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Latin American and Regional Trade Alliances: Country Updates Part III

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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.

As you know, NAFTA is a recent hot topic for lawyers and for business. It was catapulted to the front page of American and Mexican popular consciousness by a few notable quotes from an obscure guy from Texas named Ross Perot last summer, and ever since then it has more or less stayed in the headlines. Our first panel is going to deal with NAFTA's status and prospects. Many of us have lots of questions about NAFTA, such as how realistic its chances of passage are in its current form? When would it be implemented? What kinds of surprises are in store for us now that the Clinton administration is in power? How will the Mexican government react to any new American proposal to change it? What will be the socio-economic impact across the border of NAFTA? There are lots of pieces to this jigsaw puzzle, and hopefully our panel today can help shed some light on them. Certainly Ambassador Moss, at his lunch yesterday, gave us some food for thought on NAFTA, and hopefully we can continue to digest the meal today. Our panelists today are very distinguished and they come from the United States and Mexico.

B. NAFTA: Status and Prospects

JEFFREY BIALOS[14]

I am here to give the view from Washington on NAFTA. What I would like to do in the short time I have is to focus on three basic areas. One is the need for people to better understand the basics of NAFTA. What does it really mean? The second area is the focal points of the policy debate that is now raging over NAFTA — the environment, labor and safety and jobs issues. The third area is the politics and the process of NAFTA, the fast-track process.

Let me turn to the first point. What is NAFTA, what does it mean? I think today when you look broadly in the trade field a big problem is that the public is by and large disengaged in the debate over NAFTA, and you ask why is that? The business community is interested but the public at large is not. The answer in part is because the trade debate and the debate over NAFTA is one using a lot of technical subjects and language that most of the people of the public do not understand. We in the trade community frequently talk in jargon (and it is really mumbo-jumbo to everybody else) about MFN, GSP, market access, phyto-sanitary measures, and so forth. One only has to pick up NAFTA and look at it to see that it is a very talmudic document in the sense that it is completely incomprehensible to the layman.

14. Jeffrey Bialos is from the Washington D.C. law firm of Weil, Gotshal & Manges. He practices principally in the areas of international law regulations and public policy, often dealing with NAFTA issues, East/West trade, and U.S. government compliance issues. He is also an adjunct professor at the Georgetown University Law Center in Washington, D.C.

And as someone who has some experience, I can tell you there are chapters of it I look at, and it is Greek to me as well. I think that in the debate over NAFTA it is very important that it be reconnected to people in terms of an understanding of it. That is especially important in light of the increase in trade. I think we cannot afford to have insular debates over this type of a subject anymore.

What I would like to do at least is my small part in giving you some of the basics in English first. Obviously, NAFTA covers a wide range of areas. When you look at NAFTA fundamentally it includes a number of basic overarching principles. First of all, what NAFTA does is to try to remove tariff and non-tariff barriers to trade and investment through a series of basic rules. An example would be national treatment for companies of NAFTA countries, where companies are treated like a national of one of the NAFTA parties for investment purposes. Other similar rules involve procedural fairness, the removal of restrictions and licensing obligations, and basic rules for dispute resolution.

Second, NAFTA is called a free trade agreement, but it is really a *freer* trade agreement. Rather than immediately ending all restrictions on trade, and this is in part where the debate is, it gradually phases out many barriers to trade and investment. Tariffs are phased out over periods of years based upon a schedule for each type of different goods. In the service sectors there are rules that phase out certain obligations for people who would like to deliver services within the NAFTA countries. In the financial services chapter there are a whole set of provisions on the removal of restrictions on financial services. Basically you have to read NAFTA in detail to get the specifics in a given area. At this broad level it is very hard because there are so many details that matter so much, and there are exemptions, and sectors exempt from various parts of NAFTA and so forth.

The final overarching point is that NAFTA really reflects the expansion of the concept of a trade agreement to cover more, often non-traditional trade subjects. It covers not only trade in goods, but it is probably the most comprehensive agreement ever reached concerning trade in services. It also has some very basic rules in investments, intellectual property, telecommunications, the procurement sector, and the environment, among others.

NAFTA is scheduled to take effect January 1, 1994, having been signed by the parties, but it now has to be implemented through the constitutional process of each country. As I will discuss in a minute, in the United States under the so-called fast track procedure, the President must introduce detailed implementing legislation on NAFTA which can only be voted up or down. No amendments are allowed. That is part of why it is called fast track — there are a limited number of days that the legislation can be considered in Congress. NAFTA was negotiated of course by the Bush administration, but the Clinton administration is going forward with the agreement. The

administration, in fact, has stated its views quite clearly and now President Clinton has stated qualified support for NAFTA. He and the U.S. Trade Representative, among others, have voiced their support for NAFTA pending the negotiation of supplemental agreements on the environment, labor, safety, and import surges, which you will hear more about in a few minutes. The administration has made it quite clear that if it can secure these commitments, it would like to do it as quickly as possible to meet the January 1994 date for making NAFTA effective. It will submit the NAFTA implementing legislation to Congress, and move toward getting it enacted.

Let me touch on a number of other key areas of NAFTA briefly which you are going to hear more about as well. The centerpieces of NAFTA are its tariffs and its country of origin provisions. It has the gradual elimination of tariffs of many goods produced in North America and detailed rules called rules of origin (that is jargon of course) to determine whether goods or components are North American and therefore subject to the liberal tariffs. This is a critical element, really the core of the whole agreement. Market access for goods and services is enhanced. The rule of national treatment is established, that is again, a company from one NAFTA country has to be treated if it is doing business with another NAFTA country as if it is in effect a local company. The agreement also eliminates numerous quotas and licenses for goods imported from one NAFTA country to another, and removes a whole range of restrictions on doing trade in services. This includes, for example, the local presence requirement under which a business was required to have a local presence to be able do business there.

Intellectual property is considered one of the key elements of NAFTA. Basically, NAFTA calls for improved IP enforcement in Mexico and expanded protection for a range of types of intellectual property. The chapter also maintains the exemption that exists under the U.S./Canada agreement for cultural industries.

Let me touch on two other key elements of NAFTA briefly. The first (and one of the most important) is the investment chapter, which establishes some basic investment rules and a very novel dispute resolution mechanism. The mechanism allows investors to challenge violations of those rules directly against one of the NAFTA countries. This feature is very unusual, because, as many of you who know international law know, these types of agreements call for government to government dispute resolutions and citizens must petition their government. In the investment area, NAFTA follows a recent trend establishing a dispute resolution mechanism which allows an individual in a NAFTA country to go against the country's government. The rules basically follow national treatment, in that investors of one party-nation must be treated as favorably as an investor of any party-nation. NAFTA investors are also allowed free transfers of profits, dividends, interest, and other kinds of fees and expenses from investments in

other NAFTA countries.

The dispute resolution mechanism is an arbitral mechanism which is one of the most novel parts of NAFTA. I will not go into it in detail, but this is important and people are going to look to this to see whether it is effective as a model for other agreements between countries of varying levels of economic development.

