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## The Surge in Trade with Latin America: Considerations in the Export Trade

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information.

## I. THE SURGE IN TRADE WITH LATIN AMERICA: CONSIDERATIONS IN THE EXPORT TRADE

### A. *Legislative Trends Affecting Latin America Trade Law: An Overview*

MARK ROSENBERG<sup>3</sup>

Thank you Janá, that was a great introduction. I, Charles Dusseau, and Jay Malina have a dialectical relationship, but I must tell you that when I sit up front, I never know whether I should go before or after. I know if I go before Charles Dusseau I am going to make him look better than he is. I know if I go after him, he is going to make me look worse than I am. I have the same problem with Jay Malina. So now I feel as though the problem is resolved. I will do to Jay what Charles did to me.

I was really delighted to hear him mention the work of Alvin Toffler. Toffler talked about "the third wave" and the fact that societies now are finding themselves confronting the third wave of economic development. The first wave was agricultural development and in the first wave society moved at a clock's speed. The second wave is industrial development. In those societies time also is measured at clock speed. The third wave societies are those societies that move at hyper speed, that are connected globally, that rely upon state of the art information and technology in order to be competitive. The dilemma in many ways, as we confront it with NAFTA here in Florida, was precisely how to get into the third wave.

The interests of many Floridians is to keep this state either a first wave or maybe a second wave economy. Clearly, we are not really a second wave economy because we are not an industrially driven state. What we have been in the past is a first wave economy. However, if you look at the day-to-day 260 billion state gross product, only about 3% of that product is driven by agriculture or roughly six or seven billion dollars. It is amazing that the first wave mentality and the first wave political power could have had such a telling impact upon the effort to get into the third wave through the North American Free Trade Agreement (NAFTA). Fortunately, strong leadership from commercial and business people, in particular trade lawyers, showed us that NAFTA takes us where we want to be as a state, that is, precisely into the new competitive global economy.

I am a big fan of Toffler because if you look around this community and

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3. Mark Rosenberg is currently the Director of Florida International University Latin America and Caribbean Center and the Executive Committee Vice Chair for International Economic Development for the Greater Miami Chamber of Commerce. Mr. Rosenberg has a Ph.D in political science from the University of Pittsburgh.

if you understand what is going on in the global economy, you know that the only way we can be competitive is to get into the third wave, figure it out, identify the niches, and move ahead. I see this gathering being part of that larger process. The work of the Greater Miami Chamber of Commerce, and some of the work we are doing in our committees, telecommunications, international services, and foreign markets attempts to figure out what those niches are. We are, after all, a service economy. And the third wave is based upon service. The question is are we going to be competitive in that context?

What I want to talk about very quickly in that context, and I think it is entirely appropriate, is trade trends because the secretary was quite right about them. Then I will talk very quickly about legislative trends affecting Latin American trade law. Following that, I want to do a very quick case study on NAFTA. I know we are going to come back to NAFTA a little bit later, but there are some things there that are fundamentally important for our competitiveness as a business community. Finally, I will very quickly talk about investment trends. One thing that I also want to say is that I think that it is unfortunate that we as a community, when we think about trade, largely think only about trade and goods. Thus, I am going to try and come back to this notion of trade and services at the end because in the final analysis even though we can measure very easily the progress that we have made in terms of the movement of goods, it is equally clear that where the Latin American market is opening up is precisely in that area where we do not measure very well and that is the whole issue of services.

If one looks at the total export to Latin America in 1992 (the 1993 data is just starting to come in), I think that the data is fairly dramatic. The United States did about seventy-five billion dollars in exports to Latin America in 1990 which was up 20% from 1991. Our exports to Mexico and Central America increased by 22%, to South America by 20%, and to Colombia by a whopping 70%. Our exports to Argentina grew by about 60% and to El Salvador by 40%. Our imports did not grow as fast, but, nonetheless, they still totaled, in 1992, sixty-nine billion dollars worth of goods. If you look at what has happened in Colombia since 1991, you can see that Colombia's total international trade has gone from twelve billion dollars to a little over twenty billion dollars in only a three year period.

There is something else that shows up more in terms of trade trends. While Colombia has not done much to increase its export competitiveness, it has done a lot to increase its imports. These are trends that are likely to continue to take place for the next few years. Colombia is getting tremendous amounts of foreign investment, it is opening its markets and reducing its tariffs and duties. For South Florida this is very important because this is our market. There is probably not enough we can do to learn about Latin American markets and what they are doing to open their trade barriers,

because there is no indication that this upward flow of imports is going to modify itself over the next few years. As a matter of fact, people who know the Colombian economy think that that economy is on the verge of a major boom.

I would like to emphasize that it is not just Colombia, this same process is happening in almost every Latin American country. I am not really saying anything new. The fact of the matter is that we find ourselves here in South Florida already in the 21st century. What is going on in the region today is potentially as important as the initial discovery of the New World 500 years ago. This is what I would call the new encounter. Because with this kind of data and the concrete legislative and legal steps that have taken place in Latin America to open markets, we are going to see during the next fifteen years a fundamental reorganization of productive relationships in the hemisphere. Not only in terms of merchandise goods but also in the transfer of services, and obviously, here in South Florida, we are right on the pivot. All you have to do is look out these windows at the port of Miami and you can see it.

What are some of the legislative trends that effect this? I just want to run over them very quickly. The Secretary has mentioned the Uruguay Round of GATT. While it is very important, the fact of the matter is that it is not as important as the NAFTA. The NAFTA will set the terms of trade in relationships in this hemisphere for the next two decades. A series of bilateral investment treaties are taking place even as we speak. Although the NAFTA may slow down, the USTR is moving very quickly with each of our Latin American trading partners to force them to restructure their investment and trade laws.

I would like to give you an anecdote if I could. I got a call a year and a half ago from a friend of mine in Peru, who was one of the people who helped the Peruvian government and who helped to restructure Andean intellectual property laws. He called me because they were really unhappy with Carla Hills who was then the senior trade negotiator for USTR. I asked: "Why are your guys unhappy with her? You are doing the right things." She said she did not like it: "if you want to write a progressive intellectual property law, use Mexico's, that is what we want." In effect, what our USTR is doing and has been doing, once Mexico restructured itself, is using the precedent set by Mexico to jam its wishes down the throats of every Latin American country. It is important to look at that within the context of the North American Free Trade Agreement, because it is NAFTA that essentially sets the statutory and regulatory norms that are going to structure trade.

Another legislative trend that is very important is the growing U.S. concern over the quality of democracy in Latin America. There is a lot of pressure coming out of the United States on Latin America to have judicial

systems that are far more transparent. Finally, Latin American countries are getting the message. They know that if there is not national treatment — if companies cannot get just treatment in their legal systems — that it is going slow down the pace of investment. Louis Malpecca from Mexico is here today and one of things we are trying to do here at Florida International University is promote a dialogue between Mexican lawyers and Floridian lawyers over how we can learn more about each others' legal system. Because the fact of the matter is the more we understand the greater the transparency will be.

Finally, you are going to see, in terms of legislative trends, something that Cromwell warned us about almost three hundred years ago. Cromwell once said that the people are not safe when the Parliament is in session. The fact of the matter is that we are seeing already a much greater amount of U.S. Congressional oversight on trade policy implementation. Thus, it is not a given that the market opening strategy that Latin American countries have followed are going to be reciprocated by the United States. It is precisely that kind of hesitation, a society that is moving at clock speed instead of at hyper speed, that is going to hurt the South Florida community.

Very briefly on the issue of NAFTA. There is no question that NAFTA will be far more important for us than GATT. What I would urge you to look at as people who are thinking about that legislation, is to look at Chapter 4 of NAFTA on the Rules of Origin. The Rules of Origin issue will become by far the most important chapter in determining whether or not goods move freely back and forth between this jurisdiction and other Latin American jurisdictions. It is going to set the precedent.

Also, Chapter 12, which is the Agreement of Services, deserves attention. This chapter is going to be critical for our competitiveness as a community in the next few years. I can remember that nobody a few years ago wanted to talk about Latin America. Although some people had a far more progressive approach, the bankers were only looking to Europe. After all, we are a Euro-centric country. Nobody wanted to talk about this region called Latin America. Today everybody is talking about it and the words are being backed up with action. According to Business Latin America, Latin America and the Caribbean are receiving an increasing share of world-wide foreign direct investment (FDI). In 1991 and 1992 foreign direct investment growth in Latin America outstripped Asia's for the first time since the early 1980s. Projected growth of FDI inflows: Latin America over the last six years, 16%; Japan, 13%; European Community, 11%, Asia, 11%.

