NYSBA SPRING 2005 | VOL. 18 | NO. 1

International Law Practicum

A publication of the International Law and Practice Section
of the New York State Bar Association

Practicing the Law of the World from New York

COMMENTARY:

NAFTA: The Next Ten Years ... 3
Eduardo Ramos-Gomez

ARTICLES:

Distribution and Agency in Central America: Consequences of Termination and Compromises Contained in the Central American Free Trade Agreement ("CAFTA") ... 8
Hernán Pacheco Orfila

The Future of Immigration Under the Chile/USA FTA: The Chilean Perspective ... 15
Oscar Aitken

Are There Open Skies in Argentina? Changing Commercial Transportation Polices ... 24
Emilio Argüelles

Open Skies in Brazil: A General Overview and Perspectives for the Future ... 27
Antonio Corrêa Meyer and Renato Covelo

Geographical Indications—An Emerging Form of Intellectual Property ... 31
L. Donald Prutzman

Mergers and Acquisitions of Family-Controlled Corporations: A Canadian Perspective ... 39
Richard A. Scott and Catherine Pham

The Chilean Environmental Protection System ... 44
Juan Irarrázabal and Guillermo Zavala

The Brazilian Environmental Perspective ... 51
Valdo de Rizzo

The Long Arm of U.S. Law Data Protection, Privacy and the Patriot Act ... 59
Richard F.D. Corley, J. Marc Shewchun and Ian R. Hay

Antitrust in Uruguay ... 65
Daniel M. Ferrere

The Chilean Law on International Commercial Arbitration ... 69
Juan Enrique Allard Serrano

PRACTICUM: FORM AND POLICY

The *International Law Practicum* is a semi-annual publication of the International Law and Practice Section of the New York State Bar Association. The *Practicum* welcomes the submission of articles prepared by practicing attorneys. The length of an article, as a general rule, should not exceed 3,500 words, footnotes included. Shorter pieces, notes, reports on current or regional developments, and bibliographies are also welcomed. All manuscripts must be sent in laser printed triplicate accompanied by a 3½" disk formated in Microsoft Word or WordPerfect to: The *Practicum*, c/o Daniel J. McMahon, Esq., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096. Both text and endnotes must be double-spaced. Endnotes must appear at the end of the manuscript and should conform to *A Uniform System of Citation* (the Harvard Bluebook). Authors are responsible for the correctness of all citations and quotations. Manuscripts that have been accepted or published elsewhere will not be considered. The *Practicum* is primarily interested in practical issues facing lawyers engaged in international practice in New York. Topics such as international trade, licensing, direct investment, finance, taxation, and litigation and dispute resolution are preferred. Public international topics will be considered to the extent that they involve private international transactions or are of general interest to our readership.

Manuscripts are submitted at the sender's risk, and the New York State Bar Association, International Law and Practice Section, assumes no responsibility for the return of material. Material accepted for publication becomes the property of the New York State Bar Association, International Law and Practice Section. No compensation is paid for any manuscript. The *Practicum* reserves the right (for space, budgetary, or other reasons) to move an accepted manuscript from an earlier issue to a later issue. Articles, reports and other materials reflect the views of the authors or committees that prepared them and do not necessarily represent the position of the New York State Bar Association, International Law and Practice Section, or the Editorial Board of the *Practicum*.

Deadlines

Manuscripts intended for publication in the Spring and Autumn issues must be received by the Editor-in-Chief by the preceding 1 December and 1 June, respectively.

Reprints

Each author will receive three complimentary copies of the *Practicum* issue in which the author's material is published. Additional copies may be ordered at cost before an issue goes to press by communicating with Daniel J. McMahon, Esq., at the New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096 (telephone (518) 487-5582).

Back Issues and Advertising

Requests for back issues, advertising and subscription information and general correspondence should be sent to the Newsletter Dept., New York State Bar Association, One Elk Street, Albany, N.Y. 12207-1096.

Back issues (2000 to present) of the *International Law Practicum* are available online to Section members on the New York State Bar Association's Web site at www.nysba.org/ilp. A searchable index is also available.

Commentary

NAFTA: The Next Ten Years

By Eduardo Ramos-Gomez

I. Introduction

Ten years after the North American Free Trade Agreement (NAFTA) came into effect, we have been bombarded with judgments, critiques, studies, surveys, conclusions and debates as to NAFTA's economic impact on Mexico, the United States and Canada. Questions abound regarding its effects on both Mexico's economic development and the kind of relationship the country has built with the United States and Canada, including questions about where Mexico stands exactly vis a vis its neighbors and what actions are needed in order to move Mexico forward toward integrated and all-encompassing economic relations with the other two countries based on a relationship of equals.

Equally important is the current debate over NAFTA's future and the lessons that can be learned after ten years to help us, through the efficient management of the trilateral relations, deepen the economic integration and political cooperation. It is now time, after ten years, to have an open discussion about our future as a continent and its role in a new global world order, a world order that should value security, self sufficiency, free and open economies, law abiding systems, and environmentally sound policies. It is time for North America to draw from the lessons learned and walk into the future, with a firm and steady pace, toward building a North American identity and future, a future which is already being forged daily by reality itself.

NAFTA has been an undeniable success for the three countries. The achievements are extraordinary. NAFTA transformed the Mexican economy. Indeed, the treaty represented an irreversible change in Mexico's strategy of economic opening and liberalization that had begun in the middle of the 1980s. Thus the treaty guaranteed the consolidation of a modernization trend initiated at the beginning of the 1990s and the negotiation and signing of NAFTA was a central part of a new economic setup that radically changed the relationship Mexico would maintain with the United States and to a lesser degree with Canada. NAFTA thus became a useful instrument for placing the Mexican economy into the main network of trade and investment worldwide and preparing Mexico to be better positioned to face the new challenges imposed by the impending globalization. Most importantly, NAFTA gave Mexico the opportunity to feel, for the first time, like a worthy and important neighbor capable of joining, as a partner, one of the most important trade areas in the world and an actor to be reckoned with in the world of trade. Mexico has, as of today, signed over thirty-two trade agreements around the world.

II. The Developments to Date

A. Impact on Mexico

With NAFTA, Mexico became the second largest trading partner of the United States (after Canada) and Mexico became Canada's fourth largest trading partner. In order to achieve this, Mexico went through a tremendous transformation, a transformation that astonished Mexicans and foreigners alike. But the significance of NAFTA to Mexico goes beyond a treaty that can be measured by trade figures: its impact was so profound that it reshaped Mexico's psyche, politics and social cohesion.

We can assert that, without any doubt, NAFTA helped Mexico accomplish and sustain a drastic transformation that touched its essence and many of its institutions. Today, Mexico enjoys a stable economic environment and has a modern, open and liberalized economy. Likewise, Mexico has changed its political perceptions and systems during these last ten years and democracy is taking hold upon the country and its institutions. Because of NAFTA, the continental free flow of ideas, the expectations of our partners, the impact of a general sense of prosperity, and the slow but steady economic integration of North America, Mexico continues to recognize the need to further expand on its reform and modernization efforts despite today's generally somber political mood and the climate of skepticism fueled by a deep and unpopular recession.

As mentioned, NAFTA has had a major impact on Mexico. The main, but not the only, indicators are trade and investment flows. Mexico became the eighth largest exporter of the world. It also became the largest exporter in Latin America, with forty-six percent of all exports from the region, followed by Brazil with only seventeen percent. Between 1990 and 2002 exports quadrupled. Manufacturers increased their share from sixty-eight percent to eighty-eight percent of all exports.

Foreign direct investments in Mexico soared from U.S. $5.8 billion in the years of 1990-1999 to U.S. $39 billion between the years of 2000 and 2002. Over U.S. $125 billion poured into Mexico in the last ten years. The Mexican-United States border became the busiest border in the world. The daily transactions between Mexico and the United States average U.S. $640 million. Each year

ninety million cars and forty-three million trucks cross the United States-Mexican border. Since the implementation of NAFTA, the flow of commercial vehicles has increased by forty-one percent.

B. Impact on Canada

On the Canada-Mexico front, trade with Canada has increased two hundred sixty-five percent, going from U.S. $2.74 billion in 1993 to U.S. $7.29 in 2002. Bilateral trade grew by double digits every year with a striking thirty percent increase in the last years to reach approximately U.S. $12 billion. As mentioned, Mexico became Canada's fourth most important export market, after the U.S., Japan and the U.K. Canada has become Mexico's second most important export market. During 2003, Mexico exported more to Canada than it did to all fifteen member states of the European Union. Despite the recession in the U.S. economy, which affected the economies of both its North American partners, Canada-Mexico trade has continued to grow.

Canadian investment in Mexico has increased sixfold since 1993, and now stands at well over Can $3 billion. In fact, the level of investments controlled by Canadian firms is probably considerably higher, given that a number of significant Canadian-controlled investments in Mexico are undertaken through subsidiaries based in third countries, particularly the U.S. and the UK. Investment therefore represents an important stake, which could increase significantly in the near future, depending on Mexican policy decisions still to be taken in sectors where Canada has a solid competitive advantage, such as energy.

Canada and Mexico provided an example of foresight and cooperation by their implementation of a very successful Seasonal Agricultural Workers Program administered through a bilateral agreement already in place for twenty-five years. More recently, the number of Mexicans undertaking seasonal work in Canada (particularly in Ontario, but also in Quebec and the prairie provinces) has expanded steadily to more than nine thousand individuals last year, with the expectation that the total could grow to eleven to twelve thousand individuals in 2004. Mexico now supplies over fifty percent of all the temporary workers in Canada. This is a model program, clearly to the benefit of Canadian farmers and Mexican workers, which should be the basis of future seasonal workers programs in North America.

Without any doubt, NAFTA launched Canada and Mexico into a mutual trip of discovery. The two once distant neighbors have forged a deep strategical relationship during these last ten years that only promises to deepen and increase in the future for the benefit of both.

To reinforce this special relationship, Mexico and Canada have placed emphasis on the strengthening of youth contacts as a way to familiarize the two communities with one another. Canadian and Mexican universities and colleges have built a continually expanding network of some three hundred fifty active cooperation and exchange agreements. Canada is increasingly a destination of choice for Mexican students, with more than six thousand having studied in Canada last year. This is particularly impressive when you consider that this total is approaching the number who travel to the U.S. (nine thousand), and much more than the students who travel to any individual European country. Equally as interesting, an estimated one thousand Canadians are currently pursuing academic courses for credit in Mexican universities, largely through exchanges administered under university-to-university agreements.

C. Impact on the United States

From 1993 until today, Mexico has increased its total trade with the United States by two hundred eighty percent: In 1993, Mexico traded U.S. $88.87 billion with our northern neighbor; by 2002, such trade had risen to U.S. $250 billion. That is an average annual growth of over twelve percent.

From the Mexican perspective, it is clear that NAFTA has likewise been a plus for the economy of the United States. Manufacturing jobs and real compensation grew faster after NAFTA than before its existence. According to the U.S. Department of Labor, real hourly compensation (wages and benefits) in U.S. manufacturing grew fourteen percent, nearly twice as fast as the seven and a half percent in the ten years prior to NAFTA. The integrated North American economy has been better able to compete in an increasingly competitive world than it otherwise would have. Manufacturing productivity (output per hour) grew sixty-five percent faster in the ten years since NAFTA than in the previous decade.

NAFTA has boosted both U.S. exports and imports, but exports grew disproportionately faster than they would have without the agreement. U.S. exports to Mexico and Canada grew sixty-seven percent faster than United States exports to other parts of the world, while U.S. imports from Mexico and Canada grew twenty-nine percent, faster than imports from other parts of the world. Even detractors of NAFTA agree that the treaty is not responsible for manufacturing job losses in the United States, nor for the recent largest increase in the U.S. trade deficit. In fact, the higher increase in the trade deficit was with the European Union, where it grew by almost U.S. $90 billion.

D. Regional Impact

As a region, NAFTA members' foreign trade share is about nineteen percent of world exports and twenty-five percent of imports. With this, North America has become

one of the main actors in the reconfiguration of the international economy, on a par with the European Union and the Asia Pacific region.

NAFTA has been fundamental in the integration of the North American market, but the dynamics it has created have an impact beyond what is strictly trade-related to shape many other aspects of the relationships among the three countries, so that the future of the region, and, most importantly, Mexico's economic and social development, depend upon it. In that sense, NAFTA institutionalized relationships among the three countries through the creation of different bodies and regulations (like the Free Trade Commission, the Secretariat and the dispute resolution mechanisms) that during the last ten years have made trade and investment viable by giving them certainty.

III. The Future

NAFTA has been everything that it was expected to be, and probably much more. It is clear now that NAFTA is also a stepping stone in the direction of a North America consciousness and an integrated region. We can not become complaisant about the NAFTA achievements to date: We need to set our sights on the future with vision and determination. We must focus our efforts and actions in order to sustain and further NAFTA's accomplishments.

We, as North Americans, are called upon to create awareness that there is much more that needs to be done in the area. NAFTA may be considered a mechanism or thermometer to measure a reality that has taken place during the last ten years. However, we are responsible for creating the framework, agenda, mechanisms, and path for an orderly continuing trend. NAFTA needs to evolve so that we can achieve the overall economic, political, and social integration of our North American continent.

Today, though, we might feel that NAFTA is fatherless. Here we are, ten years later, with a little child named NAFTA. Although he had a difficult birth, he certainly grew into a healthy and beautiful child with a brilliant, promising and amazing future: He is a talented, gifted little boy, a kid that in ten years gave us everything that was expected and probably much more. But now our baby, almost eleven, has no direction. He can't accomplish more than what he has to date. What can he do? It somehow seems that NAFTA's parents never thought about the next stage for their child, nor are they doing anything today to lead him to where such a child should focus its energy.

We as North Americans are called to develop and improve the framework of NAFTA in order for it to continue its path of success and rewards for our communities. We cannot watch or stand still and do nothing simply because reality has surpassed all of our expectations. There's a full North American agenda that requires our attention: An imbalance of growth in the trilateral region; problems of poverty, health, education, agriculture, environment, labor, immigration, organized crime, corporate governance, and law enforcement and compliance; and, in addition, exterior challenges that vary from trade to security.

After September 11, the North American region faced a new world. We need, more than ever, to strengthen our relationship as neighbors and partners. We must strengthen institutions within our borders and those created under NAFTA. We must strengthen the dialogue and cooperation amongst ourselves, and we must set common visions, goals, and strategies.

At the beginning of the Bush and Fox administrations, in 2001, we had an incredible opportunity to advance a North American agenda. Bilateral relations between Mexico and the United States were optimal. Mexico had achieved a peaceful, orderly and calm transition that was considered the consolidation of a democratic system, while the Republican party was back in the White House ready to embrace a Southern Neighbor willing to make public its affinity towards the United States and with an electoral mandate that allowed a leap forward beyond the traditional Mexico-United States policy positions.

During the year 2000 Mexican President Vicente Fox spoke of the creation of a North American Community, of opening up the borders not only to goods and services, but also to the free transit of individuals. Fox, therefore, stated a vision whose main objective was to reshape the relationship amongst the three countries into a model that he defined as European. This vision caused an enormous commotion in the other two countries. For Washington, the cause of the agitation was the surprise more than the content of the proposal itself: nobody had warned them in advance about what Vicente Fox was going to propose—as diplomatic courtesy would usually dictate. In Canada, which was not undergoing a change in administration, officials were not so disconcerted, but they were irritated by a proposal that was incompatible with Chretien's policy of making his bilateral relations with the new United States administration a priority before ordering an eventual trilateral accord. Canada publicly disassociated itself from the proposal by stating that such a stance was not an envisioned priority.

Although the proposal was not well received in either country, it certainly had a positive effect. Mexico had adopted an active role in the trilateral agenda for the first time, defining what it wanted to discuss in terms of regional policy. Among the consequences of the proposed launch were those issues taken up by the media, academics, diplomats and research centers in Mexico, in

Toronto, in Washington and in New York. For three to five months, Fox's proposal became the center of a new debate centered on the future of North America, displacing other issues that had been central to bilateral interests like migration, drug trafficking, crime, law enforcement, extradition, and trade disputes. That is, the issues that the United States has traditionally set on the agenda were replaced overnight by a much more philosophical one: the destiny of Mexico, the United States and Canada as partners and their role in building an integrated North America.

To many Fox's proposal meant a big change in bilateral relations, moving from relations of adversaries and friends to those of real partners, in part because the proposal implied a series of changes in international policy not only by the United States and Canada, but above all by Mexico. A real opportunity was being presented to cast Mexico for the first time into the role of the perfect "ally." Academics and political analysts, and to a certain extent policy makers, considered it to be in the interest of the three countries to take the next step forward. In the United States, the trade agreement was also understood as a way of tying Mexico to a free market system, a system of economic opening, and political democracy and transparency. In short, everything it is thought that the United States represents.

Unfortunately, September 11 changed the dynamics of the relationship and the priorities and preoccupations of the United States. Bilateral relations evolved from euphoria to disappointment. NAFTA detractors in the three countries found fertile ground for criticism, due to the negative economic conditions that prevailed after September 11. Mexico's new foreign policy and its role in the UN Security Council did not help to reestablish channels of communication. Canada's luck was not much better. Suddenly Mexico and, to a lesser degree, Canada were not considered by the United States as partners: instead they once again were considered merely neighbors—sometimes at ease with the United States and other times not; adversaries in some cases, cohorts in others—but never partners.

Given other priorities, the United States has paid little attention to Mexico and to a lesser extent to Canada, and this trend will continue for the rest of the current United States administration. The reconstruction of Iraq, the Middle East, the threat of North Korea and other "evil powers," their need to mend fences with traditional European allies, are issues that are going to capture the interest of the United States.

Although Canada and Mexico have tried to capture again the attention and the interest of the United States, they have been unsuccessful in pulling the U.S. from the traditional bilateral agenda. Mexico's Partnership for Prosperity or the NAFTA Plus initiative or Canada's NAFTA enhancement initiative have been neither embraced nor enthusiastically considered. Security has been all that has truly captured the interest of the United States.

It is clear that U.S. territory will never be secure if the U.S. borders with Canada and Mexico are not also secure. This is something we should make the most of. For example, attention can be directed to developing border intelligence and border infrastructure, and developing investigations that tell us what is happening along the border so that the border is no longer the misfortune it is in some cases. It is through cooperation and communication that we will be able to accomplish security. Most importantly, it is time to strengthen our relationship and by doing so to strengthen institutions envisioned to guarantee the protection of our region.

From the lessons learned after ten years, it is clear that we must, in particular, improve dispute and settlement mechanisms. We must improve transparency, and NAFTA's resolutions ought to be binding. We must create mechanisms of repayment if dumping and countervailing duties have been imposed in error. We must clarify, review and strengthen Chapter 11 and the investment rules. Ten years ago, a major accomplishment of NAFTA was to defeat the barrier of mistrust and the cultural differences that separated us. Today, the challenge is to create the conditions to keep building on our differences for the common good of our communities. Mexico's bilateral relationship with the United States and with Canada has matured. We know each other better. Geography unites us and therefore we need to create a common vision in order to defeat the challenges faced by the region today. Economic complementation is a reality that can only result in economic integration. Mexico and Canada need attention from its common neighbor. Mexico and Canada need to become "partners" again, with a common vision of safety and prosperity, in order to be constructive architects of a new North America.

There are a number of issues neither discussed nor resolved by NAFTA's agenda: immigration; drugs; education; water; energy; law enforcement and security issues; small business market access; and health, to name a few. We need a trilateral agenda to tackle all these issues under a common vision. The time for bilateral agendas between Mexico and the United States, or Mexico and Canada, or Canada and the United States, is gone. There is no time to look for culprits or to allocate blame. It is time to engage in cooperation. We need to develop and restructure or create the institutions needed to handle these issues. North America is a continent and as a continent it needs to find the integrated solutions to its challenges. Likewise, North America needs to strategize in order to stay relevant in the world.

It is of crucial importance for us to create a consciousness within civil society and our governments of the need to revive the vision that ten years ago brought three countries together to negotiate a trade agreement. Our countries, their economic growth, their prosperity, their physical security are tied more than ever to North America as a continental concept. We need to work on uniting Canadians and Mexicans to revive U.S. interest. Canada's and Mexico's future growth, the well being of their citizens, and the state of our shared environment is at stake. Mexico and Canada have the duty and the right to defend their market access into the United States, as well as their investment flows. The trilateral agenda should be full of initiatives—initiatives on trade, agriculture, innovation, defense and security, compliance, finance, public safety, environment, education, labor, governance, culture, information and communication technologies, energy, transportation, law enforcement, and health—and the position on all these subjects should only be a mutually agreed trilateral position.

IV. Conclusion

Today, we face a world with extraordinary global challenges. The problems of any of Mexico, Canada or the United States do have a North American dimension and, therefore, their solutions should only be an integrated trilateral one. Together we will be stronger and more competitive.

We cannot, at this point, still think that the agenda should be limited to resolving old trade disputes, such as those dealing with lumber, wheat, steel, sugar, and cement. There is so much more that needs to be done. We need to start building a North American Court on Trade and Investment to consolidate disputes and settlement processes. We need to build better borders with all across customs standards. Going forward, we should be studying the possibility of implementing a customs union.

Security issues, intelligence, defense and border management give us a possibility, after September 11, to be relevant to the security and prosperity of the United States. Likewise, the United States ought to understand that U.S. security is tied to the security and prosperity of the North American continent as a whole. The matter of borders is a good field in which we can start implementing mechanisms of cooperation in cross border areas such as energy, water, health, immigration, telecommunications, transportation and defense. It is important, likewise, to understand that the deepening of North American economic integration and political cooperation is only and can only be viewed as a response to the forces unleashed by NAFTA ten years ago, including in the areas of communication and rising expectations of the population: Border areas do not have the luxury of waiting for better political times.

It will never be a good time to discuss immigration. However, we cannot pretend that the problem does not exist and continue dealing with this very thorny issue in episodic fashion and for political gain. Immigration should be dealt with more openly. The parties need to recognize the problem, but it is with intelligence and common goals that we might be able to make this matter become an opportunity for development and growth. Likewise, and without delay, the trilateral agenda needs to discuss people, arms and drug trafficking, as well as drug abuse (from a health perspective), money laundering and organized crime. It is only by consensus, foresight and determination amongst the three countries that solutions and tangible results in these areas will be achieved.

For starters and without further delay, we must strengthen NAFTA's trilateral institutions and mechanisms to their full potential. The North American Environmental Cooperation Agreement and the North American Agreement in Labor Cooperation are both under budget, and understaffed. The North American Forest Commission and the North American Energy Working Group need attention also.

We need funds for North American research centers and studies and, even more importantly, we need social participation. We need to engage civil society, which already has built transnational networks of NGOs throughout North America. We need, likewise, to start public consultations for all areas that affect our populations. As I mentioned before, it is time for our North America. In a connected and global world that favors economic and cultural ties, we need to be able to have a vision in order to benefit and distribute widely amongst our population the benefits of North American trade.

The three administrations today seem very busy and occupied in other matters. We, as the civil society, conscious of our North American identity and convinced of our common destiny, should demand from our governments attention as to who we are, what we want to be and what we deserve to become as a continent of peoples. The future ought to be a North American future. Canada, Mexico and the United States, rich in culture, history, traditions, entrepreneurships, wealth, and hope, should converge in order for us to deliver to future generations the possibility of achieving their dreams.

Eduardo Ramos-Gomez is a partner in the New York office of Duane Morris LLP. He formerly served as Mexico's ambassador to Singapore, Negara Brunei, Darussalam and Myanmar, and he is currently president of the U.S.-Mexico Chamber of Commerce.

Distribution and Agency in Central America: Consequences of Termination and Compromises Contained in the Central American Free Trade Agreement ("CAFTA")

By Hernán Pacheco Orfila

I. Introduction

During the late 1960s and early 1970s most of the Latin American countries adopted special legislation to regulate the relationship between foreign companies and domestic distributors, agents, sales representatives and dealers. Some countries also incorporated within such special legislation provisions to regulate the relationship when both distributor and supplier are local companies.

The proponents of such regulations justified the need for adoption of special legislation by contending that many foreign companies came to the region, hired a sales representative or appointed a dealer, supposedly allowed the supplier or dealer to invest significant resources in opening the market for the foreign product, and once the market matured, the foreign company terminated the distributor without cause and took over the market. In many cases the relationship between the foreign company and the local agent or distributor was not properly documented, leaving the terminated party without recourse.

Like many Latin American and European jurisdictions, the Central American countries enacted legislation aimed at protecting the rights and interests of the local distributor, agent, sales representative or dealer, particularly in cases where the foreign supplier terminated the commercial relationship without just cause. The consequence of termination under those circumstances was the activation of an indemnification mechanism, the characteristics and particularities of which vary from one country to the next.

Most of the adopted laws contained restrictions and limitations on the free will of the parties and, in some countries, made it almost impossible for the foreign company or principal to terminate a commercial relationship of this nature, without being forced to pay a costly indemnification and fulfill other obligations.

With the liberalization of markets and the global economic trends, much pressure has been exerted to abolish these protectionist legislations, some of which have been characterized as "*non tariff barriers to free trade and economic development.*"

The Central American countries have reacted in different fashions to these pressures and have amended their respective laws or the interpretations thereof accordingly. During the Central American Free Trade Agreement (CAFTA) negotiations, the existence of this type of restrictive law in most of the countries was the subject of extensive discussions. The parties finally agreed to introduce changes in practically all legislation on this matter.

This article reviews the current status of the distribution laws in the five Central American countries that executed CAFTA and in Panama, which, although not part of CAFTA nor part of the Central American Common Market, is undoubtedly an important economic player for our region. This article also examines the consequences for the parties in the event of termination of the commercial relationship. Finally, the article refers to the commitments adopted by each CAFTA subscriber under the Agreement.

II. Costa Rica

A. Applicable Laws

Costa Rica is one of the few countries in Latin America that still has special legislation to regulate the relationship between local distributors, dealers or agents and foreign companies. This set of rules is contained in Law number 6209, the Law for the Protection of Representatives and Distributors of Foreign Companies, of 24 February 1978, and its Regulations, Executive Decree number 8599 of 9 March 1978.

According to Article 1, Paragraph a) of Law 6209, a foreign company is defined as

> Any individual or company domiciled abroad which carries on commercial activities within the country, directly or through branch offices, agents or subsidiaries.

A distributor is further defined as

> Any individual or company, which, by means of an agreement with a foreign company, imports or manufactures in

> the country, goods for distribution within the national market, acting at its own expense and risk.

A representative or agent is defined as

> Any individual or company which in a continuous and autonomous manner—with or without legal representation—prepares, promotes, facilitates or accomplishes the sale or distribution of goods or services which foreign companies sell or render in the country.

Law 6209 contains particular features that tend to over-protect the rights and interests of those individuals or entities qualified as representatives or distributors of foreign companies under the definition of Costa Rican Law. The importance of the distinction between distributor and representative or agent lies in the consequences of termination in each case.

The Law has been declared to be a Law of Public Order, which means that it is paramount to the free will of the parties. Therefore, the parties cannot include in a distribution or representation contract any term or condition that would conflict with the provisions of the Law, nor can they take exception to any one provision based on their private agreement. Thus, those provisions of the distribution agreement that contradict the scope of Law 6209 are deemed null and void.

For example, there is abundant jurisprudence which in no uncertain terms establishes that the existence of a distributorship need not be documented in a formal written contract. To the contrary, Costa Rica's courts have interpreted the reference in Law 6209 to *a "contract"* or *"agreement"* to include not only a formal written instrument, but also an undocumented commercial relationship between the parties. In other words, the mere fact that a commercial relationship between a foreign company and a local individual or entity conducting business in such capacity exists suffices to constitute a distributorship, thus rendering the parties subject to the provisions of Law 6209.

Costa Rica's courts have been very liberal as to what evidence is acceptable to demonstrate the requisite relationship: correspondence, witnesses, and purchase or supply orders etc. have been accepted by our judges as substantiating such a commercial relationship.

