest case was a case that was decided May 23 of last year, where the National Court of Criminal Appeals determined that criminal infringement is not insulated by the private copying provisions of the copyright law.

One of the problems you have in many laws in Latin America is that there are exceptions to the coverage. One of them in Argentina is that once you get a copy of something, it is basically yours to do with whatever you

want, within certain parameters. So the licensee was arguing that the right allowed it to basically use the material within a corporation and make as many copies within that corporation as it wanted to. Argentine courts said that would not work.

The Bolivian copyright law, which is a new law, came into existence in April 1992. Frankly, I have not seen a copy of it in English or Spanish — all I have done is see reports of it and I have seen some synopses of the law, but apparently the law does protect computer programs as a separate category of work. So it does not protect them as literary works, but it does protect them as a separate category of work. It protects them for fifty years, which is becoming the international standard.

There are a couple of problems within the Bolivian law. One of them is that it does not really state whether the compulsory licensing provisions that are in effect in Bolivia are abrogated. There are compulsory licensing provisions for certain educational materials and certain technical materials, and a computer manual qualifies as technical material. Thus, it may very well be that a computer manual is not covered fully, or as fully as one might think it would be. The other problem with the Bolivian law is that Bolivia did not join the Copyright Convention of the UCC until 1990, so if you had any work in Bolivia prior to 1990 it is not covered under the new act. That is another thing that I do not think most people really have realized yet. Other than that, there are no formalities of coverage. Coverage is automatic, and the penalties are under the penal code and under the copyright law and they seem to be pretty significant.

For Brazil, we are going to rely on Dr. Robson Barreto to tell us a little bit more about that, but in terms of recent developments I think everybody knows now that the market reserves for computers ended in October 1992, and so that is a pretty good development. The other recent development is that there have been, under the auspices of the Brazilian computer remarketers association, cases brought against dealers and distributors where their goods have been confiscated or fines have been levied under the Copyright Law of 1986. So, there is an enforcement provision and it seems to be working relatively well. It is like it is anywhere when you go to court: you do not know what is going to happen until it happens. But for the most part, if the company finds infringement they have been able to bring the action and they have been able to collect the damages that they suffered.

Chile has had a law since February 1990, and in Chile the law is relatively clear, although the definition of copyrightable work is a little bit funny. It deals with computational programs and there are a couple of idiosyncrasies with regard to that, but I think that is not in the scope of what we want to talk about. The other thing that is unusual about Chile that you probably do need to know is that, in order to be covered by the Chilean law, you have to register in Chile. So, there is a formality with which you have

to comply. That is important. There are also specific licenses that are granted to licensees under the law, and because of that it has been difficult to get warrants from judges. It also has been difficult to get the courts to grant anything other than minimal fines. The minimal fine in Chile is the equivalent of about 190 U.S. dollars. Frequently, even serious infringers come out of court with basically their hand slapped and a payment of a 190 dollar fine. The reasons are several. One of them, I think, is that education of the courts has been a problem. Another one is that, frequently, the software that they are charged with having stolen or misused has a relatively low license fee. Third, the problems with the statute and the fact that the statute allows certain licenses of the end users has contributed to the light punishments.

Colombia is an interesting case because, until recently, not too much has been going on in Colombia. Under the Colombian law, there is a presidential decree from 1989 which specifically covers software and says that the copyright law covers software. Nevertheless, because we all know that Colombia has been pre-occupied with a few other things, there really has not been a lot in the way of enforcement. I spoke with Juan Guillermo Consuegra, who is the president of Indusoft, the software industry there, and he says that there had been some actions up until recently, but they have been kind of secondary in terms of the interest of the police. It was difficult to go in and do any kind of seizures, and that is the important thing you are trying to do — you are trying to put somebody in a position where they have got to deal with you. But on March 2 of this year, just a couple of weeks ago, there was a lawsuit filed against Banco Central Hipotecario, which is a very high profile case. They are charged with having copied Microsoft Word, Lotus 1-2-3, and Windows. It will be interesting to see how that is going to proceed. Even though there is no injunction, they were able to bring the action, and they feel very good about being able to proceed with that. This is one of a series of suits that has been brought by the business software alliance, and they have been extremely active in a variety of countries. They have tied their activity with the local software dealers and distributors, and it has turned out to be a relatively effective tool.

Costa Rica has a new copyright law as of 1982. The only problem with that is, because of changes in the law and because of the Costa Rican legislature having basically within it a disagreement as to how these changes would apply, the copyright law has been suspended since the summer of 1990. It is in litigation over its validity in general and so enforcement in Costa Rica has been virtually stopped. You can register your programs in Costa Rica, but I would tell you that if you find an infringer out there, you are going to have a hard time going after him because there is no legislative background.

Ecuador has an interesting twist. Its copyright law does not specifically

cover software but has been held to authorize coverage of software. The problem in Ecuador, however, has to do with works made for hire. Just so that you understand, let me mention two things. One of them is that only natural people can be owners of copyrights in Ecuador, which means that corporations cannot. That means that licensors that are corporations cannot technically own copyright. The authors that wrote for them are the owners, which is a real problem with bringing suit, because you have to go find those authors, and they are the ones who have to bring the suit. The other problem in Ecuador is that, if you are a reseller, or even if you are the employer of an author, you cannot get all of the rights from that author, including all the pecuniary rights, and it is very unclear where the line is drawn. So Ecuador is a country where, for lack of better direction at this point in time, you do not want to send any of those software development teams that David was talking about, and you do not want to get them from Ecuador at this point in time.

There are several countries that have enacted or are in the process of enacting new copyright legislation. El Salvador has new copyright legislation that was introduced in March 1992. It specifically provides for coverage of computer software. Jamaica is in the process of drafting a new law that provides computer software protection. Mexico, as we all know, has done a really good job of changing its laws to cover computer software.

There is an awful lot of activity right now going on in Mexico with BSA and with Mexican computer software industry groups. Let me give you some idea what the latest things are — and note that I got a fax today with some of them because I was not aware of all of them. On January 16, the Mexican Procuduraria General, which is the Attorney General's office, brought an action against the Grupo Nacional-Provincial, which is a very large insurance group. They are charged with illegally copying a lot of different things including Lotus and Microsoft and some other things. That case is not far enough along to say what is going to happen, except for the fact that they seized equipment. They seized computers. You can imagine what an insurance company that does not have its computers or that does not have its hard disks is going to be able to do. I expect there will be a settlement rather quickly on that one. Just yesterday the Procuduraria General conducted a raid at Mexicana de Aviacion. Now you can imagine what they can do without their reservation systems. So there is an awful lot of targeting going on.

What happens in these raids usually is that, even though everybody tries to keep them quiet, the word gets out, and it is a question of how soon the word gets out, not whether it is going to get out. Because it usually involves a lot of police and prosecutors — fifteen, twenty, thirty people — someone will invariably call an aunt or cousin and say, "we are coming to do this so you better watch out." Then the next thing that happens is that they go on

a wild frenzy of buying up copies of the software that they are using, so they have one for every machine. And, frequently, by the time the raids take place they cannot get them all installed. So when they go in they find stacks and stacks of new copies — of legitimate copies — of the software, but they are not installed because they only have ten people or twelve people who can install them. That has been the pattern, and that is what happened yesterday from the information that I have received. It has not been just Latin American companies that have been targeted, but in Mexico there is a lot going on and primarily it is because of the cooperation that they are getting from the police and the Attorney General's office.

Nicaragua has a new copyright law as of June 1992 that specifically covers software as a separate category, not as a literary work. The term of coverage is thirty years past the death of the author. There are strict formalities, as in Chile. If you want copyright protection for your software in Nicaragua, you must register in Nicaragua. That is a problem. Panama does not have a new law, but they have a new draft of a bill (Draft Law 98) which covers copyrights for computer software. Uruguay has a Presidential Decree that was issued a couple of years ago (1989) which specifically covers software.

The last country that I want to mention to you in terms of recent developments is Venezuela. My information on Venezuela is very current. I just picked it up fifteen minutes before I walked up here. Venezuela has a new draft copyright bill. They have had several draft copyright bills that have kind of run the mill through the legislature. The current one does not protect computer software as a literary work, but has a separate protection for it. It also covers certain other works: audio visual works, and some other things. But the interesting thing in Venezuela is that, like Mexico, like Colombia, and like some other countries, there have been activities where the courts have enforced the current copyright law as covering software and have seized computers. The latest one was October 27, 1992. It was a dealer, and this dealer had the practice (which I think you all know several dealers that do) of bundling in the software with the hardware it sold. It would sell you the hardware and at no extra charge you would get twenty packages of software. Well, all of these software packages were bootleg copies. Venezuela responded by seizing the computers that these dealers had. Well, again, economically you know the seized computers are no good to a dealer who is trying to sell them and who is trying to move his inventory. So, the dealer settled and paid the required license fees six days after the suit was brought and after the machines were confiscated.