It is very impressive what is taking place: actions are speaking louder than words. In part this is taking place not only because of what is going on in Latin America, but also because there has been a new adjustment, an adaptation to those changes in the region. New forms of transnational investment that avoid risk: joint ventures, licensing, subcontracting, turn-key

contracts. These are new adaptations to the Latin American environment that are having an impact upon foreign investment trends. Perhaps the most important dimension of this foreign investment trend is the movement throughout Latin America to privatize key industries: telecommunications, power, water, and other basic services. This is where our community is poised to be incredibly competitive. If you think about our community and the range of skills we have, we are already bilingual, we are already multi-cultural, we are already in the Latin American marketplace.

I would like to end with a question. I cannot understand for the life of me why BankOne which is based in Columbus, Ohio is providing for Ferbancomex, the largest bank in Mexico, all of the credit card technology and services to help Bancomex develop a competitive credit card system. I cannot understand how people in Columbus could have figured that out ahead of us. However, I do know that that has helped BankOne to become one of the most competitive and serious of the super regional banks that we have in the United States. It is precisely those kind of opportunities that we have to think about, that we have to try to identify. That is what brings us together at this meeting. I am a Latin Americanist, for me geography is destiny. We do not need to look to Europe nor the Pacific Rim. We can look right here in our own backyard. That is where the opportunities are.

L. JANÁ SIGARS

Jay Malina is recognized as an expert in exporting in both South Florida and throughout much of the United States. He has received the E Award for export excellence from the President of the United States and recently one of his companies formed an alliance with the accounting firm of Price Waterhouse to provide export advisory and management services for businesses seeking to benefit from the expanding trade opportunities in Latin America. He comes to us with a lot of background and experience and we look forward to hearing him speak.

### *B. Assisting Business in Developing Trade Between U.S. and Latin American Markets*

JAY T. MALINA<sup>4</sup>

Not to be left out in the dark after dealing with politicians and educators, the humble business person comes to the fore to see if he can at least match wits and give some educated viewpoints on doing business in Latin America.

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4. Jay T. Malina currently represents a group of companies specializing in developing and financing world exports for advanced technology products. Mr. Malina is the Chairman of the Executive Committee in Governor Chile's Florida International Affairs Commission and Vice-Chairman of the World Trade Center Committee of 2001. Mr. Malina has a B.S. degree in electrical engineering from Rincolier Polytechnic Institute and an M.B.A. from Northwestern University.

There are more than services involved in exporting to Latin America. I always respond this way to my good colleague in discussions we have throughout Florida. Believe it or not, the manufacturing base of the United States is increasing and doing quite well. Indeed, as was pointed out by our educator, the industrial bases of Latin America are predicating their future on further growth. So in reality, what we have to do is balance our discussions to include exports, trade, and services without a product.

What I am going to do today in the very short period I have, is to make a shift (for a few moments), and it is a shift in the direction that started as a macro viewpoint and has come down to a very micro viewpoint. It is the viewpoint of a business manager. Why do we want to talk about it here? That is simple, if you are in the legal profession, or if you are managing a business, it behooves you to know how to help direct your clients to the best ways to export and trade their product. This is your job as counselors. It does not end with legal troubles, it ends when your customer solves their complete problem. I give the point that it is our business to help our clients trade. To the extent that I can educate you in this short period of time, I will focus on some vehicles, and some questions you just might want to ask. This may enable you to help your clients at least find some solution to the export issues from a very micro and practical level.

There is a mystique about Latin America. I am speaking now from a businessmen's viewpoint, whether we are speaking from Florida or Caracas or anywhere. There is a mystique about exporting. However, let us focus on Latin America. It is there that we face the biggest mystique that we manufacturers have in all of our careers. We understand Europe to a degree, some of us have traded there. We understand a little bit about Asia. But this Latin American stuff is very strange to us. From our viewpoint it is something we want to explore. And what I want to do is to discuss these issues as reasons for exporting. To develop a marketing analysis and create a viable strategic plan we must explore the exporting culture in Latin America. Creating exporting cultures, if you will a culture within, and creating a strategic plan is creating a marketing analysis. Let us take a little look at channels of distribution, and then we will review some examples, which I think are just as important as any discussion. I will mention some of the things that I have done and some of the mistakes I have made, so maybe your clients can avoid them.

First, why are we exporting? What is this mystique about? To address these questions we are going to focus on what I call the risk/reward balance, which is something in the business environment we do every single day. Today, there is more risk in dealing in Latin America than is associated with dealing in more stable countries, because they are changing, and changing to create more risk for the businessman. On the other side, the reward prospects for exporting to Latin America and for trading to Latin America are

some of the highest of any in the world today. What we have to do is determine the risk tolerance of our clients. How far do they want to go to gain access to this market, and what are they willing to mitigate? What options are they willing to look at to mitigate some of the risks in some areas? These are the areas of analyses that we want to focus on.

What do I mean by risks? Let us for a moment look at it from my viewpoint. In Brazil, they have had their first president impeached for corruption. They have inflation 30% to 40% a month. You have got to imagine that from a conservative businessman's viewpoint. They have changed currency three or four times in the past year. In Peru, President Fujimoro has completely dissolved Congress. In Venezuela, the president was forced out of office. In Mexico there are uprisings. In Venezuela again, there was a bank that collapsed, which was one of the top banks in the country. This is not like doing business in New York or Paris, and this reality is one that we have to deal with.

Yet, on the benefit side, what is happening? In Colombia, they are opening up their markets to us. Brazil is dropping import duties at a rapid rate. Mexico has privatization programs. Along with this, we see many communities which as a result of being protected for so long, have developed a hunger for American products. We do not have that advantage anywhere else in the world. This hunger, this acceptance of American technology, has created an atmosphere that we can take advantage of right now, and Florida's geographic location makes it an ideal area to act as a hub. While Florida may not manufacture most of the products that are shipped around the world, we are a transfer point. Obviously, this is a means by which we will grow. Products manufactured throughout the United States, maybe even around the world, will come to the ports of Miami so they can be shipped to Latin America.

Let us start at the beginning. What are the goals you want to have before you export? What do you want to do? What I mean by that is very simple. I will start with an example. I was invited to speak with a client who wanted to get into the Latin American market. I said fantastic. I brought my suitcase and all of our experts along. I said let us define the strategy, and let us see what countries you want to enter. We were going on and on, and they looked at us with these blank expressions. I stopped and asked what was wrong. They said to me, "We do not think you understand. What we want to do, what our definition of going into the Latin American market is, we would like some customers who are traveling from Venezuela to America to stop by our store." That was their globalization policy. Clearly I had misread the goals required. All they wanted was some more people to fly in. The answer was much simpler. Their solution was to place some ads in some of the airline magazines. And so the questions remain: What do you want to be in the marketplace? Do you want to be number one? What



percentage of marketshare are you looking for in this marketplace? What is your five year goal? You have to present these questions right at the beginning, so you know exactly what it takes for your client and yourself.

There are stages when you go into a foreign market. The stages are simple. First, you can start with a local representative in a local country. Go to a foreign distributor, go to a foreign presence, go to a sales organization in that country, and finally to a complete presence with a factory in the country. You may wish to do them all or you may have some other ideas that are joint relationships that we will discuss later. This is the issue when we talk about the actual goal, which is resource allocation. It costs money to trade. It costs a lot of money to trade. People do not understand that. There are also direct and indirect investments. The direct is the obvious one where you are either going to have sales people in an area who are going to do advertising and who are going to make contacts. From a manufacturing viewpoint and from a product viewpoint the indirect can be just as bad.

Normally when you penetrate any market, one of the things you have to do is to become very competitive price-wise if you want to create a market niche for yourself. This is very good for a sales department, but when you have a manufacturing concern, one of the problems you may have is that the production people want to get an item out the door at the end of the month at a high profit. Guess what? That is a battle. There has to be a corporate cultural understanding of what it means to export. It means sacrifice somewhere else for limited resources. If the organization itself is not ready to do that, do not export. Stay where you are. The result of that strategy may be to go out of business in a few years. But perhaps that is the only one you can afford. It is an all encompassing issue that has to be considered. This creation of the right corporate culture is very interesting because as we all know, whether it is Latin America or the United States, the ability to communicate with your customers is critical. The personal relationships we will discuss later are critical. If that culture is not present within your organization, do not waste your time. You will just be spending it for nothing.