The courts have also ruled that, even if it was not explicitly so provided for in the corresponding agreement, a relationship established with a local representative or distributor could become of an exclusive nature if the foreign company keeps contact only with that distributor or representative for an extended period of time. The concept of presumptive exclusivity may have changed upon enactment of the Law for the Promotion of Competition and Consumer Protection (Law 7472 of 20 December 1994), since that law prohibits any and all type of monopolistic practices. However, the issue of the impact of Law 7472 upon Law 6209 has not been tested yet in court.

The scope of protection of Law 6209 goes so far as restricting any effort to avoid the applicability of the legislation and forcing the parties to submit themselves to the jurisdiction of the Costa Rican courts. Accordingly, Article 7 of Law 6209 reads: "The jurisdiction of the Costa Rican Courts and the rights of the representative, distributor or manufacturer by virtue of this Law, cannot be relinquished."

However, the Constitutional Court declared Article 7 partially unconstitutional, thereby changing the position traditionally sustained by the civil courts concerning the exclusivity of the jurisdiction of the Costa Rican courts over the handling of disputes under Law 6209. The Court held that such a position contravened a number of international conventions and in decisions number 10352 of 22 November 2000, 02655-2001 of 4 April 2001, and 12712-2001 of 14 December 2001 allowed the submission of a dispute under a distribution relationship to arbitration, even if the forum for such arbitration is abroad, provided the applicable law is Law 6209.

The law under analysis also regulates the causes for termination of a distribution or representation relationship. Under Article 5 of Law 6209, the only causes for termination without responsibility or liability for the foreign company are:

a. Offenses and misdemeanors against the property and reputation of the foreign company committed by the representative, by the distributor or by the manufacturer.

b. Incompetence or negligence attributable to the representative, distributor or manufacturer, declared by one of the judges of the Civil Court of its domicile, as well as a decrease or a prolonged and substantial stagnation in sales, due to causes attributable to the representative, distributor or manufacturer. The establishment of quotas or official restrictions on the importation or sale of the product or service shall presume the non-existence of the relationship, unless proven otherwise.

c. The violation on the part of the representative, distributor or manufacturer of the trade secret and loyalty due to the foreign company, by the disclosure of facts, knowledge or techniques relative to the organization, the products and the

operation of the foreign company, acquired during his commercial relations with the foreign company.

d. Whatever other serious fault on the part of the representative, distributor or manufacturer relative to its contractual or legal duties and obligations with the foreign company.

Termination for any other cause will render the foreign company liable to pay compensation, which includes re-purchase of the inventory, plus ten per cent to cover finance charges and, if taken to litigation, subject to an importation ban on its products until a guarantee bond is placed to satisfy the court that the obligations will eventually be fulfilled.

Law 6209 also allows the local distributor or representative to rescind the agreement for causes attributable to the foreign company, in which case, the foreign company would be held liable to pay the indemnification, even though the local distributor or representative terminated the relationship.

Accordingly, Article 4 contains an exhaustive list of instances construed as just causes for termination of the distributorship by the local distributor, representative or manufacturer, for which the foreign company is liable:

- Offenses and misdemeanors by the company's officials against the property and the reputation of the representative, distributor or manufacturer.
- The termination of activities of the foreign company, unless it is due to causes beyond its control.
- The unjustifiable restriction on sales, imposed by the foreign company, which may result in a reduction in the volume of business carried out by the representative, distributor or manufacturer.
- Lack of payment of commissions or fees earned by the representative, distributor or manufacturer.
- The appointment of a new representative, distributor or manufacturer, when the affected one has exercised the representation, distribution or manufacture on an exclusive basis.
- All unilateral modifications introduced by the foreign company to the contract of representation, distribution or manufacture which impair the rights and interest of the representative, distributor or manufacturer.
- Whatever other serious fault committed by the foreign company which impairs the contractual or legal rights and obligations that it maintains with its representative, distributor or manufacturer.

According to Article 3 of Law 6209 if the distribution agreement is terminated, the foreign company must purchase the inventory of its products from the distributor, at a price including the cost of such products, plus a reasonable percentage for the investment made. This percentage is to be determined by the Ministry of Economy, Industry and Commerce.

The foregoing is further regulated in the Regulations to Law 6209, which, in case of termination, establishes the following additional obligations of the foreign company:

- Pay all outstanding commissions, as well as those that may eventually arise from business in the process of formalization at the moment of cancellation of the contract.
- Purchase the inventory of products, at cost, including direct and local expenses plus taxes, plus ten percent to cover financial expenses.

If the foreign company terminates the agreement for reasons not contemplated in the list of just causes for termination listed in Law 6209, based on Article 2 of said law the local company is entitled to sue and claim damages based on the method of calculation of indemnification referred to above.

For many years, the Costa Rican courts ruled that a contract provision establishing a definitive term for an agreement covered by the scope of Law 6209 was null and void, and the compensation procedure applicable in all instances where the relationship was terminated for causes other than those specified in the law or was not renewed for causes beyond the will of the local distributor. Accordingly, the civil courts ruled that, if a distributorship or representation agreement was not renewed for reasons not attributable to the local distributor or sales representative, this was construed as breach of contract with liability for the foreign company.

However, a recent landmark Supreme Court of Justice ruling[1] changed previous interpretations by stating that the initial point of the analysis of a distribution relation must be the terms and conditions of the agreement executed by the parties—their free will—which would determine the existence or not of conditions adverse to Law 6209 and its application.

B. Consequences of Termination

Should a foreign company decide to terminate a distributorship unilaterally without cause, Law 6209 contemplates a mechanism of indemnification in favor of the local distributor, based on average gross profit over a period of time.

In this regard Article 2 of Law 6209 states:

> **Article 2:** If the representation, distribution or manufacturing contract is revoked due to causes contrary to the will of the representative, the distributor or the manufacturer, or when the contract has reached its term of expiration and is not extended for reasons beyond their will, the foreign company must indemnify them with an amount that shall be calculated on the basis of the equivalent to four months of gross profit for each year or fraction thereof of time served. The amount of the indemnification shall not, in any case be calculated for a term exceeding nine years of service. In order to establish the gross profit for each month, the monthly average earned during the last four years or fraction thereof of the term of the contract will be determined, in the case of representative and manufacturers, and the average of the last two years or fraction thereof in the case of distributors.

The Regulations to Law 6209, in their Article 1, further set forth the guidelines to calculate the compensation in favor of the local representative or distributor:

> **Article 1:** The amount of the indemnities referred to in Article 2 of Law 6209 shall be determined:
>
> a. For the Representative of Foreign Companies, by adding up the commissions received during the last four years of the duration of the contract, or fraction thereof, including the corresponding commissions covering pending orders. The aforementioned total shall be divided by the number of months which constitute the period of calculation to establish the monthly average of the gross profit, which shall then be multiplied by the number of years of the duration of the contract or fraction thereof; the result of which shall be multiplied by four.
>
> b. For distributors or co-distributors, by adding up the gross profit received during the last two years or fraction thereof of the duration of the contract, whose final result shall be divided by the number of months which constitute the period of calculation in order to determine the monthly average of the gross profit, which shall be multiplied by the number of years or fraction thereof of the duration of the contract, and the result shall be multiplied by four.
>
> c. For manufacturers, by adding up the gross profit received during the last four years or fraction thereof of the duration of the contract. The aforesaid total shall be divided by the number of months which constitute the period of calculation in order to determine the monthly average of the gross profit. The aforesaid average shall be multiplied by the number of years or fraction thereof of the duration of the contract and the result shall be multiplied by four.
>
> d. For the Representative of Foreign Companies who also is a distributor, co-distributor or manufacturer, by adding up all the results of each of the calculations, indicated within the clauses a), b) and c).[2]

Further, Articles 2 and 3 of the By Laws to Law 6209, refer to the indemnification procedures as follows: (i) according to Article 2 the gross profit in case of distributors and manufacturers consists of the difference between the sale price of the product and its cost; (ii) Article 3 establishes that the amounts paid for indemnification under the law shall not exceed thirty-six months of compensation.

Article 9 of Law 6209 refers to the rules for payment of the indemnification and establishes that the indemnities contemplated in the law must be paid in one lump sum, immediately after the termination of the contract or upon final judgment, as the case may be. In case a dispute under Law 6209 is brought to court, the foreign company is normally required to render a guarantee covering the total amount of the indemnities claimed by the representative, distributor or manufacturer, which amount will be determined by the judge. Should the company fail to do so, the Ministry of the Treasury will suspend, upon request of the plaintiff, the importation of all types of products of the aforementioned foreign company.

C. CAFTA

Costa Rica and the United States are signatories to the Central America Free Trade Agreement ("CAFTA"), which includes Annex 11.13. This Annex establishes the specific compromises of Costa Rica and the other Cen-

tral American countries to promote trans-border commercialization or trade of services.

Costa Rica undertakes to enact a new legal regime for protection applicable to distribution and agency agreements based on the general principles of contractual law, the free will of the parties and equity, consistent with the obligations set forth by CAFTA. The commitment specifically repeals articles 2 and 9 of Law 6209 (mathematical formula for calculation of the indemnification in case of unilateral termination and the obligation of the foreign company to provide a guaranty to secure the payment of an indemnification, respectively).

However, the acquired rights of the local distributor or agent (i.e., those granted before CAFTA came into force) will be safeguarded.

III. Honduras

A. Applicable Laws

Honduras has a specific set of rules to regulate distributorship under Supreme Decree 549, "Law of Agents, Distributors and Representatives of National and Foreign Companies."

Under this set of rules, the supplier cannot refuse to renew, nor can the supplier unilaterally terminate, the contract without just cause. If it does, it is subject to pay a significant pecuniary compensation to the local dealer or agent. Hence, under Honduran Law the unilateral termination or refusal to renew an agreement of this type by the foreign or local supplier without just cause is not allowed, unless indemnification to the Distributor is awarded.

The "just causes" for termination are established to be as follows:

- Distributor's failure to abide by the essential obligations of the contract.
- Fraud or abuse of trust in the fulfillment of the agent's (distributor's) obligations.
- Negligence of the agent/distributor resulting in the loss of market share.
- Refusal by the distributor to provide reports and accounts or to exercise liquidation pertaining to the business within the time frame and fashion agreed upon.
- Disclosure of confidential information without authority.
- Bankruptcy, insolvency, inability to make payments or any other legal disablement according to normal business practices.
- Any action initiated by the distributor that jeopardizes the business or level of sales.

Honduran courts have traditionally ruled that the parties cannot submit the resolution of their controversies to foreign tribunals nor to any ADR mechanism. Any stipulation to the contrary will be considered null and void.

B. Consequences of Termination

If the foreign company terminates the agreement without just cause, it may be forced to pay an indemnification to the distributor pursuant to article 14 of Supreme Decree 549. Such indemnification includes the following components:

- All expenses made by the local distributor that cannot be recovered due to the modification, non-renewal or termination of the agreement.
- The value of the investments made for the benefit of the foreign company, as long as the Agent or Distributor is not able to use them, in accordance to the depreciation schedules used for the payment of income tax for machinery.
- The value of the merchandise and spare parts in stock that will not be used as a result of the termination or non-renewal.
- The amount of the annual gross profits obtained by the distributor, agent or representative during the last five years of the distributorship, agency or representation agreement, and if the agreement has a shorter term, five times the amount of the annual gross profits for the number of years the agreement has been in force.

C. CAFTA

Annex 11.13 of CAFTA establishes that Honduras shall:

– Consider as a just cause for termination the expiration or non-renewal of the term of the agreement;

– Allow for the application of an indemnification (in case of termination without just cause) based on general contractual provisions; and

– Allow the parties to resort to arbitration under the general contractual provisions if the indemnification is not established in the agreement.

IV. Guatemala

A. Applicable Laws

Guatemala repealed Decree 78-71, which formerly regulated agency, distribution and license agreements.

These commercial relationships are now regulated by the Commerce Code and the corresponding agreements can be negotiated and executed in accordance with the free will of the parties.

B. Consequences of Termination

The mechanisms for termination of agency or distribution agreements (with or without just cause) are now regulated in Article 290 of the Commerce Code. Therefore, depending on the termination scenario, different outcomes and consequences can be considered.

Termination may take place by mutual written consent of the parties or by expiration of the term (only applicable to agreements with definitive term).

In the event the commercial relationship is terminated by the distributor or agent, it must notify the principal at least three months in advance. At the principal's request, the agent or distributor is obligated to render accounts information and return of goods/merchandise at CIF price. Termination under the foregoing scenarios does not trigger any responsibility or liability for any party and neither of them incurs any severance or indemnification obligation.

In case the principal decides to terminate the relationship, it becomes liable for all damages and losses caused to the agent, unless a just cause for termination exists. No requirement of prior notice exists if the principal wants to terminate the agreement.

The party responsible for termination without just cause is liable for damages caused to the other party. To such effect, the following are regarded as just causes for termination:

- *For either of the parties:*

– Lack of fulfillment or breach by the other party of the duties agreed upon;

– Crimes against the property or person of one of the parties by the other; and,

– Refusal to issue the reports and accounts relative to the business in the time and manner agreed upon.

- *For the principal:*

– Unauthorized disclosure by the agent, distributor or representative to third parties of any fact, data, password or formula classified as confidential; and,

– Unjustified declines in the agreed sales levels.

- *For the agent, distributor or representative:*

– Whenever the principal acts in such a way that directly or indirectly prevent, or tend to prevent, the agent from fulfilling or complying with the agreement.

If the indemnification is not established in the corresponding agreement, the local distributor can request damages (which will include promotion costs, nonrecoverable investments, stock, labor obligations, etc.).

C. CAFTA

The most relevant commitment for Guatemala under CAFTA is that it will promote the use of arbitration for resolving contractual disputes.

V. El Salvador

A. Applicable Law

While El Salvador does not have a specific law that regulates distributorship or agency agreements, it has incorporated provisions into its Commerce Code to regulate such commercial relationships. Articles 394 to 399 contain specific rules that establish just causes for termination, method of calculation of the indemnification, payment of commissions if there is no written agreement, and other relevant aspects of the commercial relationship between a distributor or sales agent and its supplier or principal.

In general terms the law establishes that the parties may freely negotiate the terms and conditions of their contractual relationship. However, the law contains certain provisions that tend to protect the distributor or agent.

For example, Article 395 states that, in lieu of a specific agreement, the agent or distributor is entitled to receive a commission in proportion to the magnitude of the business made through its efforts.

If a transaction is not completed for reasons attributable to the principal, the agent or distributor will still be entitled to the full commission. Further, if the agent or distributor has exclusive rights in a specific territory, it is entitled to receive a commission for any and all transactions made by the principal in such territory, regardless of whether the agent participated directly in the transaction.

Pursuant to Article 399 A, disputes generated from the application of these provisions will be handled through summarialin in the competent courts of the domicile of the agent or distributor.

If the principal is a foreign company and it is sentenced to pay compensation to a local distributor or agent for breach of contract, it will be banned from doing business in the country until it pays the indemnification or until it places a guarantee in court to secure payment thereof.

B. Consequences of Termination

Article 397 established that either party may terminate the contractual relationship through written notification thereof to the other three months in advance.

However, if the principal does not terminate the agreement based on the just causes for termination listed in article 398 of the Commerce Code, or if the principal unilaterally modifies or does not renew the term of the agreement without just cause, the distributor can request damages, which include components such as recovery of promotion costs, non-recoverable investments, re-purchase of stock, labor obligations, payment of accounts receivables and payment of gross profits during the last three years or fraction thereof.

Article 398 lists the just causes of termination without liability to the principal, as follows:

- Default by the agent or distributor in its contractual obligations.
- Fraud by the agent or distributor.
- Gross negligence on the part of the distributor or agent.
- Continued decrease in sales for reasons attributable to the agent or distributor.
- Unauthorized disclosure of confidential information.

Article 399 further establishes that the distributor or agent is entitled to terminate the commercial relationship, with liability of the principal, in the event the latter unilaterally modifies the agreement in detriment of the distributor's or agent's rights and interests. In such a case, the distributor or agent is entitled to the same indemnification and compensation established in Article 397.

C. CAFTA

Annex 11.13 of CAFTA establishes the following compromises for El Salvador:

- It will not apply Articles 394 to 399 of the Commerce Code to any distribution agreement executed after CAFTA is in force by *any* person of the United States of America.
- If the distribution agreement contains a specific clause with respect to indemnification, including a provision of no indemnification, then Article 397 (components of the indemnification) will not apply to the agreement.
- It must promote that the agreements entered into after CAFTA is in force contain provisions for arbitration.

VI. Nicaragua

A. Applicable Law

Nicaragua regulates distribution and agency agreements in the general provisions contained in its Commerce Code. It has no special law to regulate this type of commercial relationship.

B. Consequences of Termination

The consequences for the parties in the case of termination are those established in the relevant agreement and, in lieu thereof, the possibility exists of applying for indemnification for damages as contemplated in the Code of Commerce in the event the termination constitutes a breach of contractual obligations.

C. CAFTA

Nicaragua has not agreed to any compromises under Annex 11.13. of CAFTA.

VII. Panama

A. Applicable Law

Panama does not have specific legislation to regulate distributorship and agency relationships. The terms and conditions of such a commercial relationship are left to the free will of the parties as negotiated in the relevant agreement. In the absence of contractual provisions, the relationship is governed by the provisions of Panama's Commerce Code.

B. Consequences of Termination

The consequences for the parties in the event of termination are those established in the relevant agreement. In the absence of such a contractual agreement, if the termination otherwise is in breach of contract principles, the injured party can seek indemnification for damages as contemplated by law.

C. CAFTA

Panama is not a part of CAFTA.

Endnotes

1. *Periódicos Internacionales, S. A. v. UPS Worldwide Forwarding Inc.*, Ruling 62-F-04, Supreme Court of Justice (30 January 2004).
2. Further, Articles 2 and 3 of the Regulations under Law 6209 refer to the indemnification procedures as follows: (i) according to Article 2, the gross profit in case of distributors and manufacturers consists of the difference between the sale price of the product and its cost; (ii) Article 3 establishes that the amounts paid for indemnification under the law shall not exceed thirty-six months of compensation.

Hernán Pacheco Orfila is a partner of Pacheco Coto in San José, Costa Rica.

The Future of Immigration Under the Chile/USA FTA: The Chilean Perspective

By Oscar Aitken

I. Introduction

A. Chile's Position in the Global Economy

Chile is a country that has a small domestic market but has sought to participate actively in the international market by opening up to it. The intention is to maintain a sustained increase in its rates of growth and employment, in technological innovation, and in the efficient allocation of resources. This opening up to the international market is justified, above all, by a world scenario characterized by globalization and the formation of regional groups.

In this context, Chile has opted for an economy open to the world that produces competitive products, while distributing the results equitably. It has become international without losing sight of the necessary protection of the interests of its domestic trade policy. Chile has been successful in its openness and has achieved growth and competitiveness rates quite higher than most, if not all, Latin American countries. According to the most recent information on competitiveness indices, provided by The World Economic Forum (UNESCO), Chile ranked twenty-second out of one hundred four countries—and above countries such as Mexico and France.

The international economic strategy adopted by Chile includes three largely complementary concepts.

- *A unilateral openness that has been under way for two decades*. This has been generally reflected by implementation of tariff reduction regardless of what other countries did. This measure has helped accelerate growth in traditional and non-traditional exports and also stimulated a greater diversification in products and destination markets. In the last decade, this openness has deepened, aided by a reduction in the general tariff paid on imports, from fifteen percent to eleven percent. In 1998, a further reduction of one percentage point annually was approved as of 1999, reaching six percent by 2003.
- *Multilateral trade negotiations*. The purpose of these negotiations is to complement and complete the unilateral openness, allowing for the creation or liberalization of other markets for Chilean products, services and investments. From Chile's standpoint, the multilateral system of the World Trade Organization (WTO) constitutes the principal forum for international trade negotiations, which brings together more than one hundred thirty countries.
- *Negotiated bilateral and regional liberalization*. This alternative has been, and continues to be used, intensely by Chile since the beginning of the 1990s.

B. The Key Obligations of the Chile/USA FTA

As noted above, Free Trade Agreements (FTAs) are an important part of Chile's overall international economic strategy. To date Chile has signed FTAs with the USA, Canada, the EU, South Korea, Mexico, and Central America. In addition, FTAs are being negotiated currently with New Zealand, Singapore, and China, and consideration is currently being given to commencing FTA negotiations with India.

Through the FTA with the United States, Chile sought to obtain a balanced and integral agreement that would include all aspects of a bilateral economic relationship, the trading of goods, services and investments, and the inclusion of issues inherent to the new economy, such as e-commerce, telecommunications and a modern treatment of environmental and labor issues.

Chile was attempting to improve the trade position of Chilean products, and establish clear and standing rules for the commerce of goods, services and investments. It intended to create mechanisms to defend Chilean commercial interests in the United States and define clear, transparent and effective mechanisms to resolve trade disputes while reinforcing the stability of its economic policy and institutions and improving the risk rating of Chile, thereby lowering the cost of credit and consolidating the stability of its capital markets.

In summary, one of the principal objectives was to encourage an expansion and diversification of trade and increase the opportunity for investment between the USA and Chile through the elimination of obstacles to trade relations and the facilitation of the cross-border circulation of goods, services and people.

C. Immigration in Chile

Although Chile has no formal immigration policy beyond the Immigration Act and the Regulations issued in connection therewith, the number of foreigners that have entered the country in any of the ways established in the Immigration Act has been substantially on the rise.

In fact, according to statistics provided by the Immigration Department in 2003:

- 8,537 permanent visas were issued.
- 11,970 temporary residence visas were issued.
- 16,261 work visas were issued.
- 1,606 student visas were issued.

Thus the total number of visas issued in 2003 was 38,374, while in 1993 only 21,829 visas had been issued.

II. Basic Immigration Rules of Chile

A. Main Legal Authorities Involved

The rules governing the entry, exit and permanence of foreigners in Chile are the Decree Law N° 1,094 of 1975, which sets down rules on foreigners in Chile, called the Immigration Law or Immigration Act; and the Immigration Regulations in Supreme Decree 597 of 1984, issued by the Ministry of Interior.

The local authorities involved in formalizing and issuing permits to enter the country are the Ministry of the Interior and the Ministry of Foreign Relations, depending upon the visa sought and whether the applicant processes it either from his country of origin or from another country or, alternatively, after entering Chile.

Both special work permits as well as permanent residency must be requested from the Immigration Department, which is part of the Ministry of the Interior. The work visa and the temporary residence visa may be requested either through the Ministry of the Interior or through the Ministry of Foreign Relations, depending on whether the foreigner has already entered the country or is outside Chile.

B. Most Common Visas, Residence and Work Permits

1. Tourist Visa

(a) Definition

Tourists are foreigners entering the country for recreation, athletics, health care, education, business, family matters, religious or other similar reasons, but have no intent to immigrate, reside or conduct remunerated activities.

Foreigners from countries with which Chile has diplomatic relations do not usually require a tourist visa to enter Chile and may enter with their passport or other similar document and a tourist card issued by the International Police upon their entry to the country. This card may be issued free or there will be a charge depending on the foreigner's country of origin and the rules of reciprocity that may apply.

Nevertheless, there are certain cases when a tourist visa is required. These cases are basically people from countries where Chilean nationals are required to obtain a tourist visa in order to enter their countries and countries with which Chile has no diplomatic relations. In these cases, those foreigners should visit the Chilean Consulate in their country, present a letter of invitation, previously authenticated by a Notary in Chile, issued by a Chilean citizen, enterprise or entity, as well as the additional documentation that each particular consulate may require.

(b) Term

The tourist card is issued for a period of ninety days, renewable only once for the same period of time. A tourist visa, on the other hand, will be in effect for the period indicated by the respective consulate, which is generally from thirty to ninety days.

Foreigners who are tourists *may not conduct remunerated activities in Chile, even if they are paid abroad*.

2. Employment Contract Visa

(a) Definition

This visa will be issued to foreigners who travel to Chile in order to fulfill an employment contract with a Chilean employer or who intend to live in Chile for such purpose (if they are already inside the country).

(b) Procedure

The documentation required for this visa will vary slightly, depending on whether the visa is requested through the Ministry of the Interior or through the Ministry of Foreign Relations. The necessary documentation includes the following.

- An employment contract visa application form
- A photocopy of a current passport (including the pages on identification, number and issue and expiration dates) or the original passport (only when processed through the Ministry of the Interior)
- A photocopy of the current tourist card and presentation of the original (only when processed through the Ministry of the Interior)
- Four recent passport-size color photographs (4x4 cm) with the complete name and passport number
- A resume of the applicant
- A copy of the professional or technical degree
- An employment contract, signed by a Chilean employer

A certificate of criminal record and a certificate of health will usually be requested when visas are processed through the Ministry of Foreign Relations, the latter intended to certify whether the foreigner suffers from infectious or contagious diseases, particularly HIV.

The original employment contract is presented, signed by the employee and the employer before a notary, together with a copy. If the visa is processed with the Ministry of Foreign Relations, the contract must only be signed by the employer and before a notary: The employee will sign it, once the visa is approved, in the presence of the Chilean Consul in the country where he resides when he goes to have the visa stamped in his passport. The employment contract must contain certain special clauses:

- **Salary:** It must be concordant to the position or activity to be conducted in the country. The minimum is CH$100,000 net monthly.
- **Term:** It must contain a declaration that the foreigner will begin to work only once he has received the corresponding residence visa in Chile or the special work permit for foreigners with a visa application in process.
- **Travel:** The employer must undertake to pay return fare for the employee and family members to the country of origin or the place agreed upon by the parties upon termination of the contract. The employer has this obligation until the foreigner leaves the country or obtains a new visa or permanent residence.
- **Social Security:** The contract must stipulate whether the employee will affiliate to the Chilean social security system or will remain in social security system abroad. Only foreigners who are technicians or professionals may make such a choice: If the desire is to remain in a foreign social security system instead of the Chilean one, the foreigner must meet the requirements established in Law No. 18156 on Foreign Technicians. The employee must prove that he is a foreigner technician and affiliated to a social security or health care system abroad that provides minimum benefits in the event of illness, disability, old age and death. All other foreign employees must affiliate to the Chilean social security system.
- **Income Tax:** It must be stipulated that the employer has the obligation to pay income tax on the salary paid to the employee.

As indicated above, the visa application may be processed either through the Ministry of the Interior or the Ministry of Foreign Relations, depending on whether the foreigner is already in Chile or is still abroad. Processing the visa with the Ministry of the Interior will take approximately four months while it will only take fifteen to twenty business days if it is done through the Ministry of Foreign Relations. *Only remunerated activities indicated in the employment contract can be conducted*.

(c) Term

The term of this visa can be for as much as two years, extendible for the same period of time. This period begins when the foreigner enters Chile (if the visa is requested through the Ministry of Foreign Relations) or once it is stamped (in the case of the Ministry of the Interior). Once a visa processed through the Ministry of Foreign Relations is approved, the foreigner must have his visa stamped by the respective Chilean Consulate within ninety days. Thereafter he has a period of ninety days to enter Chile. An early expiration of the visa will occur if the employment contract on the basis of which the visa was issued is terminated.

3. Temporary Resident Visa

(a) Definition

Foreigners who intend to live in Chile are issued this type of visa, provided they can prove they have family ties or interests in the country or their residing here is deemed useful or advantageous.

Examples provided by the law for the residency of a foreigner to be useful or advantageous are the following.

- Entrepreneurs, investors, merchants, and, generally, businessmen traveling to the country for periods exceeding ninety days because of their activities and interests in the country.
- Scientists, researchers, academicians, speakers at conferences, professors, professionals or experts who must visit the country for more than ninety days at the request of national corporations or under the sponsorship of international agencies recognized by the government of Chile.
- Journalists or press professionals who travel to Chile because of their profession.
- Monks, priests and nuns belonging to churches, orders or congregations recognized in the country who come to conduct religious or teaching activities or work in relief programs.
- People who come to receive medical care at specialized centers.
- Others, as duly qualified by the Ministry of the Interior and the Ministry of Foreign Relations, as applicable.