I will discuss NAFTA and the environment briefly. There is no environmental chapter in NAFTA per se, but to be sure NAFTA has many environmental implications and covers a range of environmental issues. In the investment field, there is no minimum level of protection required for the environment. For example, NAFTA does not prohibit a signatory from weakening or waiving a standard to attract a particular foreign investment. Rather it merely states disapproval of this. There are standards in NAFTA, however, with respect to the importation of goods. Each country has the right to prohibit the entry of goods that do not meet its environmental standards. But these standards cannot be used as a trade barrier.

There are some other basic rules that are going to be flushed down and become important in the years ahead. Specifically, sanitary measures enacted by a NAFTA party must be scientifically justifiable. This is another way of insuring that they do not become disguised barriers to trade. Unfortunately, the term scientifically justifiable is not really defined in the agreement, and that is going to be a debate point in the future. One of the NAFTA parties will bring a challenge through the general dispute resolution process against a sanitary standard of another party. The government dispute resolution mechanisms, which also call for the establishment of panels, are going to address these issues and I think there is going to be a whole body of jurisprudence that develops in this area. The notion of dispute resolution on country A's sanitary standards and whether it meets the NAFTA requirements is itself one that is quite new and novel and that follows from developments under the GATT in recent years. It is a significant development, and in itself it has led to a whole range of new issues including, for example, the right of affected citizens and communities and companies in a NAFTA country to participate in these disputes. These environmental and sanitary disputes obviously affect a wide range of companies and people in the NAFTA countries and raise questions as to who is going to be allowed to participate in the dispute resolution process. Again, the process has traditionally been closed to the public. This is changing, however, because these issues are important, and because as you all well know in this country, in the environmental field nothing is done without a full hearing where interested parties have the opportunity to comment and participate in a range of processes. That is going to be an interesting issue.

Walking away from the basics of NAFTA, let me turn to the second thing I wanted to discuss. What is the policy debate over NAFTA, and

where is that debate? The debate really focuses primarily on the impact of NAFTA on the economy, on jobs, and on the competitiveness of U.S. firms. The proponents argue that the reductions to trade barriers are likely to cause increased economies of scale for U.S., Mexican, and Canadian producers, lower prices for consumers, and provide greater competition in various markets. The opponents argue about the effects on jobs in the United States, and there is an International Trade Commission study recently which does point out that while some industries are going to lose jobs, others are going to gain them. Overall, however, NAFTA is a net benefit. As part of the debate, the key focus is on the labor and the environmental issues, which I think you will hear more about from the other speakers as well. Labor and environmental groups in the United States have discovered trade agreements and they have become particularly vocal with respect to NAFTA. The AFL-CIO and UAW, for example, have testified that NAFTA is going to result in the loss of U.S. jobs to Mexico and the possible weakening of U.S. occupational health and safety standards. Similarly, various environmental groups have expressed concern that NAFTA might encourage U.S. companies to use Mexico and as an inexpensive haven from U.S. environmental laws and cause additional environmental damage along the border. This is where the core of the debate of NAFTA is presently.

What the administration is seeking to do is address a number of these issues through side agreements. These have just begun to be negotiated, I think starting two days ago. In the environmental area the negotiations are going to basically focus on the enforcement of the U.S.-Mexico border environmental plan which would establish a number of projects to foster enforcement. It will also focus on something called the North American Committee on the Environment, which was established for monitoring purposes under NAFTA. The administration has plans to beef up its functions both from the standpoint of fact-finding and focusing on enforcement issues. The administration has made clear in recent testimony that it does not intend to give the Commission direct enforcement authority (this would raise a range of sovereignty issues in the United States), but it does want to empower the Commission to look at ways of improving enforcement of environmental laws. That is really much of the debate in the environmental area, where the laws in Mexico are deemed good on their face, but are poorly enforced.

The labor issues focus on, again, the creation of a commission to evaluate labor issues, improve cooperation on enforcement of worker safeguards and worker adjustment training in the United States. That, however, is likely to be organized under a separate U.S. program to deal with worker displacement.

The third area, one I will leave to another speaker to talk about in detail, is import surges. The administration has indicated that it is going to seek

some kind of a supplemental agreement on import surges. This was fueled in part by various industries which fear floods of imports coming in when tariff reductions are phased in. The thing is that NAFTA already has an import surge mechanism, one which creates a snap back of tariff provisions if there is a flood of imports that injures an industry.

When you look overall, what you see is many in the service industry in the United States favor NAFTA and support it. They do not really have too much interest in the side agreements as they do not effect them. The manufacturing sector is where the side agreements are viewed as more significant and their support is holding out.

I am told my time is quickly to expire. Let me finish up with a few words about NAFTA process and politics. As to the process I mentioned, what is going to happen is something called the fast-track process. There is no deadline by which the president must put NAFTA's implementing legislation before Congress. However, NAFTA legislation requires such legislation because there are many changes in U.S. law which will have to be made to implement the agreement, cross-cutting various regulatory fields. But for the legislation to be passed in 1993 and the agreement to take effect in 1994, you probably are going to have to see implementing legislation by the summer.

That, of course, brings us to the issue of side agreements. Whether they are going to be finished in time for a 1994 effective date nobody knows, but the administration is certainly going to try. Technically, the administration fast-track negotiating authority for NAFTA lapses on March 1. That is because the agreement was signed already and because of that fact the implementing legislation can go through Congress under fast-track. The supplemental agreements raised a question as to whether they require additional implementing legislation. If they do, that will raise some interesting legal questions, including whether or not fast-track will be extended to accommodate those accords (which undoubtedly will not be negotiated until after the authority is finished). There will be an up or down vote on NAFTA once the implementing legislation is put in the hopper in Congress.

On the politics, as I said NAFTA has detractors and supporters. The debate is going to heat up in the coming months, especially once the legislation is introduced. Members of Congress have warned in recent days that the enactment of NAFTA through fast-track is by no means assured. I think the points here are, one, the president needs to engage the detractors and I think he will do so once the economic program is done. Second, NAFTA supporters need to come forward. That is where, as I said, it is important for people to get an understanding of NAFTA, how it affects them and their communities in plain English. This will let them go back to their members and tell them where they stand on the agreement. It is important

to the administration to do educational efforts in this regard to help put together a broad coalition to support NAFTA.

JOSE ANGEL CANELA[15]

I very much agree with almost everything Jeffrey Bialos had to say. In fact, he has made my job much easier. But I do want to take exception to one thing: he said, and I quote, that "The text is incomprehensible not only to the lay people but to an expert." I submit that his statement is just a perception. In fact, the text is, you could say, an acquired taste. It really grows on you. It becomes a masterpiece as you live with it, dream about it, and every single day you think about it. It is, of course, complex. Really, if we had simply agreed on a number of principles very much like we did in the context of GATT, you would have a handful of principles. After all, we repeat the national treatment principle perhaps five dozen times or so. But, NAFTA's often complex annexes are important because they really give you the full story as to how gradually and how completely we will become integrated over a period of five, ten, fifteen, and occasionally twenty-five years. There is a phase-out period of twenty-five years which I will tell you about a little later.