In terms of what all of this means to you and me, I think it means a couple of things. One is that Latin American countries really are becoming serious about enforcing some of the laws that are on the books right now. Nonetheless, I will have to admit that this seriousness is in part brought on

by the fact that United States and other licensors are being much more aggressive about their enforcement activities. Ultimately, however, they are finding a receptive audience, which is frankly something that two or three years ago I would not have predicted. I think that is the good news. The bad news is that we are dealing with issues here in terms of software protection that are at least ten years behind where the industry really is, in terms of the issues that are being dealt with in Europe and here in the United States. Those issues — there are a host of them, such as databases, scope of coverage and those type of things — have not even scratched the surface in Latin America. So it is going to be quite a while before all of that happens, and if you are a software owner you have to understand that if you are selling in Latin America you are still basically selling in an environment that is a risky environment for your investment.

QUESTION AND ANSWER

ANDREW J. MARKUS: It seems obvious from your presentation that there is some good news out there for U.S. multinationals and foreign software creators. Would you, from the perspective of a Latin American company, discuss whether there is an argument to be made that it is in their best interest to enforce these laws? It is certainly easy to say that it is in the best interest of the companies selling the software to get more royalties. Is it ever in the best interest of the user?

JAY ANDREWS: I think it is in the best interest of two groups: lawyers and technology owners. I think it causes more litigation, which is good for lawyers in each of these countries. From that perspective, I am very much in favor of it. One of the things that is very clear is that when you protect intellectual property you create an environment that generates and develops intellectual property. There are many studies around the world where this has been verified. One of them that just comes to mind has to do with chemical compounds in Japan. Until 1975, chemical compounds were not protected in Japan. After 1975, they became protected. Between 1975 and 1990, over eighty chemical compounds were protected by Japanese companies in Japan. In some industries, they have become leaders in the chemical compound arena. I think that is a good example of the type of productivity, coupled with the creativity that one sees in Latin America, which could be really beneficial. Thus, if these companies are involved in technology development at all, then I would think that this is a good thing for them also.

QUESTION: The software that you have been discussing is mass-produced, mass-marketed software. It seems to me that it is easier to protect customized software in countries than it would be to protect that type of software. Other than enforcement actions in courts, is there any way that mass-

produced software manufacturers such as Lotus and WordPerfect are protecting themselves?

JAY ANDREWS: Well, there are several things going on, and you are right. For a long time companies that did not have mass-produced software — that had very specialized software — have felt relatively comfortable because their technology was beyond the reach, so to speak, of anyone but a very specialized audience. Also, the market is a very specialized market. One can not go out and sell a million copies of specialized software and make money quickly. In terms of what the producers of mass marketing software have done, one of the things that is becoming more and more common is that they are including arbitration clauses in their agreements with their dealers and distributors. They also have been putting a burden on those dealers and distributors to be of assistance to them in the process. This accomplishes two things. First, at one point in time, the dealers and distributors themselves were some of the biggest infringers. That has pretty much stopped. It means that now one of the causes of action that one can bring against a dealer for breach of contract is that the dealer is breaching the license.

Second, when you have arbitration clauses in agreements, an action can be brought more quickly. Before arbitration clauses, criminal actions and seizures were brought and there was really a question as to whether or not you were going to obtain any enforcement in the country. One had to pursue enforcement via the judicial system. Now, one may want to let fifty Venezuelan policemen go into a place and raid it. Just that alone is enough to scare most people into becoming nice corporate citizens. I think the arbitration clause is one thing. Obviously, technologically, people have been trying to do all kinds of things — put bombs in the programs, put time clocks in them, things like that — with varying degrees of success. Those are the main things that I am aware of in terms of other kinds of activities that have gone on.

JORGE A. AGUILAR: I am from Costa Rica. I just have a quick footnote regarding our law. I would not like you to leave with the impression that our law is still suspended. The Constitutional Court in September or October of last year started enforcing the law.

JAY ANDREWS: Oh, great, I did not know that. That is good news.

C. *Telecommunications Regulatory Trends*

AILEEN PISCIOTTA[10]

To many of you, telecommunications may seem to be an arcane and specialized topic, but I hope you will agree after you hear some of my comments, that what is happening in telecommunications in Latin America is an example of, and in some ways a laboratory for, what will be happening in a number of industries following privatization and liberalization. You heard a lot this morning about some of the interesting aspects of the Telecom privatization transactions. I am not going to review the transactional aspects of these activities, but I will use privatization as a sort of backdrop to give you some idea of what has been happening in the telecommunications industry and what the implications of that are for the development of regulatory processes. And really, the underlying import of my comments is that it is the development of the regulatory institutions which is of great interest and importance (or should be anyway to you as counsel). This importance extends to companies that are providing services in Latin America and also to counsel to companies which do business there and which make use of telecommunications services. The development of telecommunications and the regulatory environment is of critical interest to large users as well as to service providers.

What I want to examine in this context is the role of the government. As someone mentioned this morning, it is becoming recognized that once you have privatization or partial privatization of a public services company, such as a telecommunications operator, there must be a concomitant development of a regulatory process on behalf of the government. This is a new realization in many Latin American countries and a number of them were thus ill-prepared to develop effective regulatory structures. Many of these countries are still floating without such effective regulatory structures. Regulation really is an inevitable concomitant of privatization and liberalization, and my bottom line, which I will get to for David right away, is that there is not yet really a successful model of regulation in Latin America in the telecommunications environment.

There are a lot of experiments going on there, a lot of very interesting experiments. I think that, ultimately, the experiments going on in telecom regulation in Latin America will be extremely informative for other countries,

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including the United States. It is very much in a state of flux, a flux which I think will continue for the next several years, and I think that the watchword down the road is going to be "diversity." I think that it is going to be increasingly difficult for service providers and users to have a global view of what the telecom regulatory environment is like in Latin America. This is because it will become very complex and diversified, both with respect to the treatment of different types of services in any particular country and to the treatment of telecommunications generally from a regulatory standpoint in the region. There is a fundamental question that needs to be asked when you look at the role of the government in the regulatory process, and that is, "Do you need to have a regulatory institution?" Along with the fact that many countries have not been prepared to establish regulatory entities (or to embrace vigorously the regulatory function), I think that there has been in some places a philosophical determination that one need not have a regulatory entity to serve this function. The concerns are mostly in the nature of the control of monopolies and the prevention of abuse for market power — basically implementation and enforcement of competition policy — and there is a belief that this may be left to the courts.

I think that, aside from the technical regulatory function of the ministry office, Chile is a good example of a country that has philosophically left a good deal of regulatory policy to the courts. I think that outside of the region this approach has been most graphically illustrated recently by New Zealand, which privatized a couple of years ago into a fully competitive market. New Zealand has no regulatory body at all, and has relied pretty much on its anti-monopoly enforcement mechanisms to control the marketplace. I think that both Chile and New Zealand are finding that there is a profound missing element: the development of regulatory policy in the communications industry. I think we will see some changes there. That is sort of a leitmotif.

There are, I think, some critical features of a regulatory process, aside from the fact that you need to accommodate competition policy issues, and other policy issues, as well as technical regulation. I think that there are three necessary features of the regulatory process which make it more or less effective. First, it has to have clear jurisdiction. Regulation really is an organic process. Every country resolves the structural aspects of the regulatory process differently: they decide whether there is a regulatory entity, whether the courts have a primary role, whether the ministry is involved, and whether the legislature is involved. To varying degrees, all of these institutions are involved. It really is an organic activity which should be viewed as a whole. But a very primary element of the effectiveness of this organic development is, "who has the power to do what?" Normally this needs to be specified by legislation or some other instrument at a high level

in the hierarchy. Unfortunately this feature is often neglected.

Second, there must be transparency or fairness in decision-making. Someone referred this morning to the critical element of attracting investment into a market. It really is true that, unless you have a transparently functioning government decision-making body, then you are going to have a political and commercial risk factor which will be a disincentive to investment.

Third, you need flexibility. This is really critical in the telecommunications field where you have nothing constant as technology and user requirements change. A regulatory entity or a regulatory process has to be able to embrace change and meet it and develop modifications of policies in line with certain given principles. The basic model of commercial change in Latin America over the past couple of years has been privatization. It used to be that in many countries in Latin America (I will not dwell too much on specifics, although I will give you some case studies later on), telecommunications enterprises were most often originally privately owned by foreign enterprises — including ITT — in Latin America. Through the sixties and afterwards, a number of these entities were socialized. The pendulum is swinging, and we are seeing, in a very broad sense, privatization of these formerly privately owned enterprises. In many countries — specifically Argentina, Venezuela, Mexico and Chile — privatization has occurred through the sale of controlling interests. These sales are taking place by virtue of the amount of stock sold or the incidents of control attached to the class of shares sold to a strategic investor or strategic investor consortium. Typically, there also is also sale of shares to labor and retention of some shares by the government, either for permanent retention or for later issuance. This is sort of a top-down model of industry change in telecommunications.

I think one thing to bear in mind is that this privatization model does not equal liberalization and does not equal competition. Along with the need to attract strategic investors goes the public policy of granting exclusivity at least for a certain defined class of services, normally what we consider basic services, or basically voice telephoning for a term of years. So, typically, this can be up to ten years. This is a very substantial restraint in the market. In some countries, including most notably Colombia and Uruguay, there have been failed attempts at privatization.