(b) Documentation Generally Required

Generally, the documentation required for this visa is the same documentation as for an employment contract visa, obviously without the employment contract. Also to be furnished is the pertinent documentation proving that the foreigner is in any of the situations that justify the issuance of this visa. Such a decision is ultimately left to the relevant authority.

As indicated above, processing can be done through the Ministry of the Interior or through the Ministry of Foreign Relations, depending on whether the foreigner is in or outside Chile. The time it takes is the same indicated for an employment contract visa. Holders of this visa can conduct any type of lawful remunerative activity in the country.

(c) Term

The term is for one year, after which the foreigner may choose to extend his visa for another year (it can only be extended once) or request permanent residency. Once the renewal expires, the foreigner should request permanent residency. The term begins upon the foreigner's entry into Chile (if the visa is processed through the Ministry of Foreign Relations) or after it is stamped (if it is requested through the Ministry of the Interior).

4. Permanent Residence

(a) Definition

This visa is a permit granted to foreigners who intend to live in Chile indefinitely and conduct any type of activity, limited by nothing more than the relevant proscriptions found in the applicable laws and regulations.

(b) Procedure

The following documentation is required for this visa.

- Certificate of Criminal Record
- An autobiographical letter explaining the reasons why this permit is requested
- A Certificate of Contract for foreigners who have an employment contract
- Passport
- Registration Card
- Passport-size photographs (4x4 cm)
- A copy of the most recent social security payments
- Other information that the authority may deem pertinent.

This permit may be requested by (1) foreign citizens, both wage-earners as well as dependents, who have had an employment contract visa for at least two years; (2) wage-earners and their dependents who have had temporary visas for at least one year; and (3) student visa holders and their dependents on a student visa for at least two years who have completed their education in Chile. The minimum periods required by law to opt for this benefit must be uninterrupted. It is understood that there is no interruption when the visa applicant is absent for no more than one hundred eighty days within the last year of the residency visa.

The issuing authority for this visa is the Ministry of the Interior.

(c) Term

The visa is, of course, indefinite. But permanent residency will be deemed automatically revoked when the visa holder is absent for at least one year from the country without interruption. This will not apply to a foreigner who has requested an extension before that period expires. Up to four consecutive extensions can be granted.

5. Student Visa

(a) Definition

A student visa is issued to foreigners who travel to Chile in order to study as a regular student at government schools or government-recognized private schools. Generally holders of student visas are not authorized to work or conduct remunerated activities inside the country, although student visa holders are allowed to work in their professional internship or, on an exceptional basis, to pay for their education.

(b) Procedure

The documentation required includes a proof of registration (or registration acceptance document) in a Chilean educational institution, submission of a certificate of criminal record, and a current passport, as well as proof of adequate means of support in Chile. This visa can be processed through the Ministry of Foreign Relations or the Ministry of the Interior, depending on whether the foreigner is outside of the country or has already entered Chile. It takes approximately two months.

(c) Term

This visa is issued for no more than one year (except in the case of scholarship recipients, when it may be for the duration of the scholarship), and is renewable until the program of study is completed.

6. Work Permit

In some qualified cases, the Ministry of the Interior may authorize a foreigner who has a tourist visa to conduct certain remunerated activities for *a period of no*

more than thirty days, renewable for the entire term of the tourist card or Tourist Visa.

The law does not list any particular requirements but in practice one must present:

- The tourist card or tourist visa
- The original passport
- A letter from the company for which the applicant will work in Chile or abroad (ideally legalized in the corresponding consulate, if the employer is foreign).

This is notwithstanding any other information that the immigration authority may request.

7. Dependent Visa

Family members (spouse, children under the age of eighteen or parents living at the expense of an adult) of foreigners who obtain a work visa or temporary residence visa may request the same visa as the head of household, but as a dependent. This visa will allow them to remain in Chile throughout the duration of the visa of the head of household, but they will be unable to work for pay. If they wish to do so, they must request a visa which may allow them to work as the main applicant.

III. The Chile/US FTA under the Immigration Perspective

A. Foreword and Scope

Chapter 14 of the Free Trade Agreement between Chile and the USA (the "FTA") regulates the temporary entry for business persons to facilitate the issuance of residence visas for nationals from both countries to enter their territories. These facilities foster economic and cultural relations between both countries and are a tool to achieve and facilitate the other objectives of the FTA, in particular in relation to the Chapter on Investments and Cross-Border Trade in Services.

Chapter 14 of the FTA sets down general obligations that are based on the principle of reciprocity and establish transparent standards and procedures for the temporary entry of business persons. They also ensure the security of the borders, protect the domestic work force, and promote permanent employment in the parties' respective territories. However, this Chapter expressly stipulates that it will not apply to measures relative to nationality, citizenship, permanent residency or permanent employment.

Chapter 14 cannot be interpreted either to prevent the parties from applying measures to regulate the temporary entry of individuals or temporary residency in their territories, including measures required to protect the integrity of their borders and guarantee an orderly movement of individuals across them, provided those measures are not applied in a way that delays or unduly impairs the trade of goods or services or the conduct of investment activities under the FTA.

B. Concept of Temporary Entry

The FTA defines temporary entry as the entry of a person from one party to the territory to the other with no intent to establish permanent residency. In this case, the relevant persons should meet the requirements established in the domestic immigration legislation of each of the parties.

The FTA allows for the creation of a Committee on Temporary Entry, which will comprise representatives of each of the parties, including immigration officers. Some of the principal obligations of this committee are to establish a meeting schedule, set down procedures for the exchange of information on the different measures the parties adopt to facilitate the temporary entry of business persons, elaborate measures to facilitate temporary entry, and conceive the development of common criteria and interpretations for the implementation of Chapter 14. This Committee has not yet been created.

C. Dispute Settlement

Should there be disputes in relation to the enforcement of the rules in Chapter 14, limitations have been set on beginning the dispute resolution procedure established in Chapter 22 of the FTA (Commission—Good Offices, Conciliation and Mediation).

Accordingly, no dispute resolution procedure under Chapter 22 may begin because of a refusal to authorize a temporary entry, or because of a particular case in relation to measures that either of the parties enforces to regulate the temporary entry of individuals or temporary residency in their territories, unless the matter is a recurrent practice or the person affected has exhausted the administrative remedies within its power in relation to that matter in particular.

A person is understood to have exhausted remedies when the competent authority has not issued a final resolution in the period of one year after the administrative procedure began and the resolution has been delayed for reasons not attributable to the relevant business person.

D. Provision of Information

The parties promised to deliver materials to the other to enable them to understand the measures that they will adopt to comply with the agreement. No later than six months after the FTA enters into effect, they were to prepare, publish and make available a document to interested parties explaining their requirements for temporary entry, indicating the applicable laws and regulations.

That period expired on 30 June 2004. Chile prepared a Guide for American Business Persons (the "Guide") that contains the definitions and criteria to which U.S. nationals should be subject to enter the Chilean territory on a temporary basis. The United States has yet to furnish its document.

The FTA embodies transparency in the development and application of regulations. The parties undertook to maintain appropriate mechanisms to respond to inquiries by individuals in regard to existing regulations. To the extent possible, the parties should provide reports in response to comments received on regulatory proposals relative to the temporary entry of business persons at the time the final regulations are adopted. Also to the extent possible, the parties should wait for a reasonable period of time to elapse between the date of publication of the final regulations and their effectiveness. Lastly, the parties should advise the applicant for temporary entry on whether the application is approved and promptly furnish the information on the status of that application.

E. Categories of Business Persons under Chapter 14

According to the Guide, if a business person qualifies in any of the categories described, he or she will generally be granted a temporary residence visa and will be authorized to work in Chile without needing specific authorization to work. He or she may work simultaneously for more than one employer in Chile, provided those jobs relate to the requested category and have been mentioned in the respective application.

Family members may accompany the business person provided they comply with the general immigration regulations on the type of residency they request. If they enter as dependents, they may study at any school, but may not work for pay. Their visa will be extended for the same period of time as the visa to which they are subordinate.

During the term of the temporary residency, business persons and their dependents may enter and reenter Chile as often as they need. Once the temporary residency visa expires, both the head of household as well as his dependents may renew it or apply for any of the other categories of immigration established under Chilean law, according to the relevant requirements and procedures.

Pursuant to the FTA, business persons can be classified in any of the following categories.

1. Business Visitors

This is a business person who intends to conduct any of the business activities mentioned in the Annex 14.3(A)(1) to the FTA (the Annex) but who does not intend to enter the local labor market. This person cannot be required to obtain work authorization, provided he or she demonstrates the following while also complying with the immigration measures applicable to temporary entry.

- Provides proof that the business person is a national of one of the parties, demonstrable by a current passport
- Submits documentation evidencing that the business person will undertake any of the activities indicated in Annex: This can be evidenced by a certificate issued by the foreign employer. According to the Annex, business activities that qualify business persons are meetings, seminars or conferences, customer assistance, research, market analysis, sales representative and sales agent activities, customs agent activities, management and supervisory staff participating in business transactions, financial services (insurance agents, bank employees), public relations and advertising services, translator services, etc.
- Provides proof of the international nature of the business activity that is proposed and that the business person does not intend to enter the local job market. This can be proven by demonstrating that the principal source of pay is outside the territory of the other party who is authorizing temporary entry and that the principal place of business where earnings are actually received is predominantly outside such territory.

The FTA says that this can be proven by an oral statement by the applicant. If one of the parties requires additional confirmation, a letter will suffice from the employer in the country of origin stating those facts. In practice, it will always be convenient to present a letter from the employer or a letter of invitation.

The FTA forbids parties to require prior approval procedures, petitions, proof of job certification or other similar procedures in order to authorize temporary entry. Nor can numerical restrictions be imposed or maintained in regard to the temporary entry of Business Visitors.

As for Chile's implementation of Chapter 14, in addition to proving the above facts, the business person must not be one who is prohibited from entering Chile under the Immigration Law, principally for reasons of public order and national security.

In addition, Chile requires that business persons who will render after-sales services in respect of equipment and machinery must also prove that:

- The purpose of the visit is to install, repair, maintain equipment or machinery, supervise or train

workers under a warranty or any other service agreement signed as an integral part of the sale of the equipment or machine during the term of the same;

- The equipment or machine must be commercial or industrial (not household or personal); and
- The person who wishes to enter must belong to the company that sold the equipment or machinery or the company that entrusted the work.

Once such circumstances are evidenced, a permit will be granted to enter Chile temporarily as a business person. The visa recipient may remain in Chile for as long as six months, but the immigration authority can limit the period of stay to the time necessary to conduct the activity. Moreover, if the applicant requires a longer period of time, he may request an extension within ninety days prior to expiration of his authorization.

2. Traders and Investors

A trader is a business person who intends to conduct considerable trade of goods or services, principally between Chile and the USA.

Chile's Guide requires proof that the following requirements have been met.

- The person is a national of one of the parties, provable by a current passport.
- The company is from the United States of America. A company will be considered from the United States if its management headquarters are in the USA and its capital has been subscribed in that country.
- The existence of a considerable trade of goods or services, evidenced by documents such as invoices, shipping receipts or bills.
- Proof that the applicant holds an executive or supervisory position or has special training in the operation of the company.
- The person is not disqualified from entering Chile under the Immigration Law.

Investors are business persons who intend to develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing a substantial amount of capital in a capacity that is supervisory, executive, or involves essential skills.

According to the Guide, Chile requires proof of fulfillment of the following requirements.

- The person must be a U.S. national, evidenced by a current passport.
- The enterprise must be a U.S. enterprise, which is when its management headquarters are in the USA and its capital has been subscribed in that country.
- The investment must have been made or is in the process of being made. The investor should demonstrate that he or she has committed a significant amount of capital.
- The applicant must prove that he or she holds an executive or supervisory position or has special skills in the operation of the company.
- The applicant must not be disqualified from entering Chile under the Immigration Law.

Traders and investors may remain in Chile for one year and their residency permit may be extended for the same period of time as often as requested, but always provided they continue to meet the conditions for which it was issued. The extension must be requested from the immigration authorities of Chile ninety days before expiration of the original authorization.

3. Intra-Company Transferees

The FTA defines an inter-company transferee as a business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge, provided the applicant otherwise complies with immigration measures applicable to temporary entry. The person may be required to be an employee of the company on a continuous basis for one year within three years immediately prior to the date of the application for admission.

According to the Guide, the category of transferees includes, in the case of Chile, executives, managers or persons with special skills. The word "enterprise" includes individuals and bodies corporate, both U.S. and Chilean.

Chile requires the following.

- Proof that the person is a national of one of the parties, evidenced by a current passport.
- Proof that the companies located in Chile and the USA are related, meaning a parent company, branch, agency, subsidiary or affiliate.
- A description of the purpose and position for which entry to Chile is requested.
- A person with special skills must also prove that
  - They have those skills;
  - Those skills are required for the proposed job in Chile.

- The person must not be disqualified from entering Chile under the Immigration Law.

As a general rule, Chile will not require that the applicant remain with the company for a certain period of time.

Anyone entering in this way can remain in Chile for one year and his or her residency permit can be extended for the same period of time, as often as requested, but always provided the conditions under which it was issued remain the same. The extension must be requested from the Chilean immigration authorities ninety days before expiration of the authorization.

4. Professionals

The FTA defines a professional as a business person who intends to conduct professional activities or training in relation to a particular profession, including seminars.

The parties agreed to grant temporary entry to professionals who otherwise comply with the general immigration rules provided they produce:

- Proof of nationality;
- Documentation demonstrating that the business person will be so engaged and describing the purpose of entry; and
- Documentation demonstrating the attainment of the relevant minimum educational requirements or alternative credentials.

The FTA forbids parties to require prior approval procedures, petitions, labor certification tests, or other procedures of a similar effect in order to authorize temporary entry. Nor can numerical restrictions be imposed or maintained in regard to the temporary entry of professionals.

Notwithstanding the above, the Parties may request that a business person who intends to enter temporarily under this section follow the procedures applicable to the temporary entry of professionals, such as certification of compliance with the labor and immigration laws. In other words, each profession should be subject to the specific regulations in the domestic law for such profession, such as licenses, revalidations or the recognition of titles.

In addition, the Parties may establish an annual numerical limit on the temporary entry of business persons of the other party who intend to conduct a business activity as a professional, although to date Chile has not imposed any numerical limits on this topic.

Unless the parties agree otherwise, the party establishing a limit may, in consultation with the other party, authorize the temporary entry of a business person who practices a profession where the requirements for accreditation, license and certification are mutually recognized by the parties. The numerical limits in the paragraphs above do not limit the possibility of a business person requesting temporary entry according to the immigration regulations of a party applicable to the entry of professionals.

According to the Guide the requirements for U.S. professionals to obtain temporary residence are the following:

- Evidence of U.S. nationality. Nationality can be proved exhibiting a valid passport, provided that a statement in that respect is contained in the passport.
- Evidence that the person possesses theoretical and practical specialized knowledge, and holds a post-secondary degree in that particular field or has completed study of at least four years of duration. This requirement is fulfilled by submitting a legalized copy of the applicant's academic background, accrediting his/her academic degree of bachelor, master or doctor.
- Evidence of a pre-established employment with a Chilean enterprise, in a position that corresponds to his/her profession. Both requirements are met by submitting a contract with a Chilean enterprise or an employment offer between the business person and an employer in Chile and that such offer has been accepted, or a contract or offer which has been accepted between the employer of the U.S. business person and an employer in Chile. The professionals cannot practice independently.
- No inclusion in the circumstances contemplated in articles 15 and 16 (inadmissibility of aliens) of the Aliens Law (D.L. 1.094 as of 1975) relating to public order and national security.

F. Interrelation Between the Rules under the FTA, the Pre-Existing Basic Immigration Rules and Chilean Internal Guidelines for the Application of the Immigration Rules under the FTA

1. Interrelation between FTA rules and Chilean Immigration Rules

The rules contained in the FTA coexist with the prevailing internal immigration rules of the Parties.

Therefore, the rules contained in the FTA do not grant preferential treatment to nationals of the parties to acquire nationality, citizenship or permanent residency in the territory of the other party. Rather, they must comply with the internal rules regulating these matters. In the case of Chile, those rules are found in the Politi-

cal Constitution of the Republic and in the Immigration Law and Regulations, among others.

In addition, the FTA rules do not supersede the requirements for licenses, certifications or revalidation that temporary residents must have to practice a profession or activity according to the governing regulations of each of the parties for that profession or activity.

Thus, the FTA does not prevent the parties from adopting additional measures that regulate the temporary entry of individuals or their temporary residency in their territories in relation to public order, national security, health and passport requirements to protect the integrity of their borders and guarantee an orderly movement of individuals, with the limitation that they cannot unduly delay or impair the trade of goods or services or the conduct of investment activities according to the FTA. Therefore, the mere fact that a visa is required will not be considered an undue impairment or impediment to the trade of goods or services or investment under the FTA.

Finally, the FTA allows applicants to choose which regulations they will follow in obtaining the permits to enter the territories of the other party, according to their needs.

2. Practical Application of the FTA in Chile

A comparison of requirements for a temporary resident visa under FTA rules and the preexisting Chilean basic immigration rules reveals that the principal differences existing between a temporary residence obtained through the FTA and those obtained under the Immigration Law are the following.

(a) Visa

Under the Immigration Law. A visa is attainable only if there is proof of family ties or interests in the country or the residency of the person is deemed useful or advantageous to Chile. If none of these facts can be demonstrated, the person may choose to apply for a work visa and should first have an employment contract with a Chilean employer to work in Chile. He will be allowed to work only as indicated in the employment contract. Business persons entering as tourists may remain in Chile for ninety days but may not conduct any remunerated activity except under a special work permit.

Under the FTA. The FTA allows a person to work in Chile without specific employment authorization. The person may work simultaneously for more than one employer in Chile, provided the jobs relate to the requested category and have been mentioned in the respective application.

(b) Obtaining Permanent Residency

Under the Immigration Law. Under the law, the temporary residency visa holder who completes one year of temporary residency can request permanent residency. He will be obligated to request it upon two years of temporary residency in Chile. Otherwise, he must leave the country.

Under the FTA. Pursuant to the FTA, a temporary residency is granted for the period of one year and can be extended indefinitely as long as the circumstances under which it was granted remain the same. The temporary resident visa holder will not be obligated to apply for permanent residency, regardless of the time of temporary residence.

(c) Identity Cards

Under the Immigration Law. The visa holders are obligated to obtain an identity card within thirty days after entry into Chile or receipt of the relevant visa, if obtained through the Ministry of Interior. Otherwise they will be fined.

Under the FTA. Visa holders are not obligated under the FTA to request an identity card. Nonetheless, this benefit may be considered more apparent than real since, for example, in order for a foreigner to be able to open bank accounts in Chile, affiliate to the social security system and, generally, do business normally in the country, he needs an identity card. The benefit is more oriented towards the foreigner having no obligation to, nor period of time in which he must, obtain an identity card. Nonetheless, they will be obligated to register with the International Police.

Finally, note that the FTA is currently fully applicable in respect of Chile: a special floor has even been set up in the Immigration Department for those who are requesting visas under the FTA. Given its recent effectiveness, there are still no official statistics on the number of visas that Chile has granted through the FTA.

Oscar Aitken is a Partner in the Immigration Practice Group of Carey & Cia, in Santiago de Chile. **Mr. Aitken wishes to thank his colleagues in the Immigration Practice Group for their assistance in the preparation of this article, Paulina Miranda, Maria Fernanda Quezada, and MA. Lourdes Velasquez.**

Are There Open Skies in Argentina? Changing Commercial Transportation Policies

By Emilio Argüelles

I. Introduction

A. Law 19,030

Reflecting a situation widespread among many other American and European countries, Argentina's Law 19.030, on National Air Commercial Policy, enacted in 1971 but significantly modified since then, was originally based on the following main concepts:

- There should be strict state control and approval of every aspect of the industry, such as approval for local and foreign airlines to operate within and to and from Argentina and approval of routes, frequencies, capacity, equipment and fares. In all cases, every aspect was regulated.
- There should be regulation and protection of the virtual monopoly enjoyed by the national flag carrier, Aerolineas Argentinas, then a wholly state-owned company, that was guaranteed all international long haul flights. In addition, with respect to international "regional" routes (defined as flights to and from Argentina and the neighboring countries of Bolivia, Brazil, Chile, Uruguay and Paraguay), Aerolineas was to have a priority consisting of not allowing any other Argentine company to fly to any of these destinations if Aerolineas decided to operate that route. Fifty percent of the domestic market was also guaranteed by law to Aerolineas, defined as "the instrument of the national air commercial policy."
- With respect to international operations, the exercise of Third and Fourth Freedoms (transportation from Argentina to a third country and from that third country to Argentina) was to be authorized basically under the terms of bilateral treaties, conditioned on equal distribution of the traffic to airlines of both parties, and to reciprocity, and an increase in the authorized traffic (either based on increasing frequency or equipment capacity) was allowed only if for the preceding twelve months the load factor on that route was not less than fifty-five percent of the authorized capacity.
- With respect to Fifth Freedom rights (total traffic carried by a foreign operator from third countries to Argentina, and vice versa), such traffic could not exceed operations between Argentina and that foreign country under the Third and Fourth Freedoms.

B. Subsequent Developments

For twenty years, from 1970 to 1990, the above principles were strictly applied, producing an omnipresent flag carrier, Aerolineas Argentinas, monopolizing from the Argentine side international operations (with very minor exceptions for some destinations in neighboring countries), and with international operations restricted to frequencies and capacities jealously negotiated with other countries.

With respect to the domestic market, with an existing state company whose fate was not dependent on efficiency or economic performance and with strong state support, and in an environment where every aspect of the business was controlled and subject to the approval of the local authorities, there was hardly any opportunity for a private airline to compete.

C. Deregulation and Privatization

The beginning of the nineties was a turning point, when the Argentine authorities put into effect a general deregulation policy on what had been a highly regulated economy, privatizing most of the state ventures providing public services (telecommunications, oil, transportation), and making Aerolineas Argentinas one of the first cases.

Privatization resulted in significant modifications of the rules on air transportation, including the elimination of the reservation for Aerolineas Argentinas of a minimum of fifty percent of the domestic market and the priority for services to neighboring countries, which permitted the expansion of other domestic airlines. With respect to international operations, the monopoly that Aerolineas had historically enjoyed to be the only Argentine airline to operate abroad, was limited to a ten-year term by Decrees 1591/89 and 461/90, with the term to commence from the privatization of Aerolineas, which was approved by Decree 2438/90 of November 1990. Thus the monopoly expired in November 2000.

II. Bilateral Treaties with American Countries

With respect to the opening of skies with other countries, the process of deregulation and privatization had actually a limited impact. Instead, Argentina has continued to deal with this matter on a country-by-

country bilateral basis, and has continued to follow a limited and cautious course.

A. Argentina – USA

The last modification of the Argentina-US Bilateral Treaty, which has been in force since 1985, was in November 2000, when there was a total liberalization of all cargo operations, without any limitation on frequencies or capacity between points in the USA and Argentina. But there were no open skies for passengers, although frequencies were increased to fifty-six weekly to each country. Destinations in Argentina were increased to three and up to five under code sharing. Destinations in the USA for Argentine airlines were increased to nine. Some destinations were agreed upon for points beyond the two countries, in the exercise of Fifth Freedom rights: for the USA Santiago de Chile and Montevideo and for Argentine airlines Montreal, Toronto, Korea and Spain.

B. Argentina – Chile

The most recent meeting was held in April 2002, when it was agreed to eliminate all restrictions on all cargo transportation, with no limits on frequencies and traffic rights of the Third, Fourth, Fifth and Sixth Freedoms, except domestic air cargo transportation.

With respect to passengers, the liberalization of the Third and Fourth Freedoms remains in force, without limitations on frequencies and capacities between all points in both countries. Fifth Freedom rights remain restricted.

C. Argentina – Uruguay

The most recent meeting, held in December 2003, maintained the amount of weekly frequencies in force, including new destinations for the Third and Fourth Freedoms. Fifth Freedom rights were limited to three weekly flights per country.

D. Argentina – Peru

The most recent meeting, in October 2003, kept the frequencies already in force, since Argentina questioned the proposal of Peru to increase from fourteen to twenty-one the weekly frequencies for each party, on the basis that already assigned frequencies were not fully operated. Argentina only agreed to modified calculation formulae for frequencies and seat equivalences and accepted that each party could operate flights the other party was not operating.

E. Argentina – Mexico

During the most recent meeting, in April 2004, Mexico requested an increase in weekly flights from five to seven. Argentina sought to condition this increase on evidence that during the twelve preceding months the load factor had exceeded fifty-five percent. Argentina requested Fifth Freedom rights to the USA and Canada. There was no agreement on any of these points, so the existing agreement remains in force.

F. Argentina – Brazil

Each party is authorized to a maximum number of seats (1,912,000, as agreed in the most recent meeting in March 2001), without any equipment restriction. A route plan has also been agreed upon for the exercise of Third, Fourth, Fifth and Sixth Freedoms, with no limitation on intermediate and beyond points.

G. Other Latin American Countries

Bilateral Agreements between Argentina and other Latin American countries (Bolivia, Paraguay, Colombia, Venezuela, Dominican Republic, Cuba) are also based on a maximum of frequencies allowed to each party for Third and Fourth Freedoms, also including some Fifth Freedom rights (Caracas for Argentina, in the agreement with Colombia; intermediate and beyond points for Argentina in the bilaterals with Costa Rica and Cuba; Europe and the USA for Paraguay in the bilateral with Argentina).

III. Other Bilateral Treaties

Of the twenty-nine other bilateral treaties signed by Argentina with European, Asian and African countries, the treaty with Spain, from 1998, deserves special mention. The treaty provides for total freedom of frequencies and capacity between all points of each country, except domestic operations, for all cargo flights, including Fifth Freedom rights on points before, within and beyond each territory, excluding domestic traffic.

Also freedom to operate for passenger traffic has been agreed, with no limit on capacity or frequencies between Spain and Argentina, including intermediate points (Brazil, Caribbean and Africa), and further points: for Spain Paraguay, Uruguay and Chile; and for Argentina Europe, Libya and Lebanon. This treaty provides for open skies on Third and Fourth Freedoms, and on Fifth Freedom rights, excepting domestic routes.

The other bilateral treaties are based on limitations of similar frequencies and capacities for each country and, in some cases, some Fifth Freedom rights.

IV. Conclusion

During the last decade there has been an evolution in Argentina from a completely regulated air industry, with a virtual monopoly reserved for the flag carrier and restricted authorizations to foreign airlines to operate to and from Argentina (based on reciprocity and limited to equivalent rights and the same frequencies as those Aerolineas Argentinas would operate), to an

opening to deregulation and privatization. This process started in the early nineties by allowing new players to operate domestically and internationally, and was followed by a slow liberalization in bilateral treaties that allowed some countries (USA, Chile, Spain) unlimited cargo operations or unrestricted passenger Third and Fourth Freedoms to all points between the two countries, and increased Fifth Freedom rights to operate with third countries.

All these changes have been produced under the umbrella of the Law Nº 19.030 mentioned above, which in some of its provisions was adapted through significant changes that (i) basically put Aerolineas Argentinas, no longer state owned, on the same level as other local companies; (ii) did not provide any longer for a protected virtual monopoly of the flag carrier; and (iii) allowed an incipient opening of the skies with a few countries.

The pendulum has slightly swung back with the creation in 2002 of a new wholly state-owned Argentine airline, Lineas Aereas Federales, whose final shape and role is yet to be seen, since it is not yet operational.