Let us talk about the core now, the strategic plan. If you consider the whole process of trading it involves two things really: First, developing goals and creating a strategic plan to implement those goals; and second, implementing the strategic plan and measuring the results. This is trading, a business practicing from a business plan as much as anything else. What we are going to talk about now for a few minutes is this strategic plan. Market research is one of the key elements. If you were to stress anything to your clients, it is that they should get people who will help them develop the strategic plan and understand the key components. None of us are too big on market research.

I am always reminded of a story that probably half of you in this

audience already know. It really brings up a point. When the Chevrolet Nova was introduced into a Latin American country (it is an automobile for those of you who are not aware), it was done with great fanfare and very little market research. Somebody called them after the cars arrived, and said that "Nova" in Spanish means "it does not go" or "does not work." That is not a good idea. Had they done some market research, they would have learned that. Unfortunately, I had a similar experience that I am embarrassed to talk about, but it did happen. One of our products which is a measuring instrument for electronics is called the Wizard. We use that for obvious reasons in the United States, and we came out with a small version which we exported to Germany, by the way, called the Mini Wiz: Small Wizard. When my irate German distributor, one of our largest in the world, called me, he said Mini Wiz in German means "small joke." We learn, all of us, that these things have to be taken very seriously.

Another component of market research is to discuss whether there is a market for the product in Latin America. While we are used to seeing a vision in our own country, we assume that that vision works in another country. It does not always happen that way. The standards are not the same. You need to learn if there is a market. We are here in our own country, and everyday we get a sense of whether our product will work. You cannot carry that with you. You have to find out if there is definitely a market for the product. As an example, standards of living are different in each and every Latin American country. Does that mean that a high technology product, which would be good in the United States and maybe certain elements of Mexico, would be good in Argentina? Maybe. But I will give you an example where it was not good.

We represent a company that manufactures solar outdoor lighting, a phenomenally successful product for us. Guess what we found out? Half of Argentina does not have enough sun, so it cannot be used in Argentina. That was one of the ideas we had to learn: the product does not adapt to the local environment. You cannot start everywhere. There is no such thing, as we are all aware of, as a homogenous Latin America. There is even no such thing as a homogenous United States. It does not work the same way for both sides in trade. As an example, I would suggest strongly that you urge your customers or clients to focus very carefully on specific countries, start very slowly, and measure the results. Pick the ones that will have competitive advantages. As an example, we have a client in the machinery business. While there is no machine/tool industry in Mexico to speak of, there is a very strong machine/tool industry in Brazil. Where do you think I tell him to start? To me, Mexico would be the place to start, and then go to Brazil later.

Business environment also is important. I say the following with the utmost respect to our guest from Brazil, but the intellectual property rights

in Brazil are not as strong as they are in Mexico. A businessman would want to weigh that in my risk/reward balance. We have to, as educators and as lawyers, list these risks for our clients to understand, or get people who will help explain that.

Political stability is another concern. Up until six weeks ago, I thought Venezuela was the most politically stable country in Latin America. Now, we have some questions. I think in general it is politically stable, but from an economic point of view, clearly some caution is now mandated. Some people lost a lot of money with the failure of Banco Latino. This has to be consistently examined.

Analysis of trade agreements is another consideration, not from a macro level as much as from where would I want to do business so that I can keep my tariffs minimized and my business relationships maximized. The signing a G3 with Mexico, Colombia, and Venezuela seems to me a good example, because one of those three might be an interesting hub for my products because I may save money with distribution if I can get into any one of them. It also seems to me that Mercosur is an interesting possibility (once they get a little further down the line) for me to consider two or three or four countries at once.

NAFTA is also there, but from an export viewpoint, we have to maximize our dollars. We cannot afford to put offices in every country, so we have to look to government to create trade agreements that make our job easier. Conversely, trade agreements are a critical point that we need to check. I also cannot overestimate the act of registering for protection. We all know about the intricacies of intellectual property from a business viewpoint. My clients are the least concerned about something that lawyers are totally concerned about in certain areas. I cannot emphasize enough the need for education in this area enough.

The best products for a market are another concern. Our clients ask: "We have a range of products so why should we not ship them all?" If you look at a company, the evolution of a product line may take five or ten years. Then you want to go in and ship all these products immediately? It does not work. You need to find the ones that fit a niche that you can start to export. This is something we need to talk about consistently. One of the best market research methods is to use consulting firms, because they have access to the local market. Also, push your clients to go to trade shows. Let them learn what the competitors are doing in the countries so they get a feel for the market. Let them talk to potential customers for their products, and also trade associations and experts. You have to be part of the market before you can ship to the market; it does not work to be an outsider.

Channels of distribution is another whole concept that could take about three or four days to fully discuss. It is an area that I am going to touch on just very quickly. In Latin America the criteria for picking channels of

distribution are very different. In evaluating them, you can go all the way from picking a distributor to what we call “piggy back” marketing, where you find somebody who is already exporting the product locally and work with them in a joint venture. I will tell you this: the further you go down and connect yourself with a factory or direct relationship in a country, clearly the further you are involved with the politics of that country. That is something you have to remember rather than obtaining some distribution help from the beginning.

As an example, when we started exporting products from our main electronics company, we found an export management firm to work with us for about two or three years before we realized we had outgrown this specific relationship. What we did next was to set up our own distribution networks, and eventually our own factories, in these foreign countries. That is the natural evolution in many cases.

The last area is also one of the most terrifying: finance. Between this country and Latin America over the last few years, it is now possible to finance without letters of credit. Many people do not understand what is available in this area. There is a phenomenal wealth of information and opportunities.

First, there are two types of financing: pre-export financing and post export financing. Pre-export deals with inventory purchases, which means you have an order, but you have to get the product made. Post-export has to deal with getting paid on a receivable. An example of pre-export would be a trader getting a purchase order who now has to buy the product. Latin America, we know, is more risky, but there are many programs available as sources of finance.

Where to go? Obviously, I suggest that your clients start with the international department of their banks. They are involved deeply, and a lot of them have grown. It is sad that in a state like Florida, there are not more international banking institutions doing more aggressive work. In my opinion, this is probably the weakest link in our international chain, one that should be fortified, hopefully, in the near future. Lobby your own international bank.

The next thing is state export agencies. Our own state has created the Florida Export Finance Corp., which will guarantee loans in conjunction with the Ex-Im Bank. That helps small exporters ship, in many cases on open account, to export to Latin America — something unheard of in the last few years. It was recently established through the Florida International Affairs Commission, we are delighted to say, and passed the legislature last year. It guarantees both pre-export and post-export financing.

The biggest player for U.S. products is probably the Ex-Im Bank. They treat the foreign buyer as if he were a domestic company. If the company can pass simple credit tests (usually a DMV report), and if their bank is

someone they know, you can ship your product on open account. This is new, and is important to your clients, because they can guarantee payment. What a trade facilitation mechanism! It is one that is critical and important. It means that you do not have to work with a letter of credit. It also means you can get your money, or get guaranteed. This is probably one of the most interesting things that we can talk about in addition to the increase in letters of credit financing.

The last area of finance is clearly the trading company. There are trading companies that actually take title to the product and actually assist in the exporting mechanism. This is obviously taken from the Japanese model and is one that is also being used.

Let me close, if I can, by stating that from a manufacturing viewpoint, we are beginning to understand the opportunities for export. But we really need education from you — lawyers and government. Why do I say you? Because 90% of small manufacturers are not exporting. They are the ones that are going to be out of business, very possibly in the next ten years. I invite you, I ask you, I implore you, to reach out to these clients of yours. Let them know that they must export or perish, and let them know that the Latin American market is close to us. Help them get started so that they can help your business grow in the future.

L. JANÁ SIGARS

Mr. Fournier is involved in a lot of civil and community service in Costa Rica. He also is a master at large of Costa Rica and on the Board of Governors of the Junta de Protection Social de San Jose. He is a very exciting, interesting, and lively man, and we are very pleased to have him speak to us.

*C. Central American Country Update: Exporting to Central America and the Impact of the Central American Common Market*

ALFREDO FOURNIER<sup>5</sup>

Thank you very much. I am going to give you an idea about what Central America has been doing. But above all I first want to inquire something of you: "Have you consulted your lawyer today?" Maybe that sounds like a joke. It is not. In my practice for thirty-three years, I found that people come to my country and start doing what they please, thinking that everything is the same as in the United States. But things are not the same in California as they are in Florida, nor in New York, nor Rhode

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5. Alfredo Fournier is a founder and Professor at Autonema de Central America and honorary Counsel General for Norway in Costa Rica. Currently, Mr. Fournier studies law at the University of Costa Rica and has taken courses at the University of Madrid and at Washington University.

