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Simultaneous Breakout Sessions

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John H. Rooney

said that the emerging markets were free of risk. But there is still plenty of growth to come from Latin America, and plenty of money to be made — provided that the herd instinct does not prevail." It would appear, despite the gloomy headlines as of late, that U.S. companies are strengthening their positions in Latin America, making the region the fastest growing U.S. export market, buying and taking almost ninety billion dollars worth of U.S. goods in 1994. The Commerce Department estimates the region will surpass Europe as a customer for U.S. wares by the year 2000 and by 2010 will surpass Europe and Japan combined. In essence, while we are seeing a jittery response from short-term investors, for the most part, companies focusing on strategic direct investment, are staying the course.

To conclude then, one must be careful not to jump to knee-jerk decisions regarding such a vast territory, projected to include 510 million people by the year 2000, because of its history of political and economic instability. On the other hand, claiming that Latin American economies have been successfully reformed, as we are now seeing, is overly simplistic and fraught with danger. One must take into account that the region has a history of reform and relapse, behaving, as we also state, like an addict of the drugs that grow so well there. Yet, if Latin America does accept the gravity of challenges ahead, and of systemic reform, not short-term fixes but long-term strides towards sustainable prosperity, and normalcy, then even the most skeptical among us has grounds for optimism.

IV. SIMULTANEOUS BREAKOUT SESSIONS

WILLIAM P. ANDREWS

In this session our first speaker is Jeff Snyder. He is the author of numerous works on international trade and speaks frequently on international export matters. Presently, Jeff is a partner in the International Trade Group in the Washington D.C. office of Graham & James. His practice includes representing foreign companies and governments in the United States in a variety of disputes. He also represents U.S. companies in disputes with foreign companies that are resolved here in the United States. So he is involved with both sides. Most of us who are involved in international trade know that as international trade grows, so do international disputes. As our clients begin to look at foreign markets as opportunities, as lawyers, we know that they also are looking at foreign markets that may cause problems for them at some time. For example, terminating distributors tends to be one of the very first problems that clients run into if they have not come to you before going international. When clients take their U.S. distributorship agreements and decide to use them throughout Latin America, bingo, about two or three years later, you usually get a call. That is often the beginning of the education process for our clients. Unfortunately, all of them do not

come to us first.

Dispute resolution has always been a part of doing business in Latin America. Litigation is becoming more and more a part of the scene. As courts become more predictable, as IP rights become more protectable, and as certain other contractual responsibilities become more defined, the vehicles available to resolve these disputes, including arbitration, become opportunities for attorneys to assist their clients in settling their disputes.

I would like to add that David Epstein, the scheduled speaker, was unable to attend. He was co-author of *International Litigation: A Guide to Jurisdiction, Practice and Strategy* with Jeff Snyder.

A. *Strategy Issues: International Litigation and Alternative Dispute Resolution*

JEFFREY SNYDER

I have designed this speech to be a practical overview. Litigation, dispute settlement, and arbitration represent a large topic. I would like to take one theme and weave it through litigation and arbitration, using it as a touchstone for discussing strategy and practical issues. That theme is enforcement. It is an awkward term but is the goal of any dispute resolution consideration. Both in the planning and in the execution stages, you need to have an objective in mind, that is, the ultimate enforcement of whatever your result might be. First, let us look at the end of the process, starting with what you want to achieve, and then work backwards through each stage in the consideration. This method often will lead to a different strategy than you otherwise might have chosen if you had started out from the beginning and worked through to the end. Starting from the end and working back gives you more choices and a different perspective on some of the alternatives.

To explore some strategies and issues presented by both litigation and arbitration, we will consider two litigation issues: service of process and gathering of evidence. These are two crucial aspects of litigation in the United States that involves foreign parties. If you do not do them correctly, it will affect the enforceability of the resulting judgment.