It may be expected that the overall policy on air transportation, still ruled after thirty years by the remainders of Law 19.030, will soon be replaced by integrated and coherent legislation on the matter, and in that respect some projects have been under preparation recently.

To what extent the newly formulated Argentine policy will implement an Open Skies concept remains, at this moment, an open question.

Emilio Argüelles is a partner with Argüelles & Asociados in Buenos Aires.

Back issues of the *International Law Practicum, New York International Law Review* and *New York International Chapter News* (2000-present) are available on the New York State Bar Association Web site

Back issues are available at no charge to Section members. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

***International Law Practicum, New York International Law Review* and *New York International Chapter News* Index**

For your convenience there is also a searchable index in pdf format.
To search, click “Find” (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click “Find Again” (binoculars with arrow icon) to continue search.

Open Skies in Brazil: A General Overview and Perspectives for the Future

By Antonio Corrêa Meyer and Renato Covelo

I. Introduction

This article provides a legal and general analysis of the open skies policy under the Brazilian legal system, regulations, as well as the perspectives of the local industry. Historically, Brazil has been in the center of all worldwide discussions related to the civil aviation industry, especially in the International Civil Aviation Organization ("ICAO") and other international institutions. Nevertheless, within Brazil the open skies policy has always been a very controversial matter. Many important concerns relating to sovereignty, the Brazilian economy and international relations are parts of the discussion.

Brazil has executed sixty bilateral agreements, with nations all over the world, in regard to reciprocal rights and duties concerning air traffic rights. In all such agreements, routes into and from Brazil and corresponding passenger seats are strictly defined. In the current context, Brazil should be classified as a closed skies country, but changes in the global economy point to the potential negotiation of multilateral aviation agreements that could change the existing Brazilian policy. But the question remains whether Brazil and its aviation industry are prepared to adopt and face a completely "open skies" policy. This article attempts to answer such questions. In general, the opinion of the Brazilian Government is favorably inclined toward a more flexible regulation, while preserving traffic control among countries.

II. The Brazilian Aviation Authorities and Regulation Overview

Unlike other countries, in Brazil the civil aviation is subordinated to the Brazilian Air Force. Therefore, the Department of Civil Aviation ("DAC"), which is currently Brazil's highest civil aviation authority, reports directly to the Command of Aeronautics. The DAC is also in charge of guiding, planning, stimulating and supporting the activities of public and private civil aviation. In order to cope with its responsibilities, the DAC comprises in its structure specific departments and commissions that are in charge of certain regulatory aspects, such as the execution of bilateral and multilateral agreements concerning traffic rights.

In connection with international civil aviation and traffic rights, the Committee of Studies Related to International Air Navigation (CERNAI) is the department created following the Chicago Convention in order to take responsibility for the study, planning and negotiation of international traffic rights between Brazil and other countries. CERNAI's main focus is to guide Brazilian international aviation relations, supporting the interests of its air commerce and good relations with friendly nations.

The main aeronautical law in Brazil is Law No. 7,565, of 19 December 1986, also known as the "Brazilian Aeronautical Code" *(Código Brasileiro de Aeronáutica)*, or CBA, which governs aircraft, airports and related domestic and international regular air transportation activities.

The DAC also monitors the concession of slots, the entry of new companies, the launch of new routes, increases in route frequencies and the lease or acquisition of new aircraft. However, the regulatory environment relating to the Brazilian civil aviation market is subject to an evolving process, and a number of new laws are being discussed in Congress and within various regulatory bodies. These laws may substantially change the regulation of the industry in Brazil.

Although the airline industry in Brazil is still a regulated environment, the current rulings of the DAC are significantly more flexible than past regulations, and a number of new regulatory acts have been frequently issued by the aviation authorities in order to harmonize the Brazilian regulatory environment with international and modem regulatory models.

As stated above, the Brazilian civil aviation system is now going through a period of revision of its legislation, revisions which aim at the reform of the Brazilian Aeronautical Code, historically one of the world's oldest codes on the matter, since its first version was approved in 1938, and subsequently revised in 1966 and 1986. Due to the approval of the 1988 Constitution and other new laws, such as the Consummer Code, for example, a new revision is certainly needed. The creation of a Civil Aviation Agency is also under examination by the National Congress and, if approved, a new regulatory model would be introduced.

Brazil has signed all major International Conventions on Civil Aviation, except one, the Cape Town Treaty (UNIDROIT), which is under analysis by the Brazilian Government. We are also a part of the Subregional Air Transportation Agreement (the "Fortaleza

Agreement"), which unites seven South American countries: Argentina; Bolivia; Brazil; Chile; Paraguay; Peru; and Uruguay. The Fortaleza Agreement is considered a very liberal agreement.

III. Brazilian Industry Overview

The Brazilian civil aviation sector is predominately divided into the following five categories:

- Domestic airlines, which provide scheduled public transportation services within Brazil and primarily operate large aircraft between major cities.
- Regional airlines, which provide scheduled public transportation services within Brazil, generally linking smaller cities with major ones.
- Charter airlines, which provide non-scheduled transportation services.
- International airlines, which operate scheduled international air services to and from Brazil.
- Cargo airliners, which operate non-scheduled freight transportation.

The airline industry in Brazil is currently served by four main airlines, among several small regional ones:

- Varig, which offers scheduled services on both domestic and international routes.
- TAM, which offers scheduled services primarily on domestic routes and three destinations on international routes.
- VASP, which offers scheduled services on domestic routes.
- GOL, which offers scheduled services on domestic routes on a low-cost/low-fare basis.

In 2000, VASP underwent a financial and administrative reorganization and has withdrawn entirely from international markets. In December 2001, former Transbrasil airlines had a number of aircraft grounded for maintenance-related issues and also had aircraft repossessed by leasing companies due to non-payments. It eventually ceased operations.

In January 2003, Varig and TAM began discussions in order to merge their operations and form a new airline. Such a new company would have had more than one hundred fifty aircraft, and would also have had a sixty-four-percent market share. Since then, Varig and TAM have been operating under a temporary code-sharing agreement in order to reduce costs and improve efficiency. The Brazilian competition authority (CADE) has recently determined the air shuttle between São Paulo and Rio, which is exploited by Varig and TAM, to be in violation of the antitrust law and imposed on both companies a fine of one percent of the annual revenues generated by such air shuttle activities. It appears now that VARIG and TAM will not proceed with the idea of forming a joint company.

The Brazilian commercial aviation market may be considered a free market as far as competition is concerned, but subject to regulation. Thus the technical body establishes patterns of access to the markets, since air transportation is a public service concession and, therefore, must be economical, comfortable and safe.

The Brazilian civil aviation is recognized as having the highest safety standards in the world. Brazil is classified as a Category 1 country in flight safety standards by the International Civil Aviation Organization, which is the same classification held by the United States and Canada. It is important for Brazil to negotiate traffic agreements with developed countries that emphasize safety standards in aircraft operation. Brazilian airlines would also benefit from such standards in order to negotiate better terms and conditions in its aircraft leasing agreements. Lessors and insurance companies can offer better prices due to the low risks of accidents involving such aircraft.

According to the 2003 Statistical Air Transport Yearbook published by the DAC, there were over thirty million enplanements in Brazil in 2002, out of a total population of approximately 175 million, according to *the Instituto Brasileiro de Geografia e Estatistica - IBGE.* In contrast, the United States, with a total population of approximately 293 million according to the latest U.S. census figures, had more than seven hundred million enplanements in 2002, according to the U.S. Department of Transportation.

Main entrance ports in Brazil for the regular services are São Paulo, Rio de Janeiro, Porto Alegre and Curitiba, and for the non-regular flights Salvador, Fortaleza, Recife and Manaus.

In 2003, all Brazilian airlines accounted for over thirty percent of the market share of Brazilian international regular routes. Due to the bilateral agreements entered by Brazil, Brazil is served by regular flights of the major airlines in the world, which account for over seventy percent of the market in the international routes that serve Brazil. It is important to stress that, comparing such statistics to those of other countries, it may be concluded that the international passenger traffic to and from Brazil is dominated by the major foreign airliners, which offer better prices and better fleet and in-flight services due to their better economic situation and governmental policies, even in controlled and regulated skies.

High local taxation of the Brazilian airliners is one of the points invoked by them as a cause for their poor economic situation. In an identical route from Brazil to the United States, a Brazilian airliner pays thirty-four percent of its fare price in taxes, while an American airliner has to pay around seven percent and the European airliners twelve percent. Thus, among other benefits to the passengers, international airliners can offer a lower price to the Brazilian passengers. It is mandatory that Brazilian authorities change such economic policy so that local airliners can compete equally with the international carriers.

IV. Open Skies from the Brazilian Perspective

"Open skies" mean a general liberalization of air traffic between countries. However, according to the prevailing opinion in the Brazilian industry, such liberalization of traffic should be done in a way that does not put at risk the survival of airliners of any country or create a predatory market. Brazilian airliners argue they can not be competitive with most of the larger airlines in the world. Since they can not compete equally, they believe an equalization in light of these unequal conditions is essential to protect Brazilian airliners and the local passenger and freight market. The use of some kind of control or safeguard would be a way to compensate these unequal economic conditions. In this sense, Brazil negotiates bilateral agreements that permit a control and balance of the traffic to both sides.

On the other hand, Brazil has, within such bilateral agreements, been very open on matters that concern air transportation. For example, Brazil has a very competitive scenario with the United States, with one hundred fifty weekly passenger flights to each side, operated by four companies designated by each country, a large amount of regular cargo flights, and finally, a large number of non-regular passenger and cargo flights. This is a good example of how a bilateral agreement can be updated or modified from time to time in order to maintain the balance and control of traffic. The demand evolution and traffic increase have been always observed by both countries, and actions have been taken to cover such evolution.

It is the feeling of Brazilian industry and governmental authorities that, without such flight limits and control, under a total open skies policy, Brazil would certainly experience a substantial increase in the number of American flights to Brazil and this would probably affect adversely the Brazilian local market and airlines to the extent that American airlines would be able to offer more flights, seats and cargo availability, for better prices than local carriers.

There are important differences in the nature of the competitive conditions faced by the Latin American airlines on the one hand and their major foreign competitors on the other hand, such as taxation, local currency, spare parts and material costs, lease costs, market size, and relative economic position of the foreign competitors (where larger companies conquer entire economies and have the possibility of integrating other markets). All of these factors are unfavorable to the Latin American competitors, whose countries are distant from the major world markets: The Latin American competitors are then confronted with far less favorable conditions than the major airlines from developed countries. With this analysis it seems obvious that the competition conditions would be unequal.

The longstanding opinion of the Brazilian government and some unions of airline employees has been that permitting free capacity, open routes, uncontrolled rates, an unlimited number of companies, and the enlargement of the already permissive traffic rights—"open skies"—would be the sacrifice of Brazilian companies and the transfer of jobs from Brazilian companies to those that are already in a favorable position. There are no benefits to the Brazilian airlines and they will not win this battle. Thus the position of the Brazilian Government has been more protectionist than liberal in relation to the open skies policy.

However, we cannot forget that the Brazilian Government is also directly responsible for the crisis in the Brazilian civil aviation, and the protection of its airliners with a closed sky policy may not save Brazilian airlines. It is urgent that the Brazilian Government change its regulation of civil aviation in order to allow such airlines to be more competitive.

Generally, the Brazilian aviation sector is against the "open skies" policy, for the reasons described above. Nevertheless, Brazilian airlines should be prepared to face such changes in the near future, and an alliance between the participants in this sector is essential in order to succeed in the struggle for a leading position in this new commercial aviation market.

V. Open Skies from an International Perspective

Through the Airline Deregulation Act of 1978, the U.S. Government deregulated its commercial aviation industry in order to promote competition and reduce regulation of such industry, and these changes transformed commercial aviation worldwide forever. Slowly, old market rules and dogmas fell and a new scenario was born. What used to be a cartelized market, with rare cases of real competition, became an aggressive industry. After deregulation, unfettered free competition ushered in a new era in passenger air travel.

A number of airlines, such as Pan Am, Eastern, TWA, Sabena, Ansett Australia and Transbrasil, disappeared, for they were not able to adapt themselves to the competition. The competition was ruthless and hard to keep up with, the market opened up to new companies, and the absence of laws or regulations had a negative impact upon the companies' financial position and greatly enhanced the passengers' purchasing power.

On the other hand, the globalization of these air services is inevitable. Sooner or later, Brazil and its local companies must evolve to an open skies environment. Brazilian civil aviation has been in a crisis for several years and therefore, at this particular moment, has no interest in participating in a multilateral global agreement. Nevertheless, it is important that Brazil participate actively in all the negotiations, in order eventually to be a part of such multilateral global arrangements that result from such an agreement.

VI. Conclusion

Commercial aviation is going through another delicate moment in its history, especially because of the terrorist acts that took place on September 11. In various parts of the world, commercial aviation incurred irreversible losses and many airliners went bankrupt. A way of reversing these damages is the union of efforts by all parties involved in the air industry to recover from such losses and reconstruct commercial aviation.

On the other hand, this reconstruction must be very well planned and executed in a way that is only beneficial to a few countries, while harmful to others. The open skies policy is an important alternative and must take place gradually and on a balanced way between the industries of all countries involved. A general and unregulated liberalization may harm a great number of countries, including Brazil.

The Brazilian air industry is favorably inclined toward global alliances that stimulate the return of development and the transportation of an increasing number of passengers, but fearful of open skies for air companies worldwide. On the other hand, liberalization is inevitable. The Brazilian Government must make efforts to change the Brazilian air companies into more competitive companies adequately prepared to face this new scenario. New rules and legislation, especially tax balancing, are vital for the country.

Antonio Corrêa Meyer is a senior partner and Renato Covelo is an associate in the law firm of Machado, Meyer, Sendacz e Opice Advogados in São Paulo, Brazil.

Geographical Indications—An Emerging Form of Intellectual Property

By L. Donald Prutzman

I. Introduction

A Geographical Indication is a designation, sign or symbol used on products that have a precise geographical origin, and qualities or a reputation linked to or that result from that place of origin. Geographical Indications are most often associated with wines and spirits (*e.g.*, "Champagne," "Napa Valley") or cheeses ("Roquefort"), but they can apply to a wide variety of other products, such as tea ("Darjeeling"), cigars ("Cuban"), fish sauce ("Phu Quoc," from Vietnam) or ceramics ("Arita," from Japan).

The ability to protect Geographical Indications so that they can only be used for products from the indicated place of origin can give an important commercial advantage to the producers of the indicated region, and to the country where the Geographical Indication is located, by creating or preserving employment in the Geographical Indication and protecting the region's agricultural, artisanal and culinary heritage. Protection of Geographical Indications can also protect consumers from deceptive geographic misdescriptions of goods.

But Geographical Indication protection can also disadvantage producers from other regions who lose the ability to describe their goods—often fairly—as of the kind, type or style produced in the Geographical Indication. Also, where a Geographical Indication has been used, but not protected, for a long time, close questions can arise whether the Geographical Indication continues to describe only products from the region, or has become generic for the type of product produced in the region but also elsewhere. For example, does "Champagne" fairly describe sparkling wines from the Champagne region of France, or does it include similar sparkling wines produced elsewhere?

Because of these issues, and others, efforts to protect Geographical Indications internationally, particularly through well subscribed multilateral agreements, have been and continue to be difficult to work out, and are often fraught with controversy and differing views. The world intellectual property community is still very much in the process of working out the legal framework for protection of Geographical Indications. As will be seen, most of the issues are philosophical and political rather than legal.

II. Previous International Agreements

International agreements protecting Geographical Indications are not new. There are a number of bilateral treaties in place and there have been several multilateral agreements over the years. Among those international agreements are the following:

- *The Paris Convention for the Protection of Industrial Property (1883)*. Article 1(2) provides that the treaty applies to "indications of source or appellations of origin." Article 10bis(3)(3), added in 1958, prohibits "indications . . . the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quality, of the goods."
- *The Madrid Agreement for the Repression of False or Deceptive Indications of Sources of Goods (1891)*. Article 1(1) provides for seizure upon importation of goods falsely describing a member country or location therein as being the place of origin of the goods. Article 3bis prohibits "indications . . . capable of deceiving the public." Only thirty-four countries are signatories, including Brazil and Cuba in Latin America. The United States is not a party.
- *The Lisbon Agreement on the Protection of Appellations of Origin and Their International Registration (1958)*. The treaty provides for protection and central registration of "appellations of origin of products" protected in their country of origin. Protection is "absolute" and "shall be ensured against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as 'kind,' 'type,' 'make,' 'imitation,' or the like." Only twenty-one countries are signatories, including Costa Rica, Cuba and Haiti in Latin America. The United States is not a party.

However, the most recent, and most promising, effort that could give Geographical Indications widespread and effective protection is the World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS Agreement.

III. Trips

A. Currently Effective Provisions

TRIPS, completed in 1994, covers many aspects of intellectual property rights. Articles 22, 23 and 24, attached as an Appendix to this article, concern protec-

tion of Geographical Indications. TRIPS does not establish a uniform system of Geographical Indication protection. Rather, it establishes minimum standards for legal protection to which each signatory must adhere as part of its own internal legislation.

TRIPS defines "Geographical Indications" as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[1] It is important to note that this Geographical Indication definition limits Geographical Indications to goods and not services. Thus there is no protection for, *e.g.,* Turkish baths or Swedish massage.

TRIPS provides two levels of protection for Geographical Indications, a higher level of protection for wines and spirits in Article 23, and a lower level for all other products in Article 22.

Article 22's lower level protection requires signatories to "provide the legal means for interested parties to prevent . . . the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin *in a manner which misleads the public as to the geographical origin of the good."*[2] It also requires refusal to register or invalidation at the behest of an interested party of "a trademark which contains or consists of a Geographical Indication with respect to goods not originating in the territory indicated, *if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place or origin."*[3] Thus, the touchstone for protection under Article 22 is whether the public is misled. The party that considers itself injured must prove that the use of the Geographical Indication is misleading to the public or constitutes unfair competition. One serious drawback to this requirement is its lack of legal security. It can lead to different protection for the same Geographical Indication in different countries, depending on the relevant public's knowledge or ignorance (which some consider entirely appropriate) and the discretion of the decision maker.

In contrast, Article 23 mandates a scheme of absolute protection for wine and spirits Geographical Indications. No showing that the use is misleading is required. Under Article 23, signatories are required "to provide the legal means for interested parties to prevent use of a Geographical Indication identifying wines for wines not originating in the place indicated by the Geographical Indication in question or identifying spirits for spirits not originating in the place indicated by the Geographical Indication in question, *even where the true origin of the goods is indicated or the Geographical Indication is used in translation or accompanied by expressions such as 'kind,' 'type,' style,' 'imitation' or the like."*[4] Similarly, Article 23(3) requires the refusal to register or invalidation at the behest of an interested party of "a trademark for wines which contains or consists of a Geographical Indication identifying wines or for spirits which contains or consists of a Geographical Indication identifying spirits . . . with respect to such wines or spirits not having this origin." Thus, under Article 22, a cigar could be marketed as "Havana Style, from Honduras" because the description is not misleading, but Article 23 would forbid the marketing of "Napa Valley style Chardonnay, from Virginia" even though the true origin is fully disclosed.

This two-tiered protection system is controversial. Countries, particularly developing countries, that do not produce wines, consider it discriminatory that Geographical Indications for their goods cannot enjoy the absolute protection afforded to wines and spirits, produced largely by developed countries. As noted below, Asian countries particularly consider the system unfair.

B. Areas for Future Negotiation

In addition to the Geographical Indication protection scheme that it did establish, TRIPS specifically provided for further international negotiations and, it is to be hoped, future agreement in two areas.

1. International Registry for Wine and Spirits Geographical Indications

First, TRIPS seeks accord on some type of international registry for wine Geographical Indications. Article 23(4) provides that, "In order to facilitate the protection of Geographical Indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of Geographical Indications for wines eligible for protection in those Members participating in the system." These negotiations have not progressed very far, although the battle lines have been drawn. In general, the European Union and its member states advocate a full registration system under which Geographical Indications for wine would be internationally registered and the registrations would be binding in all Member states. The registration system envisioned would be similar to that established under the Lisbon Agreement described above. Other countries, most notably the United States, Chile, Canada, Australia and Japan, advocate a non-binding, voluntary registry of wine and spirits Geographical Indications that would provide an informational database that countries could consult in deciding what Geographical Indications to protect.

Many consider the full registration system binding in every country unworkable because the usage and status of Geographical Indications has differed historically among countries. A particular term can be a Geographical Indication in one country, a trademark in another and a generic term in a third. For example, "Pilsen" for beer

is a protected Geographical Indication in some countries, a generic term for a type of beer in others, and is a best-selling beer brand and a registered trademark in Uruguay. Countries need the flexibility to recognize these differences. In fact, TRIPS provides for this by including a "grandfather clause" to the effect that a Member need not "prevent continued and similar use of a particular Geographical Indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that Geographical Indication in a continuous manner with regard to the same or related goods or services in the territory of the Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date."[5]

2. Expansion of Article 23 Protection

The second area for future negotiations that TRIPS mandates is the potential increase in the scope of protection available under Article 23. Article 24(1) states that, "Members agree to enter into negotiations aimed at increasing the protection of individual Geographical Indications under Article 23." Countries disagree, however, on whether this language means that the increased scope of protection should be for wines and spirits already protected under Article 23, or that other products should be moved from Article 22 into the higher tier protection of Article 23.

C. Opposition to Expansion

Several Latin American countries (Argentina, Chile, Colombia, Guatemala, Paraguay and Uruguay) and the United States, Canada and Australia have argued against inclusion of additional products under Article 23 protection. The arguments include (i) the cost of implementing the new laws that would be required; (ii) the introduction of uncertainty concerning use of Geographical Indications in existing markets and the possible closing off of future market access opportunities; (iii) the possibility of consumer confusion caused by the re-naming of products that might be required; and (iv) the possibility of unfairness to existing producers.

The potential for unfairness is quite real. Although not the result of TRIPS itself, there are a number of disturbing examples of harsh results since 1970 that prior European Community efforts to protect wine and spirits Geographical Indications have produced:

- *Cyprus and British Sherry*. "Sherry" is a type of fortified wine[6] originally produced in the region of Jerez, a city in southern Spain. In addition to Jerez, "sherry" was produced for many years in other places, including Cyprus, Great Britain and South Africa. For example, Cyprus sherry was first produced in 1872. Most of it was exported to Great Britain, which also produced substantial quantities of British sherry from grape must from Cyprus. Over one hundred years of production in areas other than Jerez made "sherry" at least arguably a generic type of fortified wine rather than a Geographical Indication. However, when Spain joined the EU in 1986, "sherry" became a protected Geographical Indication for wines produced in the Jerez region. Sales of what had been Cyprus and British "sherry" declined precipitously. No other suitable description for these wines has been found. Cyprus or British "fortified wine" does not, apparently, appeal to consumers.

- *South African Port*. "Port" is another fortified wine, and is traditionally associated with Oporto, Portugal. Similar fortified wines have, however, been made in other parts of the world. They have been made in South Africa since the early 1800s. "Port," along with the traditional designations "Tawny," "Ruby," and "Vintage" arguably became generic for this type of wine, rather than fortified wines from Oporto. However, a wine and spirits agreement between South Africa and the EU,[7] which became effective on 1 January 2002, protects "Port" as a Geographical Indication and requires South Africa to cease using the term for exports by 2005 and in the home market by 2012. The agreement hurts the producers of South African "port," who received no compensation for the loss of their ability to use that term, and the descriptive terms "Tawny," "Ruby," etc. They have tried to substitute the term "Cape" for their fortified wines, but they are clearly placed at a disadvantage. Reasonable minds can differ as to whether this is "fair."

- *Swiss Champagne*. France's Champagne region produces some of the most famous wines in the world. However, Champagne is also a village in Switzerland that has existed since the ninth century and has produced still white wine for centuries, perhaps longer than the Champagne region of France. In a bilateral treaty between the EU and Switzerland, effective 1 June 2002, the Swiss producers were required to cease using "champagne" for their wines by 1 June 2004. These producers are litigating in the European Court of Justice to annul the treaty or obtain compensation.

- *Spanish Champagne*. Since at least 1870 Spanish producers have used the "Champagne method" to produce sparkling white wines. These wines were sold as Spanish Champagne until 1970. At that time, Spain agreed to cease using Champagne and adopt the name "Cava" for these wines. Until 1994, producers of Cava could still use terms such as "Méthod Champenoise," but at that time such terms, too, were forbidden. The term now used is "Traditional Method." The story has a reasonably

> happy ending. Over the past thirty-five years the Spanish producers have repositioned their Cava wines as a distinct alternative sparkling white wine with a reasonable degree of success. However, this has not happened without substantial cost and loss of business in the process.

The expansion of Article 23 to additional categories of products can be expected to produce its share of arguably unfair hardship situations similar to those above. Protection of Geographical Indications has its costs. Note, also, that this type of problem only arises under the stricter Article 23-type protection. Under Article 22 the permissible use of modifiers such as "type," "style," etc. will often ameliorate the harshness of being banned from using a term altogether.

The drafters of TRIPS attempted to anticipate and provide for at least some of the types of conflicting situations described above by including a "grandfather" provision in Article 24. Article 24(4) provides:

> Nothing in this Section shall require a Member to prevent continued and similar use of a particular Geographical Indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that Geographical Indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

It is important to note that this "grandfather clause" would apply only in countries where competing Geographical Indications had already been used and would still prohibit expansion into new markets for the locally recognized Geographical Indications.

D. In Favor of Expansion

Many, but not all, Asian countries favor Article 23 expansion, primarily because they consider its current limitation to wine and spirits discriminatory by favoring Western and developed countries. The major proponents have been China, India, Pakistan, Sri Lanka, Thailand and Indonesia. In Latin America, only Cuba has come out in favor of expansion. Other countries favoring expansion include Slovenia, Switzerland, Turkey, Kenya, Hungary, the EU, the Slovak Republic, Morocco, the Czech Republic, Egypt, Bulgaria and Jamaica.

Asian countries tend to favor expansion because the wines and spirits they produce are usually not connected or associated with the region of production. For example, the taste and qualities of various varieties of sake from Japan tend not to depend on the region of production, but on the quality of rice used and the extent to which it has been polished. However, Asian countries have other products whose marketability could be enhanced by increased Geographical Indication protection. For example, India would like greater protection for Geographical Indications such as "Darjeeling" tea and "Basmati" rice. If tea were protected under Article 23, producers from other areas could not call their tea "Darjeeling" or "Darjeeling Style." If rice were included in Article 23, the designation "American Basmati" would be outlawed.

Another reason for countries to favor Article 23 expansion is the protection of legitimate and potentially valuable Geographical Indications from becoming generic. This has clearly happened to Feta for cheese, which was once a recognized Geographical Indication, and to artisanal items such as "Kohlapuri" slippers, once denoting slippers from Kohlapur, India, but now used for a style of slipper regardless of where produced.

The debate over extension of Article 23 protection to a wider range of products will undoubtedly continue for some time.

IV. Geographical Indications in Latin America

Geographical Indications are not a new concept to many Latin American countries. Even before TRIPS, many countries offered Geographical Indications protection and a few had registered Geographical Indications. A number of bilateral agreements between Latin American countries and European countries recognizing Geographical Indications also existed. Countries where wine and spirits production was important, such as Chile, Brazil, Argentina and Mexico, seem to have been the most aware of the economic implications of Geographical Indication protection and the most advanced in protecting them. For example, Chile's brand new intellectual property protection legislation has extended protection to Geographical Indications.

Since TRIPS, more Latin American countries, particularly the Central American countries, are realizing the economic implications of protecting Geographical Indications, particularly for agricultural and artisanal products. Geographical Indications for many such products have been recognized by tradition for a long time, but not legally protected. The implementation of legal protection is well behind the recognition of the marketplace advantages. For example, in the negotiations for the Central American Free Trade Agreement ("CAFTA") with the United States, Geographical Indications were among the intellectual property issues that the US negotiators raised early on. However, the Central American countries reportedly had no proposal to make.

