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Indirect Investment Opportunities and Challenges: Agency, Licensing, Distribution, and Franchising

Jay Andrews

Ricardo Barretto Ferreira da Silva

to present to you Jay Andrews.

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

JAY ANDREWS[9]

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[10]

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

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.

perspectives that we have in looking at the recent developments in the area on agency, licensing, distribution, and franchising law. Motorola and its operations basically deal through what we call the indirect channel. I am going to point out four particular items, which, if you are an American businessman or American attorney counseling a company that would be doing business or contemplating doing business in a foreign country, merit your consideration.

The first one, as Jay Malina was pointing out in the various countries where political scandals have taken place, is the Foreign Corrupt Practices Act. When you do business through a distributor or through an agent, you, as the American supplier, are subject to the penalties of the Foreign Corrupt Practices Act, which can reach two million dollars in fines. As to the actions of your agent, you cannot plead ignorance. You have to have a program in place. So, in Motorola, we have a program whereby the law department goes around and we counsel the managers who do business in the various countries with our program, which is basically two-fold: one is the counseling in regard to the Foreign Corrupt Practices Act; and, the other is our code of conduct.

The Foreign Corrupt Practices Act basically says that you cannot directly or indirectly bribe a foreign official in order to get new business or to continue with old business. There is no out for ignorance. Generally speaking, you cannot stick your head in the sand. So, when there are red flags, the attorney involved, as well as the businessman, have an obligation to examine the issues and to ask questions.

In my practice, that basically involves documentation. For instance, in Brazil with the ongoing political investigations with our dealers and distributors, I send them a letter. I ask them if they are conducting any unethical behavior. That is a wide open letter, and they come back and ask: Why do I have to write asking this? Why do they have to sign it? I, as a supplier, want them to sign those documents because if there is an investigation I want those documents in my file.

The next potential issue is the antitrust laws. It just emphasizes the fact that as we do business in the United States, we are all familiar with the antitrust laws and the restrictions on competition with its rich history and tremendous amount of case precedent. So, when I counsel our distribution managers for paging operations in the United States, I can give a one hour presentation on the Robinson-Patman Act and it is all clear as to what the rules are. There are cases, where I can say: "See, right here it says in this particular case this distributor was discriminated against because you gave the lower price to his competitor and he lost the business".

Traditionally, it has not been that way in Latin America. For years we had one distributor in the country that would be the distributor that undertook major projects and bids. In many companies you would have an exclusive

arrangement. It is efficient to have one representative that makes the investment of personnel, time, and money to build up marketing power. However, now various countries are reinvigorating their antitrust laws, such as Mexico which just passed antitrust laws. As far as I know, those regulations have not come out yet but we are waiting for them. As far as corporations, when I was counseling our managers on how to structure the distribution agreements for 1994-1996, I had to say: take out that exclusivity and do not appoint a dealer for a particular segment of the market, because Mexico now has an antitrust law. It is the same in Venezuela. It is something that will not happen overnight, but I do not want to be the company (or your client should not be the company) that gets targeted to set the precedent for antitrust enforcement in that country.

The next topic is market regionalization. When one looks at NAFTA, Mercosur, and G3, it translates into competition for previously protected dealers. In the past, when we appointed dealers in Venezuela we also appointed dealers in Colombia, and they each had their market and basically they were able to run their business at the prices they wanted without suffering what we call "infra-competition" from their other dealer in the neighboring country. People stuck to their country. This is no longer the case.

What does this mean for American companies who have their distribution networks fighting amongst themselves? It requires an investment in not only managers going and setting sales quotas, but also in advertising, in service, in promotional assistance, so that we can allow them to grow inter-brand competition rather than intra-brand competition. Our managers are learning that. We completely restructured our marketing strategy in 1993. It was a difficult year because of this. I think that the regional trading areas are going to be good for American businesses, but in terms of representatives in a particular country, only the strong will survive and grow.

What does this mean to the lawyer? The lawyer has to then look at termination. Our contracts are dinosaurs, they have worked well, people have been using them for years and we have never had to terminate anybody. It was only by mutual agreement that we would terminate the contract. This is no longer the case. We no longer have that comfort. If management sees that its overhead is too high to support a dealer in Venezuela when a dealer in Colombia has taken over the business, we are going to get rid of the dealer in Venezuela. You now have to reinvestigate your termination clauses.

The fourth area would be the dealer protection laws. Last year we terminated two dealers in Central America and in neither case did we have to go to court and argue about indemnification. We avoided going to court. The principle mechanism for avoiding that costly and time-consuming process is the inclusion of an alternative dispute resolution clause in a

contract.

I would like now to comment on some recommendations that I would make and refashion and emphasize some items that you should perhaps consider. The first one is the importance of local counsel. I have been using outside counsel in Latin America for twenty years. I think you have to reexamine your relationship with your counsel to see if they are keeping abreast of the changes in their country's law, and ask yourself whether or not you have in place the facilities to deal with problems in a negotiated manner. The idea of going to court is not something we want to do. Thus, local counsel can assist us with understanding the law, forewarning us of the changes that are coming in the law.

Counsel also can help in knowledge gathering as to the person that we are dealing with, in terms of who are their lawyers and what are their directions. Counsel may help determine what the other party is looking for and what are the viable alternatives in resolving the dispute. I would suggest that you ask your managers if they have done a background investigation whenever they have a prospective contract relationship or when you are asked to draft a contract or make changes on an existing contract to add another party. The steps in such a background investigation are simple: find out the reputation, find out the financial resources, and find out how many sales agents and sales representatives the potential distributor has. The distributor's reputation is highly important. How does he do business? Are there any other antecedents that we should be aware of? Then I would document that, because if it explodes one day, you have in place your procedures and you have your documents. Every two years we get a new background information form on our distributors, even if they have been our distributors for long periods of time, say ten to fifteen years. These serve to update our files and make sure the managers are staying abreast of the changes in the firm.

As to the contracts themselves, if your document and contract have not been revised in the last two years, your sales managers are probably not using it. Neither are your clients using the document. In my opinion, that is the worst place you can be, because if something blows up, third parties or investigators first look at these documents. Then, if your course of conduct is totally separate from the documents, you are immediately in a defensive position. It is an obligation under the Foreign Corrupt Practices Act to have documents and to keep them current. So, when you write contracts and take them to clients before the dispute arises, I think it is a good practice to ask people about particular clauses in the contract to see if that pricing clause makes sense.

For example, in our distributor contract there is a certain discount which applies against a certain type of product. It turns out that that type of product no longer exists. So, why would we want to keep it in the contract,

especially if that product is like a new product that has been created. The short description of it could be ambiguous — it could mean the new product or the old product — and then if you have an aggressive distributor he will claim that it is the new product, so that he automatically gets the significant discount.

Next is the documentation of the ongoing relationship. I think most people understand that you need to have documents to prove to any third party, say the Department of Justice, what happened. Even if you are in a country where there is no dealer protection law and you are by law allowed to terminate a relationship or allow it to expire (for example, Venezuela where you have a distributor relationship), I always counsel my clients to have a reason for the termination. There exists many reasons for this but one of them is so that the distributor understands that there was a reason for the termination. It was not because the distributor was a bad guy. There is a reason, such as he failed to achieve sales quotas or he was unwilling to make the necessary investment in capital to grow his business to match our growing product line. The benefit of this is basically to put something in the file in case there should be a dispute.