Just a word about enforcement of judgments. Recall that there is no multilateral convention on the enforcement of judgments to which the United States is a party, mostly because of problems with punitive damages and problems that many other countries have in recognizing U.S. judgments. This means that a U.S. judgment is subject to enforcement under the laws of the nation where enforcement is sought. So, it must be a country-by-country, case-by-case consideration. Therefore, in the planning stage of an international transaction, it makes a lot of sense to consider whether eventual litigation will lead to a judgment that has to be taken to another jurisdiction

for enforcement. It makes sense to learn as much as you can about the enforcement procedures in that country before you document the transaction and before you make a decision about litigation.

Circulars from the Office of Citizen Counselor Services at the U.S. Department of State are useful as a first step in gathering some of this background information. It may not be enough to help you practice in that jurisdiction, but it is enough to help you identify what some of the issues are and evaluate when you need legal advice in that country. Let me mention another preliminary matter. Litigation in civil law systems is very different than in common law systems. Disputes between parties of different nations can end up being heard simultaneously in both jurisdictions.

For instance, in a recent case called *Philadelphia Gear*,[45] the Third Circuit held that a full comity analysis should be extended to a request contained in the letter rogatory from a Mexican court seeking a stay of the U.S. case or a transfer of the case to Mexico.[46] A U.S. company and a Mexican company were involved in the dispute. There was no previous arrangement for dispute resolution, so both parties went to court in their own jurisdictions. It was a bankruptcy action in Mexico, and the court in Mexico was concerned about loss of assets and inability to enforce an eventual Mexican determination on the bankruptcy issues. The Mexican court issued in the form of a letter rogatory, which is unusual, a request to the Third Circuit Court in the United States that it stay its action or transfer the action to Mexico. The U.S. District Court did not consider the comity issues in any depth, and in fact, it granted summary judgment for the U.S. plaintiffs. The Third Circuit Court, in taking a look at the action of the District Court, reversed and said that a full comity analysis should be performed. This was not a direction to the circuit court that, in fact, it should comply with the request in the letter rogatory, but it was an extension of the principle that the comity analysis should be performed. This case is encouraging but does not provide an answer to all of the problems created by the differences between civil and common law.

I would like to turn now to the service of process issues, keeping in mind that a common law judgment may be difficult to enforce in a civil law jurisdiction. There is an Inter-American Convention on Service of Process. Forms are available from the U.S. Marshall's Office, and it is a fairly straightforward procedure. I would like to focus on a couple of strategic issues that you should consider in the service of process area. From the U.S. side, the Convention is not exclusive. In other words, the convention system is not the only way to achieve service of process on a foreign party. You

45. 44 F.3d 187 (3d Cir. 1994).
46. *Id.* at 193.

can use either the Convention or the federal rules for service. From an enforcement perspective, you have to consider the effect of your choice on the eventual enforceability of the resulting decision. Keep in mind, if you serve under the federal rules instead of the Convention, nations that are parties to the Convention may consider service under it exclusive and require that any service be performed in that way. As a result, the eventual need to enforce in the United States a judgment from a foreign nation should be a consideration in determining how to perform service of process.

Let us turn to evidence gathering. The distinction between civil and common law traditions is, perhaps, greatest in the area of evidence gathering. In civil law systems, the roles of the lawyer and the judge are very different. Evidence is gathered in a different way, and discovery scope is more limited. There is no convention on the gathering of evidence in Latin America, such as the Hague Convention, and only Argentina and Mexico are members of the Hague Convention.

A draft convention was negotiated in the mid-1980s. The primary issue during the negotiations, which also was the issue that prevented the treaty from coming into force, was the discovery issue. Because of the differences between discovery practices among the nations negotiating the treaty, they were unable to conclude the negotiations. Since there is no treaty with which to work in evidence gathering, you need to know the ins and outs of the evidence gathering in each foreign location.

If personal jurisdiction exists in the United States, you can use the federal rules. The federal rules provide leverage in obtaining evidence, and if evidence is not supplied, in obtaining sanctions against the foreign party. However, this again brings up the issue of enforcement. Using the federal rules, as opposed to other techniques, may lead to problems of enforcement. If you have not obtained the evidence properly, then that decision is going to be reviewed by a foreign court, and it will be more difficult to enforce the judgment.