In summary, Geographical Indications hold great potential for the marketing of Latin American products, in addition to wines and spirits. However, many Latin American countries have yet to implement the legal framework to realize this potential.

V. TRIPS Geographical Indication Provisions as Implemented in the United States

Unfortunately, the United States Patent and Trademark Office has taken a surprisingly overzealous approach to implementing the Geographical Indication provisions of TRIPS. TRIPS requires all signatories to conform their internal laws to meet the minimum standards mandated. Accordingly, in 1994 the United States amended Section 2(a) of its trademark law, known as the "Lanham Act," to prevent the registration of "Geographical Indications" as trademarks for wines and spirits not originating from the Geographical Indication involved. The added language states that a trademark shall be refused registration if it consists of:

> A Geographical Indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after [1 January 1996].

The Lanham Act revision implementing TRIPS Article 23(2) did not specifically incorporate Article 22's definition of a Geographical Indication.[8] This has caused some problems. In examining applications for wine and spirits trademarks, the Patent and Trademark Office ("PTO") has ignored the real meaning of "Geographical Indication," which is limited to areas that have some established reputation or association with respect to the wines or spirits in issue, and substituted the concept of "geographical designation," which includes any place name, whether or not associated with wines or spirits. The PTO's Trademark Manual of Examining Procedure, a set of guidelines for trademark examiners, states at § 1210.05 that:

> The examining attorney must refuse registration under Section 2(a) of any geographical designation that was first used in commerce on or in connection with wines or spirits on or after January 1, 1996, if it identifies a place other than the origin of the goods. Section 2(a) is an absolute bar to the registration of these geographical designations on either the Principal or the Supplemental Register.

Thus, under current PTO policy, marks such as PHILADELPHIA, PEORIA, SUN VALLEY or DUBLIN would be refused registration for wines or spirits that do not come from those locations, even though none of them has any established reputation or association with respect to production of wines or spirits. That seems silly, and TRIPS Article 22(1) certainly does not require it. None of these "geographical designations" is a "Geographical Indication" as defined in Article 22. As yet there have been no challenges to this policy in the Trademark Trial and Appeal Board ("TTAB") (an administrative tribunal that reviews trademark examiners' decisions) or the United States Court of Appeals for the Federal Circuit (the court that reviews the TTAB's decisions.) Eventually litigation should correct this policy. If not, it should be changed legislatively.

Surprisingly, while the PTO is applying an overinclusive interpretation of the definition of a Geographical Indication, it somehow let a real violation of Article 23(2) slip through. It permitted the trademark registration of NAPASAKE for sake originating in Oregon (U.S. Reg. No. 2,502,723). The Napa Valley Vintners Association is currently seeking to cancel the registration in a cancellation proceeding in the TTAB. (Cancellation No. 92040757.) Its motion for summary judgment is pending, and should succeed.

VI. Trademark Rights vs. Geographical Indications

What happens when an established trademark in a WTO member country is identical or similar to an established or a newly created Geographical Indication? TRIPS attempted to provide for this in another of the "exceptions" included in Article 24. Article 24(5) provides:

> Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:
>
> (a) before the date of application of these provisions in that Member as defined in Part IV; or
>
> (b) before the Geographical Indication is protected in its country of origin;
>
> measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a Geographical Indication.

This provision attempts to put into practice the principles that no form of intellectual property is inherently superior to another, and that "first in time, first in right"

should apply across IP category lines.[9] In addition, Article 16(1) of TRIPS states that the owner of a registered trademark will have the exclusive right to prevent all third parties from using similar "signs" where such use would result in a likelihood of confusion." This suggests that an existing trademark should preclude the establishment of a new Geographical Indication with the same or a similar name. In one situation involving Chile and the United States, however, these provisions did not work very well for the trademark owner.

SANTA RITA is a trademark for Chilean wine that has been registered in a number of countries, including the US (Registration No. 313,337, registered 11 November 1933), and has been used in commerce in the US since 1883. In 1998, a group of California wineries applied to the US Bureau of Alcohol Tobacco & Firearms ("BATF," now known as ATF) for the establishment of a Geographical Indication, or American Viticultural Area ("AVA") as they are known under US law, called SANTA RITA HILLS. The Chilean trademark owner opposed the application, arguing, among other things, that the designation would conflict with its trademark rights under TRIPS. The International Trademark Association supported the trademark owner in opposing the application. However, the BATF approved the AVA application, taking the position that TRIPS and the Lanham Act established purely private rights that do not restrict the BATF's authority to establish an AVA under the Federal Alcohol Administration Act. The BATF noted that establishment of the new AVA would not necessarily preclude the Chilean producer from using its mark in the US and that the Chilean producer might be able to prevent producers in the AVA from using the new designation on their labels.

BATFs head-in-the-sand position makes little sense, and embarrasses the United States in the world intellectual property community. It should have declined to approve a new AVA that obviously would be confused with an existing trademark. The situation inevitably led to litigation. In *Sociedad Anonima Vina Santa Rita v. United States Dept. of the Treasury*,[10] the court denied the plaintiff's motion for a preliminary injunction, holding that the BATF's determination was not arbitrary and capricious and any claim of infringement was premature because no label actually using the new AVA had yet been approved or used. The court required that the Chilean Santa Rita producer wait until producers from the new AVA began to sell wines with labels indicating the new AVA before suing on claims under the Lanham Act. The plaintiff's claims under TRIPS were not even discussed (although it is not clear whether this was the result of the court's oversight or the plaintiff's failure to argue the claims under TRIPS.)

Given the district court's decision, the prospect of infringement suits by Chilean Santa Rita against any producer in the new AVA that actually used the designation, and (one would assume) the mutual recognition that use of both the trademark and the new AVA would lead to substantial consumer confusion, the parties reached a settlement. Under the settlement, the Chilean winery could continue to use the mark SANTA RITA, and the name of the new AVA was changed to "STA. RITA HILLS." This was not a good result for either the parties or the TRIPS agreement.

Endnotes

1. TRIPS Art. 22(1).
2. TRIPS Art. 22(2)(a).
3. TRIPS Art. 22(3).
4. TRIPS Art. 23(1).
5. TRIPS Art. 24(4).
6. Fortified wines are made by adding brandy or other spirits during the fermentation process. This fortification, among other things, acts as a preservative, and allows for the transportation of fortified wines over great distances in times before modern transport.
7. Agreement Between the European Community and South Africa on Trade in Wine (2002).
8. However, the legislative history makes quite clear that Congress intended to incorporate the Article 22 definition of Geographical Indication. The Senate Report states, "'Geographical Indications' are defined in TRIPs as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. It is intended that this definition will be applied in the context of trademark registration and that a Geographical Indication as used in this provision will be interpreted to comprise only those areas which have a reputation for being associated with the specific goods at issue. Obscure areas or those that do not have a reputation or other characteristic generally associated with wines or spirits should not be prohibited from registration." S. Rep. No. 103-412, 103rd Cong., 2d Sess. 522 (1994).
9. An additional provision of TRIPS Article 24 permits countries to establish a statute of limitations on claims that Geographical Indications interfere with trademark rights. Article 24(7) states that: "A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the Geographical Indication is not used or registered in bad faith."
10. 193 F. Supp. 2d 6 (D.C. Cir. 2001).

Mr. Prutzman is a partner at Tannenbaum Helpern Syracuse & Hirschtritt LLP in New York City.

Appendix

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

   (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

   (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind," "type," "style," "imitation" or the like.[1]

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

   In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24

International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

   In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either *(a)* for at least 10 years preceding 15 April 1994 or *(b)* in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

   (a) before the date of application of these provisions in that Member as defined in Part VI; or

   (b) before the geographical indication is protected in its country of origin; measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

Endnote

1. Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.

Mergers and Acquisitions of Family-Controlled Corporations: A Canadian Perspective

By Richard A. Scott and Catherine Pham

I. Introduction

Family businesses represent a vital economic force in Canada. According to recent estimates, there are approximately one million family businesses in this country, ranging in size and scope from local "mom and pop shops" to large, complex corporations. Of all businesses in Canada, approximately eighty percent are controlled by families and one hundred eighty thousand of these have revenues over $5 million.[1] In 2002, Canadian family businesses generated over forty-five percent of Canada's gross domestic product and over eighty percent of new jobs.[2] More than fifty percent of the Canadian work force is employed in businesses controlled by families.[3]

Ironically, it is the element of family that is both the strength and weakness of the family business. Despite their economic cornerstone status in Canada, fewer than thirty percent of Canadian family businesses survive the transition from their founders to the second generation.[4] A survey of news articles over the past few years reveals no shortage of high-profile Canadian family businesses that have struggled with the difficult issue of succession.

- In the mid-1990s, the co-founding brothers of McCain Foods Ltd., the Canadian frozen food empire, battled bitterly over who should take over the reins of power when they were both gone. The older brother, Wallace McCain, insisted that his son, Michael, should succeed, while Harrison McCain preferred outside management. The fight played out in a New Brunswick court, which ultimately sided with the younger sibling. As planned, Harrison McCain went outside the family to hire a CEO and later installed his nephew, Allison McCain, as deputy chairman and then chairman. Wallace, having been ousted from the company that he helped grow, headed to Toronto, where he took over Maple Leaf Foods Inc. Harrison died in early 2004, the brothers having apparently never reconciled. Wallace and his family still hold approximately a third of the shares of McCain Foods.
- In 1997, after having lost $120 million and after defaulting on a bank loan, Canadian department store retailer, T. Eaton Company Limited, filed for bankruptcy protection and restructured under a plan that called for mass store closings and layoffs. Shortly thereafter, the Eaton brothers made the decision to take the company public. Eaton's issued eleven million shares at $15 each, with the Eaton family maintaining a fifty-one percent stake. But in August 1999, after a series of losses, more store closures and layoffs, the retail giant filed for bankruptcy protection a second time. The Eaton family made an exit when Sears Canada announced it would buy all of the chain's outstanding shares and take over sixteen stores.

As these examples demonstrate, there are a number of ways that Canadian family businesses attempt to deal with the challenges of succession, including installing outside management, selling an interest in the family business, and selling the family business outright. Some families suffer divisive consequences while others transition smoothly. Either way, succession strategies for family businesses often present lucrative investment or acquisition opportunities for outsiders.

Generally, the steps involved in, and the issues related to, the acquisition of a Canadian family business or an interest in a Canadian family business are much the same as they would be if the business were not family controlled. Inevitably; however, there will always be special issues resulting from the fact that the family business is, more often than not, a highly personal affair. In this article we highlight some of these issues from the perspective of a potential purchaser of, or investor in, a Canadian family business.

II. Acquisition of a Canadian Family-Controlled Corporation

The decision to sell the family business outright usually stems from the desire of the family to exit the business for any number of reasons, including the lack of a suitable successor within the family, intra-family fighting, the unwillingness of family members to invest further capital, and external pressures.

Steinberg's, the Quebec grocery chain founded in the early 1900s by Sam Steinberg, was eventually sold by its squabbling second generation owners at the urging of board members. After Sam Steinberg's death, one of his daughters and her husband assumed senior management of the company. Largely inexperienced, the duo led the company on a downward spiral, infuriating family members in the process. The family eventually ended up in court, prompting directors of the company,

for the good of the company, to pressure the family to sell. While the foregoing is an example of failed succession planning resulting in family disharmony and the sale of the business, at times the desire to leave a family business may be because an offer is just too good to resist. Whatever the reason, there are distinctive matters that a purchaser may encounter when acquiring a Canadian family-controlled corporation, some of which are described below.

A. Initial Negotiations

1. Whom to Approach?

Given the sensitivities that may be involved in acquiring the business, careful consideration should be given to whom will be approached initially. Different family members may have very different agendas, and to the extent that these can be ascertained, they should be taken into account. If the corporation is public, consideration should be given to including non-family board members in the initial approach, given that these board members will be aware of their obligation to represent all public shareholders, and not just the controlling family.

2. What is the Family's Vision for the Business Post-Acquisition?

Often a family business represents more than just an economic investment to the founding family members. The family's identity may be inextricably linked to the business. The family may be concerned with the identity and reputation of the purchaser, as well as the purchaser's plans for the business. These issues may need to be addressed before there can be any meaningful discussions on the sale of the business. This is true particularly in the context of a privately held business, where the board and the shareholders may be one and the same, and where no duty is owed to public shareholders.

B. Initial Board Approval

1. How is the Board Involved in Initial Stages?

Before a potential purchaser can be given access to confidential information concerning the business, the board should approve the disclosure of this information and a confidentiality agreement should be entered into. If the business is public, the confidentiality agreement will often include a standstill provision restricting the purchaser's ability to make a public offer for the business without first obtaining approval of the board.

2. How Will the Board Respond?

The board of a privately controlled family company will have far more discretion than the board of a public company to accept or reject an unsolicited approach to commence discussions concerning the sale of the business (especially if each shareholder is also a director). In the case of a public company, once directors are comfortable that the potential purchaser is bona fide, they may feel obligated by their fiduciary responsibilities as directors to carry out preliminary discussions with the potential purchaser.

C. Due Diligence

1. Why Review the Shareholders Agreement?

The affairs of privately controlled companies are often governed by a shareholders agreement. The provisions of any such agreement are extremely important to a potential purchaser, especially if not all shareholders are willing to sell. A potential purchaser of a privately controlled business will typically want to acquire one hundred percent of the outstanding shares of the business and may be forced to rely upon the exercise of a drag-along provision or a shot-gun provision by the shareholders who are willing to accept its offer. The potential purchaser should be comfortable that these provisions exist and are enforceable before committing considerable time and expense to a potential transaction that might otherwise not be feasible.

2. Why Review Non-arm's Length Agreements?

A potential purchaser should carefully review any employment or services agreements between the business and family members. Consideration should be given to whether the purchaser will need the services of these family members going forward, and whether the terms of these agreements are reasonable. Moreover, certain key assets necessary for the continued operation of the business, such as land and buildings or certain intellectual property, may in part be owned by family members.

The termination of these arrangements may be a particularly delicate issue for younger family members who see their careers linked to the family business. The costs of maintaining or terminating these agreements, or acquiring those assets held by family members, should be factored into the price the purchaser is willing to pay for the business.

D. Definitive Agreement

1. What is the Scope of Representations and Warranties?

The purchaser of any business will want the owners to make certain representations and warranties not only about ownership of their shareholdings, but also about the condition of the business. Family shareholders do not usually have an issue with warranting ownership of their respective shareholdings. However, obtaining warranties respecting the condition of the business can be a very contentious issue. Family shareholders who have not been involved in the operation of the business are

often reluctant to provide warranties about the state of the business.

These warranties would typically be given on a joint and several basis by all shareholders. Restricting the number of shareholders giving such a warranty will impact on the ability of the purchaser to recover damages in the event of a breach of the warranty. That is, if only a limited number of shareholders provide a warranty on the business, the pool from which to recover damages will be smaller.

2. What Is the Extent of Shareholder Liability?

Related to the issue of which shareholders will give warranties concerning the state of the business is the issue of "capping" each shareholder's liability for a breach of warranty. Shareholders who have not been involved in the operation of the business often insist on capping their financial exposure to an amount less than the price received for their shares.

3. Will the Founding Family Members Continue to Participate in the Business Post-Acquisition?

The purchaser may require the continued involvement of certain family members to ensure the successful transition of the business to new ownership. Employment or consulting agreements are often structured to ensure that the services of such family members are available. In the public company context, care should be taken to ensure that such agreements are not considered "collateral benefits" intended to give certain shareholders a greater consideration for their shares than is offered to the public shareholders. Such arrangements are prohibited under Canadian securities law.

4. When to Consider a Non-competition Agreement?

If employment or consulting contracts are not part of the deal, the purchaser may insist on a non-competition/non-solicitation agreement from those family members that actively participated in the management and operation of the business. The last thing a purchaser wants is for a family member to start his own business in competition with the business just acquired. Care should be taken to ensure that the terms of the non-competition agreement are enforceable. Both the term and geographic scope of these agreements have received considerable scrutiny from Canadian courts.

The recipient of non-competition payments is also a matter to be considered. In early 2004, Hollinger International Inc. filed a lawsuit against its controlling shareholder, Hollinger Inc., which itself is indirectly owned by Conrad Black, for diverting and usurping corporate assets and opportunities from Hollinger International through "systematic breaches of fiduciary duties" owed to Hollinger International. In particular, the controlling shareholders were accused of pocketing millions of dollars in non-competition payments received by them when they allegedly sold newspapers for less than their fair market value.

III. Acquisition of a Partial Interest in a Canadian Family-Controlled Corporation

Selling a partial interest in the business, by private or public sale, can be an attractive option for a family business. The transaction can be structured to allow the family to address succession issues by providing liquidity to some family members, allowing others to retain an equity interest (and perhaps voting control), while at the same time addressing the capital requirements of the business. By way of example, in 1998, Canadian leather designer, manufacturer and retailer, Danier Leather Inc., completed an initial public offering that enabled most members of the founding Wortsman family to exit the business through the sale of their stock and that raised $27 million of new capital to fund the future growth of the business. The founder's son was able to exercise voting control over the public company through the use of a dual class share structure. But investing in a business in which the family retains a significant interest raises a number of unique issues.

A. The Family Often Maintains Control

The decision of the owners of a family business to sell only a partial interest in the business is often a reflection of the owners' desire to raise capital (for themselves and/or for the business) yet retain control over the business. In the Canadian context, the manner in which control is retained will often depend on whether the business is carried on in a private or in a public corporation.

1. Shareholders Agreements

The use of shareholders agreements is far more common in private corporations than in their public counterparts. Private corporations typically have far fewer shareholders than public ones, making the negotiation and management of the agreement more practical. These agreements will typically set out the manner in which the affairs of the corporation are to be governed. They will deal with matters such as board representation, the sale of shares among shareholders and to third parties and will often provide that certain fundamental issues (such as changes to the corporation's governing documents) will require shareholder approval (often with more than a mere majority of the votes).

Given the relative illiquid nature of a minority investment in a private corporation (because no public market exists for the securities), purchasers of the minority interest will be acutely concerned with the provisions of a shareholders agreement which deal with

the sale of their investment. They will want the agreement to provide a mechanism for them to sell their shares in order to liquidate their investment. This can be achieved in any number of ways, including a "put" to the majority shareholders (which would include a mechanism to determine the sale price), or a covenant on the part of all shareholders to use their best efforts to take the company public within a specified period of time.

2. Dual Class Share Structure

There are many instances in Canada where founding shareholders have retained control over corporations while selling large amounts of equity to the public. The mechanism often used is the dual class share structure. The founding shareholders will usually hold multiple voting shares while the public will be issued either subordinate voting or non-voting shares. The multiple voting shares and the subordinate or non-voting shares will often have the same entitlement to dividends and to the assets of the corporation on its winding up or liquidation. The constituting documents of the corporation will often provide that the two classes of shares are to be offered the same amount in the event of a public take-over being made for the corporation. However, the votes attached to each of the multiple voting shares will allow the holders of those shares to exercise voting control over the corporation notwithstanding that there are far more subordinate or non-voting shares outstanding.

There is no shortage of examples in Canada. Lord Black's seventy-eight-percent-owned Hollinger Inc., through a dual class share structure, controls seventy-three percent of the votes of Hollinger International Inc. while it only owns thirty percent of its equity. At Atco Ltd., which is controlled by the Southern family, classes of voting and non-voting shares, give the founder over eighty-two percent of the votes while holding less than twelve-percent of the equity. Meanwhile, shareholders of Rogers Communications Inc. recently approved a motion increasing the voting rights attached to Class A Shares (the only shares carrying the right to vote in all circumstances) to twenty-five votes per share. Reportedly, the voting rights were changed to provide "maximum flexibility" to the Rogers family in relation to personal and estate arrangements. Ted Rogers, the founder, President and CEO and a director of Rogers Communications, through voting and non-voting shares, has over ninety percent of the votes and about thirty-two percent of the equity. At Magna International Inc., voting shares are divided into two classes. The Class A Subordinate Voting Shares, of which there are approximately ninety-five million issued and outstanding, entitle holders to cast one vote per share, while the Class B Subordinate Voting Shares, of which there are approximately one million issued and outstanding, entitle holders to cast five hundred votes per share. Over seventy-five percent of the Class B Subordinate Voting Shares are controlled by the Stronach family which, among other things, has allowed the family to dictate the composition of management. The founder's daughter, for instance, served as Magna's President and Chief Executive Officer before she left the company to pursue a political career.

B. Governance Issues

1. Governance of Private Corporations

Governance in private corporations is largely a function of what the various shareholders negotiate among themselves. Governance matters will typically be dealt with in the shareholders agreement, which in its most basic form will address only the number of directors on the board that each shareholder is entitled to nominate. Private corporations in Canada are not subject to regulation by stock exchanges and the provincial securities commissions which have mandated certain basic governance requirements for public corporations in Canada.

2. Governance of Public Corporations

A 2002 *Globe and Mail* review of the boards and governance practices of two hundred seventy public companies indicated that family-run companies are among the worst performers on the corporate governance front.[5] The major complaint about family-run companies is the lack of independent board members and democratic shareholder structures. Not surprisingly, there are strong views on both sides of the debate over whether family-run corporations should be held to the same standards of corporate governance as other public companies:

- Paul Desmarais Jr., the chairman and co-CEO of Power Corporation of Canada, has been vocal in his view that the push for independence in the board room is "confused with the notion that independence from management and the controlling shareholder is synonymous with excellence and integrity."[6] Control over the composition of the board, after all, is one of the incidents of majority ownership. And while Cara Operations Limited was still a public company, Gail Regan made no apology for her family's control of fifty-three percent of the total shares, but eighty percent of the vote.[7] In other words, "If you don't like our governance, don't buy our shares."
- Shareholder advocates, on the other hand, argue that, while family-run companies have the right to put close relations on the board, they also have an obligation to protect outside shareholders.[8] The problem with family-run companies, they say, is that, despite the transition from private to public company, the controlling family continues

to treat the company as its own without regard to the fact that it is now asking for the money and trust of the public.

As is the case in the United States, the regulation of corporate governance practices in Canada is in a state of evolution. Currently, companies listed on the Toronto Stock Exchange are required to disclose annually their approach to corporate governance with reference to the Toronto Stock Exchange's fourteen recommendations of "best practice guidelines." In the future, all Canadian public companies will have to disclose how their corporate governance practices measure up to those recommended by Canadian securities regulators. Recently, the provincial securities commissions proposed a new policy with respect to basic corporate governance standards, which suggests, among other things, that:

- the board should have a majority of independent directors;
- the chair of the board should be an independent director;
- the board should schedule meetings at which members of management are not in attendance; and
- the board's nominating committee and compensation committee should be composed entirely of independent directors.

While the policy is not meant to be prescriptive, public companies will be required to provide justification for any variation from these guidelines in their public disclosure documents.

According to a 1999 Deloitte & Touche study of Canadian family businesses, only one-third of family businesses believe it is important to keep the business in the family. That suggests that, while the wealth accumulated in the business may be transferred to the next generation eventually, it is not certain that the business as a going concern will be.[9] At the same time, family businesses with plans for expansion will inevitably consider their options for raising capital. Both of these scenarios present opportunities for the outside investor or potential purchaser.

Endnotes

1. Deloitte & Touche, *Are Canadian Family Businesses an Endangered Species? The First Success Readiness Survey of Canadian Family-Owned Business* (1999), online: The Deloitte & Touche Centre for Tax Education and Research <http://watarts.uwaterloo.ca/ACCT/tax.html>.
2. The Canadian Chamber of Commerce, *Inter-generational Transfer of Qualified Small Business Shares* (2002), online: The Canadian Chamber of Commerce < http://www.chamber.ca/croslib/general/F027.pdt>.
3. *Id*.
4. Martin, *Families fumbling Business Hand-offs: Only 30% succeed*, NATIONAL POST, 28 August 2004, 1NI/Front.
5. See Nguyen, *Board Games: Family Business*, TORONTO GLOBE AND MAIL, 8 October 2002, at page B7.
6. Marotte, *Desmarais defends Family-Ruled Firms*, TORONTO GLOBE AND MAIL, 16 May 2003, at page B3.
7. Pitts, *Cara Executive provides Food for Thought*, TORONTO GLOBE AND MAIL, 10 June 2002, at page B2.
8. See Nguyen, note 5 *supra*.
9. See Deloitte & Touche, note 1 *supra*.

Richard A. Scott is a partner and Catherine Pham is an associate at the Canadian law firm of Fraser Milner Casgrain LLP.

The Chilean Environmental Protection System

By Juan Irarrázabal and Guillermo Zavala

I. Introduction: The Sources of Environmental Protection Rules

The Chilean environmental protection system is set out in a number of sources, including in the Chilean constitution and in legislation and regulations.

A. The Political Constitution

The Political Constitution contains an article securing to all persons the right to live in an environment free from pollution.[1] It is the constitutional duty of the government to see to it that this right is not infringed and to preserve nature. Legislation may be enacted to impose specific restrictions on the exercise of certain rights or liberties, so that the environment can be protected.

This constitutional right of every person to live in an environment free from pollution creates both private and governmental rights of enforcement, including in the latter instance in the form of legislative, administrative, judicial and fiscal action.

This right is acknowledged as connected to and as a form of protection of the right to life of all persons.

Only natural persons enjoy this environmental right; legal persons, such as corporate entities, are not entitled to this right.

B. Legislation

Law 19,300 of 1994, known as the Chilean Law of Environmental Basis *(Ley sobre Bases del Medio Ambiente)*, implemented environmental protection at the level of legislation. This law sets out principles which are to guide all aspects of environmental regulation, including the system of assessment of environmental impact; community participation; standards for environmental quality and preservation of nature; standards of emission; plans of operation, prevention and decontamination; responsibility for environmental damage; environmental control; environment protection fund; and the creation of environmental agencies, including national and regional environmental commissions.

Law 19,300 establishes an exclusive procedure for all environmental permits, within the framework of a system of environmental impact assessment, by means of a "one window" administrative procedure, where all governmental agencies (health, agriculture, forestry, mining, public works and others) coordinate and exercise their specific competence in order to review the merits and either approve the general environmental permits or prepare for the subsequent approval of the specific environmental permits. This system of environmental assessment enables the regulators (i) to measure with certainty, within one single procedure, the environmental risks and damages which may be caused by a project or activity; (ii) to establish appropriate measures to mitigate or repair such damage; and (iii) to control the terms and conditions of the permits.

By means of other instruments of environmental management (such as standards of environmental quality and decontamination plans) the government oversees the preservation of nature, setting forth such restrictions as are necessary to preserve natural resources, to avoid levels of pollution which may constitute a danger to human health, and, also, to enable environmental cleaning in situations where pollution has exceeded tolerable levels or in cases where environmental degradation has been verified.

Law 19,300 exclusively sets forth the general basis of environmental protection rules, and thus coexists with a huge number—more than ninety—previous laws and decree-laws related to environment which are more specific.

C. Regulations

Most of the rules on environmental protection are found at the level of regulations. Pursuant to Law 19,300, it is at this regulatory level that there are primary and secondary norms for environmental quality, as well as standards of emission, to be established.

At the time when Law 19,300 was enacted, in 1993, there existed more than six hundred governmental decrees or regulations on environmental matters. These are being gradually replaced by a more orderly system, grouped around primary and secondary norms of environmental quality and standards of emission.

Regulations on primary norms for environmental quality establish the maximum or minimum values of concentrations and periods of time permitted for elements, compounds, substances, chemical or biological by-products, forms of energy, radiation, vibration, noise or combination of these, whose presence or absence in the environment can constitute a risk to the life or health of the population.

Regulations on secondary norms for environmental quality establish maximum or minimum values with reference to risks to the protection or conservation of the environment or to the preservation of the natural environment.

Finally, regulations on standards of emission establish the maximum permissible quantity for a contaminant, measured by its emitting effluent.