Finally, I would like to discuss dispute resolution. It is our practice, and I think most people would try, to have a direct negotiation. So we have a clause that states that if we have a dispute, we will attempt in good faith to settle it through direct negotiation. If that fails, we will attempt to settle our dispute through a mediator. That has worked fairly successfully, I would say seven out of ten times. If the clause says that if we are unable to resolve our differences, we would go to litigation, then we would go to court. I think that we should change the litigation clause to an arbitration clause. But in any event, you have to be sure that you have a mechanism in the contract to bind both parties to work out the differences without immediately going to court. Thank you.

B. *Brazil Country Update: Unique Opportunities for Indirect Investment*

RICARDO BARRETTO FERREIRA DA SILVA[11]

I am very glad to be here with you. I shall first thank the members of the steering committee, especially Mr. Paul Mason, for the invitation to speak at this conference. It is a very rich opportunity to share my experience with such a distinguished panel and audience. Secondly, I would like to compliment Janá Sigars and the other members of the organizing committee for the high level of this conference.

I have prepared a paper basically covering four subjects: agency

11. Ricardo Barretto is a partner in Carvalho de Freitas e Ferreira in Sao Paulo, Brazil and the Executive Vice President of the Brazil Computer Law Association.

agreements, distribution agreements, licensing of technology, and franchise. Due to time constraints, matters relating to agency and distribution agreements will be covered sparingly (there has been no recent development in those two areas). I shall make some introductory comments on what is going on in Brazil right now and then jump immediately to the licensing of technology practice. My colleague, Peter Rodenbeck, will be going over all the matters relating to franchise agreements in Brazil and recent developments in that area.

First is the recent improvements in the Brazilian scenario: the abolishment of the market reserve within the information technology field; the lifting of the ban on imports; the decreased taxation on imported goods; the decreased taxation on dividends paid to shareholders abroad; the elimination on restrictions on foreign capital registrations; the permission to pay and to deduct royalties between controlled and parent companies; the simplification of the registration of transfer of technology contracts; the regulation of the franchise agreements; the regulation of technology cost sharing agreements; and, the 1994 constitutional revision process eliminating the discrimination against foreign capital. There is an effort to increase product quality at competitive prices. At the same time, there is present in the Brazilian population an awareness of the globalization of the international market.

I shall now make some comments on the present revision of constitutional procedure, which shall end around May 15, 1994. Congress has given priority to the political issues of the Constitution: the ratio of the mandate of the President, the number of local chambers Representatives, and so on. These are a few of the various proposals presented to the Congress by the community in general. The American Chamber of Commerce for Brazil is encouraging the elimination of foreign capital discrimination, presently existing in the Constitution.

The six main proposals presented by the Brazilian American Chamber of Commerce, which are strongly supported by a large part of the entrepreneurial sector, are the following: (1) Elimination of the discriminatory treatment between Brazilian companies of national capital and Brazilian companies of foreign capital; (2) Elimination of the constitutional provision which prohibits the participation of foreigners or Brazilian companies with foreign capital from the exploitation of mineral resources; (3) Elimination of constitutional monopolies in order to facilitate the participation of the private sector in the following sectors: research and production of oil and natural gas, oil refining, importation and exportation of natural gas and oil, sea transportation of crude oil and natural gas, research production enrichments, reprocessing, industrialization, and commerce of nuclear minerals; (4) Elimination of the provision prohibiting the participation of foreign capital in the Brazilian health care sector; (5) Elimination of the market reserve principle existing over the internal market;

and, (6) Elimination of the provision restricting the participation or installation of foreign financial institutions in Brazil.

In the area of telecommunications, the elimination of the presently existing monopoly on the rendering of telecommunications services is under consideration. Also, under consideration is a simplification of the Brazilian tax system, which is strongly desired by all sectors of the Brazilian community. The main objective of the constitutional revision is to prepare the country for a stable, continuous social and economic growth with an increased participation of foreign capital aimed at reducing the inflation rate and improving the living conditions of less favored social sectors. We are not sure whether those points will pass through Congress, but there is a strong trend that suggests they will pass, at least partially. We do feel that the legal environment for foreign business in Brazil is going to improve significantly.

In the field of licensing technology we have had a tremendous increase in the practicability of making and drafting technology licensing agreements as well as registering the agreements with Brazilian authorities. In order to stimulate competitiveness and productivity, Brazil is adopting normative measures in the industrial property area, especially in regards to technology transfer. The National Institute of Industrial Property (NIIP), was created in 1970 to enforce industrial property laws and to establish the regulations governing the licensing of technology. In 1975, when NIIP enacted Normative Act 15, which remained in force for sixteen years, NIIP was empowered to verify the adequacy of the technology to the national need to control both the remuneration payments and to fix mandatory and forbidden clauses for the respective contracts. In 1991, a relevant improvement occurred in that scenario with Resolution 2291, Normative Instruction Number One, and the revocation of Normative Act 15. The most relevant improvement came at the end of 1993 with the enactment of Normative Instruction 120, which made the whole process more flexible and allowed greater freedom as to the contractual form.

We can probably refer now to "closed" contractual types as they were called in the past, and the "open" contractual types, the way they are seen today. The closed contractual types have now been abolished. All the provisions relating to the license technology may be included in just one agreement. For example, trademarks, license use, patent license use, and services may all be present in the same contract.

The basic open contractual types now existing are the following ones: patent exploitation licenses (the scope is to license the exploitation of patents in Brazil); licensing of trademark use (the scope is to license use of trademarks in Brazil); technical and scientific services (the scope is the rendering of the specialized technical services); technology transfer (the scope is the transfer of know-how and technology not covered by industrial

property rights); cost sharing (the scope is to provide for sharing of research and technologies in consideration for full licensing of the result of research development); and, the franchise agreement (the scope is the rendering of services, the transfer of technology, the transmission of operational standards, and other conditions of the franchise agreement besides the use of trademarks).

Agreements have to be registered with the NIIP in order to have the following: validity before third parties, remittance abroad of payments due for purposes of tax deductibility of the amounts paid for actual expenses, and to evidence the actual exploitation of patents. Nowadays, registration should be granted in about thirty days — that is the maximum term very recently established. For currency exchange control the agreement also shall be registered with the Central Bank of Brazil. So what has happened is that we moved from what we called controlled monitoring to self governing principles in terms of contracts in the area of licensing of technology. It has been a market evolution as compared to the previous regulations.

Now the parties may freely, with minor exceptions, establish the provisions of the agreement, such as the duration, criteria for remuneration and payments, governing law, jurisdiction, and secrecy and inalienability of the non-protected technology. For example, remuneration has to comply with international legal practice and must be agreed to on an hourly basis. Also, now in the Congress is a new intellectual property rights law. At issue is whether the payment of royalties for trademarks, after the initial ten year period of validity, can be abolished. The remuneration may be established based on a fixed price per unit or a percentage of the net sales price, but always needs to be based on international practice.