I think there will evolve a different approach to industry change, a more bottom-up approach. It will follow the liberalization approach for competition, and will be developed in fringe markets initially and possibly also in the sorts of markets that may ultimately form competitive backbones to the basic services carriers. In either of these models, there is a need for a regulatory presence, and I will go over some of the key issues that come up in the regulatory area in a moment. But, just to give you the foundation, whether you are talking about privatization and the re-establishment of private

ownership in telecommunications or the introduction of competition without privatization, you need to have a regulatory presence which can guide the development of competition and answer certain critical questions about pricing, market relationships, tariffing and other policies.

I will give you a brief overview of what is happening in some of the key markets in Latin America. In Chile, the regulatory entity (I mentioned it was a technical regulator) was initially established within the Ministry. It is an organization called SUBTEL. It was actually initiated in 1977, long before the privatization of the two telephone companies, the local company CTC and the long distance company ENTEL. Those privatizations were completed in the late 1980s, incrementally. This regulatory entity was deliberately set with a technical regulator to focus on frequency allocations and licensing, and other technical aspects. What has happened in the market in Chile has dramatically illustrated the need for a more comprehensive policy focus. Originally, CTC through privatization was sold to a group that was headed by Allan Bond, the Australian entrepreneur. He held his investment for a relatively brief period of time, cashed out at a great profit, and sold to TELEPHONICA of Spain. Meanwhile, ENTEL, the long distance company, was privatized and TELEPHONICA had already purchased a 25% interest.

Questions arose in the marketplace following privatization. Two essential questions were: first, could CTC and ENTEL each enter the other's market; and, second, could TELEPHONICA permissibly own interests in both these companies. These questions have been left to the anti-monopoly commission and to the courts and have not been resolved from a policy basis. I think the co-ownership, cross-ownership issue has now been resolved by the courts. I think that the competition policy issue is still pending but, nonetheless, the substantial delay in resolving these issues and the reliance on the courts for resolution has created a great deal of uncertainty in the marketplace. Even though Chile has a very vigorous telecommunications marketplace, I think there has been a suppression of growth and development because of this lack of an effective policy approach.

Argentina is another very interesting case. It attended to the regulatory process in connection with privatization, and by Presidential Decree it established a framework that included a regulatory entity modeled after the U.S. FCC. What could be neater? They just imported a model that seemed to work for some other country and then set it up in Argentina. Well, they found out about a year after the privatization was completed that this was just not working. It had a decision-making structure that was not grounded in any administrative procedure. Although Argentina has an administrative procedure law, it does not have any administrative laws which govern the internal decision-making processes of a regulatory agency. Thus, it had this commission with no decision-making processes and no particular substantive

expertise. It had a deadlock in the decision-making processes and things were at a standstill for about a year.

Well, the footnote to the creation of the Independent Regulatory Agency in Argentina was that the government got frustrated with this lack of activity and installed a new subsecretary of communications in the ministry who promptly fired all commissioners and installed a trustee. The trustee's job was to restructure the regulatory entity. Consultants had been hired to advise the government on what the new structure should be. The primary focus of this study is, first of all, whether the commission's structure is appropriate for the Argentine political and cultural context. We think it probably is not. But, also, what do you do about this lack of internal decision-making processes? Actually, over the past year, they have been making a great deal of progress toward resolving these issues.

Allow me to run through a couple of substantive issues that regulatory processes have to focus on. First of all, there must be a focus on frequency allocation. This is in the technical range, but more and more it is going to become a matter of policy. As basic telecommunications technologies become more and more based in mobile technologies — cellular, paging, trunking — there is going to be increasing pressure on regulatory policy-making to come to a fair allocation of these scarce spectrum resources. One should note that fair means fairness in assigning licenses to individual providers for these services. Another issue is interconnection. In most countries that have privatized (and even in the countries that are doing a bottom-up approach to liberalization), there is a monopoly services provider for basic services that must interconnect both with other specialized service providers, such as cellular, and with other service providers at the far end of the extension, such as rural service providers. The regulator has to determine both the technical and pricing aspects of interconnection policy.

Private networks are a very big issue for large companies, multi-national companies, and large corporations. Private network policies are among the most diverse in countries that have liberalized. Countries such as Venezuela — and I think it is really out in the front — have permitted large corporations (the oil companies, the railroads, the banks, and other utilities) not only to own and operate their own facilities but also to make capacity available to third party users. The restrictions are that they all have to use this for their own internal communications, and they cannot interconnect with the public switch network. But note there is a problem with enforcement of those restrictions, and that creates a big policy challenge for the regulator. The regulator must make sure that there is not an unfair diversion of traffic off the public switch network. Other countries are coming along because of tremendous user pressure to permit private networks, but in many cases there are restrictions. These include requirements to use the monopoly service provider's facilities and not to make capacity available to third-party users.

I mentioned competition, both top-down and bottom-up. One of the more interesting aspects of competition policy is how you define the boundary between basic telecommunication services and information services. This is going to have an increasing impact on a number of companies, particularly those doing business through electronic contracting. How you treat information services or value-added services once you have figured out who is within that classification is another issue. Do you regulate them? Do you license them? Do you let them operate without a license? Can anybody provide them? Can anyone own their own facilities? Can they resell basic services? All of these issues are going to be of increasing importance, not only to telecommunications providers but to everybody else.

I will deal with just a couple of other issues. I will start with tariffs, just so that you have an idea of what is happening here. Historically, tariffs have been terribly imbalanced not only in Latin America but all around the world. Typically, long distance and international rates are quite high, local rates are very low. This is a reflection of social policy and it is also a reflection of the fact that accounting rate agreements between these foreign administrations and AT&T typically benefit, by millions of dollars a year, foreign administrations. It is much cheaper to call from the United States to Argentina than it is to call from Argentina to the United States. As a matter of fact, there is a joke about President Menen when he sent Caballo on some official mission to the United States. Menen called him in the United States and said, "Call me back," and hung right up because it was too expensive to talk to him from Argentina. These rates have to be rebalanced. There is tremendous pressure again from the large-user community to lower the rates. There is now technological pressure, because there are interesting ring-back technologies which are located in switches in the United States. You can call the switch from a foreign phone (like in Argentina), and not get an answer. You will therefore not be charged for the call. You then hang up and the machine calls you back at the U.S. rate. So anyway, a lot of countries are going to have to reduce their long distance and international rates and increase local rates, and this is going to affect everybody, because those changes impact throughout the economy. Type approval of equipment is also something to watch. Many Latin American regulators do not have the capacity to develop technical standards for terminal equipment and they are relying very heavily on U.S.-type equipment standards.

Another interesting issue (and the last substantive one that I will mention) is financing. This is of increasing concern, not only to the basic services providers, but also for competitive services. There have to be innovative approaches to financing the tremendous infrastructure development that has to take place in telecommunications in Latin America. Right now, the densities there are on average about 6% or 7%. That means six or seven per 100 population have a telephone. Quality of service is very low. It is

going to take billions of dollars to improve the infrastructure to a level of service that is really acceptable in the international marketplace. How is this going to be financed? Internal generation can handle it, but as a nation privatizes it has less public sector resources. It will be going to the private market and increasingly there is going to be a need for innovative approaches to financing, including building, operating and transfers in franchise technique as well as project finance. Public policy-makers are going to have to be looking at how they can orient public policy to take advantage of these innovative approaches.

I will give you one short example. With Brazil, Telebras has a very ambitious program that it is trying to implement for rural telecenters. This is a project which could potentially be worth billions of dollars in revenue. They are constructing these telecenters, each of which could cost up to 200,000 dollars in a large number of communities, in rural Brazil. They intend to do so anyway. They are constructing these centers with public sector financing. They are doing a pilot project with twelve of them with United Nations development money. They have a fabulous opportunity there to capture long distance revenues and secure them and make a project finance package for the entire country. But, unfortunately, the services they are trying to provide with these telecenters are not going to bear any revenue. They are emergency alarm services, fire protection, police protection, and public database access services. So public policy has to see where the financing potential is and orient development policies to those prospects.

Great, I am at my conclusion. I am getting flurries of yellow notes here. Lessons and observations. I think we all know now that regulatory processes play a very important role in the success of the privatization and telecommunications policy-development process. I think that there are some very critical issues that come up in the development of effective regulatory processes. I mentioned three features that will need to be addressed in order to create success. Some of the problems in ensuring that those features will be included are that, first of all, there cannot always be legislative authority. This is the best way of specifying clear jurisdictional lines for a particular regulatory entity and insuring that the policy-making process is attended to. It is very difficult to get legislation passed. As Venezuela found out, they are stuck with the regulatory framework that is based on a Presidential Decree. They have limited powers and limited funding, and that is a problem. There is also a crying need for substantive expertise, and while there are a number of people who are very smart working very hard, coming up to speed quickly is a fundamental problem in the regulatory arena in Latin America. It will take several years to fix that. The role of the courts, as I have mentioned with respect to Chile, has to be balanced. There has to be a recognition that there needs to be administrative participation in the policy-making process. It cannot all be reactive, it cannot all be case by case. It

has to be proactive and it has to be deliberate. And finally there has to be attention to internal decision-making procedures. This affects the two other features I have mentioned — transparency and flexibility. This is a growth area for the legal profession in Latin America, not just in telecommunications but in a number of other industries. It is a very important area of development which is not well-examined yet. But I think that we all will be watching very carefully to see how administrative processes evolve in the future to guarantee everyone fair access, not only to the benefit of industry growth, but also to the policy-development process.