Thus, for a couple of reasons, some of the claims about the effects this agreement might bring are highly exaggerated. First, the effects will be minimized by the gradualness with which the agreement will be implemented. Second, the effects will be dampened by the bilateral relationship between Mexico and the United States. Your economic integration with Canada has a much longer history, and is proceeding at a much greater speed. As an aside on the commercial attitude of Canadians, since they are not represented here, there is an air of practicality over the agreement.

Let me just briefly fill in a couple of details which are important in relation to what Jeff talked about. It is true the essential component of a free trade agreement is the elimination of custom duties and non-tariff barriers on goods. NAFTA does that in a comprehensive fashion. There is this chapter called Trade in Goods or Market Access which tells you exactly which disciplines we tend to abide by and it basically incorporates into the agreement the disciplines that we have already agreed to comply with in the context of GATT. I am talking more specifically about two articles in the context of GATT: Article 3 on national treatment, and Article 11 on quantitative restriction, also known as the prohibition of other restrictions. This is important because in incorporating those articles we also have

15. Jose Angel Canela is from the Mexican Embassy in Washington D.C., and serves as an advisor to the office of free trade negotiations at the embassy. The office conducts economic analyses and monitors U.S. issues affecting NAFTA, and also provides outreach to the public about NAFTA.

incorporated the interpretive notes in the context of GATT and the jurisprudence that has developed in the context of GATT. So we have really built into NAFTA fifty years of experience in trading goods. That establishes that we can anticipate a great deal about what it is we have entered into in the context of trading goods.

Now, speaking about exceptions, there are important exceptions to national treatment and in relation to some other restrictions. For example, in the automotive sector, there can be quotas and the like. As a matter of fact, you should be aware that there are specific chapters for a set of goods because for a number of reasons they could not be fully incorporated into Chapter 3 (which otherwise is universal). There are specific chapters on textiles, and you know that for a number of years textiles have benefitted from a special regime. There is also a specific chapter on energy and petrochemicals, mainly because of Mexico's constitutional restrictions, which NAFTA will not displace. In addition, there is a special chapter or annex concerning automotive goods, basically auto parts and automobiles, trucks. The chapter tells you exactly how soon they will become integrated, and that is perhaps one of the most interesting chapters from the standpoint of North American integration. I do not say that only because I worked on it, but I really think it is one of the most important because it is a major item in the trade accounts among the three countries. The major single item concerns auto parts and automobile exchange. Finally, there is a very comprehensive chapter, in fact a set of chapters, on agriculture. Agricultural goods for many centuries have bedeviled free trade negotiations. In fact, many of the problems that we are facing in the context of the Uruguay Round of GATT have to do with the incorporation of agriculture into the free market approach. Thus, NAFTA contains three separate undertakings: one between Mexico and the United States, one between Mexico and Canada, and then another set of rules for Canada and the United States. The latter, of course, mostly brings forward the rules previously agreed upon pursuant to the U.S.-Canada Free Trade Agreement.

Let me now touch briefly on the question of dispute settlement. In NAFTA, we really try to provide for a mechanism that would be expeditious and that would compare favorably with other forums to which the parties may have recourse for the same dispute. You see, all along you will have a number of disputes which might legitimately arise either under GATT or under NAFTA, so the idea was to make this forum at least as appealing in terms of speed of resolution, comprehensiveness, and comfort with the competence and fairness of the panelists.

Dispute settlement, then, has some novelties which I want to point out to you. First, the roster of panelists from which experts would be drawn to form integrated panels will be a trilateral list agreed upon in each of the countries. Note that there are several of these lists with different dispute

settlement purposes, but in essence the countries will submit names and there will be a prior agreement on the entire lists of panels. Second, when we integrate a panel for purposes of state to state dispute settlement (I am talking roughly about Chapter 20 in the agreement, which is the mechanism under which any dispute arising under the agreement will be resolved unless otherwise noted in the agreement), we are going to use what we call the reverse selection procedure. Thus, if you have a dispute between Mexico and the United States and the panel consists of five panelists, then Mexico will choose two panelists from among the nationals that the United States has submitted and the United States will choose two Mexicans. Obviously the incentive is for the country to choose the most qualified individuals. Ultimately, you have a panel in which you have a greater trust that they will be, in effect, implementing what the provisions in the agreement were meant to be.

Let me now tie up the issue of dispute settlement with environmental issues. I agree that there has been and there will continue to be a good number of arguments against NAFTA allegedly because it might translate into the deterioration of the environment in the United States, Mexico and the border area. I am also aware that some other people argue that NAFTA will impinge on the ability of a country to protect its own environment. I have two comments to make on this set of issues. First, let me comment on Article 104, which is tied up with dispute settlement. This is a very important Article because it says that if the parties have agreed to an international environmental agreement which has trade provisions embedded in it, and that agreement is listed in an annex in NAFTA, the environmental agreement will prevail over NAFTA in the event of a conflict. So far we have incorporated into NAFTA the Montreal Protocol (which phases out chlorofluorocarbons) and the Convention on Hazardous Waste Movements.

Now, this really signifies to my mind one of the basic approaches, perhaps the most basic approach to solve the legitimate problems that may arise in the intersection of trade and environment. You can do this type of thing in the context of NAFTA because what you are doing is entering into some disciplines. Article 11, for example, says that you may not restrict the importation of goods other than through the imposition of custom duties. Indeed, when you enter into this environmental agreement you are agreeing, for example, to ban the importation of certain goods because of what they contain or how they may have been produced. What we are saying is when there is contradiction among those provisions, let the environmental agreement prevail.

Incidentally, this is something that also can be done in the context of GATT. You may take a waiver of obligations under Article 25 of GATT, and that is in my opinion a way to begin to resolve the legitimate conflicts which may arise between trade disciplines and environmental matters. The

other element that is very important in terms of this environmental dispute is the fact that we have incorporated into the agreement Article 20 of GATT, which lists the exceptions to the general obligations that you have entered into. Once again, that exception tells you that you may in effect not have to comply with your basic national treatment and Article 11 obligations when you want to take a measure necessary to protect the life or health of humans, animals, or plants. Of course, the only proviso is that when you apply this measure you do not do so in such a way as to restrict trade or invidiously protect domestic products. That set of exceptions is being brought into the NAFTA with full effect.

Now Jeff touched briefly on a very important chapter, the Standards-Related Measure Chapter, and the phyto-sanitary measures which are contained as far as the Agricultural Chapter. One may think of all these measures really as the entire regulatory regime that you may apply for safety products or for consumer protection. Among these various pieces you end up with the entire regulatory regime. If one looks under these chapters, you will see a number of principles that unequivocally suggest that nothing in the agreement undermines the right of a party to protect its human, animal, or plant life or its environment. What it establishes very clearly is that the level of protection you wish to obtain is really up to you. In other words, there is nothing in the agreement that tells you what concentration of sulfur dioxide is safe, or what residue of any food additive is allowed for any one product. It is up to you because we know that many of these simply constitute risks. And when it comes to risk you really have to make a sovereign determination as to what level of risk you are willing to entertain. And, just as you have differences throughout the United States among the different states as to which level of risk they want to take, it is legitimate for the NAFTA countries to respect each other's differences in terms of the level of protection they want to establish. The only thing that we try to do in this set of chapters is to make sure that while taking any of these measures you do not discriminate. Particularly, we do not want anyone banning the importation of tobacco products but continuing domestic production. This is a case that arose in the context of GATT involving Thailand and the United States. The Thai government barred the importation of tobacco ostensibly because it is deleterious to health and to protect its population. But, in the meantime, Thais were welcome to smoke the locally made cigarettes that had a higher tar content. The GATT panel said that this was a violation of national treatment, but there is nothing in GATT that precludes a country from prohibiting smoking period. Thus, a country may not allow its own producers to sell a product while excluding everyone else. That is the basic concept of national treatment that we have embedded into this area of protection.