Concerning cross-sharing agreements, once you have shared a cost of any development abroad, of any kind of technology, no further royalties will be acceptable to compensate the licensing of that new technology which has been developed abroad. As of the beginning of 1992, royalties may be paid by a subsidiary to its parent company, although limited to 5% of the net sales. However, a branch cannot pay royalties to its head office abroad. Tax deductibility of royalties paid is permitted up to the limit of 5% of net sales. Thus, we do have some limitation on the payment of royalties.

In the case of the patents, if a patent right is not granted in Brazil there is no right to royalties on the part of the title holder. A patent right granted to a holder residing, domiciled, or headquartered abroad, but filed in Brazil beyond the period of priority (one year for invention patents and six months for industrial models and industrial designs) also does not qualify for royalties.

In the case of the trademarks, as with patents, the law does not allow for royalties if it is not registered in Brazil. Also, royalties are not allowed for the registration of a foreign trademark granted in Brazil over the period of

priority's six months term, registrations distinguished or in process of nullity or cancellation, and ten years after the granting of the trademark registration if the previous holder was not entitled to such kind of remuneration. In reference to the taxes, payment of remuneration to the licensor are subject to a withholding tax of 25%. In case there exists a double tax avoidance treaty between Brazil and the licensor's country, the rate is generally reduced to 15%, as is the case with Germany, Argentina, Austria, Belgium, Canada, China, Korea, Denmark, Ecuador, Spain, the Philippines, Finland, France, Hungary, India, Japan, Luxembourg, Norway, Portugal, Netherlands, Sweden, and Czechoslovakia.

Very recently, we had the creation of tax incentives under what we call the Industrial Technological Development Program, aimed to improve the technological capacitation of the industry. For those tax incentives it is a must to obtain prior approval from the Ministry of Science and Technology. The main tax advantages would be the reduction of the income tax *from* 8%, a credit of the withholding tax on a 50% basis, credit of the IOC on a 50% basis, and the increase of the percentage of deductibility of royalties from 5% up to 10%.

As to the prospects of that sector, we foresee a very good debureaucratization process, and that is due to the way of thinking of the present President of NIIP. We are foreseeing a better legal environment. What has been created already by lower level NIIP decisions is going to make it much easier to negotiate a licensing of technology agreement, by a faster registration process and by eliminating restrictions on payments of royalties for trademarks.

PETER RODENBECK[12]

Franchising is alive and well in Brazil, though one might have some reservations about how good franchises are for the Brazilian economy. You might think our politics are downright sick, but franchising is alive and well. Franchising has a great attraction in Brazil for a number of reasons. Our geography makes any kind of distribution difficult. You all know that Brazil is larger than the United States if you exclude Alaska. So, getting goods sold around the country always has been a major problem and a major opportunity for local businessmen.

Local businessmen are used to traditional distribution methods which are similar to franchising: representations, agency relationships, and dealerships. Communications with consumers is excellent, television is everywhere, and Brazilians are as brand driven as the Japanese. Finally there is the entrepreneurial spirit of the Brazilian population. You can see that when you

12. Peter Rodenbeck is the managing partner of RIALCO, a joint venture with McDonald's corporation in Brazil. Mr. Rodenbeck graduated from Harvard College.

get your first taxi in Rio or Sao Paulo. You can see that when you deal with your first bureaucrat. Franchising has been one of the key ingredients in the modernization of the retail sector, which has taken place in the last ten years.

The other key ingredient is the presence of shopping centers. Shopping centers and franchising are a highly synergistic duo. Just to give you an update on Brazil and shopping centers, we are fifth in the world in the number of shopping centers, having started only in 1966. We were late comers, but currently there are ninety shopping centers either in operation or pending construction. Shopping center sales in 1993 represented 15% of retail sales in Brazil. Shopping centers are a much more established institution in Brazil than they are, for instance, in Europe. Just to give you an idea, there is the Baja Shopping Center in Rio, which is expanding now to be the largest in Latin America. There is the downtown shopping center in Rio called Rio Sul, which is the second largest in the city. Third largest is Sugarloaf, and there is the shopping center in Brasilia.

Let me go back to franchising and a little bit about its history. My theory is that in addition to the factors that are in the natural setting of Brazil, franchising enjoyed a particularly favorable childhood in Brazil. It was nurtured by some wonderful pioneers with lots of vision, pampered by the media, which is rare, and mentored by a very active professional group of consultants and lawyers. Lately it has been self-regulated and self-disciplined by a strong industry association. Let me talk a bit about this upbringing.

If you exclude the automotive and petroleum industries, which came very early, franchising had its beginnings in the late 1950s and early 1960s. One of the real pioneers was the Yazi language school. Language is a big business in Brazil. There are twenty-two franchisers operating in this field with 235 company operations and 2,030 franchise operations altogether. The young Silva family founded the school and also started a very important relationship with the press. They were great informal spokesmen for the industry. Over the years the results have been a very favorable press relationship, with a strong public appeal.

There are specialized magazines. Franchising now has two major publishing groups in the country with franchising magazines, specialized guides, and at least thirty book titles that are available in Brazil in Portuguese. Another factor in franchising's healthy development is the professional community which grew up with it, mainly lawyers, consultants, and brokers. Today the ABF has a list of over 150 consultants operating all over Brazil. Most concentrate on assisting the new franchisor with whatever he needs to format his business and his franchise.

To give you an idea of what a successful firm in this area can do, let us look at Terrato and Enrizo, which is probably the most well known. Terrato is a lawyer whose practice led him to specialize in franchise and Enrizo is a

banker. They are both outstanding teachers, the backbone of their business is seminars. They have a ten week course called "Franchising University" that includes a two week trip to the United States. The consulting side of the business deals with a portfolio of seventy clients and their services cover everything necessary for the Brazilian start up operation: research, formatting, manualization, legal documents, and organizational development.

The ABF has led the franchise industry's effort to be self-regulating and to develop a strong and very sound public image. The ABF's growth has been fantastic, and we now have over 500 members. We provide ample opportunity for the public to learn about franchising through seminars and various activities, such as training courses. Sixty percent of our members are franchisors, 30% are professionals, and 10% are franchisees. We have managed to include franchisees within the organization, which is very important politically. The ABF's efforts in developing a code of ethics, an arbitration board, and a franchise quality seal, are an example of our leadership.

With all this nurturing, where exactly do we find franchising in Brazil today? We are the fifth largest market in the world for franchisors, with over 600 franchisors at this point in time. We are now the third largest market in the world measured by the number of franchisees or franchisee operations. There are over 60,000 stores or franchise operations working in Brazil at this point in time. Sales represented 5.7 billion in 1993 which is about 7% of the PIB. In short, franchises are a big business in Brazil.

Looking at a couple of Brazilian based franchisors will give us a flavor of the number of franchises currently in Brazil. Montecayo was started in 1977. It is a distributor of cosmetic and perfume products. They have fifteen company stores and 1200 license stores and operate in Portugal as well as Brazil. Another example is Mr. Pizza. These people were pioneers and industry leaders in Brazil in the pizza industry. They have twenty-seven company operations and sixty-five franchise operations, operating in thirty-four cities. The third is Loca Liza rent-a-car. These people are from Minas and have become an industry leader in the car rental business in spite of heavy competition from foreign franchises. They operate in 227 locations, 184 of them franchised. These are examples of local franchises.