QUESTION AND ANSWER

DAVID L. TEICHMANN: If I am representing a supplier of telecommunications products, what legal advice do I give my client to help him maximize business opportunities in this environment in Latin America, speaking generally because I know it is country specific to some extent?

AILEEN PISCIOTTA: This is a very general question. I am not really sure how to address that question. It is almost too general because there would be different answers if you were, for example, a cellular service supplier.

DAVID L. TEICHMANN: What TELECOM products segment would you say would be the one that a client should focus on at this point in time? I am talking about market opportunities.

AILEEN PISCIOTTA: I would say, certainly, the fringe services. I think that value-added services, information technologies, are going to be very big, and they can probably be provided most easily on an unregulated basis or in combination with a basic services supplier. So that is a very big market, almost limitless in terms of varieties of opportunities. It is really limited only by your imagination. The next area that I think is going to be very big is the mobile services area. Cellular has burst on the scene in a big way. It is now very well entrenched in Latin America, but there are many other mobile services that are going to be very important and very big business over the coming years.

D. Patent Protection in the Pharmaceutical Industry

ROBERT M. SHERWOOD[11]

When I saw the phrase "new legal framework," I scratched my head and wondered what that might be, certainly relative to pharmaceuticals, and I will

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explain that for you. I do not want to give you a survey, country by country, on this particular subject. I do not think that would be terribly interesting for you. I will summarize instead, noting changes here and there in recent years. What I want to talk about is the process by which the treatment of intellectual property in relation to pharmaceuticals is changing (although somewhat slowly) and I am here to talk about some of the current battles. For those of you not familiar with the industry in Latin America, here is a very quick sketch of its structure. The nominal portion of the market share held by local companies, often referred to as "pirate companies" is about 20%, with the Europeans and the Americans splitting the balance. Now, of course, the Japanese are beginning to play a role there. In Argentina, the 20% is more like 60%. The Argentine companies are very aggressive, and the percentage is also fairly high in Chile.

The subject of pharmaceutical patents is highly political and has been for a long time in much of Latin America. The Latin American countries have, of course, very large populations of very poor people, and for them, any price above zero for medicine is too much. I also would submit to you that a lot of the screaming and yelling regarding pharmaceuticals prices in Latin America is really a mask for the issue of social equity.

I am going to indulge in a moment or two of economic analysis, if you will, of pharmaceuticals and particularly patents. The economic theory of a patent is that the public grants private property rights to inventors in order to achieve a public good, namely a new invention. There is a quid pro quo for this. The inventor is to disclose his breakthrough to the public in return for a right to exclude others from that invention.

As early as the 1920s, U.S. Supreme Court cases can be found saying that a patent is a monopoly, and in a lot of what I think was fairly poor reasoning, even as late as the 1970s, the Court continued to reiterate the theme that a patent is a monopoly. That theme has been picked up in the Third World countries, aided and abetted by thinkers such as Raul Prebisch, the Argentine economist who has been the tutor for many Latin American policy-makers. It is only in the more recent Supreme Court cases that it has been made clearer that a patent is not a monopoly. It may be an opportunity for "rent seeking," to use the economist's term, but it is not a monopoly. If it is a monopoly, it is a very strange one. It ends at a specific point in time. It is the right to exclude others from the invention, but not from the market served by the invention. And in fact, the protection, the exclusive right, serves to intensify what I call "technological competition." I think there are many instances where that is demonstrated, such as when two companies are searching in parallel. Each one wants to be first in the race, but this does not preclude the second from coming forward with a better product later. Tagamet and Zantec for ulcer control are good examples of that.

Now, let us look at "rent seeking," that is, at the opportunity to earn

more because of a special position. Again, attacks against patents are advanced in U.S. litigation (which are echoed constantly in the Third World, and particularly in Latin America) without mention of the patent doctrines inherent in the law which tend to constrain a lot of the "rent seeking" opportunities. I refer to novelty requirements, non-obviousness requirements, scope of claims, and matters of those sorts. What cheers me is that, more and more, economists are beginning to look at those aspects of the nature of the patent and we are getting a good marriage of law and economics in analyzing those questions. But so much of the discussion has taken place in the United States, where economic examination of the subject has naturally tended to presuppose there is a patent system that works, and this is not yet a safe assumption in most of Latin America.

I have found myself in the last six or seven years intensely occupied by the question, "what about moving this analysis into the Third World?" A couple of years ago I wrote a book entitled *Intellectual Property and Economic Development*, in which I start by saying that the best way to consider intellectual property is as part of a country's infrastructure rather than as a subject of trade confrontation. Well, that gives us a framework from which I can begin.

Let me highlight a few of the elements in the intellectual property system which are typically stressed by the pharmaceutical industry. The first is, of course, that inventions in the field of pharmaceuticals should not be excluded from protection. A number of countries in Latin America have, and some still do, exclude pharmaceutical inventions from coverage. The distinction is between a product and a process. You will find that some countries exclude one, some exclude both. And now we have the question, "what about biotechnology?" The line between inventions in the fields of pharmaceuticals and biotechnology is a line that really cannot be drawn. Compulsory licenses are of major concern to the pharmaceutical industry. The feeling would be that they should be tightly limited to very defined situations. The tendency in developing countries is to have extremely broad compulsory licensing provisions.

The mechanics of a compulsory license are that if the invention does not get worked in the country within a defined period of time, then it is thought that there is an abuse of the patent system and the invention becomes available to others under a compulsory license. That concept and the defined time period of three or four years from grant or filing were fashioned in the 1880s and became part of the Paris Convention. I always make the point that in the 1880s the state of technology was somewhat different from what it is today. Back then, I think you could fairly presume that any invention could be developed to the point of marketability within a matter of three or four years. Thus, the concept of the compulsory license perhaps served a useful purpose. Today, over 100 years later, technology often takes a lot

longer to develop and the three or four year limits serve more as a guillotine — they tend to cut off opportunity rather than stimulate technological developments. Even still in Latin America, in some of the laws now being proposed in places like Argentina and Brazil, there is a tendency to want to insist on those three or four year time limits.

The question of the adequacy of the of the term of the patent is also a concern of the industry because of the long lead times in developing a product. One of the raging debates right now is over the question of what are called "parallel imports." The patent doctrine of exhaustion runs like this: if I sell my patented bicycle to somebody else, there is a point after which my patent cannot be invoked against subsequent purchasers or users of the product. The pharmaceutical case example is this: the Upjohn sales manager in Athens, Greece is short of his budget this quarter. A Greek broker comes to him and says "I'll buy a truckload of your best product." The sales managers says "Gee, that's an opportunity I can't pass up," and he makes the deal. The Greek broker ships it to, let us say Mexico, where he sells it. Now, the product is patented in Greece and also in Mexico. The question then is whether the holder of the patent in Mexico, the market country, can invoke that patent against the products coming from Greece. Well, that issue was debated within the European Common Market, where you have a high degree of trade intimacy. The research-based industry feels strongly that there should not be, as they say, "parallel imports," whereas the "pirates" are insisting that as a matter of public concern there should be authority for parallel imports.

I suggest its something of a false issue. As a practical matter, the health authorities in Mexico are not going to let a product which is labeled in the Greek language into the country. They are going to insist that it be put into Spanish-language packages and there are not too many Greek pharmaceutical agents who are going to undertake the expense of unpackaging and repackaging in order to sell the product in Mexico. But it does become a highly emotional debate.

Pipeline protection is another issue that has become very important to the industry. Let us suppose that tomorrow Brazil passes a new patent law that has pharmaceutical patent protection. What about the pharmaceutical invention made two years ago? Under the Paris Convention, the inventor would have one year from filing for a patent in the first country to file for patents in other countries. Two years later that deadline has passed. Can that invention now be protected in Brazil, the law having changed after the invention and after the one year period for filing? Proponents of pipeline protection would say yes, there should be patent protection for the unexpired term of the patent in the originating country, as long as no one else is marketing that product yet in the country where the law just changed. In Latin America, many of the constitutions have prohibitions against retroac-

tively reaching back and taking away established private rights. Thus, some opponents of pipeline protection use the argument that this is a retroactive provision. In fact, it is only prospective, but the discussion goes on.

Two other points are important to the industry. One would be the trade secret. The trade secret is little known and is terribly important. The surveying that I have done suggests that perhaps two-thirds of the technology that is created and moves from one place to another relies upon trade secret protection. Because there is no bureaucracy and because there are no statistics to report the number of trade secrets, the importance of a trade secret is not widely appreciated. Those of you in the room who deal with technology transfers would be among those few who are aware of its importance. Trying to obtain trade secret protection in many of the Third World Countries is, I think, of major concern, not only in the pharmaceutical industry but for many others.

Finally, regarding enforcement, temporary injunctive relief provisions, and their equivalents are of critical concern. Often in Latin America, as elsewhere, the judicial systems are not up to effectively enforcing intellectual property rights, or other rights for that matter.