Finally, I will discuss the process in Mexico, and if you know Spanish

you know we refer to these things with the acronym TLC. T stands for *tratado* so, we are considering this as a treaty, and thus it will be submitted to the Senate for ratification. The Mexican Congress is not in session now and the treaty as of today has not been sent to the Senate for ratification. The Mexican Congress has two sessions, one that begins on April 15 and goes through no later than July 15 and the other from November 1 through December 31. November 1 is when the President submits the state of the union. As for the procedure itself, there are not any specific provisions either in the statute that governs the functions of Congress or in the internal regulations for the Senate. However, the Senate is divided into commissions very much like your committees, with some forty-two or forty-three standing committees in all. The committees that come to mind are foreign affairs and commerce, among others that will have jurisdiction on this. There is no necessary minimum or maximum term for consideration within the committees, but eventually anything that goes into the committees must reach the floor for determination. So you have those two windows, April through July and November through December, for possible consideration by the Mexican Senate.

LEONARD ROSENBURG[16]

I would like to make an observation before I get into the meat of my presentation. Jose Angel Canela took a little bit of the steam out of this, but I would like for you to think for a minute that the foundations of the Judeo-Christian ethic are found in the ten commandments. That is a document, if you will, which contains somewhere around 300 words, perhaps a little bit less. The English Magna Carta, which basically proclaimed the citizen's right to be free from tyranny of the Crown, is a document of similar length. These are profound documents which have obviously had a significant impact through history. Finally, we get to NAFTA. I do not know how many tens or hundreds or thousands of words are contained in this document, but you begin to wonder why it takes so much to say "let us have free trade in goods and services," when more profound documents take much fewer words to get their point across.

NAFTA is obviously going to impact the flow of goods as well as services across the three contracting parties. It is also going to impact the supply of materials from what I call fourth countries or non-contracting parties to the NAFTA parties. Currently, the United States and Canada are operating under their own free trade agreement. They too, or it too, has a set

16. Leonard Rosenburg is a principle member of the Miami-based national law firm of Sandeler, Travis and Rosenburg. Prior to joining that firm, he served as senior attorney for the U.S. Customs Service in Washington D.C.

of rules of origin. These rules of origin will be superseded and merged into the NAFTA document once it is made law within the three countries. The duty increases already earned or recognized under the free trade agreement will not be eliminated and will go forward from that point.

The rest of my talk is rather micro, as it hardly can be considered under a macro point of view, as Jose said when we talked earlier this morning. But, for those of you who are going to be involved in the trade of goods, you have to be micro-oriented. If you are already involved in the import area you know that is true today. The objective of the rules of origin is primarily to prohibit any country from acting as an export platform for fourth country or non-contracting party components or materials. This, of course, occurs when a fourth country is able to use a contracting party as a means of entry into any of the other contracting parties. In other words, you cannot bring an article from Taiwan or England or anywhere else into a NAFTA country, smack a label on it, put a screw in it, and then ship it into one of the other NAFTA parties duty-free. That is simply not permitted. The rules go to great length to describe what exactly is permitted. However, there is no prohibition, absolutely none, to the use of fourth country non-contracting parties.

Nevertheless, the rules of origin do provide what must be done to materials in order that they qualify as what is know as originating materials. We have originating as well as non-originating material. In order to know how a non-originating material becomes an originating material, you have to memorize one of these books. Just kidding. Actually, you just have to buy one of these books and go through it. If you have dealt with the tariff schedules of the United States, Canada, or Mexico, you are probably about 60% of the way home, because you know where the tariffs are. But, the rest of the agreement is new and the rules are just set out. We do not have regulations yet as to how these rules are going to be interpreted. But, without knowledge of these rules of origin you or your clients or your companies could be met with a blockade, if you will, at the border when you try to import.

Uniformity in the application of the rules is a necessity, and this is one thing as a customs attorney that scares me. I have to be frank. Transparency is something which the agreement strives for in the application of all of its rules, and there is a procedure for obtaining binding rulings before you import. I have to admit I do not know the process for binding rulings in Mexico. Perhaps during the question period Jose can enlighten us, and as far as the Canadians are concerned they issue their D memos, but neither has the same kind of binding ruling procedure which currently exists in the United States. Even in the United States, you can get a binding ruling today, but six months from now, two years from now, ten years from now, customs can change its interpretation. So, I am still not certain as to how we are going

to have a set of binding rulings which are available to everyone, which are transparent, and which do give you a degree of certainty in applying the rules of origin. I can tell you today from personal current experience between the United States and the EC, we still have not reached any degree of uniformity as to how we apply the concept of substantial transformation, which is the rule that we currently use in the United States. By the way, senior government officials have expressed a desire in the future that the kinds of rules that we are using in the FTA (and hopefully in the future in NAFTA) will be the same rules that the United States applies to other non-NAFTA importations as well. So, anybody who learns the procedures under NAFTA will have a head start, presumably, in applying U.S. rules in the future.

Let us get to the rules themselves. The first rule is that anything that is produced entirely in the territory of one or more of the contracting parties exclusively from originating materials is entitled to the benefits. Here is one of my favorite examples, a cow. This cow is born in Canada, Mexico, or the United States, and raised in Canada, Mexico, or the United States. It is an originating material if you will, or an originating product. Roses raised and grown in Mexico, they are originating materials. That is an easy concept I think to understand, probably the easiest in NAFTA. If this cow was born in Guatemala and walked into Mexico, it is a Guatemalan cow. The fact that it happens to wander into Mexico does not change its origin — it was not born in Mexico.

The second rule is that each non-originating material used to produce the finished product must undergo a required change in tariff classification as a result of the production occurring entirely in one or more of the NAFTA countries. Here is where we get into the tariff and the rules of origin. In order to know whether a non-originating material undergoes the appropriate change, you will have to have a copy of these rules and know where to turn with the tariff to see what the applicable provisions are. As an example I will use, once again, our poor cow, born in Guatemala, now crossing over the border into Mexico. If some entrepreneur farmer decides to take this cow and mercilessly slaughter it, and winds up with chopped meat, hamburgers, and steak, what happens? Well, processed boneless beef cuts are classified under a heading in the tariff 2201. Now, under the specific rule applicable to heading 2201, any change to heading 2201 from any other heading, any other four digit number will qualify the resulting product as a product of the contracting party. Well our poor cow is classified under heading 0102, a different heading from 2201. Therefore, when they catch this cow and slaughter it and make it into hamburger, we have a required change and the hamburger can then be exported to the United States or Canada and qualify for the benefits of NAFTA.