Today after many years, foreign franchises are becoming increasingly significant. Five years ago they represented 4.6% of the franchises and today they represent 15.5%. Royal ribbons, which have been liberalized in Normative Act 15 and was literally a catch 22, is now a thing of the past. The only clinker that still remains with the problem is that remittances are an expense item for income tax purposes and there is very heavy taxation: Twenty-five percent withholding tax for the account of the franchisor and 25% financial operations tax. This makes remittance through this channel very difficult. At the same time there are other ways to remit in order to

avoid the financial remittance tax. Complicated but legal mechanisms can be used.

Another thing to be considered in Brazil is the legislative setting for franchising. Currently there is only a Civil Code to guide franchise relationships. There is no specific legislation for franchises. However, in Congress there is a project which is a modern piece of legislation designed to guarantee disclosure. If it is passed through the House, it then will be amended by the Senate. If it is returned to the House, it should shortly go to the President. It does not create any heavy bureaucracy, nor registrations, nor approvals, but it does call for the availability of an offering document, which calls for a reasonable amount of disclosure and requires that all franchises be by contract. The law has been the subject of lengthy debate and it promises to leave franchises alive and well. The law is now returning to the House from the Senate with some amendments.

Opportunities with Brazil's offices of global franchises can be accessed in many ways. The most common is simply a Brazilian businessman who has come to the United States and negotiated here and is taking a franchise back to Brazil. The consulting community is also a useful source for somebody who wants to take their brand to Brazil and talk to a variety of candidates. Many of the consultants specialize in bringing brands into the country. Once a year in August, we have the ABF franchising show, which is an opportunity to meet, people who are interested in franchises. Last year there were 13,120 companies. Twenty of them were foreign. There is a special event prior to that show called the International Franchising Seminar, which takes place in Sao Paulo. That seminar offers information on how one can offer franchises to a more select crowd.

Business is being done in a variety of ways. Direct franchising on a single store basis is the most common. Area development franchises have been widely used as well. Pizza Hut has recently entered the market using this method. Master franchises are also typical. Examples of master franchisors include Johnny King and McDonald's. Franchisees are also joint ventures. There are other kinds of opportunities which could be developed. A number of Brazilian franchisors are operating or would like to operate in the U.S. market, South Florida in particular. There are approximately sixty to eighty thousand Brazilians residing in this area and the taste for Brazilian products is well-developed. Two examples of franchises that are already in South Florida are the Yazi school and the CCAA, which are teaching English to Portuguese speaking Brazilian people residing in the area.

A market which I personally would like to develop is Brazilians returning to Brazil. People who have lived in this area for some time have been involved in activities here, have accumulated some capital, have U.S. culture as part of their baggage, and would be interested in taking up a franchise in Brazil. In researching our presentation, we found another example of a

typical franchise. One of the very first food franchises in Brazil was owned by a young fellow who had a very heavy case for a Brazilian lady and ran out of excuses for his frequent trips to Sao Paulo. That franchise still exists, although the fellow has moved. He married the lady, and the franchise was the key to his marriage.

Those of you who know Brazil well are no doubt impressed with our private sector. Within the private sector franchising is probably the part which is growing at the highest rate. It has averaged a growth rate of over 30% in the last few years Thank you.

QUESTION AND ANSWER

QUESTION: What are the prospects of private health care insurance?

BARRETO: We do have some companies who have created that sector in Brazil. Very recently I got to know a company from which most of the Brazilians traveling abroad would purchase a kind of health insurance for say ten or fifteen days while they are abroad. The company's name is Assistguard.

QUESTION: In terms of the indirect marketing of products in Brazil, we have encountered a lengthy import process with difficult customs issues. Is that being addressed at all in legislation to improve the import and sale of products?

BARRETO: That is not a constitutional matter. That is more of a bureaucratic procedure that has to be improved. To make a comparison, we lawyers who deal with licensing of technology encounter more or less the same kind of problems. I hope that the authorities come to be aware what has to happen. Just improving the quality of the legal system is not going to help.

QUESTION: Could you please tell us what the normal scenario is for the Constitution in corruption cases and are there any statistics?

MCFARLAND: Happily I do not have any direct experience in it. However, I do read the monthly reports. BNA has a publication on the Foreign Corrupt Practices Act that is a loose leaf binder and gives you up to date reports. Specifically interesting is the Baxter case, which is the most recent case where the general counsel of Baxter got directly involved. Needless to say, he is no longer the general counsel. Generally, something will happen in a foreign country in which there is a public scandal, perhaps an investigation and prosecution of the agent or the distributor. It will involve the foreign company which is represented by that entity, the government of the country, the state government, and the national government, which will file a communication with the Department of Justice. The Department of Justice and their attorneys will send what is the equivalent of a subpoena to the company. This will say, essentially, you

must respond, and provide testimony in the form of witnesses and parties involved and documents to show what actually transpired. Lastly, you have to show programs of internal control that you had in place during the time that the incident arose. The significance of that is that you get judged accordingly. The parties will then negotiate.

The Department of Justice may resolve the matter by accepting a kind of plea bargain in which case the problem goes away. It gets reported by BNA and other periodicals, but no one ever goes to jail. If it does go to court, then it would be a criminal prosecution and I imagine it would be handled by Janet Reno and her staff. It is not only the entity, the company (like Motorola), but the individual officers who also are personally liable and could go to jail. The individual officers who could be liable have to defend themselves. Assuming that were to happen, you would then get judged under the new organizational sentencing guidelines. Culpability under the organizational sentencing guidelines is based on what type of programs you have in place. For example, if your company was convicted of something and you had this internal policy to detect, resolve internally, and then self report, you would get less than the maximum fine. Say the maximum fine is two million dollars, you would only get a $20,000 fine. It behooves us not only to have our managers on the lines aware of this and attentive to what is going on, but also the legal department.

QUESTION: What if you are a small manufacturer and cannot control a big distributor's behavior?

MCFARLAND: That is a good question. I generally work with the big companies. First, I would recommend that your contracts have a clause with an ethical standard of business so that it is in writing. Second, I recommend that you document the course of the relationship, the whole course of performance, because you will be judged on that course of performance as well as what the document says. Sending quarterly or monthly letters to confirm how things are proceeding can serve as your defense as to what you thought was going on. Lastly, we just did a deal where we gave what I consider to be a significant discount to our distributor. I was concerned that he would have the ability, when he charged a higher price, to make a significant profit, because I cannot set his resale prices. Instead of giving a normal customary 25-30% discount, he wanted a 50% discount. Where is that other money going? Maybe 10% is going to a public official, thus in that specific instance we wrote him a letter that said: "We will give you this increased discount upon the condition that you sign this paper stating that you will make no payments or lease bonds to any public officials and have it notarized." It is a little overkill, but it does not cost anything to do this and you are protected to a certain extent.

JAY ANDREWS: Let me just add something to the discussion. I have clients who have been in that situation and one of the big differences

between the large companies and the small companies is that usually the small companies do not do the kind of research they need to do to find out who they are dealing with in the international marketplace. So they generally do not know the quality of the person they are dealing with on the other end. That lack of knowledge is not a defense. So you have to make sure when you are advising them here in the United States that they understand that ignorance is not going to save them, which is generally not what they believe.