Section 1782 of the Judicial Assistance Statute, may help bridge the gap between civil and common law jurisdictions.[47] Under the provisions of section 1782, a U.S. court can order discovery of persons or documents found within the district for a proceeding in a foreign or international tribunal. Interestingly, this provision recently has been defined to include arbitral tribunals. If arbitration is taken in a foreign location, section 1782 may enable a U.S. court to assist in gathering evidence for use in that tribunal. The use of section 1782 in Latin America is illustrated by a recent case known as *In re Letter Rogatory from First Court, Caracas, Venezuela.*

47. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 997 (codified as amended at 28 U.S.C. § 1782(a) (1988)).

The case is referred to as the *EDS* case because it involved an EDS subsidiary in Venezuela, which was involved in a labor dispute. An employee of EDS in Venezuela sued the EDS subsidiary in Venezuela. The employee sought documents and information that were in the possession of EDS in Texas. The Venezuelan court issued a letter rogatory for certain information via the U.S. State Department, and it was transferred to the Justice Department. The letter rogatory ended up in the northern District of Texas. A Texas judge appointed one of the U.S. attorneys as a Special Master. The Special Master conducted the discovery for eventual transfer back to the court in Venezuela.

EDS challenged the discovery on several grounds and tried to stop the U.S. court from ordering discovery. The most interesting challenge was that the information was not the type of information that was discoverable under Venezuelan law. In other words, it was beyond the scope of what the parties in Venezuela would have access to; therefore, the U.S. court should not order discovery under the U.S. federal rules. EDS argued it would be an expansion of the Venezuelan law to use the federal rules of civil procedure. The District Court disagreed and rejected EDS' claims. The Fifth Circuit affirmed there is no discoverability requirement in section 1782. In other words, there is no limitation on using section 1782 in order to obtain information for use in a foreign tribunal.

There are a series of other unreported cases winding their way through the courts, that could go the other way. It is still a developing issue. You may want to keep an eye on it if you have an interest in using section 1782 in this way, because apparently, there was one unpublished district court opinion that suggested that there was a discoverability requirement. But for now anyway, it is a creative issue for those of you who might be engaged in litigation in a foreign country.

Turning to enforcement of civil judgments, I just have a few comments to wrap up the litigation perspective. Keeping in mind that enforcement is always an issue and there is no treaty for enforcement of civil judgments, it is important to focus on enforcement issues from the very beginning. Find out what it takes to enforce a judgment in the country of your business partner and incorporate that into your planning.

We get questions all the time from lawyers who ask us to evaluate the enforceability of a judgment that they have obtained in the United States. Recently, we were contacted about trying to help enforce a U.S. default judgment, which is difficult to do. It is really too late if you have gone through that process. Although it did not involve Latin America, we recently were called on to advise a U.S. client in a dispute with an Italian party in which there was no previously designed mechanism for dispute resolution. First, we looked into Italian law and then obtained an opinion from Italian counsel about the enforceability of a U.S. judgment in Italy. We worked

with the U.S. party in conducting the litigation in the United States in such a way that the resulting judgment would be enforceable.

I would like to turn now to arbitration and alternative dispute resolution (ADR). Actually, I would like to focus on arbitration, however, I do not want to suggest that you should ignore any of the other forms of ADR, such as mediation and conciliation. There is something that happens to a business transaction when a dispute occurs. Very often when a dispute occurs, the parties already have stopped doing business together, and there is not much of a future in the relationship. Using other forms of dispute resolution may enable the business relationship to continue. A recent project on which we worked involved providing a quick and effective dispute resolution in the context of an on-going transaction. The parties were going to work together to commit to a regulatory approval process in the United States, which would have taken several years. The parties were concerned that a dispute would occur that would interrupt or detract from their ability to continue and complete the regulatory process. They came up with a "wise person approach," in which they both agreed to have a single person listen to the parties for a designated amount of time and then make a final decision. So, you need to keep in mind lawyers are often expected to come up with creative solutions.

I would like to focus on arbitration. There is a great deal of confusion concerning what the ADR provisions in NAFTA provide.[48] One point that I want to make is that there is nothing in NAFTA that deals with private party or private commercial disputes. There are provisions to set up an advisory committee and to encourage the use of arbitration and ADR for private commercial disputes. But NAFTA does not create a forum or have a set of rules for those disputes.