I thought about doing a twenty country survey of the state of pharmaceutical protection in Latin America and decided it might not be really interesting for you. I just did a little sampling of about nine countries: Argentina, Brazil, Mexico, Chile, the ANCOM countries as a group, and then four small countries I was quite familiar with: Costa Rica, El Salvador, Paraguay, and Uruguay. Only three of the nine have good systems from a pharmaceutical point of view: Mexico, Chile (with a question mark), and El Salvador. I have to give some praise to El Salvador. El Salvador, going back to the turn of the century, has permitted pharmaceutical patents. I think, actually, way back then nobody thought of excluding anything, so perhaps by default there has been protection in El Salvador for a long time. The same is true for biotechnology. Two more countries offer pharmaceutical invention protection, yet what they give in one article of the law they take away in certain other areas. Costa Rica, for example, says yes, you can have a pharmaceutical invention patented, but the life of the patent will be one year. That becomes rather a joke. In ANCOM, under Decision 313, which is the common regime for intellectual property, you can get a pharmaceutical patent but its value tends to be severely reduced by the very broad, compulsory licensing provision, and I believe there is no pipeline protection or protection for parallel imports. Also, the term of the patent is a little bit short.

There are various proposals now pending in the legislatures in Argentina and in Brazil. Those are two countries which have historically had no patent protection for pharmaceuticals or very little, at best. So now, largely because of pressure from the U.S. Trade Representative, the drafts before their

congresses would provide patents for pharmaceuticals. Instead of resisting the inclusion of patents for pharmaceuticals, the opponents of these bills are seeking to weaken the value of a patent by broadening the compulsory license, by insisting on dependent patent clauses, and by shortening the term of the patent. These devices would effectively weaken the grant of any patent given to a pharmaceutical invention. What few people recognize is that those weakening devices would affect the entire patent system, not just the pharmaceuticals. Although many of these patent laws are not very strong to begin with, it would be a shame to see them becoming even weaker if these proposals go through.

Efforts by the pharmaceutical industry to improve patent protection are spread across several fronts. For several years, there was a very high hope that the GATT Uruguay Round would produce a positive result. I think the TRIPS text, that is the section of the GATT Uruguay Round draft text that relates to intellectual property, has some very severe deficiencies in it. One of the major ones is that, if the GATT goes through and there is an agreement, countries that do not have pharmaceutical protection would be permitted up to ten years before they will be required to institute the protection. But, of course, the major problem is that the GATT round itself is in some difficulty. My own projection is that it may be dead.

NAFTA, which we hear a lot about and will hear a lot more about, has in Chapter 17 a regime for intellectual property protection which, in effect, is meant to freeze the Mexican intellectual property reforms of 1991 so that they cannot be revised. The NAFTA requirements, particularly with respect to patents, trademarks, and trade secrets, are essentially equivalent to what action Mexico undertook for itself before the negotiations began.

Another instrument for improving pharmaceutical patent protection is the Section 301 provision of the 1988 Trade Act. Section 301 has limitations. I think the industry, at one point, really felt Section 301 would help a great deal. A case brought against Brazil in 1986 led, in fact, to trade retaliation in 1987. The amount of the retaliation was calculated different ways, but somewhere between 39 million dollars and 200 million dollars worth of trade to the United States was hindered by a 100% increase in tariffs. The Brazilians simply laughed at that. They ran a 17 billion dollar trade surplus that year, so the amount of the retaliation was virtually nothing. But it did affect a few industries severely, among them the Brazilian paper industry. The process by which the U.S. government chose to retaliate was not very well-refined and the expected sting to the political system of Brazil did not take place. There was not much of a reaction. In fact, the reaction in Brazil was to go to the GATT and request that a panel be created to review the Brazilian's assertions that the imposition of the tariff was a nullification or impairment of U.S. trade obligations to Brazil. Many observers close to the scene in Washington thought the Brazilians were right, that in fact the United

States was violating its treaty obligations to Brazil. In any event, when the very first opportunity came along the United States lifted the retaliation on the promise that the newly-elected Brazilian President Collor would introduce a bill to correct the situation. That bill has finally moved forward to fairly active legislative consideration. On a down note, however, there was a hearing a couple of days ago that was not very promising in terms of passing an adequate intellectual property law for Brazil. So much for Section 301.

A few months ago, somebody told me that the most effective means of putting pressure on Latin American governments has been a steady drumbeat of questions from visiting U.S. officials. Every U.S. official who comes to town, from whatever agency, whether it is State, Treasury, USTR, or whatever, always asks first, "what about intellectual property"? This steady drumbeat, I think, has had quite an influence on the thinking of many of my counterparts from many different ministries in many of these countries. The opportunity to raise that question comes up in bilateral investment treaties, science and technology agreements, and so forth.

Finally, another approach in which I have been very much involved and which I find quite fascinating is this: about a year ago, the Inter-American Development Bank asked me to go first to Paraguay, then to Uruguay, then to Costa Rica and El Salvador to do a diagnostic of the intellectual property systems there. My report was then factored into a program of investment sector loans which the Bank is now working on. I am not a party to what has happened since, but I have been told here and there that there have been some shocks felt within some of those governments as the IDB threatens to withhold loan money if the intellectual property system has not changed. It is too soon to know what will happen in the long run.

I want to say a few words about biotechnology. I think the greater opportunity for inventions in that area in Latin America will be in agriculture. A little bit of biotech will go a long way to improve the agricultural sector in so many of these countries. I have talked with a number of people in the World Bank who are working on agriculture. They say that this is absolutely right, and they have been trying to encourage developing countries to give more attention to biotechnology in relation to agriculture. But the issue that always comes up, if you are going to build that route, is what about the ability to protect through patents and other devices the results of research leading to advances? In much of Latin America, certainly in Brazil and to a degree in Argentina, we find elements of the Catholic Church speaking up strongly against patents for biotechnology.

The Biodiversity Treaty is, I think, a distressing development in relation to intellectual property. The treaty itself, as I read it, is not much more than an aggregation of slogans. It will be a legislative drafter's nightmare when trying to figure out what it really means. But what it is being taken to mean is that patent exclusivity and other intellectual property protective forms

should be suspended under the banner of environmental protection. In effect, I see the very same people who for years were opposed to intellectual property protection without much success, now reentering the debate through the environmental protection door and trying again to minimize or reduce the intellectual property protective systems in the Third World. So people need to do some careful work in explaining the law of the Biodiversity Treaty and the kind of suspensions of intellectual property it threatens.

A few weeks ago in Brazil, I met with the man in the Ministry of Science and Technology who has been charged with figuring out what the Biodiversity Treaty means for Brazil. What must they do to comply? This man, a biotech scientist, recently made an invention which he patented in Chile and Europe, but it could not be patented in Brazil. I have no idea what the treaty will mean for Brazil and I think it is only going to hurt Brazil.

What I want to talk about a little bit more are the sources of resistance to improved protection. Obviously, the local pirate companies that are doing good business will protest. They tend, in some countries, to have political influence. In many, they tend to provide funds to idealogues, nationalists, and those who function out of anti-political economic theory, so that they can make public arguments. What few people understand, and therefore attack, about intellectual property protection in their country is weakening the country in a number of critical areas. One, for example, is venture capital. The willingness of private funds to back start-up companies with new technology is very severely handicapped without adequate protection. Human resource development — particularly the ability of larger companies to conduct real research in-house, to grow science technology capability there, and to give career incentives to students — is all diminished, and university research has not found its way to the marketplace.

Let us speculate a little bit here about what is likely to come. Even if the GATT round were to be concluded and the text of the TRIPS portion of that agreement were to become an international standard, it is too broad, too sketchy, to lead to specific mandates for legislation in these countries. And so, I think a great deal more education is still needed to show these countries why strong protection is beneficial.

I think it is too early to know exactly how the Clinton administration is going to implement the standing legislative capabilities they have available under Section 301. By the end of April, the annual review for GSP and Section 301 actions will be completed. At this point, the working level officials must be conferring about what they intend to have happen. I think that there are distinct limits to what can result from forcing legislation on these countries. It is one thing to force a tariff down: on the day appointed, the tariff comes from 40% to 20% or whatever and you can see whether that happened. If you force a country to install an intellectual property system, there are at least a hundred ways in which the patent office can defeat you.

The system is so highly discretionary in some of its concepts that unless the country is willing, and accepts a stronger law because it has benefits for the country, any reform which is purely the result of external pressure will likely not work well.

And so, I would like to conclude by saying I think that building a case which demonstrates to developing countries that they will benefit — that an effective intellectual property system will stimulate their own people to become much more active and contribute more to their growth potential — is extremely important work. I have been involved for a dozen years with a multi-industry group of companies which has been doing precisely that in Mexico. About seven years ago, I was asked to begin a parallel effort in Brazil. It is very difficult to try to change the mindset of countries so that people understand the ways in which the country will benefit, but slowly we are making progress. I have developed the perception that there are many individuals in most developing countries who want to do things in science and technology, but who are frustrated because they know intuitively that any results they attain will be at risk because of the lack of effective intellectual property protection. Bringing these people together is part of what we are doing in Brazil.