D. Administrative Jurisdiction

In Chile there exists no public administrative agency having total jurisdiction over all environmental matters, as would be the case with a ministry or other agency with similar characteristics.

Law 19,300 sets out that each of the public administration agencies that participates in the system of environmental impact studies is to use its legal authority to supervise the compliance with the standards and conditions upon which the environmental impact study (EIS) has been approved or the environmental impact declaration (EID) has been accepted.

The constitutional duty which the government has to protect the environment is delegated to various agencies, among others (i) the National and Regional Commissions on Environment (CONAMA and COREMA), which approve the EIS or accept the EID; (ii) the Ministry of Health, through its health public services in matters connected to human health; (iii) the Ministry of Agriculture, through its services in matters connected to land, soil and forestry protection; and (iv) the Ministry of Mining, through its national Service of Geology and Mining in matters related to mining exploration and exploitation.

II. Key Definitions

A. Definition of "Environment"

Law 19,300 defines the "environment" as the global system comprised of natural and artificial elements of a physical, chemical, biological, or sociocultural nature and their interactions, permanently modified by human or natural actions that limits and conditions the existence and development of life in its multiple manifestations.[2]

B. Definition of "Environment Free of Contamination"

An environment free of contaminants is an environment in which the contaminants that exist are in concentrations that are less than those susceptible to causing risk to human health, to the quality of life of the population, to the preservation of nature or to the conservation of the environmental resources.[3]

C. Definition of "Contamination"

"Contamination" is defined as the presence in the environment of substances, elements, or forms of energy, or a combination of these, in concentrations, or a combination of concentrations and duration, greater or lesser, as applicable, to those established in the legislation in force.[4]

D. Definition of "Contaminant"

"Contaminant" is defined as every element, compound, substance, vibration, or noise, or combination of these, whose presence in the environment at certain levels, concentrations or periods of time can cause a risk to human health, the quality of life of the population, the preservation of nature or the conservation of the environmental resources.[5]

E. Definition of "Environmental Damage"

"Environmental Damage" means every loss, diminution, detriment or significant lessening of the environment or one or more of its components.[6]

F. Definition of "Restoration"

"Restoration" is the action of replenishing the environment or one or more of its components to the quality similar to that which existed prior to the damage or, if that is not possible, to re-establish its basic characteristics.[7]

III. Environmental License and Permits

A. General License or Declaration of No Environmental Impact

Law 19,300 establishes a system of assessment of environmental impact, where owners of projects or activities of types which are included in a list and which may have significant environmental effect must prepare a study of environmental impact (EIS) or present a declaration of environmental impact (EID) stating that no significant environmental effect can be reasonably predicted. Such owners must obtain from the Regional Environmental Commission or the National Environmental Commission, as appropriate, a license approving such EIS or an acceptance of the EID stating that no study is required.

Sectorial environmental permits are to be obtained within the system of assessment of the environmental impact, if the project or activity requires the approval of an EIS. This permit approval system operates as a "one-window" procedure, thus streamlining the process of approval of such permits which are granted together with the favorable assessment of the EIS. But if the project or activity does not require an EIS but only an EID, then the owner must file permit applications with each competent public agency, with the attendant burden of separate assessments of the merits of each application.

The Chilean system of environmental licenses and permits has a preventive orientation: it is structured to foresee in advance possible environmental damages in order to avoid them or, if that is not possible, at least to lessen their effects. This is why prior to the start-up of a project or activity subject to the license and permit system, an assessment of its environmental impact is

required, concluding with an authorization or general license granted by the COREMA (the regional branch of CONAMA), thus if such license is refused, the project or activity cannot be implemented and all sectorial governmental agencies are precluded from granting sectorial environmental permits.

The general environmental license is granted to the specific project or activity, and is not a right or concession in favor of a specific applicant. Consequently, the acquisition of the controlling share capital or assets of a corporation developing the licensed project does not mean a new environmental license must be requested. However, the environmental public agency will need to be informed of the transfer by the new owners of the project.

B. Environmental Sectorial Permits

Regulation Nº 30 of 1997, which regulates the environmental impact system, contains the terms and conditions of the environmental sectorial permits. The Regulation lists thirty-nine permits,[8] but many of them are not applicable to any one particular project.

Among those permits which would be relevant to the construction of a petrochemical plant, for example, are the following:

- A permit to build, modify and expand any public or private facility for the discharge, treatment and final disposal of industrial wastes.
- A permit to build, modify and expand any public or private facility for the discharge, treatment or final disposal of drains or sewage of any kind.
- A permit for the construction, modification, and expansion of any plant used for treating any type of garbage or waste products.
- A permit to divide and urbanize rural lands in order to complement any industrial activity with housing, equip a rural area, and for industrial construction outside of the urban limits.
- A permit for the installation, expansion or relocation of industries which may have effects on the health of the population.
- A permit to throw ballast, debris or garbage and spill oil or its by-products or wastes, tailing wastes of minerals, or other hazardous substances of any kind that damage or harm water protected by national jurisdiction, into ports, rivers and lakes.
- A permit to discharge water containing oily mixtures from a land treatment plant for the reception of oily mixtures.
- A permit to install and operate an ocean terminal and the pipelines for the transportation of contaminating substances, or those liable to contaminate.
- A permit to empty or discharge materials, energy or hazardous substances of any kind, which will result in damage or harm to the water, flora and fauna.

The resolution containing the general environmental license, with the approval of the EIS, will be the sole prerequisite to obtain promptly the environmental sectorial permits from the sectorial public administration agencies which have competence or jurisdiction over the subject matter of such permits.

IV. System of Environmental Impact Assessment

A. Environmental Impact Study and Environmental Impact Declaration

Law 19,300 establishes the need to carry out a prior assessment of the environmental impact of the projects or activities listed in the law.[9] Included in this list are industrial plants (whether metallurgical, chemical, textile), producers of construction materials, metallic equipment and products of industrial dimensions.

As noted above, the listed activities are subject to an assessment of environmental impact either through the Environmental Impact Study (EIS) or through an Environmental Impact Declaration (EID).

Article 11 of Law 19,300 establishes which projects or activities, among those listed, require an EIS.[10] The project has to present at least one of the following effects:

- Risk to the health of the population.
- Significant adverse effects to the quality and quantity of renewable natural resources, including soil, water and air.
- Risk to human communities or the significant alteration to the lifestyles of and usages by human groups.
- Proximity to the population, resources or protected areas susceptible to being affected, as well as the environmental value of the territory in which it will be located.
- Significant alteration, in magnitude, timing or duration, to landscape values or tourism of any zone.
- The alteration of monuments, a site with anthropological, archaeological, or historical value or, in general, those pertaining to the national culture.

Owners of projects not having at least one of the effects stated above are required to present an Environmental Impact Declaration (EID), describing the activity or project which is intended, with a sworn declaration which states that the project or activity complies with existing environmental legislation and regulations and that it will have none of the effects listed in Article 11. The information provided in the EID will be reviewed by the authority to assess whether the EID is acceptable. The acceptance of the EID is a prerequisite to be fulfilled prior to commencement of the planned project or activity, notwithstanding the need to obtain other sectorial environmental permits, as applicable to the specific project.

As for the example of a petrochemical plant project, its construction would fulfill both criteria on activity eligibility for impact assessment and the possibility of having at least one of the environmental effects which triggers the request for an EIS.

The EIS must include the following: (i) a detailed description of the project activity; (ii) a baseline; (iii) a description of those effects listed in Article 11 that will give rise to the necessity of an EIS; (iv) a prediction and evaluation of the environmental impact of the project or activity including potential risks; (v) measures to minimize adverse impact and restoration activities when appropriate; (vi) a list of the environmental variables which give rise to the EIS; and (vii) a plan for complying with applicable environmental legislation.

The EIS is presented to the Regional Environmental Commission (COREMA), which has a period of one hundred twenty days within which to issue its resolution approving or rejecting the EIS.

B. Main Stages in the EIS License Procedure

The main stages in the EIS procedure are the following:

1. The project owner files a formal application for the environmental license, accompanied by the EIS with all relevant documents and information, as well as an abstract of the EIS containing all essential data.

2. The abstract of the EIS is published in a newspaper of national circulation, within ten days following the filing of the formal application, to enable the participation of the community in the procedure of evaluating the environmental impact.

3. An analysis of the EIS is undertaken by the environmental agency COREMA and by the sectorial public administration agencies who participate in the system of assessment within the same COREMA. There is also a review of the EIS by legal entities and individuals from the community which are directly affected by the project. Where applicable, there is a public hearing.

4. Reports from the sectorial public administration agencies who participate in COREMA are issued, and comments from legal entities and individuals from the community which are directly affected by the project are filed.

5. A consolidated report is issued by the authority, requesting clarifications, rectifications and expansions or changes arising out of the assessment process.

6. Addenda are filed by the project owner/applicant covering matters requested pursuant to the consolidated report, followed by new definitive sectorial reports from public administration agencies.

7. The process of assessment concludes with a resolution from COREMA that environmentally assesses the project or activities. Notice of the resolution is given to the relevant public administration agencies and to the applicant. The EIS license application is either approved or rejected. If the resolution is favorable, it will certify that it complies with all applicable environmental requirements, including eventual works of mitigation and restoration, and no public administration agency may refuse the applicable environmental sectorial permits.

C. Follow-up and Monitoring of Licensed Project

Chilean law does not empower COREMA to carry out a follow-up or monitoring program in connection with licensed projects in order to assess environmental problems or damages not envisioned in the EIS which may appear after the EIS has been approved. To cover this statutory shortcoming, the COREMA usually includes among the terms and conditions of the resolution approving the EIS an obligation of the project owner to disclose to the environmental authorities any unforeseen problems or damages that may appear during the development or operation of the licensed project or activity.

However, COREMA does not have the right to examine and monitor compliance with those terms and conditions it imposes in the EIS license.

D. Administrative Remedies

If the resolution of the COREMA agency rejects the EIS or sets forth certain terms or conditions of an EIS that the applicant finds unacceptable or inappropriate, the applicant may file an appeal before the Board of Directors of the National Environmental Commission (CONAMA).

In addition, if the COREMA rejects the applicability of an EID as stated by the owner of a project and instead requests an EIS, the applicant may file an appeal before the Executive Director of CONAMA.

The applicant must file these remedies within thirty days after the date of notification of the objectionable resolution.

If these administrative remedies are not accepted by the competent authority (Board of CONAMA or Executive Director of CONAMA, as applicable), then the applicant can file a judicial appeal before the competent ordinary judge within thirty days after the date that the administrative remedies were denied.

V. Judicial Oversight and Control

Judicial oversight and control exists not only in cases where administrative remedies are not accepted.

Ordinary courts also may intervene in environmental matters to protect the constitutional right of all persons to live in an environment free from contamination. This right may be asserted before the ordinary courts by means of a special recourse of protection to be filed directly before the Court of Appeals, and also by means of ordinary claims of general annulment, public law annulment, and special environmental claims to obtain compensation or repair of damage pursuant to Law 19,300.

Additionally, and in connection with damages caused to third parties due to contamination, obtaining repair of the damage or compensation, subject to the general rules on extra contractual liability, is available by means of an ordinary lawsuit before a civil judge.

In sum, there exist in Chile various means of judicial oversight and control which help to prevent environmental damage or to stop its effects.

VI. M&A Transactions

A. Generally

According to Chilean law, liability for environmental damages and for environmentally injurious conditions rests on those individuals or companies which negligently or by willful misconduct have caused the damage, or have caused the activity, or maintained the environmental condition. Responsibility for repair or compensation rests on the person or party who owns the project or activity causing such environmental damage, actions or condition.

Banks and financial institutions providing financial resources to such project owners have no environmental liability under Chilean law, since such financing is not considered as causing the damage or condition.

Liability rather is focused on the project owner, and for that reason the acquisition of such project owner must be preceded by environmental due diligence, particularly if the purchase consists in the acquisition of controlling shares or controlling equity participations in the stock corporation or partnership owning the project.

B. Succession of Environmental Liabilities

According to Chilean law, environmental liability rests on the project owner. But according to general rules of civil and corporate liability, such liability does not extend to its shareholders or partners. Consequently, only the project owner, and not the assets of its shareholders, is subject to environmental liability.

This rule remains applicable even if the project owner's assets are insufficient to cover all the costs of the environmental repair. Neither a US company owning the Chilean project owner nor the affiliates of the same have any environmental liability for the Chilean project or activity. Rather, only the assets of the Chilean project owner are liable to cover the same.

The acquisition of a Chilean project owner by a US company does not entail a legal change as to who is the responsible party for environmental matters. The environmental liability is maintained in the project owner. If the acquisition were made through an amalgamation of one company with the other or by means of a merger of companies, the company which in the end remains as the operating project owner will have acquired all the rights and obligations of the original project owner and for this reason it would bear all environmental liabilities.

Contractually, in a merger or acquisition transaction the parties may agree upon indemnities and compensations to cover environmental liabilities. But as far as the authorities or environmentally affected third parties are concerned, these contractual arrangements have no legal effect.

C. Environmental Due Diligence

In view of the above, we recommend undertaking an environmental due diligence before entering into any M&A transaction.

This would include an assessment of the project by a specialized environmental firm, together with specialized legal assistance, the scope of which should not only include verifying whether the general environmental license and all the sectorial environmental permits have been obtained, but also the following: (i) the fulfillment of the terms and conditions of the approved EIS as set forth in the general license and in the sectorial permits; (ii) compliance with regulations on primary and secondary standards for environmental quality; (iii)

compliance with regulations on standards of emission; and (iv) current or potential liabilities/contingencies, including but not limited to existing and potential lawsuits and an assessment of possible costs of repairs and compensation.

The following information is relevant for the environmental due diligence and should be required from a seller:

- Information on the EIS.
- Information necessary to establish what are the environmental rules applicable to the specific plant and information necessary to assess the fulfillment of such rules.
- Information and authorization for the use of hazardous, toxic, inflammable or corrosive materials, as well as information on the equipment and elements which contain them and any withdrawal or renewal to be carried out.
- Information on and evidence of authorization to discharge, treat, transport and dispose of industrial wastes and drains or sewage of any kind, including hazardous materials, as well as detail on possible breaches of legal obligations and administrative sanctions.
- Information on past environmental conditions or liabilities, and on those which may occur in the future.
- Information on installations or real estate of the project owner which may have a special environmental treatment (for managing hazardous materials, for location in protected areas, or for other reasons).
- Copies of authorizations, licenses and permits, issued by all public administrative agencies and municipalities, for the operation of the plant and installations of the project owner.
- Information on fulfillment of the status of applicable environmental rules and environmental audits carried out by the project owner, if any.
- Information on the existence of breaches of legal obligations, fines, summary investigations, claims and requests from public authorities, past or present judicial proceedings, and information on the existence of possible claims, demands or petitions from members of the neighboring community against the plant or installations of the project owner.
- Information on past environmental accidents or events which may justify the exercise of environmental claims or damage compensations.
- Reports on the existence of pending environmental liabilities, such as contaminated soil, hazardous material, which have not been finally disposed of in conformity with applicable rules and permits.
- Any information on environmental matters which is of substance for the future stability and operations of the project owner and which may affect its assets.

VII. Environmental Liability

A. Civil Liability

Under Chilean environmental legislation, there is no strict or vicarious liability.

Law 19,300 deals with environmental damage, stating that whoever causes environmental damage, acts negligently or engages in infringement or willful misconduct will be liable for such damage.[11]

Environmental civil liability is subject to the four classic principles on liability: negligence or willful misconduct; damage; causation; and legal capacity.

1. **Negligence or willful misconduct.** Civil negligence, as well as environmental negligence, refer to not fulfilling a general duty of care. On the other hand, Law 19,300 provides that infringement or violation of laws or standards constitutes a presumption of negligence and therefore responsibility. This negligence by infringement refers precisely to breach of standards on environmental quality, the standards of emission, the plans of prevention and decontamination, the special rules on cases of environmental emergency, or the rules on preservation of nature and the conservation of environmental resources established in Law 19,300 or in other special laws or in regulations.
2. **Causation.** There must exist a causal relation between the act or omission and the damage. There must exist a relation of illegality, of infringement or violation of the rules, whereby the damage can be attributed precisely to such infringement. Consequently, a right of compensation will only arise if a cause-effect relationship can be established between the infringement and the damage produced.
3. **Damage.** Environmental damage is all loss, diminution, detriment or significant lessening of the environment or one or more of its components. The legislation, as a general rule, entrusts the judge with the role of establishing the existence and amount of damage. There are no limits to the amount the judge may award to cover the

costs of repair of the damage, or of an indemnity, although court practice has been usually reasonable in establishing liability amounts.

4. **Legal Capacity.** Environmental claims can be filed by individuals, companies, other legal persons (private or public), municipalities, and public administrations or the government. Once a claim has been filed by any of these persons or entities, other persons may not file a new claim on the same case, but rather can only intervene in the pending lawsuit as interested third parties.

Chilean legislation requires that only persons suffering damage are entitled to file an environmental claim. There is no general action for persons or entities which are not directly affected by the environmental damage. Nor does there exist a class action for environmental liability. Law 19,300 does not interpret a special action in favor of the government or public administration, which, if affected by the environmental damage, would be entitled to enjoy the same status and the same action rights as private parties.

Finally, Law 19,300 establishes the possibility that individuals or private parties may denounce, before the competent municipality, any activities which may cause damage to the environment. In such cases, the municipality may file a judicial claim within forty-five days, or, alternatively, issue a statement refusing to file a claim and expressing the reason for this.

There is a five-year limitations period for bringing an action for civil liability.

B. Criminal Liability

Chilean environmental legislation does not establish special rules for criminal liability. This does not mean that environmental damage may not be sued criminally, but for this to happen it is necessary that the case of environmental damage or contamination becomes covered by any of the traditional criminal violations regulated by the Chilean Criminal Code. For example, a case of damage caused to a person due to contamination may be prosecuted criminally if such damage is the result of using poisoned or corrosive materials, or if, due to the contamination of waters, the result is the illness or death of a person.[12]

A criminal action must be brought within a period of five years from the date the crime was committed, if the crime has a penalty of three years of imprisonment or less, or within a period of ten years if the crime has a greater penalty.

C. Administrative Liability

The Environmental Agencies CONAMA and COREMA have the power to impose fines and other administrative penalties to project owners subject to EIS assessment, such as the ownership of a petrochemical plant, in cases where an administrative or legal environmental infringement is committed. An administrative infringement is any violation of Law 19,300, its regulations, and the EIS approval terms and conditions.

Administrative sanctions include:

- Warnings.
- Fines of up to 500 monthly tax units (approximately US $22,000).
- Revocation of the EIS approval license.

These sanctions are imposed on the project owner who is directly responsible for the damage caused to the environment.

There is a two-year limitations period on the enforcement of this type of administrative liability.

Endnotes

1. Article 19 N°8 of the Political Constitution of 1980.
2. Article 1, item l of Law 19,300 / 94.
3. Article 1, item m of Law 19,300 / 94.
4. Article 1 item c, Law 19,300 / 94.
5. Article 1, item d, Law 19,300 / 94.
6. Article 1, item e, Law 19,300 / 94.
7. Article 1, item s, Law 19,300 / 94.
8. Articles 68 through 106, Regulation N°95 / 2002.
9. Article 10, Law 19,300 / 94.
10. Article 11, Law 19,300 /94.
11. Articles 51 through 62, Law 19,300 / 94.
12. Articles 485, 315 and 317, Criminal Code of Chile.

Juan Irarrazábal and Guillermo Zavala are partners with the law firm of Philippi, Yrarrazaval, Pulido & Brunner, Abogados, Ltda., in Santiago.

The Brazilian Environmental Perspective

By Valdo de Rizzo

I. Background

Let us suppose that a US company wishes to establish a presence abroad, either through the construction of, or the acquisition of, a business whose manufacturing process involves the use of various materials and the subsequent disposal of the waste products related thereto. These wastes under US law would be considered to be hazardous.

In this article, we will address the environmental issues as a matter of Brazilian law in relation to the construction or acquisition of a petrochemical plant.

II. General Overview on the Brazilian Environmental Protection Rules

A. The Legal Framework

The Brazilian Environmental Protection System is set out in a number of sources, including the Brazilian Federal Constitution[1] and federal, state and municipal legislation.

1. The Federal Constitution

The Federal Constitution contains a specific chapter placing a series of obligations on the Government in regard to the environment, including: i) the protection and preservation of an ecologically-balanced environment; ii) providing education at all levels in respect of the environment; iii) establishing specific environmental protection areas; and iv) producing environmental impact reports in relation to the establishment of any business, operation or activity that may have a detrimental impact on the ecological system.

The Brazilian Constitution also confers powers upon the federal, state and municipal governments to enact environmental protection legislation.

2. Legislation

Law No. 6.938, of 31 August 1981 ("Law No. 6.938/81"), known as the Brazilian Environmental Policy (*Política Nacional do Meio Ambiente*), implemented environmental protection at the federal level. Law No. 6.938/81 seeks to enforce environmental protection through the establishment of principles, concepts and guidelines, specifying certain permissible activities and residues/waste. However, the central concept is that of strict liability: to ensure that where such waste actually causes damage to the environment, the defaulting party is liable, regardless of whether such activity is tolerated under any principles or guidelines. Such strict liability means in practice that the industry as a whole bears all the risks related to the activities involved.

Law No. 6.938/81 also created the National System for Environment (*Sistema Nacional do Meio Ambiente*—"SISNAMA"), establishing those agencies responsible for, and their respective duties in regard to, the protection of the environment at all governmental levels. Creation, regulation and enforcement of the rules to protect the environment are among these duties and further include the authority to grant authorizations, permits and licenses, as well as granting powers of inspection and the power to enforce penalties.

Law No. 6.938/81 defines the "environment" as the natural conditions and influences and the interaction of physical, chemical and biological nature which enables, protects and governs life in all of its forms.[2]

The concept of pollution is also set out in Law No. 6.938/81. "Pollution" is the degradation of the environment as a result of activities that either directly or indirectly (i) cause damage to the population's health, security and well-being; (ii) have an adverse effect on social and/or economic activities; (iii) adversely affect the fauna and flora; (iv) affect the aesthetic or conditions of sanitation; or (v) result in any discharge, substance, or energy that contravenes the established environmental standards.[3]

A "polluter" is an individual or legal entity, of public or private law, directly or indirectly responsible for activities that cause degradation of the environment.[4]

Finally, it is important to mention Law No. 9.605 of 12 February 1998 ("Law No. 9.605/98"), which regulates environmental crimes and punishments. This legislation is unique, since it is the first piece of Brazilian legislation to hold legal entities criminally liable, in this case, through the imposition of fines or substantial restriction of rights.

B. Environmental Protection

The Federal Constitution sets out that the public administration has the duty, and the community has the right to demand, the protection of the environment in order to guarantee the quality of life.[5] In addition, the public administration is also responsible for regulating existing legislation, ensuring compliance, and establishing any rules and standards necessary to achieve an ecological balance.

The administrative jurisdiction in regard to environmental issues is jointly held by the federal, state and municipal governments.

SISNAMA consists of a number of agencies and entities at the federal, state and municipal government

level, as well as foundations created by the public administration. Their main structure is composed of the following.

1. Government Council (Higher Agency)

The Governmental Council, which was to assist the President of the Republic in the preparation of a national environmental policy and governmental guidelines for the environment and environmental resources, was never established. Its role is currently performed by the National Council for the Environment (*Conselho Nacional do Meio Ambiente*—CONAMA).

2. CONAMA (Advisory and Decision-Making Agency)

CONAMA is in practice the highest agency of SISNAMA. It has both an advisory role and a policymaking role in regard to rules and standards for achieving an ecologically-balanced environment and a better quality of life for the population as a whole.

3. Ministry of the Environment (Central Agency)

The Ministry of the Environment plans, coordinates and controls both the national environmental policy and the governmental guidelines established for the environment. It is led by the Environment Minister, who also supervises CONAMA.

4. Brazilian Institute for the Environment and Renewable Natural Resources (*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis*) (IBAMA) (Enforcement Agency)

IBAMA is responsible for the enforcement of CONAMA's resolutions and policies in regard to the maintenance, preservation and sustainability of natural resources.

5. Sectional Agencies

Sectional agencies are state agencies or entities, established by law, with the duty to protect the environment, guarantee and improve the quality of the environment, and inspect and control any activities that may either potentially or actually harm the environment. In certain states (e.g., São Paulo and Rio Grande do Sul) such agencies are very strong and well organized.

6. Local Agencies

These are municipal agencies and entities responsible for the management of the environment in respect of their territory and are limited to the scope of that territory's jurisdiction.

III. Licenses and Permits

Environmental licenses and authorizations are the main instruments employed to protect the environment. At the same time, they aim at reconciling economic development with environment preservation. Upon enactment of Resolution No. 237/1997, CONAMA defined the environmental license as an administrative act by which the conditions, restrictions and environmental control measures in regard to an activity are established.

Any entity that carries on an activity that may potentially cause damage to the environment must obtain a license as granted by the public administration. As set out in Article 10 of Law 6.938/81, any construction, installation, expansion and operation of establishments and activities that use environmental resources, which can be considered to either potentially or actually pollute, as well as those establishments and activities that can, in any form, cause environmental degradation, will be dependent upon first obtaining a license from the competent agency.

Any acquisition of the controlling share capital of a corporation or of its assets does not mean a new license must be requested. However, the authority will need to be informed of the acquisition in order to transfer the license to the new party controlling the plant and also, if there is any change to the installation in question or in the activity for which a license has already been granted, a new license application request may be made to the competent environmental authorities. It is advisable to consult with the environmental agency to confirm whether the change to the installation or the activity will need to be preceded by a new license or by an amendment of the existing licenses.

A. Types of Licenses

There are three types of licenses, each one corresponding to a particular phase of a project.

- Prior License ("PL"). A PL is granted for the preliminary planning phase of any project. It requires basic conditions to be met in relation to the location, installation and operation phases of the project, along with the due adherence to federal, state or municipal plans for the use of the land.
- Installation License ("IL"). An IL authorizes the actual installation and implementation of the project in accordance with the specifications set out in the previously approved implementation project plan.
- Operation License ("OL"). After the necessary verifications, an OL authorizes the actual activity for which the license is sought and also the operation of the project's pollution control equipment, as were established in the respective PL and IL.

The activities involving (i) utilization of water and/or (ii) deforestation of a certain area, (such as agri-

cultural activities, timber operation and cattle raising), require the acquisition of a special permit from municipal, state or federal environmental authorities, as the case may be.

B. Procedure for Obtaining Licenses

CONAMA regulates the licensing process and sets out the list of activities or projects that require an environmental license. It is important to note that the list is not exhaustive, and the environmental agency will evaluate other projects on a case-by-case basis to determine whether the project in question must obtain a license.

1. Jurisdiction—Who Is Empowered to Grant Licenses?

CONAMA Resolution No. 237/1997 also determines which authority (federal, state or municipal) is responsible for granting the relevant license. As such, environmental licenses are granted as follows:

- by the Union, if the activity involves two or more states;
- by the state, if the activity involves two or more cities or state-protected areas; and
- by the municipalities, if the activity involves only one city.

There are some critics who believe CONAMA Resolution No. 237/1997 is unconstitutional on the ground that Law 6.938/81 only gives the authority and jurisdiction to issue environmental licenses to the federal and state agencies, and not the municipal agencies. However, others argue that the CONAMA Resolution is not limited in its jurisdictional reach because the Brazilian Constitution provides concurrent jurisdiction to all of the agencies (i.e. at the union, state and municipal levels).[6]

For this reason, it is advisable to consult with the environmental agencies on a case-by-case basis about whether it is necessary to request a license. As discussed above, this is especially important at the municipal level (if the Municipality has an agency with jurisdiction to grant licenses) and the state agency level, if the activity does not involve more than one state.