There is a nice procedure in chapter 11 of NAFTA that deals with investor versus state disputes.[49] I am not aware of any cases under that provision, but it provides an alternative method when considering disputes, especially in Mexico. Mexico is a member of the International Center for the Settlement of Investment Disputes (ICSID).[50] Therefore, it is another alternative to litigation if you are considering an investment dispute in Mexico.

One of the first questions to address is whether arbitration is always preferable to litigation. The question suggests its own answer. Arbitration

48. NAFTA, *supra* note 2, Institutional Arrangements and Dispute Settlement Procedures, ch. 20.

49. NAFTA, *supra* note 2, ch. 11.

50. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereafter ICSID] (also known as the Washington Convention).

is not always preferable. It depends on the dispute. It depends on the parties and the nature of the transaction. If you can negotiate a consent to jurisdiction in the United States and have the dispute heard in U.S. courts, then it is probably preferable to consider having litigation, because you have the additional leverage of the U.S. court system, including discovery and the full range of benefits it brings. On the other hand, it is almost impossible, in most international business transactions, to get a party to consent to U.S. jurisdiction. Therefore, arbitration becomes the next best alternative. Also, it is important to consider the enforceability of whatever you get through litigation or arbitration as a factor in your choice. It should be noted that arbitral awards are much easier to enforce than civil judgments.

When you choose arbitration, you should consider the ultimate enforcement issues up front. Think about the type of business transaction involved. Arbitration, despite its general preference over litigation, still changes the tenor and the nature of the relationship. Model clauses are available, and you will find them in most of the basic materials on international arbitration.

When looking at an arbitration clause, a model clause is a good place to start, but you will need to adapt it to your situation. Consider the location of the arbitration, the language it will be conducted in, what leverage you might need within the context of the arbitration, how it is going to be enforced, and the convenience for the parties involved. Everyone wants to avoid the parallel proceeding problem, the anti-suit injunction that we talked about with *Philadelphia Gear*, where you have two cases proceeding simultaneously. The cost of litigation or dispute resolution will double. If you have a weak or ineffective arbitration agreement, you are going to have a lot of fighting over where it should be arbitrated, and whether it should be arbitrated; you do not want to spend a lot of time doing that.

From the perspective of enforcement, I would like to discuss two points of an arbitration agreement. The first is enforcing the agreement to arbitrate. Can you get the dispute into arbitration and keep it out of court? The second is enforcing the resulting award. It has been said that an arbitration clause has to speak four languages or speak to four different audiences. It has to speak to the parties, to the arbitrators, to the judges who might interfere in the case, and to the judges who enforce the resulting award. The goal is to avoid a situation in which the other party goes to court in an inconvenient forum.

There are a number of issues in the agreement that need to be addressed; doing so will increase your leverage in the resulting disputes. These issues include:

(1) Avoid vague clauses, which create more problems than they solve. It is very common for a boilerplate agreement that has a promise or an obligation to arbitrate to be used but with no definition of the process that will be used for arbitration. Courts have looked at such agreements and

ordered particular kinds of arbitration that may not have been convenient to the parties.

(2) Do not use imprecise or obsolete institutions. This is another case in which courts will end up ordering arbitration that they think is appropriate under the circumstances.

(3) Address the scope of the arbitration. What disputes will or will not be subject to arbitration? It is a common problem to find that there is no definition of what is covered by the arbitration agreement.

(4) Consider the language of the arbitration. In which language will it be.

(5) Consider the location. This will have a direct impact on cost and convenience.

(6) Consider the institution. There are a variety of arbitral institutions and rules that need to be considered when determining how you want the arbitration to be conducted. There is a tremendous cost difference between them. You need to look into these choices before you decide which one would be most appropriate for your situation.

(7) Address applicable law. Which law will apply? Not just to the merits of the claim but to the agreement itself and how the proceeding will be conducted.