The other thing you need to make sure they understand is that there are very real criminal penalties that will attach to the individuals, the president, the financial vice-president, and any others who are at home dealing with this. It will not just be the salesman that went out to make the sale or the one that made the contact. It will be several people in the company who will end up spending time in jail. They will in fact spend time in jail if the case is brought to court. They have to be very aware of what the normal practice is in a particular country. They have to understand that it is important, for their own safety, to understand what their dealers and distributors are doing.

QUESTION: What should a small company do, if say, to get a small shipment off the docks, they get a call that a bribe is needed?

MCFARLAND: The Foreign Corrupt Practices Act provides an exception for what are called facilitating payments. Basically if you have to make a payment to an official to get him to do an ordinary and routine job, that is considered a facilitating payment. An example is if you have to make a payment to an official to allow you into the country carrying your computer, which we all know you can do if get the right documents. But you have to properly account for it.

The Foreign Corrupt Practices Act also is a Securities and Exchange Commission accounting statute. In the case where it is a small company, you may be able to solve that particular example on the basis that that is a facilitating payment. When confronted with those circumstances, I get a hold of local counsel because the payment of a bribe to an official in a country is a crime. Who enforces it, I do not know. At least you get local counsel involved. They go to a meeting with that official, who is normally a customs official, and put it on the table and talk about it. Sooner or later the dam breaks and you resolve the situation.

QUESTION: There is a lot of cynicism in small business, do you see any change in business practice there?

ANSWER: My answer is yes. I think some extremely positive signs are the fact that we now have antitrust laws in Mexico and Venezuela and the fact that both Collor in Brazil and the President of Venezuela are out of office. I view the Foreign Corrupt Practices Act as a benefit to U.S. companies, because we do business on the up and up. You compete on quality. In my personal opinion, in Latin America the oligarchy is on the

decline and competition is rising. People who get graduate degrees now can start businesses and compete effectively.

ANOTHER SPEAKER: Let me give my opinion. You can avoid such problems if you are persistent and you go in the first time it happens and talk to the people face to face. If a businessman does this, he will not have problems in the future. If he pays the first time he will pay forever. Thus, it is worthwhile to invest the time. The avoidance may be nothing more than a lunch. It may be a favor, it may be something which is not money, it may even be friendship. However, it saves a lot of worry and money in the future.

DIFFERENT SPEAKER: I would like to reiterate that that is absolutely the case. There are people who do business cleanly and there are people who do business dirty. I expect most international business is done both of these ways in every country. You can choose which of the two you want to do and that is your choice.

L. JANÁ SIGARS

We are very fortunate this afternoon to have with us Ana Julia Jatar. She is a former professor with the very prestigious institute for post graduate studies, El Instituto de Estudio Superior Administracion in Venezuela. She also was personally involved in the actual implementation of the new Venezuelan law on competition practices. Also with us this afternoon is Francisco Javier who is currently working as a foreign legal advisor with the firm of Baker & Hostetler in Washington D.C. We are very glad to have both of them with us.

C. *Chile and Venezuela Country Updates: Addressing the Laws and Legislation Affecting Antitrust and Competition — A Panel Discussion*

ANA JULIA JATAR[13]

Thank you very much. Since I have only a short time to summarize my experience I am going to start by summarizing in a sentence what it is to implement antitrust legislation in Latin American countries. After extensive experience, I think the answer is to promote social policy. I will attempt to explain what it is to promote social changes and social policy. For me it is a pleasure to talk about antitrust, because I think that antitrust is already becoming a very important subject in the process of modernizing the economies of Latin American countries. Why is it so important to consider the implementation of antitrust legislation in our countries as social policy?

13. Ana Julia Jatar is the former chief of Venezuela's Agency for the Promotion of Free Competition in Caracas, Venezuela. Ms. Jatar has a post graduate degree from New York University and a Ph.D from the University of Warwick.

I think it is because there are ethical codes in our countries that have something against competition. Sometimes ethics and politics go together. Countries develop their ethical code and the State is in charge of developing laws in order to respect and enforce that ethical code.

There are two issues in Venezuela and in Latin America in general that make it so difficult for a competition agency to implement competition policy. First, companies are still family-owned, and you do not hit your own family. Family-owned companies also have Boards of Directors that have more boards than directors. Therefore, the directors interchange in multiple permutations, so the birthday parties are good occasions to discuss business issues and boards are good places to discuss birthday parties. Since we are all in the same family, we do not compete, we get along. There are groups that are very faithful to their own group and most of the time also very faithful to their competitors.

The second issue, that I think is important, is that the State has been the owner of the oil rent and, therefore, has developed a dynamic by which pressure groups have to get organized in order to get to the oil rent before the other pressure groups get it. In this manner the State also has organized itself to please pressure groups instead of work in the public interest. The public interest concept is a very foreign concept in Venezuela, and a very foreign concept in many Latin American countries. So when you are there defending competition for consumer welfare and public interest, people are very suspicious, because when you are in government you are usually there to defend private interests, be they the private interests of the textile manufacturers, or the cultural producers, or the maize processors. Thus, when you are there defending public interests you raise many suspicions. That is exactly what the Agency for the Promotion of Free Competition raised for over two years while I was its Chief, because nobody could understand that we were just working for the public interest. So that is something to keep in mind because as I said we do have an antitrust law.

The antitrust law in Venezuela was passed in 1991. It was passed as a part of the economic reforms that were implemented in 1989, economic reforms that left behind 30 years of protectionism. Protectionism which left Venezuela with a highly concentrated industrial sector. Because, almost by definition, when you have a small, closed economy you have a highly concentrated economy. That is why in Venezuela, on average, the four biggest companies in each sector have around 64% of the market. When the antitrust law was passed in 1991, we had to start instrumenting the competition policy in a very difficult environment. First, businesses were used to having price agreements. Price agreements had never been prosecuted, but were actually encouraged by the State. Because we had price controls, the government did not want to negotiate individually with each company. So, the negotiations about prices went through the private sector,

and therefore the agreements are something practically most Venezuelan companies are used to and have been encouraged by the government.

Additionally, due to Venezuela's highly concentrated industry, we also have to be very careful in instrumenting merger and acquisition policies. Our law is based on the Treaty of Rome. The Venezuelan antitrust law has an extension regime, like the European law, that prohibits all restrictive practices unless authorized. That can be very worrisome and can cause the enforcing agency a lot of red tape, but that is the way the law was written and that is the way the law was passed in Congress. We basically have horizontal prohibitions, such as price agreements, bid rigging, and market allocations. We also have vertical restrictions, such as once again price agreements, market allocations, and others, which we have in the regulations of the law. In addressing the disadvantages in the current law, we proposed a new law differentiating between horizontal and vertical practices, because many vertical practices enhance competition and efficiency. Also, besides the horizontal, hardcore restrictions and the vertical restrictions, the Venezuelan law has the dominant position concept. Firms that are in a dominant position are considered specifically under Article 13 of the law: the restrictive practices are price discrimination and justified tying and unjustified refusals to deal.