2. Main Licensing Stages

The main stages in obtaining a license are as follows.[7]

- Initial assessment of the project by the relevant environmental agency, in conjunction with the applicant for the license, including an initial review of the relevant environmental documents and project plans necessary to start the corresponding licensing process for the license requested.
- Formal application for the environmental license by the applicant, to be accompanied by all relevant environmental documents, project plans and assessments, with subsequent public disclosure of the license application being made.
- Analysis by the environmental agency of the environmental documents, project plans and assessments submitted, plus any technical inspections where necessary.
- A single request for clarification and further information by the competent environmental agency may be made as a result of the analysis of the environmental documents, project plans and assessments submitted. The environmental agency may reiterate the request where it believes such request has not been satisfactorily answered.
- Where appropriate, public hearings may be held in accordance with the applicable regulation.[8]
- A request for clarification and further information by the competent environmental agency may be made as a result of any public hearings. The environmental agency may request alterations where it believes such request has not been satisfactorily answered.
- A final technical report is issued in respect of the project and, where appropriate, a legal opinion may be sought.
- The license request is either approved or rejected, with subsequent public disclosure.

The licensing process often demands a thorough assessment of all environmental, social and economic factors involved. Together with the fact that the Brazilian environmental agencies lack the structure to meet the growing number of licensing requests, the reality of the situation is that it is an extremely slow process. As such, from our experience we have observed that obtaining an environmental license is a complex and time-consuming process, involving various professionals at each stage and requiring the necessary financial resources to complete.

IV. Environmental Impact Assessment (“EIA”: *Estudo de Impacto Ambiental*) and Environmental Impact Report (“EIR”: *Relatório de Impacto Ambiental*)

The Federal Constitution establishes a duty of care to maintain and protect an ecologically balanced environment.[9] This in turn establishes the need to carry out a prior assessment of the environmental impact of “installation of works or activities that may potentially cause significant degradation of the environment.”

CONAMA Resolution No. 1, of 23 January 1986, lists a series of activities that require an EIA/EIR to be prepared before such activities may be implemented. Included in this list are petrochemical, mining, and steel industry facilities, and the construction of roads and railroads, among others. The concept of a "significant degradation" is very broad, and since the list of activities is non-exhaustive, the requirement for the preparation of an EIA/EIR may be extended to other activities. Factors that may influence such a decision in terms of either having, or potentially having, a significant environmental impact include the size and location of the project.

The EIA and the EIR are closely linked to the PL. This is because the aim of the PL is to make a prior assessment of the impact that the installation and operation of the project may have on the environment. Therefore, if the EIA is prepared in observance of the guidelines and requirements as laid down in Resolution No. 1, it should set out:

- an analysis of the environmental impact of the project and its alternatives through the identification and forecast of the extent of probable, relevant environmental impacts;
- those measures taken to mitigate the negative impacts of the project;
- a follow-up and monitoring program; and
- conclusions on the feasibility of the project.

In general, a license will be granted by the relevant competent environmental agency if it concludes that the project is environmentally feasible. If, however, the environmental agency rejects the license request, the company can, as a remedy, seek a writ of mandamus.

It is important to note that, based on the Environmental Impact Assessment, an Environmental Impact Report will be prepared. The EIA is a technical assessment and, as such, is often difficult for the layman to understand. The EIR, on the other hand, will reflect the conclusions of the EIA in an objective and easily understandable form. The EIR, as a requirement, is publicly available. This is important because, considering that the project under analysis can potentially cause degradation to the local environment, the EIR provides the community with the opportunity to offer its views regarding the project's feasibility. As a result, the local community, mainly represented by non-governmental agencies (NGOs), has a say in public hearings held throughout the licensing process. The environmental agency will consider the opinion of the community in making its decision on the license request.

V. Administrative Control

Item IV of Article 6 of CONAMA Resolution No. 1/86 provides for the inclusion of a follow-up and monitoring program in the Environmental Impact Assessment. Therefore, after the license is granted, and as set out in the EIA, any flows and discharges of effluents must be measured. This requirement aims to verify and improve the suitability of those measures taken to limit the environmental impact. The monitoring may be carried out either directly by the competent environmental agency or by the company itself, if the environmental agency requests it to do so.

In addition, the competent environmental agency may request an environmental assessment to be conducted. This request can be made as a preparatory step for the application for an Installation License (IL) and/or Operation License (OL), or it can be made prior to the renewal of such licenses, or even on a periodical basis for control purposes.

Finally, the environmental agency has the right to examine and monitor compliance with those conditions it imposes in the licenses, as well as the right to monitor any potential environmental damage caused, for which various penalties may be enforced. Therefore, if a plant or company is to be bought in Brazil, it is important to monitor continually compliance with the conditions contained within the relevant license. If such conditions are not complied with, the license may be revoked, thus preventing the operation's purchaser from operating the plant. This concern of revocation is in addition to any potential penalties that may be imposed for damages caused to the environment.

VI. Judicial Control

If the environmental agency commits an illegal act in connection with the process of granting of a license, such as, for example, denying the license request when all requirements and conditions for granting the license have been satisfied, or revoking the license without relevant grounds, the license applicant can file for a writ of mandamus against this act.

On the other hand, any citizen can file a popular action against the environmental agency to challenge the granting of a license. This is in addition to the right of the Public Prosecutor's Office, federal, state and municipal governments, governmental agencies, government-owned companies, foundations and quasi-government companies or associations to file a Public Civil Action in order to challenge the granting of a license.

VII. Merger and Acquisition Transactions

A. Succession of Environmental Liabilities on Due Diligence

According to Brazilian law, succession of environmental liabilities occurs in an acquisition or through use by the acquiring entity of the target's plant. Consequently, due to the legal framework and strict protection of the environment in Brazil, one of the main con-

cerns in M&A transactions is environmental liability succession. It is therefore always advisable, before entering into any M&A transaction, to verify the level of environmental compliance and any potential environmental liabilities by undertaking legal due diligence.

In an M&A context, due diligence is a focused investigation of the target company and/or business. We recommend then an environmental site assessment (ESA) on the plant be carried out by a specialized environmental firm, including both Phase I and Phase II. The scope of the ESA should include not only the verification of whether all licenses required for their activities according to environmental laws have been obtained, but also appraisal of

- the fulfillment of all rules, criteria and standards established by law;
- current or potential liabilities/contingencies of an environmental nature; and
- from a strict legal standpoint, the chances of loss regarding existing or theoretical lawsuits (to assess if and to what extent an environmental damage has actually occurred) and the respective amounts involved, especially the costs to comply with remediation or restoration obligations.

B. Licenses

As mentioned above, any acquisition of the controlling share capital of a corporation or of its assets does not mean a new license must be applied for. However, if there is any change to the installation in question or in the activity carried out at the installation, it is advisable to consult the environmental agency.

The legal procedure for obtaining licenses and permits, as well as their validity, should be verified during the due diligence process.

C. Environmental Audits

The practice of environmental auditing is quite new in Brazil. The first auditing programs in the country were initiated in the late 1980s as a result of voluntary multinational corporation initiatives. Commencing in the 1990s, some major national corporations also announced the gradual implementation of environmental management and auditing programs. Parallel to such initiatives, some Brazilian states and the Brazilian federal government have developed local legislation in order to require some industrial sectors to audit themselves.

More recently, the ISO 14000 series has played a major role in expanding the participation of the private and public sectors in environmental auditing-related initiatives. A joint effort of industry, government and the major Brazilian technical standard association (*Associação Brasileira de Normas Técnicas* - ABNT) represented Brazil in the ISO 14000 process.

VIII. Environmental Liability

Under the Brazilian environmental legislation, any individual or legal entity (whether public or private) that directly or indirectly causes any harm to the environment may be held liable for such damage. This is a matter of strict liability: it is irrelevant whether the causal connection between the defaulting party's act (or omission) and the damage caused to the environment is direct or indirect.

There are three types of possible liabilities: civil, criminal and administrative. Each is addressed in turn below.

A. Civil liability

1. General

Any individual or legal entity engaging in an activity that causes damage to the environment is liable for the damage such activity causes. This liability applies equally to all parties involved, whether they are directly or indirectly responsible. The obligation and liability to indemnify the aggrieved party or remediate the damage caused to the environment is a matter of strict liability and is imposed regardless of the existence of fault or negligence. It is important to note that this strict liability cannot be excluded or carved out of any agreement. Moreover, the defense that, despite acting in the most diligent and conscientious way, such damage could not have been avoided will not negate this strict liability. In this sense, the party bringing the claim may, therefore, choose freely whom to sue.

The party that is being sued, as a result of this strict liability, may be held liable to remediate all of the damage caused. This is so even if that party is not directly responsible for the damage. However, such a party may in turn bring an action against the party who was directly responsible for the damage, in order to recover any and all amounts the first party paid to effect the remediation. The indirectly responsible party, however, must provide evidence that the party directly responsible for the damage acted with willful default or negligence. This legal action may take many years before a final decision is reached.

2. Piercing the Corporate Veil[10]

Brazilian courts will pierce the corporate veil in those circumstances where the company form is used to evade an environmental obligation to indemnify damage. When the veil of the corporation is pierced, the shareholders, rather than the company itself, are regarded as the relevant actors and, therefore, the shareholders are personally responsible for any liabilities incurred.

3. Liability of Purchaser and Seller

As a result of this strict liability, the purchaser may be held responsible for all damages caused by the activity undertaken by the target. For this reason, it is very important to establish, before completing the purchase, the extent of any historic environmental damage caused by the target. This issue should be factored heavily into any negotiations concerning the purchase price and those contractual liabilities being assumed. It is important to emphasize that, despite the existence of clauses seeking to exclude liability, the purchaser can still be held liable in an action for the remediation of damages. However, the existence of such a clause will guarantee the purchaser the right to bring an action against the party who was directly responsible for the damage caused.

4. Liability of Financial Institutions

According to recent interpretation, a financial institution that grants credit to a project that is engaged in an activity that is potentially harmful to the environment may be held indirectly responsible for the damage caused and, as such, may be liable for remediating any damage caused. Thus, both the company that has carried out any activity to the detriment of the environment, as well as the financial institution responsible for financing the project, may be held liable for all damages caused and losses suffered, irrespective of evidence of fault.

The absence of any requirement to prove willful default or negligence reflects the gravity with which environmental damage is viewed in Brazil. Moreover, the absence of any requirement of proof and the equal liability of all parties concerned may result in a potentially greater liability for financial institutions. This is especially relevant if the party who is directly responsible for the damage caused has insufficient funds to meet the full costs of remediation, which in relation to environmental damage can often be considerable. There are few judicial decisions regarding this issue, and none relate to the issue of liability of the financial institution.

5. Liability of Environmental Agency

There have been some recent discussions regarding the liability of the environmental agency itself in connection with granting licenses for activities that caused damage to the environment.

Case law precedents have shown a tendency of the courts to allow the inclusion of the environmental agency as defendant in lawsuits for recovery of damages. However, if the plaintiff does not include the environmental agency as defendant in the action, it cannot then be impleaded. This is due to the amount of time that would be spent in identifying the agency's liability, if any, which in turn delays, and is detrimental to, remediating the damage caused.

Overall therefore, an action can be brought against the environmental agency in order to recover any amounts paid in remediating the damage caused. Moreover, environmental agents may be held jointly liable if they fail to disclose an environmental violation after becoming aware of it.

6. Types of Claims

Under Brazilian law, there are three types of action that may be brought.

- Class Action: Any citizen may file a popular action in order to stop a party committing acts that are detrimental to the environment.
- Public Civil Action: A Public Civil Action ("PCA") may be filed by any of the Public Prosecutor's Office, federal, state and municipal governments, governmental agencies, government-owned companies, foundations and quasi-government companies or associations. However, quasi-government companies or associations are only allowed to file a PCA if they have been registered as such for at least one year and one of their stated functions is the preservation of the environment. This type of action is designed to protect the environment by (i) obliging parties to comply with their obligations with respect to the environment; (ii) preventing parties from continuing practices that are harmful to the environment; and (iii) forcing parties to remediate the damage they have caused to the environment through payment of an indemnity.
- Individual action: Any individual who has suffered from the effects of pollution is entitled to file an individual action against the party he believes caused the pollution in order to claim indemnification for any individual loss suffered.

7. Limits to Liability

There is no limit to the amount that the courts may award to cover the costs of remediating the damage or, if the damage cannot be remediated, the payment of an indemnity. In this latter case, the indemnity amount awarded will be remitted to the national fund for the protection of widely spread environmental interests, which in turn is to be used in actions for the protection of the environment.

8. Statute of Limitation

There is no limitation period for bringing an action for civil liability. An action may be brought at any time after the damage has been caused.

B. Criminal Liability

In addition to the penalties imposed on individuals and legal entities liable for environmental damage, members of legal entities, including officers, controllers, directors, managers, auditors, nominees (shareholders or not) and employees of such legal entities may also incur criminal liability. However, unlike civil and administrative liability, negligence or intent must be proven in order to establish criminal liability.

The Environmental Crime Act (ECA) states that anyone who commits any of the offenses set out therein (including, *inter alia*, atmospheric pollution, carrying out of business activities without the relevant environmental licenses and contamination of drinking water) may be held criminally liable. This includes members of legal entities who, having knowledge of the criminal conduct, fail to prevent its execution when they could have done so.

Nevertheless, legal entities, and not just individuals, can be held criminally liable, even if the decision to commit the act was taken by its legal representative or its board of directors. There is a rebuttable presumption of negligence on the part of the company, a presumption that can be difficult to discharge. The criminal penalties that are applicable to legal entities include, *inter alia*: (i) the obligation to render services to the community; (ii) funding of environmental programs and projects; (iii) payment for the restoration of damaged areas; (iv) financial contributions to public entities whose purpose is to protect the environment; and (v) payment of fines.

The criminal penalties that are applicable to an individual include, among other penalties, a term of imprisonment ranging from one month to ten years and/or the payment of a fine. The most severe penalties are in relation to crimes of pollution, which are mostly committed by legal entities and their members. Penalties in this respect include a term of imprisonment of up to five years, which can be doubled if the pollution results in a person's death.

The criminal penalties that are imposed can be reduced through proof of mitigating circumstances. Such circumstances include a clear demonstration of the intention to remediate and/or control the damage caused and proof of prior communications with the relevant authorities about the potential environmental danger. However, where a person or legal entity continues to commit an environmental crime which dangerously exposes the public or the environment to damage, or continues to abuse the rights granted under an environmental license, the penalty imposed may be increased.

1. Liability of Purchaser and Seller

As previously mentioned, unlike civil and administrative liability, negligence or intent must be proven in order to establish criminal liability. Therefore, in the situation where an operation is purchased, if environmental damage has been caused in the past by the vendor, the vendor will be criminally responsible for it. However, upon completion of the sale, if the criminal conduct continues (e.g., a polluting activity), the purchaser will then be criminally responsible.

2. Liability of Financial Institution

Under Law N. 9.605/98, anyone with a legal or contractual duty to fulfill an obligation in relation to environmental matters may be subject to a penalty of one to three years imprisonment and/or a fine if they are found to have acted with malice, and/or three months to one year imprisonment and/or a fine in the event negligence is established. In this sense, in relation to an activity for which they are providing the credit, the non-compliance with an obligation in relation to the environment can result in the lenders and/or their managers being held criminally liable. However, there is no case law establishing criminal liability for lenders in this situation.

3. Liability of Environmental Agency

Environmental agents may be held jointly liable if they fail to disclose an environmental violation after becoming aware of it.

4. Who Can Bring a Claim?

A Public Criminal Action can only be filed by Public Prosecutors.

5. Statute of Limitation

An action must be brought within a period of twelve years from the date the crime was committed or, in the case of a continuous crime, the date on which the crime stops being committed.

C. Administrative Liability

Environmental Agencies have the power to impose fines and other administrative penalties in those cases where an administrative infraction is committed. An administrative infraction is in essence any action or omission that violates the legal rules of use, protection and restoration of the environment.[11]

Fines range from R$50.00 to R$50,000,000.00, and administrative penalties include:

- warnings;
- restriction of rights;

- closure of the plant or construction;
- prohibition against concluding contracts with public agencies;
- suspension of any relevant licenses;
- suspension of any financial or fiscal benefits;
- a daily fine; and
- full suspension of all activities.

Environmental Agencies usually impose these penalties and fines on the company or individual who is directly responsible for the damage caused to the environment. Only the Environmental Agencies can bring a claim through issuing a Notice of Infringement. There is no limitation period for imposing administrative liability. However, the penalty must be imposed while the infraction continues.

IX. Disclosure Issues

1. Disclosure to Public Authorities

There is no express obligation regarding the disclosure of an environmental damage to the authorities. However, the prior communication to the authorities of an environmental danger, or even a damage, and collaboration or cooperation with the authorities, can reduce the criminal penalty to its minimum. In addition, the polluter can enter into, with the environmental authority, a Term of Commitment, by which it commits to adopt measures to repair the damage in order to avoid the imposition of administrative penalties. The execution of a Term of Commitment is not a guarantee that the polluter is not going to be sued. For this reason, it is advisable to submit the proposed Term of Commitment to the Public Prosecutor for approval.

2. Disclosure by Seller and Purchaser

Upon deciding that it wishes to sell the target company, a seller will need to disclose a certain amount of information about the target to allow the potential purchaser to determine whether it wishes to acquire the target and, if so, at what price.

A confidentiality letter between a seller and a potential buyer may be signed. This is designed to protect the seller, as provider of the information on the target, by prohibiting or regulating the disclosure and use of information that is considered confidential.

3. Disclosure by the Target Company

The obligation of disclosure of information in publicly-held companies depends on their classification as a material fact, according to Instruction No. 358 of Brazilian Securities Commission. Therefore, to determine whether there is a requirement to disclose an environmental damage to the market, it is important to verify if it can be qualified as a material fact.

A material fact may arise as a result of (i) a decision of the controlling shareholder; (ii) a resolution of the shareholders general meeting or of the management bodies of the company; or (iii) *any other political, administrative, technical or economical/financial act or fact related to the company or to its business*, which may reasonably influence:

- the quotation of the listed securities issued by the publicly-held company or securities related thereto;
- the investors' decision to buy, sell or retain those securities; and
- the investors' decision to exercise any ownership rights over the securities mentioned in the first item above.

The obligations and penalties arising from an environmental liability may represent a substantial sum, considering that the polluter can be held responsible, beyond the payment of fines and other penalties, for the remediation of damages, by being obliged to build construction, install equipment, close down activities. In this sense, the environmental liability could represent a substantial contingency to the company, which may influence the value of the shares and, for this reason, could be considered a material fact.

Endnotes

1. Chapter 6 of the Federal Constitution, published in October 1988.
2. Article 3, item I of Law No. 6.938/81.
3. Article 3, item III of Law No. 6.938/81.
4. Article 3, item IV of Law No. 6.938/81.
5. Article 225 of Law No. 6.938/81
6. Article 23, item IV, of the Federal Constitution.
7. Article 10 of Resolution No. 237 issued by CONAMA.
8. According to Resolution 9/87 of CONAMA, a public hearing will be held when the environmental agency believes it to be necessary or upon the presentation of a request from a civil entity, the Public Prosecutor's Office or a request signed by at least fifty citizens.
9. Article 225, item III.
10. Article 4 of Law No. 9.605/98 (Environmental Crime Act).
11. Article 70, Law 9.605/98.

Valdo de Rizzo is a Partner of the São Paulo office of Lefosse Advogados/Linklaters.

The Long Arm of U.S. Law Data Protection, Privacy and the Patriot Act

By Richard F.D. Corley, J. Marc Shewchun and Ian R. Hay

I. The Hypothetical

The discussion below in this article is based upon the following hypothetical.

A la Salud S.A. is a Chilean corporation engaged in the provision of medical office support, invoicing and insurance-claims processing for doctors offices, hospitals and medical clinics in Chile and Brazil. The Brazilian operations are conducted through a majority-owned Brazilian affiliate called A la Salud (Brasil), which is privately held. Salud sees significant opportunities for growth, but needs capital investment and expansion of its IT infrastructure.

Among other things, more than sixty-five percent of Salud's revenues have historically come from the provision of services to clinics owned by the Chilean government. Salud has been concerned that it needs to expand its private-sector business and its operations in Brazil, in part, so that it is less dependent on a single customer.

As it happens, a major U.S. medical claims processing company, Angic Corp., has approached Salud about a possible strategic combination. Angic has operations in Canada and the United States and is interested, first, in expanding its business into Latin America and, second, in utilizing some of Salud's specialized data processing facilities for certain of Angic's data processing needs. Under the preliminary plan it has outlined, it suggests that there could be significant synergies were Salud to send certain of its claim processing work to Angic's facilities in Canada and the United States while Angic would send its invoice processing and other medical-office support work to Chile or Brazil.

II. Introduction

The form of international cross-outsourcing of health data processing functions contemplated by Salud and Angic raise potential issues under personal information protection and data privacy regimes in each of the affected jurisdictions, namely, Canada, the United States, Chile and Brazil. Salud and Angic will need to be aware of the multiple comprehensive or the specific health-sector data privacy laws and regulations potentially applicable to each of them, and also the requirements applicable to the health-sector clients (i.e., hospitals, clinics and physicians' offices) for whom they provide claim, invoicing or related data processing services, and to which Salud and Angic may be expected or required to adhere.

As a direct result of the wealth of data protection legislation applicable to Angic and Salud, it is likely that their agreements with their health care provider clients will already contain provisions governing their ability to subcontract to third parties and may even provide prohibitions against transferring or disclosing information across regional or national boundaries. These agreements would have to be examined in connection with the applicable legislation in order to determine all of the issues raised by the proposed transaction.

The purpose of this paper is to canvass briefly the significant (though not exclusive) issues raised by various data privacy regimes that would have to be understood in connection with a review of Angic's and Salud's contractual relationships with their health care provider clients. These issues include the adoption of security standards required in certain jurisdictions to protect health information, which may require modifications to Salud's and/or Angic's systems and facilities, and potential restrictions or conditions on the transfer of health data or other personal information outside of a particular jurisdiction.

III. United States

A. Federal Legislation

Key U.S. federal legislation that may be applicable to the outsourcing activities of each of the parties includes the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[1] Pursuant to HIPAA, final regulations have been published in the form of the "Privacy Rule,"[2] and the "Security Rule."[3]

The Privacy Rule and Security Rule apply to "covered entities," which include health plans, "health care clearinghouses," and health care providers that transmit health information in electronic form. The first and third of these may apply to many or all of Angic's health care provider clients, resulting in a number of requirements imposed upon Angic as a "business associate" of those clients. In addition, the Rules may apply directly to Angic as a "health care clearinghouse," depending on the processing functions it performs on behalf of its clients. The Rules may also affect Salud in connection with its data processing services to Angic, either as requirements applicable to U.S. health care providers required to be imposed on their business associates and passed down to subcontractors, or as

requirements directly applicable to Angic, which may have an independent obligation under the Rules to impose protection and security measures on its own business associates.

The Privacy Rule became effective on 14 April 2001 with a compliance deadline of 14 April 2003 for most covered entities. The Rule requires covered entities to implement standards to protect and guard against the misuse of individually identifiable health information, as well as providing for restrictions on use and disclosure of health information. Of relevance to the relationship between Angic and Salud under this arrangement are the requirements regarding disclosures of health information to business associates of a covered entity.[4] In addition to due diligence requirements on a covered entity regarding past privacy violations of the business associate, a covered entity must obtain "satisfactory assurance" from the associate regarding privacy safeguards. The assurances must be documented in the form of a written contract, and must include, *inter alia*, the following.

- Expressly stated permitted and required uses and disclosures of health information.
- Prohibitions against further uses and disclosures.
- Safeguard requirements to prevent unauthorized use or disclosure.
- A requirement to impose similar restrictions on agents and subcontractors.
- A requirement to make health information available in connection with individual access rights, amendment of health information and accounting of disclosures.
- A requirement to permit audits of internal practices, books and records by U.S. health authorities.
- A requirement to return or destroy health information at the conclusion of the contract.
- A right of the covered entity to terminate the contract on breach.

The Security Rule became effective 21 April 2003, with a compliance deadline of 21 April 2005 for most covered entities, and specifies a series of more particular administrative, technical, and physical security procedures for covered entities to use to assure the confidentiality, integrity and availability of electronic health information. The safeguards applicable to covered entities include, *inter alia*, the following.

- Administrative safeguards, including security violation procedures, risk analyses, workplace security, training and sanction policies, documentation of security incidents, and contingency and emergency plans.
- Physical safeguards, including facility access controls, validation procedures, workstation security and media re-use and disposal procedures.
- Technical safeguards, including electronic information security measures, ID tracking, electronic audit controls, authentication systems, transmission security and encryption.

As with the Privacy Rule, these requirements may be directly applicable to Angic, and may have to be passed on to Salud in the form of a "written contract or other arrangement" meeting the requirements of the Rule.[5] These include, *inter alia*, the following.

- A requirement to implement administrative, physical and technical safeguards that "reasonably and appropriately" protect the security of the electronic health information handled on behalf of the covered entity.
- Requirements regarding agents and subcontracting.
- A requirement to report to the covered entity and security incidents of which it becomes aware.
- A right of the covered entity to terminate the contract on breach.

A key part of the outsourcing arrangement between Angic and Salud will be a fuller analysis of these requirements and their applicability to Angic and Salud, and an analysis of Salud's current privacy and security protections to determine what steps need to be taken to bring its facilities in line with HIPAA's requirements as a service provider to Angic.

B. U.S. State Legislation

In addition to federal requirements such as HIPAA, there may be state requirements that add higher or different health information protection standards depending on their applicability to Angic's (and possibly Salud's) activities.

As an example, the new California Civil Code Section 1798.82, known as the California Database Protection Act (effective 1 July 2003), requires "any person or business that conducts business in California" to disclose to California residents any breach in the security of their computerized data if that breach would result in the acquisition of personal information by unauthorized users. The "personal information" triggering this obligation is limited in scope to certain personal identifiers (such as Social Security numbers, driver's license

numbers) and financial and credit account numbers, and does not include health data. However, some of the processing conducted by Angic and proposed to be outsourced to Salud includes invoicing and related office support, and information handled by the parties may include applicable information, such as credit card numbers.

States may have local general or health-specific privacy legislation, which would need to be reviewed. The federal HIPAA does not preempt state laws that set higher standards than those in the federal act. Again using California as one example, there are several laws relating to health information privacy that may have an impact upon the arrangement between Angic and Salud, including the Confidentiality of Medical Records Act,[6] the Patient Access to Health Records Act,[7] the Insurance Information and Privacy Protection Act,[8] and the Information Practices Act.[9]

C. Future U.S. Developments

Finally, Angic and Salud would be advised to monitor the progress of proposed federal and state laws that would place restrictions or conditions on the out-of-state or foreign transfer of health-related or other personal information. For example, a bill was recently introduced in the U.S. Senate that would require HIPAA-covered entities that outsource information to foreign-based business associates to notify consumers of this practice, along with promising that U.S. standards will be met by both U.S. and foreign firms.[10] A bill in California would require contractors providing medical information processing services to disclose to health care providers whether medical records will be sent offshore to other countries, and would require health care providers to get patient consent for offshore transfer.[11]

IV. Canada

A. Canadian Federal

At a federal level in Canada, Salud and Angic would need to consider the implications of Part 1 of the federal Personal Information Protection and Electronic Documents Act (PIPEDA)[12] in connection with the proposed transaction. PIPEDA is a comprehensive data protection law that applies to all private sector organizations that collect, use or disclose personal information[13] in the course of a commercial activity.[14] Consistent with most private sector privacy legislation of general application, the central requirement of PIPEDA is that the knowledge and consent of the individual to whom personal information relates be obtained for any collection, use or disclosure of that information. PIPEDA also contains general requirements with respect to:

- limiting the collection, use, disclosure and retention of personal information in accordance with identified purposes;
- maintaining the accuracy of personal information;
- safeguarding personal information; and
- granting access to personal information;

all of which would apply directly to Angic's operations and its health care provider clients' operations in Canada.