(8) Consider the qualifications and number of arbitrators. The qualification issue is very important. Many people do not pay attention to it at the time. They think in arbitration there will be plenty of opportunity. However, it may make sense to include something stating nationals of the countries of the disputing parties cannot be arbitrators or that they need to have a particular expertise before they can be considered eligible to be an arbitrator in your case. Conflict of interest regarding the arbitrators can be a problem. This is a case that was very close to home. We were involved in a conflict situation. One of our partners was appointed as a arbitrator for an international dispute before he joined us. One of our clients was a party to that arbitration. As a result, we suddenly had a conflict issue where he was sitting as an arbitrator on a dispute involving one of our clients. Luckily, we were able to obtain waivers and work all the way through it, but it was a difficult issue. The agreement, of course, had nothing in it about conflicts and how they should be resolved, so it ended up delaying the arbitration substantially.

(9) Address discovery. Whether it is necessary to address the discovery issue is difficult to say, but you may want to consider having some mechanism for limited discovery of particular kinds of documents.

(10) Address how arbitration should occur when multiple parties are involved. This is important because arbitration clauses are not only included in agreements between two parties. When you have multiple parties from multiple jurisdictions, all with different stakes in the overall business

transaction and with different roles, it may be favorable to address how arbitration would occur if all of the multiple parties were involved. You also may want to include something about the number of parties that will be involved.

(11) Include provisions regarding costs and attorneys' fees, and how they are going to be handled in the arbitration.

(12) If a government party is involved, include a provision regarding waiver of immunity. There is an exception to immunity in U.S. courts for agreements to arbitrate. In other words, an agreement to arbitrate a dispute is considered a waiver of a sovereign immunity.

(13) Consider the currency of the award. What currency will be used in granting the award?

(14) Depending on whether there will be difficulties with enforcement, another issue that could be addressed in the agreement is the availability, the rate, and the term of the interest.

Very often you do not want to raise all of these issues in the context of negotiating a simple joint venture agreement, because doing so can create an unfavorable climate for the business decisions. Parties have set out to do business together, and at this point, they are not concerned about a dispute arising. Nonetheless, we have found that the more issues you do raise, the higher the sensitivity of the parties to the fact that a dispute may ultimately arise. This tends to increase the seriousness with which the parties undertake the negotiation.

I would like to note two arbitration regimes that are of particular importance. The first is the InterAmerican Convention on Commercial Arbitration.[51] The current members of this convention are the United States, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Panama, Uruguay, Venezuela, Paraguay, and Mexico. The Convention works very much like the New York Convention[52] on the recognition of foreign arbitral awards, with some minor differences. An agreement to arbitrate a commercial transaction is considered valid, recognizable, and enforceable. In addition, arbitrament is recognized and enforced like a final judgment and is not subject to appeal. Second, is the Washington Convention or the ICSID.[53] This is a specialized institution in Washington that was formed at the initiative of the World Bank. ICSID is limited to cases against members and investment disputes. Investment disputes are defined as

51. Inter-American Convention on International Commercial Arbitration, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention].

52. Convention of the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-207 (1994)) [hereinafter New York Convention].

53. ICSID, *supra* note 50.

disputes arising out of an investment made by a national of one signatory state in another signatory state. Therefore, it is limited to investment disputes and cases in which a private party challenges the actions of a member government. The current members of ICSID in Latin America are Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, and Peru. Several other nations have signed the agreement but have not yet ratified it.

QUESTION:

I am not an expert, but I have an opinion on international arbitration involving intellectual property. I do not like arbitration in IP agreements in the United States. I think they muddy the water. But in certain international contexts, arbitration may be quicker than going through a court system, particularly if injunctive relief is not an available vehicle or a realistic vehicle. For me, the short-handed response is, to see if there is injunctive relief available in the courts. If there is, do they actually use it? Is it real? If so, then I tend to use the courts.

ANSWER:

One of the difficulties with arbitration, if you are representing a technology owner in an IP case, is the issue of confidentiality. Unless you are very careful about the way you draft your arbitration clause, there is no framework for the kind of confidentiality that you need in an IP dispute. That is the biggest problem. Unfortunately, there is no framework for that type of confidentiality in many of the judicial systems. Although, you may not be hindered because you do not have confidentiality, but it certainly inhibits your willingness to go to court.