We switch from cows to electronics. If you produce a printed circuit from plastic sheets which originated in Venezuela and from copper wire

which originates in Colombia, will the printed circuit obtain the benefits of NAFTA? Printed circuit assemblies are classified under heading 8534, another four digit number, while the plastic sheets are classified under heading 3921 and the copper wire is classified under heading 7408. In order for a printed circuit to qualify according to the rules produced from non-originating materials, the non-originating materials must be classifiable in some other heading than 8534. Well, because the copper wire and the plastic sheets are in other headings, the resulting printed circuit will qualify under NAFTA and may be exported within any of the three countries, imported within any of the three countries from any other, and qualify for NAFTA benefits.

The third rule concerns goods produced entirely in one or more of the NAFTA countries exclusively from originating materials. It sounds somewhat simple. Our cow again is born in Canada, raised in the United States, and slaughtered for its hide in the United States. The hide is taken to Mexico where they produce footwear upper. Footwear upper is produced entirely from originating materials, because this cow and the hide all started the manufacturing process within one of the three contracting countries. But, that is an originating material which is easy to comprehend. Remember, under the second rule you can get an originating material by taking a non-originating material and processing it according to the rules of origin. So, the third rule does not apply solely to articles which are entirely produced within the three contracting parties all the time. You can come from without. Take our Guatemalan cow again, slaughtered for its hide, the hide is shipped from Mexico to the United States and in the United States they produce the upper. An upper, however, is not a good example because an upper would not qualify. If you produce these parts of footwear, these parts that are produced from foreign hide, these would qualify. The upper, on the other hand, would not because of the way the rules are structured. There is a specific rule for uppers. These other parts of footwear however would qualify. It gets extremely technical. Footwear is a protected area, which is why we have some of these more precise rules. These rules, you should be aware, are not even as difficult as some of the others.

The fourth rule involves an article produced entirely in a NAFTA country, but one or more of the non-originating materials provided for as parts of the article did not undergo the required change in classification. It therefore has satisfied the regional value content requirement. This is where we get the accountants in with pencils, or now with computers, and some of this is going to be very burdensome on the exporter, not the importer. Let me give an example. Let us assume that this is a finished piece of footwear. You have the upper and the sole and you put them together. Finished footwear produced from originating uppers, this is an upper which is an originating article, Mexico, United States, or Canada, and soles imported

from the Dominican Republic. What is going to happen?

Under the rules, footwear produced with originating and non-originating parts does not undergo the required change because it is only sewn and therefore, the shoe must satisfy regional value content. Regional value content is determined two ways, through transaction value, and through the net cost method. Those are two different methods. Generally, beware when a lawyer says generally that an importer can choose to satisfy the regional value content by either method. However, where certain items or situations are involved, the importer must choose the net cost method. These areas include where the customs transaction value is not acceptable, where there are too many sales, and where more than 85% of the same product comes to related parties in a six month period. Motor vehicles, footwear, and word processing equipment have been chosen for more burdensome rules.

Now, let us discuss how transaction value is determined. Under transaction value, you take the customs transaction as a starting point, you subtract the value of all non-originating materials, divide the sum by the transaction value and multiply by 100% to get the qualifying percentage, which generally under transaction value is 60%. Under the net cost method, you start with the net cost, not the transaction value. Now, speaking generally to arrive at net cost, you must first determine the total cost of the good. From that you subtract marketing and after-sales service costs, sales promotion costs, royalties, shipping and packing costs, and nonallowable interest costs which are otherwise included. Then you subtract all the non-originating materials, divide the total again by 100, and multiply by 100%. This is a more precise method, albeit more burdensome.

I want to give an example before I have to close because it is important to see one of the problems. I told you that generally net cost is 50%. Not with footwear. With footwear it is 55%. If you did not know that, if you did not study the rules of origin on Chapter 64 for footwear, you would have thought you met it, brought the shoe in and, boom, customs says you owe us 8.5 or 10% duty on that moccasin. You say, what are you talking about — it is 50%? They go no, it is 55%. There are also some exceptions in transaction value, which go from 60 to 65%.

Obviously, you have to read the rules of origin, whether you are a domestic producer looking to export to one of the other two, or if you are a foreign supplier who wants to be able to take advantage of NAFTA and go to a contracting party manufacturer and let them use your materials. It is not only the importer who has to know it, the exporter has to know it as well. My time is up. I can only say that hopefully next year when we meet here again, we can be discussing what it is like under the operation of NAFTA, because it goes into effect in January.

QUESTION AND ANSWER

JORGE D. ORTIZ: As a farmer and a lawyer, let me tell you that it is impossible to distinguish between a Guatemalan cow and a Mexican cow. Absolutely impossible. This seems funny, but for Argentina it is very important because the country is divided in two in terms of a disease called "abtosa" which is fever. Argentina wanted to export cattle to the United States and to Europe. The United States said no, because you have abtosa fever, so we went into a meeting with the U.S. ambassador to Argentina, and he said, "Guys, I cannot allow you to export cattle to the United States because it is impossible for me to check whether you just move the cattle from the North to the South and export from there." I think that checking that, I mean, you would have a hard time with that.

ANSWER: I think you are right. I can only speak from the U.S. customs service perspective. Our investigators are unflagging in their attempts to uncover fraud and deceit upon the customs service. Other than the investigators and the customs agents, however, I do not know how we can distinguish one cow from the other either.

CLYDE E. MCFARLAND, JR.: I have a question for Jeffrey Bialos. With regards to the dispute resolution and the panels, what is going to happen with the state court systems and the federal courts? Is the panel going to be the supragoverning entity? Or, will there be a flow-down into the state courts?

JEFFREY BIALOS: You have to distinguish between what kind of panels you mean. I think generally the answer to that is no. NAFTA is not an agreement that removes sovereignty so that things can stay in the state courts. There are dispute resolutions at many levels under NAFTA. There is government-to-government dispute resolution. Those, of course, are matters that have nothing to do with what happens in state courts.

There are two other areas where courts could be implicated. One is the investor dispute resolution vis-á-vis a foreign state under NAFTA. Generally, as an investor you have a choice: you can go under NAFTA for violation of NAFTA rules and seek money, but if you do that you essentially waive all rights to seek money damages under local law standards in local courts. The other choice is to go to a local court to seek an injunctive or equitable remedy to the extent that it exists.

Another area where courts are effective, which I did not touch on, is the anti-dumping and countervailing duty area. NAFTA establishes a bi-national panel dispute mechanism, precisely like the one in the U.S.-Canada Free Trade Agreement, which basically says that where there is a national determination under a dumping or countervailing duty law, the determination will be reviewed by a NAFTA panel. For example, in the United States, Commerce Department or International Trade Commission rulings appeal not to the U.S. courts, but to this bi-national panel which is essentially an arbitral

type body set up for that purpose. So, in effect, that takes the courts out of those situations, to the extent parties choose to exercise that right.