Island. Each has its own legislation, just as Costa Rica and any other Latin American country. But still they arrive and think they are back in their state in the United States or their own province in Canada. That is not so. That is why I ask, have you consulted your lawyer today? Once I found a lawyer at a hotel, he was having lunch and said "I understand you are a lawyer?" I said, "Yes." "Can I come to your office?" he asked. He had bought property without a notary public, which is indispensable, and he was a lawyer from Louisiana. How can a person make such a mistake? You need your lawyer all the time.

Central America became independent on September 15, 1821. Seven states, two of which were won by vote, belonged to the Captain General of Guatemala. The rest of the countries, Costa Rica, Guatemala, Salvador, Honduras, and Nicaragua, became members of the Provincia Spunida de Central America which was styled as a federal organization copying the Constitution of the United States. That was 1824-1825. But there were four years during which there was no Central American Constitution. On September 15, 1821 Costa Rica became independent, and Costa Ricans called for an election of delegates to draw up a Constitution. By December 21, 1821 Costa Rica had its own provisional and internal legal organization. This date is important because this organization would affect the way future affairs in Costa Rica would be managed under the law. The law is the source of power in Costa Rica, not the generals. In fact more than half of the Presidents of Costa Rica have been lawyers. The four powers in Costa Rica are the electoral power, the legislative, the judicial, and the executive — all in the hands of lawyers. Further, the police forces, since there is no army by Constitution, are in the hands of another lawyer. We are very proud of this. Anyway, the Central American Federation broke up. Dissent grew among all the other countries, and the Federation broke up. So each country started its own independent life. There have been many attempts to integrate the countries. There was even an attempt by the President of Guatemala, President Barrios, who decided to conquer the rest of Central America and make it one country again. He died in battle in El Salvador. All this shows that although there are differences, there also is a tendency towards integration.

Central American integration really began at the end of World War II. By 1950 under the guidance of the United Nations Costa Rica made the first attempt towards economic and political integration. There were two efforts, one economic and one political. The economic effort has been instrumental through many different treaties. One is a treaty that says there will be free trade in certain goods. Of course, that makes for privileges and benefits to only certain products. It was rapidly understood as such, so it was completely buried and repealed.

That treaty has since been replaced by the Tratado General de

Intergracion Economica de Central America of 1960. That treaty, or the "frame treaty" as it is called, is enforced. It has had few changes and is in full force and effect. Under this treaty all commerce between the countries is free, except for a limited list of products on the annex, which are restricted. The annex is a major document that is a must for anyone who plans to invest in Latin America, because this treaty gives privileges to Central American entities already established there. This treaty also contains complimentary treaties. One of these is a customs union, so that outside products coming into Central America are given similar treatment in all five countries. This treaty has been substituted with a new one that contains the same list of products included in the Brussels Treaty, and thereby, globalizing the identification of products. Among the complimentary treaties I have included in your documents is the Constitution of the Banco Centro Intergracion Economica (CABE). CABE is a major institution, financing more than one billion dollars that has been contributed by the five Central American countries. Now the Republic of China and Mexico also have joined as stockholders.

The Constitution has been modified so that other countries, not only Central American countries, can belong. The importance of the Bank is that it provides the financing for investment in Central America, so that the investor does not have to provide all of his own financing. Most of the lines of credit are not directly from the bank but from specific countries. Among them is the Export/Import Bank of the United States. But the United States is not the only financier, others include Korea, the European Economic Union, Japan, Spain, Holland, and France. Those countries will also give lines of credit to purchase durable goods from them at promotional rates with long grace periods.

One of the things the Constitution enforced was a system of industries of integration. Certain industries that were very large in scope would get special treatment. But because the treaty provided for unnecessary benefits and privileges, it has been revoked and is no longer in force.

On the political side there was the Organizacion de Estados Central Americanos (ODECA). But El Salvador is a major example of how politics can damage a country. Other countries started ODECA in the early 1950s and it was reformed in 1962, but it never worked very well. Then, in the early 1970s, there was a soccer war between El Salvador and Honduras. Soccer was the pretext for a fight which erupted into a war. This war caused great damage to the Central American project. Later in the 1970s, the dictatorship of General Anastasio Somoza in Nicaragua also did much damage, followed by the Sandinistas regime. You can well imagine that having war in such a small territory was quite a disturbance to all of Central America. The Sandinistas were in Nicaragua, there was war being waged in El Salvador, and there is still no peace in Guatemala. This made certain

countries, mainly Costa Rica, withdraw from ODECA. Costa Rica has not accepted the free transit of people, nor capital, nor goods through its borders. Although these things are working in the other countries, Costa Rica has continually decided against these policies.

Why? Our tradition of more than 100 years of democracy is quite different from the tradition of other countries. There have been reasons why in Costa Rica democracy worked when in other countries it did not. The United States requires a democratic process and respect for human rights. This we have. The Inter-American Court of Human Rights is in Costa Rica, and, while we are happy about it, that does not mean we should "throw it in other people's faces." What we must do is help. Although I have had little participation in politics, it is my opinion that Costa Rica is a Central American country in the Americas, thus the Americas have to be our project.

Several of the tropical countries on the continent have had difficult problems with the European Union because of restrictions they have placed on bananas. Ecuador is the largest producer of bananas in the world and Costa Rica is the second largest. But this does not mean that we are the only ones. Colombia, Venezuela, Nicaragua, Guatemala, Honduras and Mexico all produce bananas, and there have been restrictions put on bananas. Since Costa Rica is a member of GATT and some of the other countries (not all of the other countries are members of GATT) we have won all the GATT complaints that we have lodged. But still the winning has been rather disheartening because obedience is not compulsory to the members of GATT. We are still fighting, and we hope to continue winning. Very soon, we want to not only win in the court, but in reality. This is a major project for all our countries.

Bananas are the largest export product in Costa Rica. But, they are not the prime income producer. Costa Rica is also a service country. But still, bananas amount to about half a billion dollars worth of exports, followed closely by cotton. Now, what prospects do we have? Several things are functioning, one of them being the Caribbean Basin Initiative (CBI), of which all of you are very knowledgeable. Costa Rica is a member and is the country that is second in benefits conferred by the CBI. The Dominican Republic is the first, Costa Rica is the second. It has been a major benefit to us.

Soon after the CBI President Bush initiated the Enterprise of the Americas. Its scope is such that everybody, not only Costa Rica but all of Latin America, was very enthusiastic about it. But the implementation of the Enterprise of the Americas has been slow and haphazard, and really is not happening. It is a major project. I remember talking to two Congressmen at a social meeting, one from Paraguay and one from Argentina. We were commenting, "let us take Mr. Bush's word, let us do it now." Of course, it has not happened.



NAFTA is another possibility. NAFTA does not include Latin America nor Central America. Is NAFTA going to be a major impetus or not to the area? Or will it only benefit Mexico? This is something all of our countries are examining. Answering these questions is a major challenge. Costa Rica at present is negotiating a free trade treaty with Mexico. We are going to follow immediately with treaties with Venezuela and Colombia. We have been criticized by the rest of Central America for being so far ahead. We are ahead in negotiations, but we foresee that a huge market is in the formation and that we are either going to be the open bridge or the broken bridge between the two Americas. We want to be the linkage, not the separation.

Before independence, Napoleon took power in France. This is a major event because Napoleon's legislation was transferred to Spain and the rest of the other countries in Europe, except for England. Therefore, we have French (via Spain) legislation. It is said that although the Civil Code of Costa Rica is fashioned after the Civil Code of Spain, the Civil Code of Costa Rica was enacted first, but of course we copied the draft. However, there is another major document which is not the Napoleonic Civil Code: the Commercial Code. Napoleon not only enacted the Civil Code, but he enacted five codes: Civil, commercial, criminal, criminal procedure, and civil procedure. He is known for the Civil Code, *Le Code Napoleon*. But the Commercial Code is also very important, and it spread throughout Latin America, including Costa Rica.