ANSWER:

Even in the United States, this is a developing area. There are differences in the circuits over confidentiality of certain parts of arbitration.

QUESTION:

Can you give us some general guidelines on collecting judgments against foreign nationals who set up in the United States and then become bankrupt.

ANSWER:

The most difficult problem always is how much guarantee do you get up front when you enter into a relationship with somebody. It depends on the country of the transaction. At the same time, there is some predictability about how a country will enforce a U.S. judgment. Typically, a Latin American court will perform a comity analysis and review the judgment of the U.S. court. If the Latin American court disagrees with or feels that the U.S. judgment is not fair to their national, then it will not enforce that judgment. That is why it is important to take care of service properly and gather evidence properly — those kinds of things. Anything that is done improperly may result in the Latin American court deeming the process unfair to its national under comity analysis and not enforcing the judgment.

For instance, depositions are not common in civil law jurisdictions. The judge takes evidence, not the parties. Therefore, a judgment based on a deposition might be looked with regards to the quality of the evidence on which it was based, and the court would take a look at that under the comity factors. How that particular element is going to be treated depends on a country-by-country analysis of enforcement. There is no automatic bar to a U.S. judgment, that is, just because it is a U.S. judgment does not mean it is going to be ignored. Courts will evaluate the basis for the judgment. Unless, of course, it has a punitive damages component to it, in which case, it is up for grabs.

ANSWER:

I think that is a key point. If you are trying to collect punitive damages, you probably will not be able to. It is probably not worth even looking at.

QUESTION:

So it is purely compensatory damages?

ANSWER:

Yes. Just one related point is the uniform products liability law. It is of interest to many foreign nationals and foreign governments, because someday we might have a convention on the enforcement of civil judgments. The U.S. tort system and the U.S. state-by-state process is behind the fact that we do not have an international treaty on the recognition of civil judgments.

QUESTION:

Is there any reason why you should not just use a state's rules for service of process?

ANSWER:

No, and this is an overall qualification. It is a good point, because underlying much of today's commentary is that the assets on which a judgment will be executed are located overseas. In other words, a U.S. judgment cannot be executed here because there are no assets here. Therefore, I was assuming that if you have foreign assets, you must go there. If you do not have to worry about the quality of the judgment, there is no need to be worried about making sure that you comply with the Convention.

B. *NAFTA, the Summit of the Americas, and Beyond: Accession and Expansion*

WILLIAM P. ANDREWS

The next speaker will be John H. Rooney, Jr. Mr. Rooney is Vice President and Assistant of the John Alden Life Insurance Company. He began his career in international insurance with the Pan-American Life Insurance Company in New Orleans, where he served for twelve years as counsel to that company's extensive life and health insurance operations in Latin America.

JOHN H. ROONEY

In the Declaration of Principles and accompanying Action Plan adopted by the thirty-four heads of state at the conclusion of the Summit, establishment of the FTAA by 2005 was given a high priority. The Action Plan directs the countries of the hemisphere to look to existing regional trade areas in designing the FTAA and encourages the expansion of existing free-trade areas. In keeping with the mandate of the heads of state, we will briefly review the salient features of NAFTA and examine the instructions of the heads of state to identify the principal issues that could be expected as accession to NAFTA is considered and the negotiation of the FTAA takes place.

I begin by providing general overview of the NAFTA negotiation process and the scope of the Agreement. I follow with a description of the Summit's Declaration of Principles and Plan of Action as each pertains to trade issues. I conclude with a brief analysis of the issues and subjects that a country wishing to accede to NAFTA would have to address.

On December 17, 1992, representatives of the executive branches of the governments of Canada, Mexico, and the United States signed NAFTA. It has been ratified by the governments of the three signatory states, each of which has now enacted the appropriate enabling legislation. NAFTA went into effect on January 1, 1994. Supplemental agreements on environmental and labor cooperation were executed, and the United States and Mexico entered into a bilateral agreement to establish a Border Environmental Cooperation Commission and the North American Development Bank.