Just to elaborate a little bit on that, most of the disputes you will have under NAFTA are disputes in which one party-nation challenges another party-nation's measure as inconsistent with the agreement. That will go generally under Chapter 20. The process is one really of consultation and negotiation, prior to and through the offices of the commission. Failing any resolution to that, there is this panel which convenes, issues an initial report, and then a final report with recommendations to the parties as to how the dispute should be solved. The panel decides whether or not there has been a breach of the obligations under the agreement, and how the parties can conciliate and resolve the disputes. Now, if the party complained against has been found in violation of the agreement, and the party complained against chooses not to adopt the panel recommendations, then the other party gets the right to suspend commercial benefits equivalent to the benefits that it is being denied by virtue of that measure. There is really no panel that has the ability to strike down a law or regulation that has been enacted by the federal government or by a state government. You either comply or you get benefits suspended.

LAURA HERRERA: My question is for Mr. Rosenburg. In your outline, you also have fungible articles exempt. How do you regulate that? It would be like the cow from Guatemala, is that not extending it too much? You can bring tobacco from Costa Rica, and it is fungible with tobacco from Mexico. Where do you draw the line?

LEONARD ROSENBURG: The regulations as to fungibility have not obviously been set up yet. The contemplation there is really, I think, to use it through accounting methods. Generally accepted accounting principles for inventory purposes will probably be the basis upon which fungibility is determined.

C. Mercosur: Implications for Multi-National Companies

L. JANÁ SIGARS

Next we are going to deal with the other end of the hemisphere, South America. We are going to talk about Mercosur, or as it is known in Brazil, "Mercosul." The scope of Mercosur at present covers Argentina, Brazil, Paraguay and Uruguay. Although these countries are a few miles further down the road from the United States and Mexico, the importance of trade integration in this dominant region of South America simply cannot be underestimated by any company that wants to do business in these countries, regardless of whether they are U.S.-based or not. Even with its current economic problems and over-the-horizon "Nation of the Future" forecast, Brazil still represents one of the major economies in the world. Argentina's

recent progress toward privatization and stabilization on the monetary front is well known now. We covered that yesterday in part. The integration of these major economies with those of Paraguay and Uruguay would represent a very major unified market, and would present some interesting strategic business opportunities for many of our clients.

Our panel today focuses on implications of Mercosur for multinational companies. On that panel we have two distinguished speakers, one from Brazil and one from Argentina. Our Brazilian guest is Eduardo Lessa Bastos, and from Argentina we have Alfredo Vitolo. So let us start with the Brazilian perspective and move to Argentina.

EDUARDO LESSA BASTOS[17]

A month ago, your former Secretary of State George Schultz went to Rio and made a very nice speech to the business community. In general, he was not very optimistic in relation to world trade. He said he was very concerned about GATT and the problems that GATT will bring. He raised a very interesting point. He said that the rural producers, mainly in France, are creating some problems. He also said something very special. He said that it is the first country in the world where cows have voting power. It is amazing, yes indeed, talking about cows today, it seems.

If the world gets into a sort of a loss, I think we are going to have a very big strain on the world savings. For Brazilians in the last ten years, we have suffered a lot already. We have saved everything we can save. We are saving money, we are saving water, electricity, everything. People say that Brazilians achieved the ultimate savings stage: Brazilians are starting to bark in their backyards to save the dog. This is the ultimate stage.

Today I would like to show you some figures concerning Mercosur. They are related specifically to multinational companies. In reality, this idea about Mercosur dates back to about fifty years ago. In 1941, there was an attempt by the foreign minister of Brazil to get a free trade area between Brazil and Argentina, but shortly thereafter Pearl Harbor was attacked. This created a certain problem because in 1942 we had a conference in Rio called the Interamerican Consultation Conference. In this conference, Brazil and Argentina had totally different viewpoints. From 1942 onwards, the relationship was frequently a little bit abrasive, but in 1951 and 1954, in the Vargas Mandate, there was another attempt to bring together Brazil, Argentina, and Chile. This time the initiative was boycotted by the Foreign Minister, who was a big shoe in those years in Brazil. Since 1991, we have

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had the Treaty of Asunción, which admittedly is not as sophisticated as the Treaty of Rome. The Treaty of Asunción was an attempt to establish a starting point toward something bigger, possibly something that could bring us together with your treaty, NAFTA.

Well, let me talk now about Mercosur. The Treaty of Asunción established this progressive little notion, which is very similar to your NAFTA. For instance, it calls for the progressive elimination of tariffs and restrictions, free flow of goods, worker services, progressive reduction of a list of exemptions, establishment of common tariffs, domestic equal treatment as far as taxation goes, colonization of macroeconomic sector policies, and harmonization of the four countries. In reality, we pay attention to Mercosur. Mercosur is very much based upon the five principles figured out by your American constitutional lawyers: free movement of goods, workers, and capital, and freedom of competition and establishment.

As for free trade, we also have a general system of origin, albeit not as sophisticated as your system. The reductions in tariffs will be 61%, 68%, 75%, 82%, and 89%, and then 100% after 1995. The key factors for the development of integration are those listed here, including free trade implementation programs and customs structure. In this, Brazil tends to resist a little bit in the relation of free trade to reduction of customs duties. Argentina is much more flexible. The average duty in Argentina, if I am not mistaken, is around 9%, and in Brazil it still is about 14% to 15%. There is also a big discussion in Brazil about the exchange policy for foreign trade. There are two ideas, either you have a common currency or you have a sort of anchor currency, and you have the other three currencies fluctuate. Which currency that will be, we do not know yet. Also, the creation of an institutional control body, a supernational body, is something that could be very bureaucratic, and we still do not have that. Besides, Latin American countries have this idea of absolute sovereignty. This is very hard to change, at least in the very near future.

The situation of sensitive industries and sectors is mainly in Brazil, and mainly concentrated in Saõ Paolo. There are very big industries, and to these people either they have more subsidies, they pay more taxes, or they employ more people. In all three cases, they could be considered sensitive industries.

In the treaty structure there is a common market group and work subgroups. The subgroups are divided into commercial affairs, customs, technical norms, fiscal, monetary, and so forth. There is also an administrative secretariat and there is, not a supernational body, but a parliament commission comprised of sixteen members of the parliament of each country.

As for disputes, if there is any problem amongst the states, they first go to the common market groups. If the common market group does not sort it out, they go to the common market council. This is the last resort, but there is no decision, just advice. They try to sort out the situation. In case

you cannot reach an agreement, you then go straight to arbitration. For arbitration, there is a list of ten people in the administrative secretariat. Each country group represents ten people, and you choose two from these ten.

Now we are going to touch upon a very important point for the multinational companies, namely patents and trademarks. Paraguay is not party to the Paris Convention. In Paraguay, as well, there is a certain freedom of trademarks, but it is a problem. We are thinking about the possibilities of the registration of trademarks via the trademark interpretation unified according to the Agreement of Nice. Unfortunately, though, it is not only Paraguay, it is also Uruguay.