From the constitutional point of view, the first constitution of Costa Rica was written in 1812, before independence, because it was the Constitution of Spain. We were a Spanish colony. Therefore, Spain enacted a Constitution for all of Latin America, for all of Spanish America. Therefore, when we decided to begin our constitutional legislation we based it on the Spanish Constitution of 1812, which had been in force but was later suspended by King Ferdinand VII. The Constitution was mainly influenced by the Spanish, not the Constitution of the United States, although the Constitutions of the United States of both 1786 and 1787 were prototypes at the disposal of the constitutional legislators in Spain when the Constitution of 1812 was adopted. We began a constitutional movement with the Spanish Constitution of 1812, but, in 1825, when the Provinces of Central America formed what was really the United States of Central America, they copied the U.S. Constitution, forgetting the Spanish, in the intermingling of two very important documents. Therefore, the Constitution of the United States, manifested itself in the Central American Constitution.

With that in mind I want to point out that property in most of Central America, including Costa Rica, is freely transferable even to foreigners, except for sea front and border property. Land up to two kilometers from the border cannot be owned, by either Costa Ricans or foreigners. Fifty meters away from the ocean you cannot buy land, that also belongs to the State.

Surface rights in general can be purchased by anybody, foreign or national. However, mineral rights belong to the State. They cannot be permanently transferred from the State, but can leave the State as a concession to private individuals. At present in Costa Rica we do have a new mining code, and we are hopefully going to adopt a new oil/petroleum law soon which will allow for exploration and foreign exploitation of petroleum resources by any company whose law is tailored after the French and Spanish conception of Sociedad Anomia.

More important is the fact that companies have limited liability for stockholders and managers. This is surprising to investors in Central America, and it is not a very good thing. As a Professor of commercial law, I find myself answering monthly questions regarding distributors' and agents' rights. The laws exist in both the Dominican Republic and in other Latin American countries. Indemnification and compensation to be given to the distributors and agents is substantial and, therefore, before entering any distribution or agent relationship exporters into Central America must be very careful to understand and analyze what these laws are going to mean to the future relationship.

There are drawback laws and free trade zones in which you can bring in your semi-finished goods and export them. This is being done all the time, and free trade zones are very important in certain countries, especially those countries which have no electricity, no running water, or which have problems with their public services. These free trade zones provide these services in a constant and permanent way. In countries where utility services are not a problem, free trade zones are not as important as drawback situations, which could be even more useful.

Exchange regulations are and have always been a problem in Latin America. The good news, in conclusion, is that exchange regulations are being improved. Thank you very much for your patience, it is hard for a Latin American lawyer to be short.

*D. Market Access: NAFTA's Impact on Trade and the Acceleration of Regional Integration in Latin America — Mexico Country Update*

FRANCISCO DE P. CARRAL PUCCIO<sup>6</sup>

I am sure Mexico has become a very interesting subject in light of the changes that have occurred in the past few years. First of all, I want to thank the Florida Bar for this opportunity to be here and talk about these changes with you. As has been the case in most Latin American countries, the Mexican economy was traditionally characterized by protectionism as a

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6. Francisco de P. Carral Puccio is General Counsel for Celular de Telefonía, S.A. in Monterrey, Mexico.

means to achieve industrial development and social welfare. Foreign trade was highly restricted through the so-called substitution of imports, and oil exports became a strategic tool for the country's economy. Since the 1970s Mexico has been experiencing high inflation and a dramatic falling foreign exchange rate. When oil prices rose, several civilization programs were adopted, but these programs failed to restore economic growth.

In 1982, the lack of foreign reserves led the government to nationalize banks and adopt foreign exchange controls. When President Miguel de la Madrid took office in 1982, Mexico was facing the worst economic crisis in the country's modern history. Since 1982, the Mexican government has implemented structural reforms with the purpose of altering the nation's economy and recovering from the crisis. Among other measures, these reforms included the liberalization of trade, the deregulation of the country's economy, and the privatization of state owned companies. As a result, Mexico joined the General Agreement on Tariffs and Trade in 1986 with substantially reduced import duties on several products in order to stimulate trading activity.

Under the current administration of President Carlos Salinas, these reforms are continuing and have been significantly improved. Even before Mexico started negotiating with NAFTA, the government took important steps to attract foreign investment such as the adoption of new regulations in that field and the passage of tougher intellectual property laws. Furthermore, burdensome regulations impeding free market development, such as the foreign exchange controls, have been eliminated along with several restrictions on transfers of technology. Presently such agreements may be negotiated with Mexican companies on a free will basis. In the past, any Mexican company receiving technology was required to register the transfer of technology agreement with a Mexican agency, and for purposes of registration, several restrictions were imposed on this agreement. Just to give an example, any royalties paid under the agreement for a license could not exceed a certain rate, and the parties to the agreement could not submit to the jurisdiction of foreign courts for purposes of the agreement.

At the present time foreign investors may have greater confidence about the enforceability of Mexican law, even though the legal and regulatory framework has yet to be completed. The most recent development in this regard is the enactment of the new law of foreign investment, which is consistent with changes required under NAFTA. Under this law, foreign investors in Mexico are now permitted to own up to 100% of the capital stock of a Mexican company, provided this company is engaged in a non-regulated activity.

As far as telecommunications, which is a very important field (and I am specifically involved in this business) foreign investors may now invest more than 49% in Mexican companies. That means they can have a majority

interest in similar companies. Another major development in this field has to do with long distance. The long distance market will be open in a couple of years, and I am sure foreign investors will have an opportunity to take advantage of this situation.

As far as intellectual property is concerned, the new legislation broadens the protection of patents and trademarks, trade secrets, and property rights, including foreign registrations in a manner consistent with the Bern, Geneva, and Paris Conventions, to which Mexico is a party. As an example, registration terms for both patents and trademarks have been increased. Trademark registrations are now valid for a term of ten years. Renewable terms and patents are valid for fifteen years. This also is a very important subject, because I know Mexico was put on a watch list here in the United States for not aggressively protecting intellectual property rights. Mexico took this very seriously and as a result, the new law broadens this protection in a significant matter. Trade secrets for instance, which were not even mentioned in the old law now have adequate protection, and I am sure foreign investors may now have greater confidence as far as intellectual property is concerned.

Regarding taxation, on September 18, 1992, representatives from the United States and Mexico signed a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to income taxes. By eliminating government taxation the Treaty will encourage investment and promote trade between the two nations under NAFTA, as well as provide a greater degree of certainty as to tax aspects of commercial transactions. This Treaty applies to persons who are residents of the United States, Mexico, or both, and prevents residents of third countries from taking advantage of its benefits. This is basically an anti-treaty shopping provision. Another very important aspect of this Treaty is that withholding tax rates were significantly lowered according to the text of the Treaty. For example, the rates applicable to royalties were reduced from 35% in the case of patents and trademarks and 50% in the case of copyrights to flat rates of 10%. Through these new instruments, U.S. companies may credit income taxes paid in Mexico against income taxes in the United States.

In regard to NAFTA in particular, NAFTA in Mexico is viewed as an instrument to consolidate the development of an efficient economy that may offer adequate employment and prosperity, viewing the internationalization of the world economy as a common process. NAFTA will allow Mexico to trade from a stronger position of competition for different technologies and markets.

Mexico as a developing country was not in a position to immediately liberalize trade in all sectors under the agreement. This is something that we must clarify, therefore, only 40% of U.S. and Canadian exports to Mexico are duty free upon entry into ports under the agreement, with the balance subject

to various tariffs and reductions schedules. On the other hand, tariffs for nearly 80% of Mexican exports to the United States and Canada were eliminated as of January 1, 1994.

Something worth mentioning is that Mexico is still eligible for special preference, the so called GSP tariff benefits from the United States. It is expected that the economic growth of Mexico and the lowering of Mexican tariffs under NAFTA will bring significant benefits to U.S. and Canadian exporters. Mexico, for its part, will also enjoy the benefits of integration of labor intensive industries from the United States and Canada due to its low wage rates.

According to Chapter 3 of the agreement concerning rules of origin, the parties assured that only parts, or components of finished products manufactured within the region, will qualify for NAFTA benefits. For this reason, products assembled in Mexico under Maquiledora programs (which are very common in Mexico) with parts and components imported from outside the region, will not enjoy duty free entry into the United States and Canada, and export oriented companies operating in Mexico will have to use a specified percentage of Mexican parts and materials in order to be eligible for preferential tariff benefits. I also wish to point out that considering the importance of trade with other regions and existing international rules, NAFTA is consistent with Article 24 and other provisions of GATT since it covers all internal tariffs and does not raise the tariffs charged on imports from non-parties.