There has been reference earlier this afternoon to the question of enforcement and at lunch I was suggesting that an interesting theme for this group next year would be to look at the rule of law and the enforcement of private property rights throughout the developing world. As I see it, we have economic liberalization being promoted in many countries at a fairly high level. It is seen as privatization, opening of borders, balancing of fiscal budgets, and so forth. As these reforms are made, less happens in the economy than might be the case because there is a second layer of reform that needs attention. It includes social equity, and very importantly, the effective and efficient functioning of the courts which calls for judicial independence under the rule of law. Without that, economic systems shifting away from state command models to emphasis on private decision-making will not function terribly well. Whether these countries are going to be in the fast lane or the slow lane is what is at stake. My sense is that there are opportunities galore in Latin America for moving into the fast lane. Science is exploding in so many directions so rapidly that even the largest companies cannot keep track of all that is happening, even in their own fields. Dow Chemical reserves a significant portion of its research budget and is on the lookout for little companies, seeking to develop relationships with them. Why? Because often two or three very bright people working in very modest circumstances will be advancing technology in some niche faster than Dow. There are a great many people in Latin American who can do this, given the opportunity to have their results protected.

So I see a tremendous opportunity for Latin America, but the lack of

intellectual property protection may prevent its realization. As to what may happen in the balance of this year with respect to reform in intellectual property, I think that in Argentina the issue will continue to sleep. Nothing will happen. In El Salvador, the expected new patent law will be better than the Mexican law and the copyright law will be very acceptable. Mexico, interestingly enough, even after the law changes made in 1991 — which were major, significant, very positive, and have formed the basis for NAFTA — is quietly thinking about still further improvements. And, in Brazil, up to about a week ago, I would have said the law will pass in about a month and a half. I would have said it will be a fairly poor law, but it will get the USTR off of the back of Brazil, and Brazil will have to revisit the question of the law's influence and undertake further intellectual property reform in another three or four years. But, in the last week, I think things have turned even more negative there. That is my sketchy forecast of what may happen. Thank You.

QUESTION AND ANSWER

DAVID L. TEICHMAN: In light of President Clinton's current pressure, in terms of healthcare reform and some of the implications that likely will result from his healthcare reform initiatives, there is an assumption that prescription drug prices will either come down or there will be great pressure for the companies to drop the prices of prescription drugs in the United States. Assuming you accept that assumption, do you think that might in any way cause multi-nationals to be less able to consider alternatives in dealing with some of these other countries, for example, less willing to consider trading off patent protection that is acceptable to them for some kind of accommodation on reducing prices so some of those social inequity issues will go away?

ROBERT SHERWOOD: I do not think I can make any assumption on where Clinton's plan is going to go at this point. What I will say is that, certainly in Argentina and Brazil, Clinton's plan is received as an attack on the pharmaceutical industry, and as license to attack the industry in those countries. In an attempt to build up his political base, the new President of Brazil has made quite an onslaught on the industry — allegations of price fixing, monopoly, and so forth. As with the patent system down there and attempts to reform it, those who oppose the reform are also taking courage from the Clinton approach to the pharmaceutical industry. There are false reports circulating in Argentina now that Clinton plans to reduce patent protection for pharmaceuticals in the United States. Maybe I missed something, but I read the papers fairly frequently and have not heard that. As to whether pharmaceutical companies would behave differently in Latin America because of what is going on here, they are entrepreneurs and they will behave as they are able to in any setting in which they find themselves.

GEORGE FOLSOM: My name is George Folsom. I was the former Deputy Assistant Secretary of the Treasury making those comments about IPR and visits to Latin America and what it involved. I am very glad to meet someone who is actually in the trenches helping them to draft the elements, the diagnostic, that deal with the IPR. My responsibilities were not just in multilateral development banks in depth, but also in implementing the EAI. I want to give you a little bit of good news in terms of future tools, because as a practicing attorney (because we are always concerned about getting paid in fees), what I have to say is directly related to that.

We negotiated so-called investment sector reform loans with the countries I am going to name. In every loan other than the loan with Chile, I had the bank put in IPR as a condition of the loans. The way it is to be implemented is that the loans are not disbursed all up front, they are disbursed in what we called tranches, over a series of years. So, if the country meets the conditionality of tranche number 2, which may include drafting and submitting IPR statutes, then that money for tranche number 2 of that investment sector loan with, for example, Uruguay, will be released. Same thing for any of these countries. The countries with which we negotiated investment sector loans are Chile, Bolivia, Jamaica, Argentina, Uruguay, Colombia, El Salvador, and Paraguay. The last four out of five we did in December and January, right before we left office. I know they have ISL's under negotiation with TNT, Honduras (which has been struggling back and forth over several years), and Guatemala as well as, eventually I hope, Peru. Ecuador I do not know about really.

The point that is important here in terms of IPR is, once again, the leverage. As counsel, we should try to follow the progress of the development of the tranching of these investment sector loans to make sure the conditionality is actually met. In addition, with these new investment sector loans that are coming up, when you go back home to your capitals to try to liaise discreetly with the Ministries of Finance or Planning — whoever is negotiating the investment sector loans — find out if the perfect conditionality is in there that will benefit your future client.

In terms of IPR and the relationship between not just investment sector before, but also trade, Miles Rochet and I worked together very closely. He was and still is the USTR (representative) in charge of Latin America. We developed sort of a tandem strategy to work together, using various leverages, to be able to get better IPR, as well as investment sector reform. That is to say, not just debt relief but also trade. So, Miles specifically stated at an OAS meeting on trade last year that if a country does not have an adequate IPR regime, the United States will not negotiate a free trade agreement with that country. I say this not to suggest that this is putting on heavy pressure, but rather in the sense that it was important for the United States to make that statement for countries to work toward that goal, because we all know

it is a very difficult political and economic step to be able to take as well as implement. But with regard to implementation, this is where the fee element comes in. Not only did we put IPR in the investment sector loans, or had them put them in the investment sector loans, but I was also the chief negotiator for another major instrument of the EAI, the 13.5 billion dollar multilateral investment fund.

Basically, this fund is designed to be able to be used to help pay for anything. I got investment reforms defined very broadly: anything that will help a country develop a better investment environment. And that is not just IPR, but also capital markets, environmental issues, and administration of justice. Now the fund was legally signed by twenty-two countries in February of last year. We brought it into legal establishment around the second week of January. We (the United States) contributed 500 million dollars over five years. The Japanese contributed the same amount of money. The rest of the money is coming from the Europeans, the Canadians, and the Latins. And, I might add, even countries like Brazil signed the agreement.

In terms of funding levels, the money that is in the bank is basically the billion dollars — the 500 million from the United States and the 500 million from the Japanese. The rest of the countries, absent three other countries, have not yet passed necessary implementing legislation to allow them to make their contributions. Thus, money from the multi-lateral investment fund can in fact, for example, be used to pay for the development of IPR statutes and regulations, the administration of the IPR regime, the training of the personnel that are needed to purchase the computers, and the software that is necessary to run an IPR license regime in an efficient and effective way.

Running the regime is the other step. Reform is not just development of the statutes and the enforcement — it has to be made easy and quick and simple for countries in the region to be able to operate. Finally, monies are available out of the fund to be used to pay for the training for enforcement. To reemphasize what Bob said, when I traveled in the region it was obvious how fiery a domestic political issue IPR was. I was not as familiar with IPR and all of its different elements with regard to industry benefits as you all have become this afternoon. It is absolutely essential for arguments to be made as to why IPR, or an effective IPR regime across the board, is, in fact, in the long term economic development interest of the countries. The argument must be made on a country-by-country basis, because otherwise those draft bills will continue to languish in various legislative chambers. What I have learned is that the people who are fact in favor of continuing the status quo do lobby their legislators very hard not to bring those bills out of committee.

ROBERT SHERWOOD: I would agree that the problem is selling the

concept that strong IP benefits developing countries. The case for this has been built. It is available. The issue, as in selling NAFTA, is how do you build a coalition within the country that is willing to stand up in public and argue for the change? The book that I put out a couple of years ago contains the case.

I find, interestingly, that the USTR is more and more using that as they negotiate. The problem with what you are discussing is that, within the IDB, there are no staff people that have a strong knowledge of what intellectual property is. I have, for example, written up a diagnostic of a country's system and identified twenty problems. I have found the IDB staffer assigned, knowing little about IP, may pick the least of the problems and push it forward as the first priority for the country to correct in the first tranche. I would like to talk with you more about this because, within Treasury, there has been a paucity of knowledge of the subject which further diminishes the opportunity that is there. I make the point that a Section 301 action strikes against the private sector interests in a country, whereas, the withholding of an IDB loan hurts the pocketbook of various ministries, so there is a higher level of interest and attention, I would say, through this instrument. I think it is something that needs to be built in terms of institutional processing of the demand, or the making of the case that there should be a change. The idea that intellectual property is beneficial for these countries must be sold. We have had a lot of experience in these two ad-hoc groups, Brazil and Mexico, and, in a sense, what I am trying to do is bring that to the IDB process.