Now let me describe roughly what multinationals think, the way they are looking at Mercosur. They identify opportunities and difficulties that reappear in this common market in the program. The identification of the marketable product via trademarks is a serious problem, and something must be done. On the other hand, the market seems to be growing and multinationals are aware of the positive figures. The commerce amongst the countries increased 55% in 1991 and 30.2% in 1992. What the multinationals also see is both the total population and total demand staying unchanged for awhile. These, in my opinion, are the elements multinationals look to when analyzing an economic climate: taxes, commercial practice, increased market potential, competition, decreased protection to domestic companies, subsidies, market restrictions, and monopolies. It is what the multinationals see in terms of the advantages and disadvantages of each country. Brazil is building energy costs, business and management structure, technology, and this week, a tax burden, for which I must apologize. Brazil has, unfortunately, one of the biggest tax burdens in the world. On average, the foreign capital investor in Brazil has a tax burden which varies from 50% to 64%. It is really unbearable.

As for local population, Brazil has 147 million people, while all of Mercosur has 188 million. Thus, the GDP is not correct. Some people say that the GDP is something around 600 billion dollars, while others say it is closer to 500 billion. I can never get the right figure. But anyway, compare it to the U.S. figure, which is 6 trillion. Mercosur comprises almost 200 million people, and 75% of the population is concentrated in the big cities.

Companies' main problems in Brazil, then, are related to tax burdens. Sixty-seven percent of the companies in Brazil complain about tax burdens. In Argentina, by comparison, it is only 57%. I do not have the time, to be frank, to go into detail, but let me try to give an example. I remember that you Americans in the past said, oh good Lord, the Pacific Rim, this is the place. If you have the opportunity to go to the Pacific Rim, whenever you get a plane it takes at least ten or eleven hours to get from one point to the other. The food is quite different from American food so you must be careful. Different religions, customs, and the like strongly influence the local

population. In Mercosur and South America, on the other hand, we have the same food. We have the same principles, we have the same religions, and we are in the same time zones. What is more, Rio to Miami is only seven hours. I do not think there is anything too bad to say about Mercosur. Of course you can say, "O.K., but you Latin Americans, you have made some mistakes in the past." But good Lord, if you find a man who never made a mistake in his life, you can be sure that his wife has made a big one.

ALFREDO VITOLO[18]

Maybe to your disappointment, I will have to agree with what was just said. I cannot but endorse his comments on the business opportunities that Latin America presents. Yet, I would like to focus a bit more on the legal aspects of the Mercado Común del Sur (Mercosur) than on the economic ones.

To begin with, you have to understand why Mercosur exists. The truth is that Latin American nations, despite several attempts at integration, have been reluctant to truly integrate their economies. Particularly from the Argentine point of view — and I may be generalizing here — I think that from the Argentine perspective, despite the claims that have been made by public officials, there was never a real need to integrate with other Latin American countries. This was true even with the two major treaties for integration signed during the second part of this century, the Latin American Free Trade Association (LAFTA) and the Latin American Integration Association (LAIA). The reality changed dramatically after the debt crisis and changed even more dramatically after democracy was returned to these countries. Therefore, in the late 1980s and the early 1990s, the climate towards integration changed substantially. There are three main causes for this. First, the democratic changes in the context I have just said are important because these tend to dilute the long term rivalry that exists between Argentina and Brazil, the two major players in the area. Historically, Argentine children have been taught in school that the Brazilians are the bad guys. We were even on the verge of war with Chile in 1978. But, all of this changed dramatically with democracy. The rule of law has returned, at least in principle, to Latin America.

Second, there is the need for these countries to present a more united front to creditors. Although this is not directly related to Mercosur, it has somewhat changed the view of isolationism that Argentina had in the past.

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Third, of course, is the global trend towards the creation of lower market barriers and the creation of trading blocks. The European Community pushed towards 1992, and the agreements between Canada and the United States have created a strong reaction in the southern part of Latin America towards integration.

Finally, there is the idea of increased competitiveness vis-á-vis "off-regional" trading partners. It has to be said that the idea of integration at the very beginning, in 1985, was only in the minds of politicians. It was not the idea of the commerce people or the business community. Yet, now they endorse it strongly despite the fact that the governments are now backing off and are not endorsing integration that much.

Argentina and Brazil entered into what can be said to be the seed of integration in 1985, when they signed the Declaración de Iguazú. This agreement established the idea that the two countries should transform their permanent links of friendship and cooperation into an integration that reflects the will to grow together. This sounds like political rhetoric, and it was to some extent, but it created serious activity in both countries. Working together, the nations created twenty-four different protocols aiming towards integration. This activity culminated in 1988, when both countries signed the first treaty concerning integration, the Tratado de Integración, Cooperación, y Desarollo. This treaty provides for the establishment of a common market within a period of ten years. Fortunately, despite the hyperinflation that existed in Argentina at that time, the new administration — the Menen administration — continued this trend. In 1990, Presidents Menen and Collor de Melo signed the Acta de Buenos Aires, which reduced the ten-year term to a four-year term, establishing December 31, 1994 as the new deadline for achieving the common market.

This treaty was the first organized attempt towards integration. It created a series of institutions within this integration structure, including Grupo Mercado Común, which at that time was composed only of Argentina and Brazil. It also created a national Congressional Committee comprised of both Argentine and Brazilian Congresspeople, whose activity would be merely advisory. It was under this structure that Mercosur emerged, when by means of the Tratado de Asunción in 1991, Uruguay and Paraguay joined Argentina and Brazil in the efforts towards integration.

The Mercosur treaty is a treaty of transition. It provides for a transition period that will terminate at the end of 1994. At that time the free flow of goods, services, and persons, as well as the elimination of tariffs among the different countries should be achieved. There will be a limited exception for Paraguay and Uruguay, who will have one extra year for attaining a zero-tariff structure. It is important to know that the Asunción Treaty continued with the Grupo Mercado Comúns' structure composed of members of the different ministries of each country. It also created the "Consejo Mercado

Común," which was drafted in the image of the Council of the European Communities, and which acts as the highest authority of the common market.

If one compares Mercosur with other integration treaties, one could conclude that the final aims or final goals of the treaty are not different from NAFTA or the European Community treaties. The difference between Mercosur and the European Community, at least from the perspective of the officials in the four Mercosur countries, is that the Mercosur is more open to foreign trade than other attempts. As the Argentine minister of foreign trade said, "the treaty has provided for a free market, not only within the Mercosur area, but also open to third country markets." One proof of this is that the safeguard clauses of the treaty can only be invoked by any country just once, and only during the transition period. That means that from January 1, 1995, no local business can request the application of the safeguard clauses against any foreign product in the Mercosur countries.

Mercosur, despite its problems, has also attracted a certain amount of attention from the United States. Within the framework set by the Enterprise for the Americas Initiative of President George Bush, in 1991 the four Mercosur countries entered into a treaty with the United States known as the Rose Garden Agreement. This agreement has not yet been ratified by any of the signatories. Its content is quite interesting, because it sets the basic parameters for the creation of a free-trade zone in the hemisphere. It also establishes a consultative council on trade and investment, which is comprised of a representative of each party and is chaired by the foreign relations ministers. This council may seek the advice of the private sector on investment and trade areas. Of course, this council will only be of an advisory nature, but it is the first step towards a more integrated pattern. This agreement has also established an immediate action agenda intended to coordinate its activity with GATT, and to try to solve the problem in the Uruguay round.