While most Latin American countries, including Mexico, share a common element in respect to economic reform problems, the region is becoming an important international market with interesting possibilities for both domestic and foreign investors. Although economic reforms are being implemented in different stages according to each country's particular situation, Latin Americans are willing to create a free trading block in order to integrate the region into a global market. NAFTA will increase regional trade and accelerate this integration process.

The 1980 Montevideo Treaty is considered to be as a first important step in gradually establishing a Latin American common market. The Treaty provides for multilateral and bilateral mechanisms as a means to accomplish regional integration. The regional mechanisms include all members of the association, and set forth preferential tariff treatment for Latin American products. Partial mechanisms are intended to promote trading regions through specific accords between two or more members. During the 1980s, the Treaty did not meet its members expectations due to a very slow tariff reduction process as well as several trade barriers imposed on regional products by industrialized nations. However, NAFTA will certainly remedy this situation, and, as I have mentioned before, increase regional trade will further the expansion of Latin American economies.

The integration movement in Latin America was significantly accelerated in the 1990s. Despite the fact that several Latin American nations are currently emerging from complicated economic problems and a slow recovery process, the reforms undertaken by the governments of the region including trade liberalization have given an initial impulse for growth. Mexico for instance, signed a free trade agreement with Chile which entered into force on January 1, 1992. This agreement provides for the liberalization for trade between the parties, through various tariff reduction schedules starting with a 10% import duty for almost all products. However, oil and certain agricultural products were excluded from the agreement.

At the present time, Mexico is in the process of negotiating free trade agreements with Colombia and Venezuela and the Central American region. As mentioned before, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama signed a free trade accord on October 29, 1993 in order to create a six nation zone allowing for free movement of labor and capital as well and the elimination of tariffs. New developments in regional free trade are expected in the near future. In summary, it is proper to state that, with Mexico as a model, Latin American nations are rapidly integrating their markets which will stimulate global economic growth and further their introduction into a new international context. Thank you.

#### QUESTION AND ANSWER

**QUESTION:** Is regional integration incompatible with more global integration?

**ANSWER:** I think they both compliment each other. I do not think NAFTA interferes with this local integration. There are very important mechanisms which were created even before NAFTA was signed which are perfectly consistent with the goals that both Mexico and the rest of Latin America are trying to achieve through this integration movement.

**QUESTION:** How does NAFTA handle trade secrets?

**ANSWER:** There is a specific chapter dealing with trade secrets. What the law does in this respect is basically define the term trade secrets. As far as these trade secrets are concerned, companies have to take care of what their personnel do in general terms on the different subjects of each business. On the other hand, sanctions, which are also a chapter that has to do with trade secrets, were toughened in such a manner that anyone violating this provision will be subject to criminal sanctions and other tough penalties.

**QUESTION:** What is the present state of trade relations between Mexico and its Central American neighbors?

**ANSWER:** Currently there is no agreement between Mexico and Central America. However, Mexico is now in the process of negotiating a free trade agreement with its neighbors.

QUESTION: How does NAFTA deal with improper trademark usage?

ANSWER: There is a specific provision in the new intellectual property law where sanctions are imposed on Mexican distributors that market foreign products and register a trademark which is not owned by them but by their foreign suppliers.

ANSWER: Recently I was at a meeting of the international trade market association where the equivalent of the secretary or the commissioner of trademarks and patents spoke. I think he said that about two years ago they were having about 175 confiscatory raids per year. Now they are having over 175 per month. He said they recently raided a company that manufactured counterfeit Levi jeans. They confiscated over 175,000 pairs of jeans.

ANSWER: One point of information on that, the NAFTA intellectual property chapter creates a treaty obligation among the three parties to provide for private rights of action and to enforce intellectual property rights. So, in this case, the alleged inadequacy of Mexican, Canadian, or U.S. law would be a breach of the Treaty and would provide grounds for the State parties to bring claims.

QUESTION: Are there any provisions on international arbitration in NAFTA?

ANSWER: There are a couple of instances where NAFTA recognizes private rights to compel international arbitration. One is between an investor and the host government. The other is found, I believe, in chapter 20 where the NAFTA parties are encouraged to facilitate the use of arbitration and ADR to resolve private commercial disputes. It also obligates the parties to insure that agreements to arbitrate are observed. Fortunately, all three countries are parties to the New York Convention so all we are really doing in NAFTA is re-stating the existing New York Convention obligation.

#### L. JANÁ SIGARS

Our next speaker, Daniel M. Price, is a Washington, D.C. lawyer specializing in international business transactions, trade policy, and arbitration. Formerly, Mr. Price was principle General Council in the office of the U.S. trade representative. Mr. Price served as the USTR negotiator on investment issues in NAFTA. He also has negotiated trade and investment agreements with the former Soviet Union and Eastern Europe. He is a member of the American Society of International Law and of the Council of Foreign Relations. I am pleased to introduce Dan Price.

DANIEL PRICE<sup>7</sup>

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7. David Price is a partner in the Washington D.C. office of Powell, Goldstein, Frazier and Murphy. Mr. Price received his undergraduate degree from Hartford College, his diploma of law from Cambridge University and his J.D. from Harvard Law School.

Thank you very much. The NAFTA negotiations were a lot of fun. As you have heard from a number of speakers this morning, the entire region is quite dynamic, Mexico being certainly among the primary dynamic economies of the region. Now, the three parties to NAFTA all approached the negotiations with a common objective, but with different anxiety levels.

Some of the U.S. anxieties about NAFTA were played out in the NAFTA approval debate and indeed on the debate on the Larry King Show between Ross Perot and Vice President Gore. It is important to remember that the Canadians also had anxieties about these negotiations. Perhaps best captured in a political cartoon which appeared at the mid-point in the negotiations in one of the Ottawa newspapers. It was an outline of North America, and you could see Canada, the United States, and Mexico. Each country had a caption. For Mexico it said manufacturing zone, for the United States it said shopping zone, and for Canada it said skiing zone. However, I think that by the end of the negotiations all three parties believed that the agreement was a balanced package.

I thought it would be perhaps most useful, given all this talk about NAFTA, to give you kind of a way of looking at NAFTA, and for the practitioners among you, a way into NAFTA. Think about NAFTA as doing two things. First it creates market access for U.S. origin goods and services as well as direct and indirect investment by U.S. companies. Second, it creates a body of rules to insure that this market access is meaningful. Intellectual Property (IPR) illustrates the importance of the Accord development. A concern about IPR is relevant whether you are engaged in trading goods or investment licensing provisions. Virtually everything a U.S. company does contains an element of intellectual property, as was apparent in your earlier questions. What good is a zero tariff and what good is an elimination of equity ownership limitations if there are no enforceable intellectual property protections? The two go hand in hand: market access and market rules to ensure that the market access is meaningful.

I would like to give you some categories to think about regarding market access. Tariffs is the most obvious. We have heard a fair amount about the reductions of tariff barriers. To give you some perspective, the average tariff facing U.S. products in Mexico was 10%. The average tariff facing Mexican products in the United States was 4%. Further, before NAFTA almost half of Mexican goods entered duty-free anyway under GSP. In contrast, on some of the U.S. most competitive products, machine tools, aviation products, and other high tech goods, tariffs were as high as 20%.

As you have heard, under NAFTA almost half of U.S. goods will enter duty-free within five years. A total of two thirds and the remainder will be phased in over ten and in some cases fifteen years.

Tariff barriers are an obvious barrier. Less obvious are the non-tariff barriers. The import licensing requirements that a number of your clients



may have faced, particularly in the agriculture products area, are either being eliminated or phased out.

Other market access concerns appear in the 146 billion dollar Mexican services market. Importantly now under NAFTA, there are provisions for cross-border provision of services. Local incorporation or local establishment requirements with respect to most service providers are now prohibited.

Government procurement is an enormous market in the NAFTA area. Government procurement is now open to U.S. bidders in a way that it has never been before. This includes eight billion dollars worth of procurement in the energy field.

Another market access area is investment. I would like to address the increase of market access to invest in more detail. How do you remove barriers to investment? Well one way is to lift or eliminate equity limitations: those requirements that say foreigners can only have 10%, 15%, 25%, or 49%, and so forth.

A second way to remove barriers is by restricting the scope of the activities. My counterpart who heads the National Commission on Foreign Investment was a superb participant in these negotiations and took, indeed, as his mandate, to restrict the scope of his own activities. Thus, under NAFTA, foreign investment commission approval is only required as a general matter if one is acquiring more than 49% of the interest in a Mexican enterprise whose assets in the first year of NAFTA are greater than twenty-five million dollars. This is a sliding scale that adjusts upward to 150 million dollars in year ten.