NAFTA was the product of years of negotiations between the three countries and was preceded by a Bilateral Framework Agreement between the United States and Mexico and the United States-Canada Free Trade Agreement. In the years prior to the drafting and signing of the Agreement, the private and public sectors of Canada, Mexico and the United States engaged in wide-ranging debates on the desirability of the establishment of a free-trade area as well as the nature of economic activity that NAFTA would regulate. The debates took place in the context of formal industry advisory groups and legislative branches of the governments of the three parties were closely involved in the negotiation of NAFTA. In the United States, the executive branch was given very specific negotiating objectives in the legislation that bound Congress to consider expeditiously agreements negotiated by the executive in accordance with those instructions. The process of expeditious consideration is called the "fast track," and its application is considered crucial in the serious negotiation of an international

trade agreement.[54] When the fast track does not apply, Congress can enact legislation contrary to the provision of the agreement negotiated by the executive.

Although NAFTA was negotiated in accordance with and respect for the principles contained in GATT, it goes far beyond the limited scope of GATT, which dealt principally with trade in goods. NAFTA is comprised of twenty-one chapters that cover such diverse subjects as foreign investment, trade in services, dispute resolution, intellectual property, and institutional arrangements for resolution of trade matters among and between the signatory states. For trade in goods, NAFTA establishes aggressive schedules for reduction of existing tariffs. In general, however, the twin principles of national treatment and most-favored-national, central to GATT, are also cornerstones of NAFTA. Enjoyment of the benefits of NAFTA are limited to the Parties and person of the Parties, although liberal definitions of an enterprise of a party could operate to dilute this concept.

Notwithstanding the broad scope of NAFTA, unique conditions in one country required that some issue be treated specially in the negotiation of NAFTA and in its content. For example, in Mexico, the subsoil and most minerals found under the soil are the property of the state. In addition, the exploration and processing of certain of those minerals are the exclusive province of state monopolies. In the United States as in Mexico, the movement of persons across international borders was a sensitive political issue. Both the United States and Mexico were concerned about the treatment of the *maquiladora*. The content of NAFTA reflects the special concerns of each. What was of extreme importance to one country was sometimes of peripheral interest to the others. Likewise, every other country that enters into negotiations leading to possible accession will bring to the table its own set of unique conditions. Also, since the territorial extension of the free-trade area established in NAFTA is defined in terms of the national territories of the Parties, the process of accession could re-open issues involving the fixing of borders between and among potential and existing parties.

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54. The so-called fast-track negotiating authority, which Congress granted the Executive Branch in the Omnibus Trade and Competitiveness Act of 1988, and which constituted the negotiating authority for the Uruguay Round and NAFTA, has now expired. In practical terms, the fast-track procedure commits Congress to approve the enabling legislation without amendments or to vote the bill down in its entirety. Express approval of the subject trade agreement is normally found as a section of the enabling legislation. The enabling legislation will also often attempt to define the relationship of the agreement to other sources of federal law and to state law. In this way, a foreign country can negotiate with the Executive Branch with the knowledge that the agreement reached will not be amended during the ratification process. There is little doubt that the failure of the Congress to renew fast-track authority will make it more difficult for the accession of new states to NAFTA in the immediate future.

On the other hand, particularly in the area of foreign investment and dispute resolution between private persons and Parties, NAFTA serves as a unifying force that imposes principles and requirements clearly divergent from those generally or historically applicable in many Latin American countries. For many Latin American countries, accession to NAFTA would require acceptance of principles, especially in the areas of foreign investment and dispute resolution, that are new and possibly controversial.

NAFTA permits the accession of additional signatory states in the future and provides a procedure for that purpose.[55] Immediately following the signing, there was considerable speculation that other countries might quickly attempt to accede. Other countries, particularly in Latin America, entered into trade agreements with Mexico in the hope of indirectly benefiting from Mexico's incorporation into NAFTA. There was and remains much speculation that Chile will be the first country to accede to NAFTA, although Congress is not presently bound by the fast-track procedure. Reinstatement of that procedure will be necessary in order to negotiate to a conclusion the accession of any new party to NAFTA.