Some authors have stated that one of the major reasons for the Mercosur parties entering into this agreement with Uruguay was the existence of NAFTA. South American countries fear that NAFTA will have a negative impact in the area of commerce, with the U.S. imports from the region possibly being replaced by imports from Mexico and Canada. The idea underlying this agreement is, for some of us, that the agreement has to compensate and to balance the deterioration of commerce that can be provoked by NAFTA. As one official from the Argentine foreign ministry said, this has to be considered a dialogue mechanism. It is the first step towards the hemisphere-wide free market sought by President Bush in the Enterprise for the Americas Initiative. But, what are the implications for the foreign investor in Latin America? The truth is that the countries in the region still have strong disequilibria. Inflation rates are still high, although, I am happy to say, we have reduced our inflation rate dramatically. There

is disequilibria in that fiscal trade polices, customs duties, and taxation still have to be harmonized and changed. In a thing that can be described as one step behind, the Minister of Economy of Argentina, Mr. Cavallo, has recently said that Argentina is committed strongly to Mercosur, but only if Brazil dramatically changes its current policies. He said, in what may be considered a threat to Mercosur, that Mercosur may end if Brazil does not change its policies within a year.

The other problem is that although Mercosur has been presented as a treaty creating a new legal order, as was the case of the European Communities in 1957, the truth is that it is not. Mercosur is nothing more than an international law treaty trying to provide a free market and to liberalize commerce between the member countries. It lacks any sovereign powers, organisms, or a dispute resolution system. There is no direct effect or direct applicability of any decision adopted by the Grupo Mercado Común or by the Consejo Mercado Común, which means that every decision has to go through the internal procedures of the four countries in order to be implemented. This creates serious problems regarding the viability of the treaty. But, taking into account the situation existing among the four countries, this is the best result achievable at the time we enter into it. In the last few years, however, certain steps towards a more perfect integration have been taken. On December 12, 1991, the four countries entered into the Protocolo de Brasilia, what may be considered the first dispute resolution system in the region. This Protocolo was approved by Argentina on July 6, 1992.

The protocol is similar to the dispute resolution system in the U.S.-Canada Free Trade Agreement. It provides for certain international law solutions, such as direct negotiation among the parties. After that, the matter can be referred to the Common Market Group, which may issue recommendations. But the new thing, at least in the southern part of Latin America, is that it provides for arbitration proceedings before a court established by the treaty. The court has a three-person panel, and should reach decisions within sixty days. If it does not decide within that period, there is an extension for another sixty days. All decisions are final and are not subject to any further appeal.

The problem, of course, is that this arbitral tribunal has no power to enforce its decision. But, in the case of noncompliance with the decision, the agreement does allow the affected parties to apply countervailing duties to the country that refuses to comply. It also provides for a very preliminary system for dispute resolution on the part of a private person, mainly a corporation or individual rather than a state. That means that any individual who considers another party to be in violation of the treaty (or any of the treaty's auxiliary documents), and which violation affects it directly, may refer the matter to the national section of the Grupo Mercado Común. That

group may then decide whether or not to refer it to arbitration. This is the first step.

Well, what has happened from the investor point of view? At the very beginning, the business community almost ignored Mercosur. However, soon thereafter, it was endorsed very strongly by the business community and intra-Mercosur trade increased dramatically. More than thirty companies from Argentina and Brazil have entered into agreements to improve their trading systems, to increase their capacity of exports within Mercosur, and even to export to third countries. Some examples: the Auto Latina case, the merger between Volkswagen and Ford, and a beer company from Brazil, Brahma, that is producing malt in Argentina and Uruguay and exporting it.

The other important instrument, although it is within the Argentinean/Brazilian structure rather than Mercosur, is the Bi-National Companies Protocol. The Protocol is a treaty signed between Argentina and Brazil that allows certain companies which are at least 80% owned by Argentine and/or Brazilian residents, and which have at least 30% of their capital owned by nationals of one of the two countries, to have a national treatment in the other country. This is not unified law of corporations, but is only a privilege for those companies who fit into this configuration.

Well, this is the status of things today. Many things have to be done. For example, the countries have different foreign investment regulations. Argentina is the most liberal in this respect. In Argentina, there is no restriction at all to foreign investment and the tax burden is quite low. The other problem that exists is that the four countries do not have provisions in their laws allowing the submission of international disputes to foreign courts or foreign arbitration. Argentina, on the one hand, has no restrictions against submitting an international matter to foreign courts or foreign arbitration, nor does it contest the applicability of foreign law to international contracts. My understanding, however, is that none of the other three countries allow this, and this creates a hindrance to trade. I will now answer any questions. Thank you very much.

QUESTION AND ANSWER

DAVID TEICHMANN: Is there anyone from Paraguay in the audience? If so, maybe you would like to come to the microphone and answer this question. Although Paraguay is a smaller market than Argentina or Brazil, would not the implication of Mercosur basically deal a mortal wound to the Paraguayan economy based on where it is today?

PARAGUAYAN: Could you clarify please?

DAVID TEICHMANN: What I mean is that Paraguay right now is in an informal free-trade status with most of the countries around it. Would not that status be hurt if everybody enacted free trade anyway? Would not that

harm the flow of goods and services through Paraguay?

ANSWER: Yes, that is one of the main concerns of local businessmen.

DAVID TEICHMANN: Eduardo, would like to amplify on that?

EDUARDO LESSA BASTOS: Alfredo, you end your briefing saying that in Brazil, our local law does not allow the applicability of foreign law or forums or courts to judge Brazilian matters, cases, or obligations in relation to Brazilian trade. I must say that according to our Supreme Court and its rulings, Brazil must accept foreign laws, even in matters related to Brazilians in disputes. There are cases in the courts which allow that. On the other hand, there are decisions saying that you can choose not only the law but also another court because you do not have to confuse the applicable law and the court which will judge the matter. There is just one slight problem regarding courts which will judge Brazilian matters or a Brazilian and foreign relationship: transfers of technology. So there is a problem, but I think this has been circumvented. I just would like to say that.

COMMENT FROM THE FLOOR: I am sorry that Siegfried Marks does not appear to be here today. My comment is very simple. Having lived in Latin America and been interested in it for many years, I think there is a truism to all of this. And basically, the truism is that these plans of integration will be dictated by economic principles. To the extent, for example (and I think this was probably mentioned yesterday), that the Argentine government maintains a one-to-one exchange rate and that Brazil has galloping inflation, you have got concurrent problems that will have to be resolved somehow if it is to go forward. If I am not mistaken, there are many agreements that have been signed. Some go forward and some do not. I was in Chile one day, two or three years ago, and read in the newspaper that there was a new agreement between Chile and Argentina. I do not know what happened to that one. Is that still in existence? It referred to another one of these free-trade efforts, a bilateral free-trade agreement. In any event, all I am saying is that NAFTA will, of course, give an impulse to all of these efforts, but they will all be governed by economic results, I think. As far as goodwill goes, we all hope they do prosper, and I think the former administration of the United States was really hoping that someday in the far-distant future we would have one great area for all of North and South America. Maybe it will come true, maybe not.