A third way to create market access for foreign investment is to eliminate and phase out performance requirements. One of the barriers to U.S. investment was that there was a price for investment. The investor had to agree to export 50% of his output. You want to invest to serve the local market, but for each local sale, there must be two exports. There were also various other requirements formally imposed by the Foreign Investment Commission. Well, these are now drastically reduced or eliminated.

What are the rules that safeguard these market access initiatives? NAFTA has rules regarding product standards. Nations use production and process standards for legitimate purposes to make sure plugs that you manufacture fit, to make sure cars are driven on the correct side of the road, and so forth. These standards may also be used for illegitimate purposes, that is, to exclude products. For example, certain forest products of the United States do not meet flame retardant requirements because they are chemically treated to put out fire. Therefore, they are not flame retardant.

These kinds of standards and the formulations of these standards are now subject to rules. The procedures have to be transparent, and the standards have to be applied in a non-discriminatory fashion. Likewise, there are rules in NAFTA addressing the conduct of certain state monopolies. Those of you

who have dealt in the energy sector have no doubt bumped into Panex or CFB's. These are very large economic actors in Mexico. In any event there are rules in NAFTA to insure that they act in commercially reasonable ways. Finally, there are significant provisions on intellectual property.

If you have clients that are looking to do business in Mexico or through Mexico, how do you figure out how to use NAFTA? If any of you have seen NAFTA, it is quite thick. It is best numbered in feet rather than in pages. There is a volume of rules and then three volumes, one for each country which include the tariff schedules and most importantly the exceptions. The rules can be stated very succinctly, it is the exceptions to those rules which take up all those pages. I suggest individuals get hold of a copy of NAFTA and look at the table of contents. Also get hold of the statement of Administrative Action submitted by the Administration along with the implementing bill. This statement provides a very good description, not only of NAFTA, but of the U.S. implementation of NAFTA.

Finally, and then the overview will stop, keep two principles in mind. If your clients are dealing in goods, if you have a trade issue, you need to think about the origin of the goods, and their North American content. On the other hand, if you are dealing with a services or an investment issue, think of the nationality of those who own the capital stock of your client and its place of incorporation, because for services and investment the points of attachment are nationality of the company and place of incorporation. Conversely, the points of attachment for trade are the origin of the goods. Thus, those of you who advise U.S. subsidiaries of non-North American companies, they are covered by NAFTA. It is not just U.S. companies and U.S. passport holders. European companies producing in the United States qualify if they meet North American content. Their own investments qualify if made through their U.S. subsidiaries if the subsidiary's place of incorporation is in the United States.

I am going to take five minutes and get some highlights of the Investment Chapter and then I would be delighted to take questions. For the most part what was done in NAFTA was done at least in rehearsal in the Canada Free Trade Agreement. One notable exception to this is the investment chapter, ineptly named for purposes of Ross Perot by a NAFTA number, chapter 11. Indeed we have not seen a flight of U.S. companies shutting down facilities here and moving to Mexico. In any event, the U.S.-Canada investment provisions were quite thin, while the provisions in NAFTA are very expansive. They begin with the definition of investment.

What is an investment? It covers virtually anything. Virtually any commitment of resources in the form of capital, in the form of technology, or in the form of long term service contracts. Any commitment of capital to the territory of another NAFTA party will be covered by this chapter.

What are the protections? The first is non-discrimination, that is,

national treatment. Neither Mexico, Canada, nor the United States may discriminate in how they treat a company on the basis that it is foreign owned. Second, and I have already touched on this, is the elimination of performance requirements. Foreign investors are no longer told the mix of goods they must use in the export or local market (percentages that they must meet in terms of their target markets).

Third, and this resolved a dispute that has dragged on for decades, are international rules governing expropriation and compensation. Mexico, Canada, and the United States agreed that in the event of an expropriation the fair and full market value of the investment would be awarded. Payment is required in convertible currency and at the going concern value.

Fourth is free transfers. What good is an investment if you cannot get money out? Therefore, the parties agreed to unrestricted repatriation of profits through dividends or other means in connection with the life of the investment. For example, this would include payments of principal and interest as well as payments to third party service or goods providers.

Finally, and most importantly, there are provisions in the investment chapter that give investors enforceable rights. Those are the provisions that govern investor state arbitration. For the first time in an international agreement with Mexico, and indeed for the first time in an international agreement between the United States and a developed country (we have been doing these in the developing world for a long time), the investor itself may assert a claim for money damages against the host government. If the host government breaches any of NAFTA's promises, the investor may initiate arbitration under the auspices of the International Center for the Settlement of Investment Disputes (ICID), or under an additional facility, since Canada is not a party to the ICID. Arbitration pursuant to the UNCITRAL arbitration rules is also provided.

The appointing authority to any case in the event the parties fail to agree on an arbitrator or to compose a panel, is the Secretary General of the ICID. There are time limits provided in the rules and there are provisions for consolidation of claims, so host governments, in the event of a wide scale expropriation or discriminatory legislation across a sector, cannot screen you out and pick you off.

Once you have received an award, it becomes a NAFTA obligation of the offending government to make payment. If it does not pay, you may seek enforcement in the courts of the defendant state or in any jurisdiction where it has non-sovereign assets under the New York Convention. Finally, if your efforts are unavailing, your own government may assert a claim against the offender for breach of NAFTA. If the country still refuses to pay, trade sanctions can be imposed, and ultimately, if it persists, termination of NAFTA. I will stop there and invite you to ask any questions you have.

## QUESTION AND ANSWER

QUESTION: Are banking assets considered non-sovereign with respect to arbitral awards?

ANSWER: I can only speak for our own Foreign Sovereign Immunities Act which draws a distinction between assets used in the commercial activity of a foreign State and the assets used in its sovereign activities. So in the case of bank accounts there is going to be a question if that is a counselor account or is that an account of the embassy? Therefore, if there is no claim that those are engaged in sovereign or political activities, I would say you would have a good claim. The individual determination would be up to our courts to decide because Mexico would certainly raise the sovereign immunity defense.

QUESTION: Are there any plans to bring in other FTA's?

ANSWER: I do and I do not know the answer to that question. As you heard, Mexico has been very active and aggressive in negotiating FTA's with its neighbors (an excellent strategy for it to become the hub of Latin American trade and investment). I do believe that NAFTA will move south and that it will gradually incorporate other regional arrangements, whether it is Mercosur or the new G3, whatever arrangements are underway.

QUESTION: How long will arbitrations take and what law governs them?

ANSWER: A very good question and fortunately there is a provision in the dispute settlement chapter that says the governing law is the law governing this agreement of NAFTA, plus applicable principles of international law. We resisted, and I think wisely, the temptation to say, if a dispute arises in the United States, it is governed by U.S. law and if it arises in Mexico, it is governed by Mexican law, and so forth. Thus, the arbitrators, I hope, will be knowledgeable about general international law. Principles governing expropriation, discrimination, and so forth, are versed in NAFTA itself.

QUESTION: Can parties choose their own dispute resolution mechanisms?

ANSWER: Good question. I do not see that as a problem. For example, let us look at interstate arbitration of intellectual property matters involving a NAFTA party. If a NAFTA party elects to resolve the dispute under NAFTA, then the NAFTA dispute settlement mechanism will pertain. The state parties are free to seek to resolve the dispute under the auspices of WIPO in which case those rules would apply. With regard to arbitration between private parties, except in the limited respect I mentioned in response to this gentleman's question, NAFTA does not govern disputes strictly between private parties. Finally, and a footnote because it is so clear that abrogation of intellectual property rights may be considered an expropriation and thus subject to investor, state, and these rules of arbitration. NAFTA expressly provides that if a matter relating to intellectual property is addressed in part by the intellectual property chapter, such as compulsory

licenses, it will be resolved under that chapter, rather than under the investment chapter. So there too, there was an effort made to insure that whatever overlap there was, it was at least managed and recognized, if not resolved.

#### L. JANÁ SIGARS

Our next speaker on the panel is Luis Malpica de la Madrid. He is the author of many diverse books and articles on foreign trade and the Mexican banking system. We are very pleased to present him to you.