We also have structural regulations in Article 11 of the law. It is a very broad provision, but we have developed the regulations for the mergers and acquisitions and in doing so we have taken into account U.S. and European law. Interestingly, in the Venezuelan Constitution, limitations on individual economic freedom to engage in any profitable activity can only be enacted by law for reasons of "security, public health and social interests." This part of the Constitution which is in Article 96 was suspended for thirty years until July 1991. The suspension granted the government the ability to regulate economic activity by decree. This meant that you could regulate who was going to Congress. In many different sectors in Venezuela if things get too bad you can always go back to the system in which the guarantees are again restricted. I believe that that is going to be very difficult in the future, but still that problem is there. On the other hand, even with the economic guarantees as we have them now, this provision of regulating the economy by decree can only be enacted by law and for reason of security, public health, and social interests. I have to say that the social interest has been very much misinterpreted and social interest can get Congress and the Executive to eagerly legislate on economic issues.

I would like to point out our policy, and our priorities. We decided first that deregulation was one of our main concerns. An economy that had been regulated through a very paternalistic State for many years now had to face a new law, the free competition law. A lot of regulations, resolutions, and laws that were enacted before were in frank contradiction with the new

legislation. Thus, we had to deregulate and that is exactly one of our main priorities. Secondly, we always take into account efficiency over fairness. In other words, with large companies, if they are efficient and if they increase consumer welfare, we are not against concentration. In other words, our objective is efficiency, not competition itself. Competition is a means to get to the objective of efficiency. Third, behavior over structure. We also placed our interests on behaviors and conducts that were restrictive to the law instead of going into the practice of trust-busting divestitures. We decided because of the experience of other countries that that can be very costly and very inefficient in the long run. So we favor conduct over structure.

In this area, we have been working with pharmaceuticals, agriculture, capital markets, and insurance. We broke up the Venezuelan monopoly for the distribution of sugar. In Venezuela, to find a cartel, you do not have to put microphones on a golf course. They are written in regulations and laws. Also, we have had some very interesting cases on cartels which are problematic, because they were prevalent and the first to be prosecuted felt persecuted.

The merger cases are both interesting and problematic for Latin American agencies which evaluate the potential of mergers, especially in respect to new market developments and new geographic markets. We are a lot more flexible than in the United States. It is something that we have to manage with a lot of expertise, common sense, and practicality.

After two years of implementing the Venezuelan competition law we found three major problems with the law. That is when we wrote a new draft that we would like the Congress to evaluate and perhaps make changes. First, we want to introduce a rule of reason into the law. Second, we believe that concentrating too much power in the superintendent creates a position of pressure. I have told many politicians that this job was scientifically designed that only a corrupt person could feel comfortable in it, because if you want to do your job and listen to proposals, it is very difficult, especially in a society were everybody knows each other. Thus, we are proposing to have a full time board of five commissioners. Third, we would like that commission and that agency to have total functional independence from the rest of the government and to give the agency real advocacy powers, especially when confronting other decisions made by other governmental agencies. Also, we recommend the ability to appeal to the Supreme Court decisions that have been made by other agencies in the government that are against competition.

With that I want to tell you that I am very optimistic because when I was working in the competition agency I used to tell my people: "We are working for the ecologists. Do not worry about what is going on outside, keep working, because we are working for the ecologists and that is what we have to keep in mind." Now I believe we did not work for the ecologists. The

superintendency has become an important agency and it is a reference point for economic decisions in the country. I also think that it will be a very important governmental agency for the modernization of the Venezuelan economy.

FRANCISO JAVIER[14]

The Chilean foreign investment regime is comprised of three regulations. The Decree Law 600, known as the Foreign Investment Statute, The Compendium of Rules on Foreign Exchange of the Central Bank of Chile, in particular chapters 14, 19 and 26, and the Law 18657, on foreign capital investment funds. The main source of Chilean foreign investment law is the Decree Law 600. For this reason I will analyze its different aspects focusing on those matters that worry the investors the most. In addition, I will refer to the regulations for American Depository Receipt, known as ADR's, which are booming in Chile. Finally, I will address the main aspects of the law of foreign capital investment funds.

The Decree Law 600 was enacted in 1974. In 1976 Chile withdrew from the Andean Pact, and since then the statute has been amended to create a more favorable legal framework for foreign investors. The foreign investment statute applies to foreign individuals and legal entities and Chilean individuals and legal entities with residence or domicile abroad. The statute contains easy procedures. An application must be filed with the Foreign Investment Committee showing among other things the identification of the investors, the identification of the project, the amount of the investment, the time limit in which it will be brought into the country, the identification of the company receiving the investment, and a tax law choice.

The capital can be brought into the country and must be valued in one or more of the following ways: freely convertible foreign currency, tangible assets, technology in differing forms (provided it can be qualified as capital), credit associated with foreign investment, capitalization of foreign loans and debts, and capitalization of profits. As a general rule, the investment has to be brought into the country over a period of three years. In the case of mining investments, the period is lengthened to eight years. This period can be extended up to twelve years in the case of mining investments when prior expiration is required. In the case of investment in industrial or non-mining resource projects valued at fifty million dollars or more, the period can be extended to eight years. In addition, it is important to mention that no less than 15% of the total investment must be brought into the country as equity. The remaining 85% may be brought as associated loans.

14. Francisco Javier holds a law degree from La Universidad Catolica in Santiago, Chile and an L.L.M. in International Legal Studies from Washington School of Law at the American University in Washington, D.C.

Under the Decree Law 600, investments are formalized in a contract signed by the foreign investor and the Republic of Chile. This contract sets forth the rights and obligations of the parties. One important characteristic of this contract is that it cannot be modified unilaterally. Therefore, the investor is fully assured that the terms will remain stable during the project. The foreign investor has the right to repatriate capital up to one year counted from the day it was brought into the country. This is one of the few changes made by the legislature last year. Before March 1993, the investor had to wait three years in order to remit the capital investment. This modernization in the law hopefully will continue until there is an unlimited repatriation of capital.

Profits can be remitted at any time without any limitation, provided that the corresponding income taxes have been paid. In order to remit capital and profits, the investor has the right to acquire foreign currency at the highest rate of exchange available in the formal foreign exchange market. It is important to note that there are two different exchange markets, the formal market which is basically formed by banking institutions, and the informal market which is comprised of everybody else. As a general rule, the investor will be subject to the general taxation scheme applicable to Chileans, which imposes a total rate of 35% for the additional remittance tax. This rate is composed of a 15% first category tax on net income and a 20% withholding tax on remittances abroad.

In spite of the general system and in accordance with Decree Law 600, foreign investors have the right to choose a special regime based on a fixed tax rate. In fact, the foreign investor will have the right to include in its contract a clause that for a period of ten years from the start up of the company's operation, the investor will be subject to a fixed overall tax rate of 42% which includes all tax applicable under the income tax laws enforced the day that the contract was executed. An additional change also was made by the legislature last year: the fixed rate was decreased from 49.5% to the current 42%. If a foreign investor has opted for this fixed rate he may only once waive this right, in which case he will be taxed under the ordinary tax rules, losing the right to invariability.

There are special regimes for investments of fifty million U.S. dollars or more under Article 11-B of Decree Law 600. Under this regime the legislature gave additional rights to some major industrial and mining projects which have been thus far successfully developed. These special privileges are as follows: the regular ten year period for the tax invariability may be extended up to twenty years; the contract may include stipulations that the legal provisions and resolutions of the Chilean Internal Revenue Service enforced at the time of the contract regarding depreciation carry forward to organization losses and start up expenses; and, the right to keep accounting records in foreign currency will remain invariable.