GEORGE A. FOLSOM: Let me give one further opponent of implementation to show you where all the linkages are. For the United States to vote in favor of the investment sector loans (or even debt reduction) we had to communicate not just Treasury to Finance Ministry or Planning Ministry, but also by marshalling all the relevant agencies of the U.S. government. This was done in the form of a special committee that I would chair to decide if the investment sector loan is good enough for the United States to vote in favor of and also, if these reforms give the United States the expectation of significant enough reform to be able to grant debt reduction through Enterprise of America's Initiative. I say this in the sense that we have a lot of cooperation with the Department of Commerce and the USTR but Treasury is not the repository for knowledge on IPR. I just picked that up because I knew it was of major interest to the administration at large. What the IDB was doing the last time I looked (which was December-January) was to contact people like you, instead of trying to develop the in house expertise. They also have evidently begun to develop a relationship with WIPO, The World Intellectual Property Organization. David, my question is "is WIPO going to work? Is it going to be any good?"

ROBERT SHERWOOD: The quick answer is this: in some areas they are

very good; in others they are not so good.

E. Brazil Country Update

DR. ROBSON G. BARRETO[12]

As a Brazilian and as a practicing lawyer for ten years, it is very hard to be optimistic, even though I would say that most Brazilians have the tendency to be optimistic most of the time. I am certainly very glad to be here, but at the same time very concerned about the situation, because, again, Brazil is certainly in the spotlight for several things and most of them are not that good. Looking at the cover of the course materials, I am even more concerned. I am not sure if on the map Brazil is highlighted or whitened out. We Brazilians have seen a change in direction that was led by political reasons. Some say criminal reasons. This, of course, has dramatically changed the environment for business enterprises in Brazil at the time. Brazil is a hard country to guess about in any event, and this would make anyone's task more difficult. In the handout materials I tried to cover as much as I could. At least three of the points, coincidentally, were already touched upon by the three prior speakers. I will discuss how those points will impact high-technology companies doing business in Brazil. I also have been asked to do a little of what would be a general political, economic, and financial country update for Brazil. I guess that is needed to understand how we got to the current situation from the political standpoint.

Brazil has gone through tough political situations in recent years, starting off with the Constitution of 1988. I guess one could wonder what would happen in the United States if you were to start off from scratch and try to write a new constitution today, under the media press and all that. So, in 1988, Brazil's Constitution came out. It was certainly not perfect by any standards, but it was a positive development in certain areas, especially in human rights. Right after the Constitution, we got the first direct presidential elections in about thirty years in Brazil, the first since the military regime took over in 1964. Then we got to President Collor's election. It is very important that you understand how Collor came to power. He was very outspoken, always leading toward modernization of the country. At the time, for most business people or people involved in business, he was the best choice. And he had a close call in the end with Lula, a leftist party member, in the second and final round. Collor did make good on his words, at least in the beginning. His administration took excellent initiatives. Actually,

12. Robson G. Barreto practices law in Rio de Janeiro as a local partner of Veirano e Advogados Associados, a Brazilian correspondent office of Baker & McKenzie. He received his law degree from the Faculty of Law of the Rio de Janeiro State University in 1984 and also graduated from the Getulio Vargas Foundation in Corporation Law in 1985.

most of the things I am going to touch upon in a minute are still being generated by Collor's own initiative. And I guess that is a good sign — that he was as well-intentioned as he could be at the time. That, however, does not necessarily mean that it would hold him in power after all that happened in Brazil.

The impeachment process was particularly painful for Brazil because of the personalities of the two persons that were trying for power at that point. On one side you have Collor, who was very much business-oriented and going in a direction that everyone felt would be good for business and good for Brazil in general. He was trying to get rid of the talk of Brazil being first in the Third World, but perhaps instead being the last of the first. The impeachment process was not necessarily a decision between Collor or Itamar, for that matter. The vice-president was involved. Actually, he was picked up by Collor himself because, like Collor, he was sort of a lone-runner without much political support — or at least without much political clout. The impeachment process was by no means a choice between Collor and his ideas and Itamar's, or what our fears were about Itamar being in power. I guess most Brazilians were left with no choice whatsoever but to support what otherwise would be a painful process that was unprecedented in the recent history of any modern democracy. Even though some say otherwise, I would contend that Brazil does not have a social democracy. I would also say from a political standpoint, as a Brazilian citizen, I am very proud Brazil was able to overcome such a difficult political situation guided by the political institutions it had to work with at that time. However, the work is not yet done. I guess there is much ahead of us in this political scenario, one which raises concerns about what Brazil's future should be. First of all, needless to say, Itamar has very different beliefs than Collor had. Itamar is certainly more conservative, even nostalgic to some extent. Some time ago (this is not a joke) he was meeting with Autolatina, a joint venture between Ford and Volkswagen, trying to get the old Volkswagen back on track. It initiated a discussion on whether Brazil would actually be going back in time, and that was pretty much true.

The 1988 Constitution left us two inheritances, both of which will be forthcoming in the near future and will be difficult to deal with. Neither is predictable, but let us give it a try. One of these is the so-called plebiscite. It is more of a popular referendum in which Brazilians will get to vote in a general election on which form and system of government they want for themselves. On one side, you have a republican system or a monarchy, and, on the other side, a parliamentary system or presidential system. The advertising on TV and so on for each of the groups started about a month ago. I guess chances are that this plebiscite is going to take place on April 21. We are either going to have no change at all (in terms of Brazil remaining with a republican presidential system) or we are going to end up

with a kind of parliamentary system in which, for example, the president could be tied up (or the prime minister could be tied up) in the hands of Congress. For example, the president or prime minister might have no dissolution powers. That is kind of a hard guess, but that may very well be what will happen, specifically with the kind of Congress that Brazil has today.

We also have the upcoming congressional revision that was called for by the 1988 Constitution. This congressional revision is aimed at making whatever adjustments that were deemed necessary in the course of these five years, and being able to make those adjustments by simple majority, without the required supermajority of Congress that will be needed otherwise. There is not much hope, in my personal opinion, that things will change dramatically from this constitutional revision, at least not the way I, as a Brazilian, would like to see the change.

One of Collor's legacies was one called the "big amendment" to the Constitution. That is still pending in Congress, but after Collor's process of impeachment and so on, it has not been talked about very much. There is no group that will be lobbying or pushing for this particular big amendment's approval. However, some changes are expected in line with this constitutional revision. One of them, for example, could be in the labor area. As most of you should know, Brazil has a long list of statutory labor rights thrown into the Constitution itself. That, needless to say, creates a very rigid system for the labor force and for employers in general, not necessarily allowing the kind of flexibility that economic recession could otherwise dictate.

One of the areas where we could see a little bit of change is in the mining business. Not everyone agrees that excluding foreign-owned companies from the mining business in Brazil was such a good idea, since investments have decreased substantially ever since. Thus, we might see this change. Again, there are a couple of structural things that I would say perhaps should be changed in the new constitutional revision, but chances are that Congress will not be in line with any of those changes. One of them would be the very composition of congress. One of our legacies from the military regime was that the military controlled the congress by giving different representation to each state in the house of deputies. For example, well-populated and developed states like Saõ Paulo have almost as many deputies in the lower house as does the state of Bahia, despite the fact that Bahia does not have a tenth of the economic importance of the state of Saõ Paulo. Thus, the balance of power is something very unstable in Brazil right now. Because Congress itself is supposed to be handling those changes in the future, it has had to be optimistic.

One other area that could see a major change — and again, it is in everyone's interest, especially in the business community — is the tax system. Brazil is well known for having too many taxes, not just too much

but too many. We have about fifty-four taxes, not including one that was created last week, the IPMF. Everyone agrees that it is impossible to control the economy by just adding complexity to it. The government has always complained about not being able to curb tax evasion. With that many taxes it is easy to perceive why the government is not able to control evasion.

On the economic and financial environments, I would say that Brazil's economy has been going more and more underground. What the government calls tax evasion is more in line with people doing more kinds of informal business than they would otherwise do in other countries. We have had some ups and downs, and I guess most of the ups are somewhat related to what Collor did in the past, which is still providing some good and positive effects to the economy as a whole. The downs are, I would say, more recent.

On the good side, since last year we have had the abolition of the so-called supplementary income tax. For those of you who may not be familiar with that, that was a 40% to 60% confiscatory tax on excess dividend remittances out of Brazil. Fortunately for everyone except the auditors who calculated the tax, it now gone. As of this year, we also have a reduction from the withholding of income tax which is levied on dividend distributions out of Brazil. That has been reduced from 25% to 15% and, again, there will be no excess remittance taxes whatsoever. In an earlier tax reform, Collor lowered the corporate income tax rate brackets from a range of 30% to 40% to a range of 25% to 35%. That should not in itself provide the effect, but it is also, as a whole package, a good and positive sign of what was meant to be done. Brazil's stock market is not necessarily a hot issue, but there is still a lot of activity down there in terms of Annex IV investments, for those of you who are familiar with the expression. The rules of the game are pretty clear about how you invest and divest out of the Brazilian stock markets. They are clear even though, now more than ever, caution should be exercised in terms of your basic choices in investments in Brazil. The stock markets are extremely volatile in Brazil. Prices go up and down by mere gossip that comes from the government itself from one day to the next.