#### LUIS MALPICCA DE LA MADRID<sup>8</sup>

I have divided this conversation into three parts. First is the GATT and the legal modernization of Mexico's trade. When Mexico first sought admission to the GATT as part of the Tokyo Round, it had to recognize that to meet the member state requirements it had to modernize its national legal system.

In 1979, however, Mexico decided not to apply until the next round in order to modernize its international trade legal structure. Mexico formally applied for membership in 1985. In April 1985, Mexican and U.S. officials first signed a bilateral agreement on subsidies and countervailing duties. In 1987, another understanding was signed concerning bilateral trade and investment matters, a precursor to NAFTA. On November 26, 1986, Mexico became the ninety-second member country of the GATT.

That set the stage for negotiating the NAFTA with the United States and Canada. With Mexico's adherence to GATT, however, only the complex international trade legal structure was modernized. In other words, at the time of Mexico's admission to GATT in 1986, all other legal structures retained the old protectionist economic model. It was necessary to undertake an overhaul of the entire legal system to reflect the new model based on exports and liberal economic trade and investment philosophies.

This one sided legal modernization took place almost entirely under the administration of President Carlos Salinas de Gotiari before, during, and after NAFTA negotiations. The reform of Mexico's legal system is intimately connected with the negotiation of NAFTA. Mexico's old development model was connected to its political structure, which included government intervention in the economy, government protection of industry, and import substitution. The system had little regard for international law, particularly regarding its protectionist philosophy and tight control on exchange rates.

The new developmental model is based on NAFTA. It has a minimum

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8. Luis Malpica de la Madrid is a professor of law at the School of Law at the Universidad Nacional Autonoma de Mexico in Mexico City. Professor Madrid received his doctorate in law from the University of Paris School of Law in France.

of intervention in the domestic economy, and an industrial sector open to international competition balanced by a platform of competitive exports. This model has a much greater international emphasis, including a greater respect for international law and a liberal exchange rate. Between January of 1989 and February of 1994, the government had promulgated over 550 important legal dispositions. All of these changes have resulted in a constitutional, and conventional modernization in key fields. These include direct foreign investment, parastatal industries, communication, technology transfers, property protection, the environment, human rights, the security market. Additional areas include banking, services, insurance, tax, monetary policy, encouraging private investment in agriculture, educational reforms, and public safety.

The new constitutional reforms have resulted in nine constitutional amendments and new laws. Some of these included laws to regulate and promote foreign investment, such as the law of credit institutions, and the law of financial groups. Others are decrees to promote the Maquiladora export industry, the industrial cooperative, the development and profession of law, and the mining industry. Finally, the national human rights commission law, the law on metallurgy, the law on fiscal simplification, the foreign trade law, and the central bank autonomy law were also enacted.

From 1989 to 1994, Mexico signed and put into effect at least 100 bilateral and multilateral treaties covering many diverse fields. Of particular importance are those treaties between Mexico, the United States, and Canada. Mexico signed twelve bilateral treaty and one trilateral treaty with the United States. These include an agreement to exchange tax information and an agreement on protection of the environment in the Mexico City metropolitan area. Others include an agreement for bilateral tourist development, an agreement for cooperation on ocean contamination due to oil spills or other toxic substances, an agreement on combating narcotics trafficking and drug addiction, and, of course, the NAFTA and its side agreements.

During the NAFTA process, a series of domestic and international dispositions were published and implemented to keep pace with NAFTA negotiations. The Mexican government issued a number of complementary decrees on the day NAFTA was signed. These decrees directly modified Mexican law to make it congruent with the NAFTA text.

As examples of these decrees, I would like to mention the following. First, is a decree that reforms, modifies, or repeals dispositions in different NAFTA-related laws. Second, is a decree that sets up a transitional tariff schedule for trade, restaurants, hotels, and certain other services located in the northern border zone. Third, is a decree that establishes the transitional tariff schedule for all industry, construction, fisheries, and repair and maintenance facilities in the northern border zone. Fourth, is a decree modifying various articles of the 1989 decree promoting the Maquiladora industries. Fifth, is

a decree that establishes applicable antidumping rates for North American origin goods as is stipulated in NAFTA. Finally, a decree establishing new U.S. and Canadian rules of origin under NAFTA's terms.

The third and the last part of this discussion is a review of the most salient legal dispositions, particularly the foreign investment law. The widely anticipated law was published on December 17, 1993 and went into effect the following day. It repeals the restrictive and often controversial Law to Promote Mexican Investment and Regulate Foreign Investment. The new law consists of eight chapters, with thirty-nine articles, and eleven transition sections.

The objective of the law is to set the rules for channeling investment into Mexico thereby contributing to domestic development. The law represents a significant step forward from the 1973 law concerning direct foreign investment in various sectors of the economy. It eliminates the discretion granted to Mexican government authorities. The new law incorporates precise factors to the authorities and simplifies administrative procedures.

The new law still reserves complete control to the Mexican states over petroleum, electricity, minerals, satellites, telecommunications, post, and ports. As part of their corporate charters, Mexican companies in these areas cannot admit foreigners as partners or stockholders. Access to other activities by foreign investors will develop in gradual steps: 10% to 30% in such areas as investment bond institutions and exchange houses. In order for a foreigner to have an equity position that exceeds 49%, a ruling from the Federal Foreign Investment Commission is required for activities ranging from deepwater ports to educational institutions to legal services.

Finally, I have a word on the restrictive zones which have historically prohibited foreigners from owning clear title to land within 100 kilometers from the border and fifty kilometers from the shore. The only mechanism through which a foreigner could hold such real estate was through a specialized trust by a Mexican bank which would hold legal title for the benefit of the party contracting to the trust. Under the new law, foreign investors can now acquire title without the trust, and current trusts may be terminated. However, this only applies to tourist or industrial properties, not individual properties, which still require the special trust. However, the maximum trust time has been increased from thirty to fifty years, and can be renewed. Under the new law, the authority for designing mechanisms and implementing policies is the National Foreign Investment Commission. The new law also leaves the National Foreign Investment Registry in place.

L. JANÁ SIGARS

Our next speaker is William P. Andrews, otherwise known to many of you as Jay Andrews. He has been an expert in Latin American and Mexican matters for over twenty years. His expertise is in licensing, international transactions, joint ventures, and intellectual property law. I am very honored

to present to you Jay Andrews.

## II. INDIRECT INVESTMENT OPPORTUNITIES AND CHALLENGES: AGENCY, LICENSING, DISTRIBUTION, AND FRANCHISING

JAY ANDREWS<sup>9</sup>

I have the enviable task of being able to sit up here and act like I know something without having to prepare anything, and, from my perspective, this is a nice position to be in. This next section will focus on recent developments in franchising, agency licensing, and distribution laws. For the first session I am pleased to introduce to you Clyde McFarland. Mr. McFarland counsels distributions managers in paging and radio sales throughout Latin America. From 1982-85 he lived in Colombia and was council to Morris & Kunitz International during construction of the Cevalon Coal project.

I also would like to go ahead and introduce Ricardo Barretto Ferreira da Silva and Peter Rodenbeck who are the first part of the international panel. They are going to speak after Clyde McFarland and are going to be dealing with Brazilian issues. Richardo Barretto is a member of the Sao Paulo Lawyer's Association, the Sao Paulo Law Institute, the Brazilian Institute of Tax Law, and the Interamerican Bar Association. He also served as legal counsel for the American Chamber of Commerce in Sao Paulo. I also know that Mr. Barretto is Vice Chair of the Brazil country committee for the ABA International Section.

We also are very fortunate to have a non-lawyer on the panel, just so you realize that we are trying to be a little more egalitarian here. Peter Rodenbeck is active in the Brazilian Franchise Association as Vice President of international relations and also is president of the Rio de Janeiro chapter. We are very fortunate to have him here and his enlightening views on franchising issues as they effect Brazil.

### A. *Recent Developments: Franchising Agency, Licensing, Distribution Law, and Related Matters*

CLYDE MCFARLAND<sup>10</sup>

I am going to limit my comment so that we can proceed with the substance and take questions at the end. My job as in-house counsel is to provide preventative legal advice in our operations in various countries. I thought that I would share with you some of the insights and some of the

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9. William P. Andrews is a lawyer with Graham and James in Raleigh, N.C. and is also the vice-chair of the American Bar Association Interamerican Law Committee.

10. Clyde McFarland is Senior Counsel at the Motorola Law Department in Boynton Beach, FL. Mr. McFarland has a B.A., B.S., M.S., and J.D. from the University of Notre Dame and is an officer in the U.S. Navy submarine service.