In projects involving the exportation of production, the foreign investors may apply for invariability of the legal rules. In addition, the foreign investor may receive a special regime with respect to the obligation of repatriating export proceeds and necessarily converting them into Chilean currency. According to this exceptional treatment, the exporter may be allowed to maintain foreign currency in offshore accounts in which the proceeds from the exports will be deposited. This is to allow the exporter to pay obligations which have been incurred in foreign currency with the permission of the Central Bank, including the services of non-Chilean debt, and also to pay tax deductible expenses of the project incurred in foreign currency or to pay directly abroad capital repatriations or profit remittances duly authorized under Decree Law 600.

The second source of the foreign investment regime is the compendium of rules on foreign exchange of the Central Bank of Chile. Chapter 19 sets forth the rules applicable to the debt equity swap system. This mechanism of investment was very attractive during the mid 1980s when Chilean debt paper was traded on international markets at 50% or 70% of face value. Today this mechanism has lost its importance due to the fact that currently the paper is being traded at about 90% or more of the face value. Under Chapter 14, foreign investors may bring foreign currency and credits into the country by liquidating it into pesos through the formal exchange market. This alternative is for foreign investors who do not wish to invest through the Decree Law 600. The differences between Chapter 14 and the Decree Law 600 are mainly that the capital can be brought into the country only in the form of foreign currency. No contract has to be signed, but registration with the Central Bank is required. Concerning the remittances, the same rules set forth in Decree Law 600 apply. Profits can be freely remitted at any time and capital must remain one year before it can be repatriated.

With respect to tax benefits, the general rules of taxation apply, and no special regime is available. Chapter 26 deals with provisions of ADR's issued by Chilean companies. This process got started slowly in 1990, when the first Chilean company, CDC, issued its shares on the New York Stock Exchange, and since then has increased rapidly. At least ten Chilean companies are planning ADR issues in 1994 — looking for more capital, attracting foreign investment, and obtaining global recognition. Meanwhile, for U.S. investors these offerings mean excellent possibilities to diversify their portfolios and achieve better investment results.

However, there are many other requirements for companies to issue these ADRs (due to space constraints this article does not address all of these requirements). The minimum amount of placement of the ADR under licensors may not be lower than fifty million dollars. Additionally, contracts have to be signed by both the issuing company and the requirements and depository bank in order to access the formal exchange market and repatriate

capital and profits. Regarding taxation, cash dividends paid by the issuing company are subject to a 35% Chilean withholding tax. Regarding the issuances of depository receipts, the gain from the sale or exchange of ADR's abroad is not subject to Chilean taxes but the gain recognized on the sale or exchange of the underlying shares will be subject to a 15% first category tax and under certain circumstances to an additional 35% withholding tax.

Finally, I will discuss in brief the law on foreign capital investment funds. According to this law, entities organized as foreign capital investment funds will be eligible to receive resources from abroad through the application of participation accords or to enter resources contributed by foreign institutional investors into the country. One disadvantage with respect to remittances that the law has established is that the investor will not be able to repatriate the capital invested during the first five years, counting from the day the contribution entered into the country. This is a very long time considering the time limitation set forth by the other regulations just mentioned, in which no more time is required in order to repatriate capital. However, this is related to the tax regime. The profits will only be subject to a 10% tax rate. In other words only the earnings over the amount invested will be taxed by a 10% tax rate, and no additional tax will be charged.

L. JANÁ SIGARS

I am briefly going to introduce two specialists on Brazil and Argentina who deal with issues associated with telecommunications, copyright law, entertainment law, video reproductions, and all of that which is now being called by the new buzz word "Multi-Media." Silvia Gandleman is from Rio de Janeiro and has served as President of the Brazilian Computer Law Association from 1989-1991, she is now the chair of the advisory board of that association. She is a member of the Brazilian Lawyer's Institute, and she has lectured in numerous places and written articles on copyright and computer law issues. As you can see she is very well qualified on this subject.

Antonio Millé is the Dean of Computer Lawyers in Latin America and was one of the first to see the need for such a thing. He is often used as an expert and has advised numerous institutions including UNESCO and WIPO. He is the publisher of DAT. DAT is a monthly review of high technology legal issues. He is a member of the editorial board of various international publications on computer law and he has lectured in many countries around the world and written articles on these same issues.

D. *Intellectual Property and Multi-Media in Latin America: Bringing Together Telecommunications, Entertainment, Computers and Consumer Electronics*

SILVIA REGINA DAIN GANDELMAN[15]

I am very happy to be here today and share the panel with Antonio Millé. It is funny how we both started as copyright lawyers, and then we developed as computers lawyers, and now we are back again in something called multi-media, which involves not only copyrights but computer law as well. I have seen and watched and heard a lot about Brazil today, and it was very interesting to see how Brazil is seen from the point of view of American lawyers and other Latin American lawyers, because we mostly get the opinions about our country from people inside Brazil. We heard a lot about the risk of going and doing business in Brazil, and then we saw that, for instance, franchising is a thriving area in Brazil.

I was reminded of a joke that every Brazilian knows. When God was making the world he stopped as he was designing Brazil and made Brazil the most beautiful country of all the countries. He made the longest shoreline with sandy beaches and warm water, he put a huge rainforest and a wonderful river and he put all the natural resources and the best climate in the world. Everything was wonderful, with warm weather and beautiful waterfalls. Suddenly one of his helpers, the Angel Gabriel, said, "God, look, what are you doing, it is not fair not to give them hurricanes and earthquakes and things that you gave the United States, why did you not give them this?" He said, "Wait, wait until you see the government I am going to give them." Thus, we must apologize for our beautiful country and for the government we received.

But things are changing in Brazil and we expect that in the near future, Brazil is no longer going to be the country of the future, but the country of the present. Everything is there concerning entertainment law and multi-media, and I think we are a rich resource in a rich market. I would like to point out the legal aspects of multi-media that affect not only Brazilian legislation but the whole world's legislation.

The term multi-media has been designated to include everything that has sounds, image, and computer software, but mostly it means that it is a program where you can associate voice and text. What kind of protection can be granted to works developed as multi-media? We know that the

15. Silvia Gandelman is a lawyer with the Rio de Janeiro firm of Dain, Gandelman e Lacé Brandao. She received her law degree from the State University of Rio de Janeiro and teaches intellectual property law in continuing education courses held for judges and courts in Rio de Janeiro.

separate parts are already protected by different copyright laws, but how do we protect the whole thing? In both common law and Bern Convention countries the protection of compilation was always granted, so when there is a creation in compilation, the collective work, or the work that assembles all kinds of different media, can be protected.

We have the proposed legislation for European countries which grants protection for databases. We will have to decide whether these protection are going to be granted or not, because when we are dealing with multi-media products, database protection is a necessity. In Brazil, the United States, and other Latin American countries, databases are not protected by themselves. They can only be protected if they are selected, arranged, or compiled in a certain way. This means that there must be a creation. The theory of the "sweat of the brow" is in play in these countries, which means that the data should be protected even if they are in public domain because they are very expensive to get. Thus, one has to find two currents. First, one must have a special arrangement or treatment of the data in order that it can be protected. The second current that is prevalent now that multi-media products are present is that the databases must be protected by themselves.