NAFTA entered into force in the United States as an international executive agreement. For the purposes of the internal law of the United States, it is not a treaty. In the United States, a treaty must be entered into and ratified with the advice and consent of the Senate, which must give its consent by a two-thirds majority. In the process of approval, the Senate has on numerous occasions exercised its authority to impose reservations to the treaty. The President does not need specific authorization to commence treaty negotiations. Under the U.S. constitutional scheme, Congress is charged with the regulation of international commerce. From this grant of authority comes the basis of the congressional authorization to negotiate trade agreements. Since NAFTA was not a treaty, its enabling legislation could be approved by a simple majority of the Senate and House of Representatives. In the hierarchy of internal U.S. law, NAFTA primes state law, but not treaties (which are classified as federal law) and federal statutes. In the United States, treaties and federal statutes enjoy the same status. In the event of an unavoidable conflict between the two, the latter in time will prevail.

The Summit of the Americas Declaration of Principles is a wide-ranging document, including many trade issues. In the section, "To Promote Prosperity Through Economic Integration and Free Trade," the heads of state speak positively of "trade without barriers, without subsidies, without unfair practices, and with an increasing stream of productive investments," and declare that the vehicle for accomplishing those reforms would be the FTAA. The Declaration makes the statement that the FTAA will eliminate barriers

55. NAFTA, art. 2204 (Accession), *supra* note 2.

to trade and indicates that the countries will build on subregional and bilateral arrangement already present in order to accomplish this integration. The importance of investment is noted and the leaders indicated that they were committed to increasing investment in the Western Hemisphere, while taking into account the different levels of development in each country.

Specific steps for implementing the Declaration are found in the Plan of Action, adopted at the same time. In the Action Plan, the countries commit to a plan of action for implementing FTAA by the year 2005. In refining and further developing the principles, the leaders voiced support for the approval of the agreements that were developed during the Uruguay Round of GATT and encouraged the entering into of agreements embodying the same principles. The leaders recognized progress already made and pledged to continue along the same lines. The specific principles recognized as beneficial read as a summary of the most important features of NAFTA. The need for special assistance for smaller economies is also recognized. The Action Plan establishes steps for the development and liberalization of capital markets and sector-specific measures. In the development of a free-trade agreement similar in scope to NAFTA, many of these additional areas would also be included with the scope of the FTAA.

In the area of existing free-trade areas and integration arrangements, it is clear that the heads of state wish to build on existing arrangements. What is not clear, and possibly can not be predicted at this early date, is whether one of the existing arrangements will be renamed the "Free Trade Area of the Americas" once its scope and expanse become extensive enough to so justify.

There are many legal considerations that a party considering accession to NAFTA or participation in the FTAA should consider. Much like a contract with respect to restrictions on the freedom to act of a private person, an international agreement restricts the sovereignty of a Party. Some examples include:

(1) Final determinations on countervailing and antidumping duties would be made by a supra-national panel, rather than the highest administrative or judicial authority of the country in which the determination was made.
(2) The country could under certain circumstances be compelled to arbitrate investment disputes with persons of another country.
(3) The foreign investment provisions will restrict the ability of a country to impede the repatriation of capital and dividends, as well as the ability to impose exchange controls for that purpose.
(4) The process for promulgating new laws and regulations as well as for adjudicating trade disputes will be subject to objective norms designed to promote transparency.

(5) The country will be subject to the dispute resolution mechanism of NAFTA with respect to complaints brought by another country.
(6) Increased trade with other countries will require greater knowledge of the legal systems of the other countries.
(7) Crossborder trade may remove some transactions from the regulatory reach of national authorities.

The Preamble to NAFTA sets forth its basic objectives. A comparison with the objectives of the Declaration of Principles shows that the two are largely compatible. A careful observer will note, however, that the objective will conflict with the economic laws of many countries in Latin America. The paths to achieving these objectives are many, and NAFTA represents but one of them. The undeniable importance of NAFTA and the size of the free-trade area that it represents suggests that NAFTA will be an important influence in the development of the FTAA. Furthermore, it can be anticipated that interest in accession to NAFTA will continue to run high in the Americas.