In recent months, we also have had in Brazil a number of outside placements of medium-term notes, Eurobonds, etc. That is meant to decline in the subsequent months, basically for two reasons. The government itself has gone into several changes in the underlying regulations. For example, there was in place during Collor's administration a regulation that would exempt interest payments out of those financing schemes for a transaction that would have a minimum term of two years. That was extended first to thirty-six months and now to five years. Because of that, and because of the decrease in the credibility of Brazil's economy as a whole, interest rates have gone up, reflecting the higher risk to investors. So, I would say in a couple of months most Brazilian issuers will no longer feel that interest rates are going to be that attractive.

Still, I would say that a good sign left by Collor is a change in the mentality of the central bank. The central bank of Brazil, as you may know, is a regulatory entity for foreign investments. The central bank has made a strong effort in terms of putting the regulations in writing. In the past, some were not even written, although the central bank applied them as rules. The central bank is very open and has been working closely with several foreign investment groups in Brazil to try to come up with (1) written rules (which is a good change in itself); and (2) reasonable rules that should be applied to everyone without necessarily giving the central bank too much discretionary power.

Unfortunately, the bad news is more recent than the good news. I have been out of Brazil for two weeks, so before coming here I actually had to do a little bit of updating myself, and found that about last week Itamar Franco was finally able to push through Congress another so-called fiscal tax reform. As one of the main features of the tax reform Itamar created a new tax. It is a .25% tax that would be imposed on each and every check clearance in the bank system. Needless to say, you are going to find there is a cascade effect to this tax, because it actually applies to the same money over and over again as it circulates throughout the economy. There are some rumors coming out of Itamar's own government saying, given the reluctance of everyone to accept this tax lightly, Itamar will not issue implementing regulations for the time being, postponing those for as much as a year until everyone gets used to the new tax. It is hard to believe, but Itamar also has proposed (and actually pushed through Congress) some new income tax regulations especially for legal entities in Brazil. These regulations basically try to consolidate some of the existing rules and establish more complicated (and, I would say, time consuming) requirements for income tax filings. From now on, some companies may find themselves required to prepare monthly balance sheets and file monthly income tax returns in Brazil.

Brazil's problems in the economic area, just to cite a couple, are the poverty of the people, government deficit, and, of course, inflation. Unfortunately, most of the biggest problems of the Itamar administration were in trying to get a plan to curb inflation somehow. In *Time* this week, I came across a piece of information that, as a Brazilian, I have no reason to doubt for a second, which is that the compounded twenty-five-year rate of inflation for Brazil is said to reach the number of 1,825,059,944,842.56%. So, one should wonder how Brazilians deal with that kind of inflation. I should say that is a simple answer: we have something that is called monetary correction. It is a way — at first, a very clever way — of trying to live with some inflation. It is basically an indexing system that allows one (regardless of the currency that is involved) to try to establish what would otherwise be the price for a product or service. Monetary correction could sometimes work its wonders, but it does have its evil effects. One of them

is the inertial effect. Inertial effect means that, after a time, people start predicting inflation at a rate equal to or greater than the preceding month's rate. This basically means inflation will never come down, because no one will take the risk of predicting inflation that is going to be less than the previous month's inflation.

My guess for what should be the trend for Brazil in the economic area (and I guess there are several Brazilians here that might dispute this, and I see their points), would probably be something in line with the dollarization plan like Argentina used in the past. First, there are now somewhat successful results of the Argentine plan. Second, Brazilians tend to look at their currency as something meaningless, so if it were to have a reference like the dollar, it would probably work more in line with what otherwise would be a price freeze than would anything else. That would be the only way I see to break the inertial effect of monetary correction without establishing a so-called price freeze, which I guess most Brazilians would fear today.

After the general overview, the three speakers touched upon specifics. One of them I would like to bring some news on is the computer area. As of October 29 of last year, Brazil abolished the so-called market reserve. Basically, from that date on there would be no barriers, other than tariff barriers, to keep a foreign-controlled company from doing business in the computer area in Brazil. However, in a trade-off, Collor used tax incentives to push through the abolition of the market reserve. Some of them would apply to both Brazilian and foreign-owned companies. Collor, in my view, wisely decided not to implement those regulations for as long as he could, because (again, as a trade-off) I feel that those particular tax benefits were aimed at creating a different and disguised form of market reserve in themselves, especially the IPI, which is our federal excise tax. I just heard from Paul Mason, out of Digital Equipment, that Brazil recently extended the IPI extension that was in place until March 31 of this month for another two years, while discussions are continuing on the implementations rules. That is actually good and surprising news at the same time, because I was under the impression that they were going to couple the end of the IPI exemption with an implementation of rules or tax benefits that would otherwise benefit more Brazilian companies as opposed to foreign-owned corporations.

On the telecommunications issues, I guess, I would just like to touch upon a little bit of what is happening in Saõ Paulo with the cellular phones. There is a real court battle going on right now in Saõ Paulo. As you may know, for telecommunications purposes, the cellular phone was divided into two bands. That was the way the government found to accommodate things. Band A would be for state-owned companies that were concessionaires of public service to run and operate, while Band B would be subject to a bidding process in which private groups would get to participate. I hear that

both Band A and Band B are now stalled in Saõ Paulo. Band A stalled because of injunctive relief granted in the bidding process for the acquisition of the equipment by the public-owned company. On Band B, although the commercial proposers are required to be filed with the statutory entity by March 22, that is said to have another injunctive relief on the way.

Basically, again, as a Brazilian, I would say it is very hard to predict where Brazil is going right now. What I would tend to believe is that, unfortunately, what Collor stood for in the process is now taken away by a conservative person like Itamar. Itamar is a very old politician from the countryside of Brazil, not necessarily open-minded by any means, and is certainly not likely to move in the direction that general businessmen would like him to. He is, I guess, a set-back from what Collor stood for, things which did not have anything to do with why Collor was thrown out of power. As a Brazilian, my hope is that the change in the people's mentality which came out of public participation in the impeachment process will lead to a change in the mentality in the politicians themselves, hopefully in the near future.

In the short term, perhaps in the next two years, who knows what will come out of the plebiscite. We are probably going to see some old faces back. Lula is certainly one of the front-runners for the presidency, as is Brizola, the governor of the State of Rio de Janeiro. We are going to see Quércia, the former governor of the state of Saõ Paulo running as well, and certainly someone from the Social Democrat party like Ciro Gomes, the former governor of the State of Ceará, and so on. I guess Brazil's best bet would be in anyone but Lula or Brizola. Those two are certainly not in line with the kind of thinking that would lead to the changes that were going to be implemented in Brazil. What I can say in an optimistic view, is that Brazil's potential should not be overlooked. It has been said before (I guess we can see it from the map) that Brazil, being as extensive as the continental United States, and having around half of the Latin America population and 35% to 40% of its economy, should, despite all of these negative effects, always be in line for consideration. And let us hope that is still the way we come out in the following years. Thank you.

QUESTION AND ANSWER

ANDREW J. MARKUS: I have heard people speculate that the problem with Collor was really an effort by some of the import-substitution minded people in Brazil to keep the economy closed and to keep certain industries protected to the extent they could. I wonder if you have any viewpoint on that?

ROBSON BARRETO: I guess that was actually Collor's own point in his defense. Again, Collor was overthrown in a political process. From a

criminal standpoint, he is under prosecution by the Supreme Court right now. He is under indictment, and it is going to be a long process. But I guess for the import-substitution types it was just a lucky coincidence. For some, like, for example, even Minister Marcilio Marques, who had a double personality problem, or for others that just felt that Collor's new ideas were inconsistent with the kind of old politics they were used to, it was just lucky coincidence. Collor was someone that had no political support as such in Congress, there was no strong party behind him. Public pressure was to take him out at whatever cost. I guess our cost is Itamar and we are willing to take that in lieu of what would otherwise be Brazil's image before everyone else in the world.

III. LATIN AMERICAN AND REGIONAL TRADE ALLIANCES: COUNTRY UPDATES PART III

A. Introduction

L. JANÁ SIGARS[13]

This morning's session of our conference will focus on the theme of Latin American regional trade alliances and integration, specifically NAFTA and Mercosur, which are two vehicles designed to help propel the economies and business in all the Americas to a more advantageous position. Whether you are representing a consumer goods company, a heavy industrial manufacturer, a grocery chain, a car dealer, a bank, a borrower, a high tech company, an employee group, a government agency or just about anybody else under the sun for that matter, I think it is fair to say that NAFTA and Mercosur have something in them for all of us and our clients. I think our challenge in looking at those prospects is first of all to find what is in them for us and our clients and second, to try and develop some kind of strategy for dealing with them, to leverage the positive for ourselves and minimize the negatives. The first panel, the NAFTA panel, will be looking at NAFTA from a high altitude, high plateau view. It will be, in many respects, a macro-view and, later on, one of our workshops will be looking at NAFTA from a micro-view: the view of a multi-national company doing business across the borders in the three NAFTA countries in the computer industry. Our second morning panel on Mercosur will be hovering at a more or less intermediate altitude in that it will be talking about the implications of Mercosur for multi-national companies in general.

13. L. Janá Sigars is a shareholder with the law firm of Holtzman, Krinzman, Equels, Sigars & Furia, P.A. in Miami, Florida. She specializes in international commerical transactions and business law, including foreign and domestic licensing and distribution, intellectual property, product development and technology transfer, foreign trade, and related matters.