The second aspect of legal problems that may arise with multi-media being sold in large quantities around the world, is how do we collect the money for the authors of the parts that are used in the multi-media? We know that with software by itself, each time you sell a copy you save a certain percentage of the proceeds for the author of that product. Will this criteria be fair to multi-media products when you find out that you may have 3000 or 4000 authors in one single program? Then we have the payments called by the way you pay. For instance, if you use TV, or if it is distributed to your house, then you have to pay, just like a signature. Then from this amount collected, all the authors would be paid.

You can always pay for a flat fee, which means that every time you give an assignment for a work to be used as a multi-media, the author gets one single payment and does not receive anything anymore. If this product becomes a great success you will not have any problems. Another way of paying is giving the authors part of the profits from the product, similar to a risk agreement. If they make money on the product the author receives part of it. If it is not profitable they will not receive anything. There are several other forms of collection. Since music is used in multi-media products, you pay for mechanical rights, public execution, and several other collecting rights applicable strictly to music. Thus, if you have a collective work, you have to decide which kind of payment you are going to do. A major issue is that societies of the world will not be able to control every time a copy of the multi-media software is sold or when a copy of a multi-media product is executed anywhere in the world.

How do we find solutions for these problems? We solve them in the

same way that collection of copyrights has been solved all over the world: we sit together and write conventions about how to collect money on multi-media works. People representing the movie industry, the music industry, the photographers, and the authors of books must sit together and work out a model agreement for multi-media and a model form of collection.

Another form that is becoming very popular is developing works specially made for multi-media. Which means that we are going to forget all the culture we have, all the music we know, all the movies we have, all the taxes we wrote, and we have to start all over again writing for multi-media and then establishing how much we are going to pay for each other. We find again that these questions are not yet solved, and the use of public domain work in multi-media products is very extensive. You will find out that the life of Beethoven, the life of Moses, and other music in the public domain are the most popular multi-media products. You will not find anything about Eric Clapton or any other famous composers or writers of our time.

Another development happening is that the big industries that make the TV's and computers and all the hardware are buying the publishers of the software. They are buying the music publishers, they are buying the songwriters, they are buying everything, because they need software for their hardware. We know this practice in Brazil. Most of the small song publishers were bought by Sony music, or Warner music, or EMI. Before that, we used to have a multiple of local publishers. Nowadays, it is a shrinking market, shrinking in the sense that more and more large international companies own the local publishers. This also means that local songs and local authors can be heard and seen and used all over the world because these companies assimilate all the programs.

We hear a lot about the information highway in the United States, and we hope that it will pass through Brazil as well. Nowadays all of Brazil gets cable TV, and TV is also becoming interactive so we hope that the information highway will come our way.

Finally, I will go over some difficulties that I visualize for those countries who belong to the Bern Convention. For instance, you know that multi-media is interactive in the sense that the user can interact with the product, can modify what he sees, and can interrupt what he sees. All of us from South America, from Latin America, have in our copyright legislation something called the moral right, which the United States did not have until 1989. The United States joined the Bern Convention with reserve, so they did not grant the moral right. This moral right grants the author the right to oppose any modification of his work. This is one of the big problems that we are going to have to test before multi-media products become a bestseller. In our countries we do not have compulsory license. This means that every time a song is going to be recorded or used you must get another license. I remember watching a demonstrator of the multi-media version of the

Dracula film, where they had to obtain 4000 licenses only for one single program. Thus, this is one thing that is not allowed to develop in the multi-media industry.

In Argentina there are ten unions that collect copyrights. In Brazil we have twelve only for music, and then we have the different ones who represent the theater, the movies, the opera, the publishing houses, the editors, and so on and so forth. So we have to unify all these collection groups in order to establish a common language for everyone.

Another thing to verify, if you want to use what is still in force, is the period of protection of copyright. Because if you do a compilation of work, each one might have different protection periods. There are different times for protection depending on if it is a movie, a song, or a text. There is also a different time of protection, if the author of one of the works is dead and the others are alive. Therefore, you have to verify everything before you put it into a multi-media product.

In conclusion, I would say if you are talking about multi-media in Brazil I think that if the right companies come and invest it will work. Why? Because we have the largest population in Latin America and correspondingly the largest number of TV sets and communication nets. We hope to deregulate our monopoly on telecommunications. Additionally we have the best music in the world, as well as a growing movie industry with tax incentives. Brazil just issued three or four new laws declaring that one can even buy bonds in the Brazilian stock market and invest in films in Brazil. Finally, we have cheap manpower for these kinds of industries. Brazil is a very inspiring country to work in with respect to multi-media.

ANTONIO MILLÉ[16]

I will attempt to present to you the particular business scenario at the present time in Argentina, which is changing in a way of deregulation, legalization, and establishization. Also, I will try to show you the size and the condition of the computer market in general and the multi-media market in particular. However, I consider it more interesting for my colleagues to understand what multi-media is and what are the particular legal problems of multi-media. In this last part I have the support of the presentation of Silvia that was very comprehensive. The fact of the matter is that expressive mediums give much to a specific technique to transmit information and that each of these techniques remains different. You can see that they are all different, and that you in your office, and you in your documents, can use them today as one single piece of information — to explain with different languages one thing: multi-media.

16. Antonio Millé is the Chair of Latin American Institute for High Technology. Mr. Millé received his law degree from Buenos Aires University in Argentina.

Multi-media uses digital binary language that unifies all technologies in order to transmit and transcribe information. With this new invention, this new technique, we can use audio or video individually or together. You have unification of different activities that were separate in the past: the entertainment industry, the computer industry, the telecommunication industry, the publishing industry — all jumbled into one industry of the future. This is an important point. You can see the figures for the past year and provisions for the coming year. The market will grow by more than 10%. The CD-ROM drives are the peripherals that are needed to use multi-media in personal computers. The installed base of CD-ROM drives will more than double in the next year.

What are the legal problems of the multi-media industry? The principal problem is that if you are producing a multi-media work, you are tempted to use items that may be the property of a third party. Music is an example. Even if the composition is public domain, the performance may not be. Secondary performances are not always protected.

Another problem is establishing the price. In the cinema or music, you have established, customary prices. These do not exist on the multi-media side, and the costs of production can be difficult to calculate because of different rights that different parties may own. Thus, the first step is not just to settle with one owner, but rather to investigate and settle with all possible copyright owners. A work that is in the public domain in one country may not be public domain in another. Rights even can vary from state to state. Furthermore, countries with a civil law approach have different views towards copyrights.

The commentators advise a worldwide unification of definitions of rights so that the owners can collect their money and give the multi-media makers a chance to produce. The first advice we give clients is to avoid anonymous use. If you cannot determine the owner, do not use the material. What if you cannot find the owners or the terms of the right? This is a problem because old contracts may not specify new media techniques. Even if the contract includes a "all future media" clause, not all countries may recognize it. It is a good idea to get a specific multi-media agreement.

III. Structuring Direct Investment in Latin America: Keeping Pace with New Financial Regimes, Innovative Investment Vehicles, and Changing Labor Laws

L. Janá Sigars

The moderator for the next section will be Salvador J. Juncadella. Mr. Juncadella has been with this conference since it commenced. He is one of the conference's bright stars and one of the persons to whom we look to give us guidance and answer any questions we might have. He is a great resource