The first key issue for Angic under PIPEDA is whether consent is required from its health care provider customers' clients in order for Angic to transfer its invoice processing and other medical-office support work to Salud's operations in Chile or Brazil.[15] Angic will have dealt with this issue in respect of its relationship with its health care provider clients in its capacity as a service provider to such clients.

In exploring the consent issue the important provision in PIPEDA is Principle 4.1.3, which states that "an organization is responsible for personal information in its possession or control, including information that has been transferred to a third party for processing." This Principle suggests that a "transfer for processing" is not a disclosure under PIPEDA and thus would not require the knowledge or consent of the relevant individual when undertaken. This distinction between transfers and disclosures of personal information has been endorsed by the former federal Privacy Commissioner, whose office oversees the enforcement of PIPEDA.[16] However, it is not clear whether the courts would share that view, and the precise boundaries of what does and does not constitute a transfer for processing have yet to be settled. Despite this uncertainty, organizations in Canada are generally taking a broad view of the business functions that can be performed by a third party on a "processing" basis without the requirement to obtain consent.[17]

Provided that Angic and Salud could reasonably take the position that the performance of invoice processing and medical-office support work was a transfer for processing, they would have to observe Principle 4.1.3 of PIPEDA, which also provides that "organizations must use contractual or other means to provide a comparable level of protection while the information is being processed by a third party." Thus, in order to rely on Principle 4.1.3 to transfer information for processing, there would have to be a written agreement in place that ensures the personal information is protected to the same extent as though it were in the possession or custody of the transferor (i.e., Angic) and thus subject to all of PIPEDA's requirements. For example, the agreement

between Angic and Salud would have to provide, among other things, that:

- Salud is prohibited from using or disclosing any personal information transferred to it for any purposes unrelated to the processing activity;
- while in the possession or custody of Salud, the personal information is protected with security measures and safeguards that comply with PIPEDA; and
- Angic had immediate access to the personal information and the ability to have it returned, corrected or destroyed upon request.

Recently, an additional and complex issue has arisen under PIPEDA that could affect the proposed transfer of information between Angic and Salud. The issue revolves around concerns about the ability of foreign authorities to access personal information of Canadians transferred to a foreign jurisdiction.[18] Part of the issue has arisen from some uncertainty as to whether the phrase "comparable level of protection" in Principle 4.1.3 of PIPEDA implies an obligation not to transfer personal information for processing to third parties in jurisdictions whose governments' have broader powers of access relative to Canadian authorities. The other part of the issue relates to specific exemptions in PIPEDA that allow Canadian authorities to obtain access to personal information in the possession or control of organizations without the knowledge or consent of the individual, since it is far from clear whether these exemptions could be relied upon by an organization to disclose personal information to foreign authorities.

In addressing this issue of transborder data flows, the federal Privacy Commissioner has recently suggested that, at a minimum, a company in Canada that outsources information processing to an organization based outside Canada should notify its customers that the information may be available to a foreign government or its agencies.[19] However, it is not clear from the Privacy Commissioner's comments whether she believes that PIPEDA prohibits the transfer of information into jurisdictions whose government's have broader rights of access to personal information relative to Canadian authorities. Until this issue is settled, it may create some concerns among Angic's health care provider customers who are concerned about personal health information leaving the country.

In the event that Angic and Salud cannot rely on the "transfer for processing" exemption in PIPEDA, the only alternative would be for Angic to use reasonable efforts to ensure that the appropriate consent of the individuals to whom the personal information relates has been obtained in order to disclose the personal information to Salud for processing. Depending on Angic's contractual arrangements with its health care provider clients and the information practices of such clients, this may or may not be a difficult issue to overcome.

When considering the proposed transfer of Salud's claim processing work to Angic's facilities in Canada, a key issue will be the extent to which such information becomes subject to PIPEDA. Indeed, it is likely that Canadian organizations must comply with PIPEDA in respect of personal information about foreign nationals that the organization maintains in Canada because Parliament's intent in enacting PIPEDA was, in part, to satisfy European requirements regarding international data transfers. However, it is not clear to what extent a Canadian service provider would be required to comply with PIPEDA in respect of such personal information. For example, while it would be reasonable that the Canadian service provider apply PIPEDA-compliant security safeguards and procedures to protect such information from unauthorized access or disclosure, it would seem unreasonable to expect the service provider to ensure that the organization that has provided the personal information has obtained any necessary consents from the individuals.

As mentioned above, Angic and Salud will have to conduct a careful analysis of PIPEDA's requirements and its applicability to the proposed transaction.

B. Canadian Provincial Privacy Laws

Three provinces in Canada (Alberta, British Columbia and Quebec) have enacted comprehensive private sector privacy laws that apply to organizations in connection with the collection, use and disclosure of personal information within their respective provinces.[20] All of these laws are similar to PIPEDA and would present many of the same issues as above. However, there are differences in each piece of legislation and they would each need to be specifically examined. For example, the Quebec Act does not contain the same distinction between transfers for processing and disclosures of personal information that appears to exist in PIPEDA.

In addition to PIPEDA and the general provincial private sector privacy laws in Alberta, British Columbia and Quebec, there are a broad range of statutes at the provincial level that apply to the collection, use and disclosure of personal health information by health professionals (such as physicians, pharmacists, and dentists) and health care facilities (hospitals, personal care homes, psychiatric facilities, medical clinics and laboratories).[21] Some of this legislation consists of public sector privacy acts that apply to government and government-run facilities and some of it consists of privacy

legislation specific to the health care industry. As a result of the different levels of government and overlapping legislation, the application and interaction of such legislation is extremely complex and unclear in many cases, and would need to be carefully studied by Angic and Salud.

The privacy law specific to the health care industry in Alberta, Manitoba, Ontario and Saskatchewan contain many of the same general requirements as HIPAA in the United States. One fortunate characteristic of this legislation is that it generally contains specific provisions for the outsourcing of certain functions by health care providers. For example, the Alberta Health Information Act (HIA) provides that a health care provider governed by that act may enter into an agreement with an information manager for, among other things, the processing or storage of health information. Where the health care provider has entered into such an agreement, the health care provider may disclose health information to the information manager without the consent of the individuals who are the subjects of the information for purposes authorized by the agreement.

Also, where health information is to be stored or used by an information manager outside Alberta, the HIA requires that the agreement with the information manager:

- provide that the health care provider retain control over the health information;
- adequately address the risks associated with the storage, use or disclosure of the health information;
- require the information manager to implement and maintain adequate safeguards for the security and protection of the health information;
- allow the health care provider to monitor compliance with the terms and conditions of the agreement; and
- contain remedies to address any non-compliance with or breach of the terms and conditions of the agreement by the information manager.

However, even with the express provisions in the health sector privacy legislation, given the current issues in Canada surrounding the transfer of personal information across national boundaries discussed above in relation to PIPEDA, it would not be unexpected for Angic's health care provider clients to have concerns about the proposed transaction between Angic and Salud.

C. Recent Developments in British Columbia

In 2004, a proposed outsourcing of British Columbia's public health insurance program to a private company touched off an intense discussion in Canada on the extent to which foreign authorities could and should be able to obtain access to personal information of Canadians that is being processed by foreign based or foreign linked service providers on behalf of a Canadian public body.[22] In British Columbia, this debate has culminated in specific amendments to that province's public sector privacy legislation, the Freedom of Information and Protection of Privacy Act (FOIPPA). Amongst other things, the amendments to FOIPPA require public bodies in British Columbia to ensure that personal information in their custody or under their control is stored and accessed only in Canada, subject to specific statutory exceptions. To the extent that any of Angic's and Salud's activities will relate to the provision of services in British Columbia, the amendments to FOIPPA will need to be carefully considered.

V. Chile

Chile was the first Latin American country to enact a comprehensive data protection law. The Law for the Protection of Private Life[23] (the "Chilean Act") came into force on 28 October 1999. The Chilean Act provides many of the same principles for the protection of personal information in the private sector as PIPEDA. Moreover, the Chilean Act does not provide any express restrictions on the transfers of personal information to foreign jurisdictions. Chile does not have any privacy legislation specific to the health sector.

VI. Brazil

To date, Brazil has yet to enact a comprehensive data protection law similar to PIPEDA, although a bill proposed in 1996 aimed to introduce privacy laws to Brazil modeled on the OECD guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Brazil does not have any privacy legislation specific to the health sector.

Endnotes

1. Public Law 104-191.
2. 45 C.F.R. Part 164, Subpart E.
3. 45 C.F.R. Part 164 Subpart C.
4. See § 164.502 and § 164.504 of the Privacy Rule.
5. See § 164.308 and § 164.314 of the Security Rule.
6. Civil Code § 56 *et seq.*
7. Health & Safety Code § 123110 *et seq.*

8. Insurance Code § 791 *et seq.*
9. Civil Code § 1798 *et seq.*
10. See the "Increasing Notice of Foreign Outsourcing Act", S. 2472, 20 May 2004.
11. See California AB 2163.
12. S.C. 2000, c. 5.
13. Defined as "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization."
14. Defined as "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists."
15. There is no specific exception to consent in PIPEDA for disclosures of personal information between or among affiliated entities.
16. See, e.g., a speech by the former Privacy Commissioner of Canada, Toronto, Ontario, 20 November 2002, located at http://www.privcom.gc.ca/speech/02_05_a_021120_e.asp.
17. It is commonplace for business to retain third party service providers to provide a range of services from information technology management to mailing and order fulfilment. When these relationships are carefully entered into and documented, they should not present privacy concerns of the nature that PIPEDA is directed.
18. See Part IV.C. below.
19. *Transferring Personal Information about Canadians Across Borders—Implications of the USA Patriot Act*, Submission of the Office of the Privacy Commissioner of Canada to the Office of the Information and Privacy Commissioner for British Columbia, dated 18 August 2004 and available at http://www.privcom.gc.ca.
20. Applicable provincial privacy legislation includes Quebec's Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q., c. P-39.1, and Alberta's recently enacted Personal Information Protection Act, S.A. 2003 c. P-6.5, and British Columbia's Personal Information Protection Act.
21. See Alberta's Health Information Act, R.S.A. 2000, c. H-5; British Columbia's Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 195, and Personal Information Protection Act, S.B.C. 2003, c. 63; Manitoba's The Personal Health Information Act, C.C.S.M., c. P33.5; New Brunswick's Hospital Act, S.N.B. 1992, c. H-6.1; Newfoundland's Hospitals Act, R.S.N.L. 1990, c. H-9 and Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1; Ontario's Personal Health Information Protection Act, *2004*, S.O. 2004, c. 3, Public Hospital's Act, R.S.O. 1990, c. P.40 and Independent Health Facilities Act, R.S.O. 1990, c. I.3; Prince Edward Island's Hospitals Act, R.S.P.E.Q. 1998, C. H-10; Saskatchewan's The Health Information Protection Act, S.S. 1999, c. H-0.021; and Quebec's An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1, and An Act respecting Health Services and Social Services, R.S.Q., c. S-4.2.
22. In response to this issue, British Columbia's Privacy Commissioner carried out a public inquiry that generated a large number of submissions containing a wealth of discussion and viewpoints. The Commissioner's final report and selected submissions are available at http://www.opic.bc.ca.
23. Act No. 19628.

Mr. Corley is a partner and Messrs. Shewchun and Hay are associates in the Toronto office of Blake, Cassels & Graydon LLP.

Antitrust in Uruguay

By Daniel M. Ferrere

I. Introduction: A Tradition Contrary to Antitrust

Article 50 of the Uruguayan Constitution provides that "every cartelized industrial or commercial organization will be subject to the government's control." This provision was enacted in 1934, but was never subject to any legal development until the twenty-first century.

Irrespective of what the regulation says, Uruguay has a tradition contrary to the concept of antitrust itself. The prevailing opinion among economists is that Uruguay is too small a country to afford imposing antitrust policies. Such policies, economists additionally claim, would prevent the growth of companies to a minimally efficient size. In general, antitrust is seen as an impediment to reaching economies of scale.

Similarly, the Uruguayan industry is seen as a "newborn" one, or one of recent development, and as such, the idea of protection of recently created industries is normally opposed to the idea of antitrust. In this sense, antitrust is seen as a category only applicable to mature industries.

One way or the other, most center and center-to-left economists are opposed to the general idea of antitrust itself, and have never supported its enactment until very recently. On the other side, conservative economists have also opposed antitrust, on the basis that even destructive competition, at the most "cut throat" extreme, is good for consumers in general, and any conduct—even predatory pricing or selling under cost—that benefits consumers is good for the market's welfare.

Until very recently, only a few orthodox economists were supportive of the idea of antitrust. Antitrust was traditionally seen as a "foreign" concept, rejected and opposed by almost everybody.

It is also to be remembered that Uruguay is a country with a highly centralized economy, in which most of the utilities are run by the state, and most other activities are heavily controlled by a government with social democratic or quasi-socialist policies.

In this context, the most blatant anti-competitive practices often come from state-run entities that are very difficult to criticize, while the response to predatory practices and other anti-competitive practices by private companies had traditionally come through direct and ad-hoc regulatory intervention by the government.

Due to the above, no trend whatsoever as to the establishment of anti-competitive rules existed until the adoption of the Mercosur Protocol on Antitrust in 1996.

II. The Mercosur Protocol

The Mercosur Protocol on Antitrust (MPA) was enacted by Decision 18/96 of the Mercosur Council in December 1996, and counted with the favorable vote of the governments of Uruguay, Paraguay, Brazil and Argentina. The MPA generated some level of local interest about antitrust matters.

The main problem, however, was that the MPA contained two principles significantly shocking to Uruguayan minds. First, it provided that legal entities that exercised state monopolies are included among the legal entities referred to by the Protocol. The idea that no distinction whatsoever is to be made between state-run legal entities and private legal entities is radically contrary to current Uruguayan political thinking, and thus very difficult to accept.

Second, Article 7 of the MPA provided that the countries should internally adopt a system of pre-transaction control of mergers and acquisitions, as part of the rules to "prevent the possible anticompetitive effects" of acts and contracts.

This structure implies the creation of an agency in charge of reviewing acts of concentration through mergers and acquisitions prior to their consummation. Both ideas were substantial causes for opposition against the MPA, which never got close to being ratified by Parliament.

Between the time of approval of the MPA and the national elections of 1999, however, several widely publicized anticompetitive situations developed in Uruguay, and generated some degree of criticism. Because of this, some level of support for the idea of a regulation of anticompetitive practices was given by the leftist political forces, that saw in it a way of attacking the "predatory" practices of "big business" and multinational companies.

III. The Act 17.243

In 2000, upon the government's submission, the Parliament approved several rules on "Defense of Competition." The first group of rules was included in three articles contained in the "Urgency Bill" submitted by the government immediately after its accession to power.

Article 13 of Act 17.243 provides that "the companies that develop economic activities, irrespective of their legal nature, are subject to rules of competition, without prejudice of their limitations established by law or reasons of general interest (Articles 7 and 36 of the Constitu-

tion of Uruguay) resulting from the nature of public service of the activity involved."

Nobody knows what the limitations "resulting from the nature of public service of the activity involved" are. Most interpreters understood this as restricting the possibility of applying the law to activities monopolized, or rendered exclusively, by government-run entities, establishing some kind of "blanket coverage" that would exempt them from antitrust control. As will be seen later, however, most government-run agencies actually operate in some form of competition with private parties, provoking frequent conflicts between the two. This, however, has not been discussed extensively up to now.

Article 14 says that "concerted practices," the "decision to associate" and the "abusive exercise of economic power" are forbidden, and details a list of forbidden activities that are enumerated as examples and do not restrict the scope of the rule. These include:

- "Imposing sale prices or other commercial conditions in an abusive way."
- Restricting the production, distribution or technical development in a way that damages consumers.
- Applying different conditions for sale to different parties.
- Imposing bundling deals upon parties.
- Selling under cost with no commercial reasons for doing so.

This Act does not provide for pre-transaction controls of mergers and acquisitions, nor does it foresee any form of prior review of conduct that may disrupt competition.

The final paragraph of Article 14 includes a significant limitation to the application of antitrust rules, by providing that they will only " . . . apply when the market distortion causes relevant damage to the general interest." This was intended to exclude the application of remedies against conduct that, although restrictive, could be seen by the Executive as "not causing relevant damage" to the general interest.

Finally, the Act does not include any procedural rules other than a generic reference, in Article 15, to the possibility of voluntarily submitting disputes to arbitration.

After the approval of the statute, Act 17.296 granted the Executive Branch the authority to investigate and sanction anti-competitive acts under the Act 17.243, as well as the authority to request from the courts the "cautionary or preventive measures that it considered pertinent" in the context of anti-competitive investigations.

Finally, Decree 86/001 regulated the procedural aspects of the Act 17.243, and gave to the General Direction of Trade (a division of the Ministry of Economy) authority to investigate anti-competitive actions through a procedure common to most bureaucratic investigations.

IV. The "Frente Amplio" Project

In May 2003, a number of representatives of the "Frente Amplio" party, together with a minority of the then ruling "Colorado" party, submitted to Parliament a bill on "freedom of trade and defense of competition" that differed significantly from the existing regulation.

The general principle that ruled this bill was that:

> All sectors of the market will be subject to the principles and rules of free competition, except the limitations established by law, based on reasons of general interest. The abuse of market position is forbidden in general, as well as all practices that have as an effect the restriction, limitation, hampering, distortion or impediment of competition in any substantial part of any sector of the market. The conquest of market share resulting from higher efficiency in relation to competitors will not be seen as a restriction of competition.

This broad concept was maintained throughout the bill, which in thirty-five articles adopted a proposal of regulation that was substantially comparable to any sophisticated and modern competition act.

Differing from the existing legislation, this bill proposed the creation of a system that controlled all types of concentration operations, including mergers, acquisitions, cross participation in capital and all forms of indirect control of companies. It was intended to be applicable to companies that either controlled more than forty percent of any portion of the market, or generated more than US $200,000,000 in sales per year.

The bill was not approved by the legislature in the session ending in early 2005. However, the party that proposed it has recently won the national elections by a wide majority of the population, and therefore will have absolute control of the Congress starting on March 2005. It is then likely that either this bill, or some version based on it, will be enacted into law by the future government.

V. A Review of Case Law

A. The Cable TV Case

The television and visual media in Uruguay are a highly cartelized activity. The government granted three licenses for open TV channels in Montevideo in the early 1960s, and their beneficiaries successfully opposed the granting of any new licenses from then on. In the early 1990s the government called for a bid to grant licenses for cable television in the capital city of Montevideo. At that

time the Government approved a Decree forbidding any foreign national or foreign company from bidding, a restriction that was maintained until one of the local awardees agreed to sell its license to an Argentinean company, at which time the Decree was repealed.

A number of offers were submitted in the public bid for cable TV in Montevideo, but only five were accepted, one for each of the main open air channels, plus two asking for wireless technologies, one of which was for a company jointly owned by the open TV channels and the other for a group of local investors.

Soon after the award the three main television channels created a joint venture that concentrated the purchase and distribution of programming to all their channels. In fact, cable television in Montevideo was run until very recently as a single business venture with three distribution channels, one operated by each open air TV channel.

The three open channels built the cable network together, creating only one single cable network jointly run. The actual ownership of the licenses was registered in the name of individuals related to the open air TV channels.

The companies that unsuccessfully bid for cable licenses continued to complain about the situation, supported by a portion of the press and large sections of the public, creating negative public opinion about the government's policy on cable TV. This generated two complaints before the antitrust authorities.

Seven independent operators filed the first complaint. A number of small cable television companies operate in the countryside, competing with cable operators owned by the Montevideo open-air channels. In 2001, seven of these operators filed a claim against the main television channels of Montevideo before the General Direction of Trade, arguing that the company that distributes programming for the Montevideo TV channels only sold them rights to air Uruguayan Soccer League games when in locations where the cartel did not own a cable TV operator, but refused to sell them those rights in locations where they competed with operators owned by the Montevideo open-air channels.

The complaint was filed in October 2001 and was never decided. In fact, for about one year the file was officially lost. In the meantime, the dispute was commercially resolved.

The second case was brought in 2004 before the URSEC, the regulatory agency in charge of telecommunications. The case was filed by all the independent operators against the company that sells programming for the Montevideo channels, arguing that this company refuses to sell them the signal of the open-air Montevideo channels. These signals are only sold to the cable operators owned by the Montevideo channels.

The case is still pending. The URSEC has produced an internal report saying that the open-air channels are required to sell their signal on similar terms to all interested parties, but no formal resolution has yet been adopted.

B. The Ambev Case

The Ambev-Brahma merger in the region produced the consolidation of the two of the three breweries existing in Uruguay (Fábrica Nacional de Cervezas —"FNC"—owned by the Heineken Group, and Cympay S.A. "Norteña," owned by Brahma). Ambev-Brahma, additionally, entered into an agreement with Danone (which owned the third brewery, and was the best source of mineral water) to purchase the third brewery and to buy water for its production of beer. After this process, Ambev-Brahma had control of 100% of the Uruguayan beer production.

Immediately after absorbing Norteña, Ambev ceased production of beer in the Norteña plant located in the city of Paysandú. Ambev maintained different brands for the beer it produces, but all brands contain the same beer, the only difference between them being the brand itself.

Due to the strong opposition presented by the Federation of Beverage Transporting, the Ministry of Industry requested to the General Direction of Trade to conduct an investigation, in order to determine whether the cessation of operations of the plant located in the countryside was the consequence of an anti-competitive practice.

In 2003 the Ministry of Economy, through the General Direction of Trade, decided to close the procedures, alleging that there was "lack of sufficient merit for its continuation." The argument was that even if this was a clear case of dominant position, the associated power had not been exercised in an "abusive" way, and the underlying theory was that the rules on competition only apply to the competition among companies, and do not protect the right of the consumer as an independent party. On this basis, once all competition disappears, there is no possibility of abuse.

C. The AUDAP-Ginko Case

The only case that ended in a positive decision by the competition authority was rendered in July 2001, against the Trade Union of Advertising Agencies of Uruguay.

One advertising agency offered a price in a public bid called by a government agency, that was around seven times lower than the price offered by all of the other agencies. The Trade Union of Advertising Agencies publicly denounced the practice of that advertising agency, pointing to it as a breach of the common agreement they had regarding the fees that could be charged.

The General Direction of Trade conducted an investigation to determine whether indeed an agreement on tariffs between the Trade Union members existed. It was found that the very bylaws of the Trade Union contained a provision saying that the maximum and minimum ranges of the fees charged by its members should be established by agreement among them. On this basis, the competition authority ordered the Trade Union of Advertising Agencies to stop the price fixing practice.

D. The Case of Farmadescuentos

A group of local pharmaceutical companies sell medicines at a discount to pharmacies, when they sell medicines under a prescription issued by a local doctor. The system (called "Farmadescuentos") is intended to promote sales through pharmacies, as opposed to sales through local hospitals.

A reseller of medicines independent from this group ("Cyberfarma") started offering similar discounts to pharmacies, on generic medicines produced by other pharmaceutical companies. As a response to this, the companies associated with Farmadescuentos decided that they would stop selling to any pharmacy buying from Cyberfarma, and that any company selling to Cyberfarma would be excluded from Farmadescuentos.

Cyberfarma filed a claim against the twenty-eight companies associated with Farmadescuentos, but the case has not been decided yet. In the meantime, however, Cyberfarma has stopped operating.

E. Other Open Cases

The lack of interest in the application of antitrust rules has effectively stalled the submission of other complaints, although it has not prevented open discussion of anti-competitive practices in the media.

One of the most discussed situations is that of the restriction of space on shelves of supermarkets. It is a common practice in Uruguay for companies to enter into agreements with the three largest local supermarket chains, which not only grants shelf space for the company's brand but also forbids the granting of shelf space to competitor companies. This has been openly discussed in the press, and there have been opinions given on this matter by the League of Commercial Defense. But the matter has never been submitted to the Uruguayan competition authority.

Similarly, state-run agencies frequently engage in conduct that in other places would be considered blatantly anti-competitive.

For example, the government insurance bank benefits from a monopoly on the mandatory working liability insurance system, and normally offers its clients "package deals" that bundle workers liability with other forms of insurance that are not monopolized, all in one single price. This practice is normally interpreted as being openly discriminatory in the pricing of the monopolized workers insurance. No action has ever been brought against this practice.

Similarly the state-owned telephone company (ANTEL), which has a monopoly on telephone landlines but not on cellular lines, engages in frequent bundling of monopolized and not monopolized services. The "Plan Zafiro" implemented in 2002 gives discounts between ten percent and thirty-five percent on all landline and cellular services, subject to the condition that the client acquire all those services exclusively from ANTEL for a term of one to two years. No claim has ever been filed against this position.

The government oil company (ANCAP) has a monopoly on importation, refining and sale of oil. ANCAP sells the refined product to four different distributors, who sell gasoline to the public. Three of these are private companies (ESSO, Shell and Texaco) and one is a corporation fully owned by ANCAP, called DUCSA (Distribuidora Uruguaya de Combustibles Sociedad Anónima). DUCSA, Exxon, Shell and Texaco purchase their gasoline from ANCAP at the same price, receive exactly the same product, and sell to the public at the same price, established by ANCAP. It is forbidden to differentiate the gasoline in any way, even by differentiating its color. However, ANCAP allows DUCSA to sell under the brand ANCAP, and directly pays for both the advertising of ANCAP products and finances the improvement and remodeling of the service stations run by DUCSA. As in the previous cases, no claim has ever been filed against this practice.

VI. The Future of Antitrust

It is difficult to predict what the future of antitrust will be in Uruguay. The political party that won the recent general elections had in the past favored the imposition of antitrust regulations. Its policy, however, was addressed against private anti-competitive acts, with very little said about anti-competitive actions by the government-run agencies.

This party, additionally, is a leftist party that has in the past supported the monopolization of key activities, and opposed any attempt to privatize state-run utilities. It is highly improbable, then, that this party will support or promote open competition against state-owned companies.

If the recently elected Government insists on passing the Bill that its representatives submitted to Parliament in 2003, however, a new era of antitrust may start in Uruguay—at least with respect to private parties.

Mr. Ferrere is the managing partner in the Montevideo law firm of Ferrere Abogados.

The Chilean Law on International Commercial Arbitration

By Juan Enrique Allard Serrano

I. Introduction

Law 19,971, on international commercial arbitration (hereinafter the "Arbitration Law" or simply the "Law"), was published in the Chilean Official Gazette on 29 September 2004. This Law is based on the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) from 1985.[1]

The purpose of the Arbitration Law is to fill a gap in Chilean legislation. This law also seeks to strengthen Chile's position as an arbitration center for Latin America.

The Santiago Chamber of Commerce has highlighted the following benefits such a law will signify:

- It helps strengthen Chile's image of seriousness and trustworthiness in the eyes of the international legal and business community, offering legal certainty to investors and foreign counterparts.
- Consequently, it will enhance international transactions and foreign investment, since reliable dispute resolution is the cornerstone on which every investment and commercial transaction is founded.
- It creates a set of regulations applicable to the resolution of international disputes arising between private parties within the framework of the Chile-European Union Association Agreement and the Chile-USA Free Trade Agreement.
- It generates confidence in Chile as an international commercial arbitration center, as it overcomes current weaknesses (procedural remedies against the arbitration award, local requirements of arbitration-at-law, difficulties in formalizing preliminary relief, among others), and takes advantage of the capacity and prestige of Chilean professionals as international arbitrators. This is particularly important when disputes arise between one or more Latin American parties.
- It contributes to the fostering and improvement of international commercial arbitration services offered by Chilean arbitration centers.
- It allows Chilean small and medium size businesses, entering into contracts with foreign parties, to resort to international arbitration in Chile, meaning lower travel expenses and even arbitrator's fees, since Chilean arbitration centers should be expected to charge lower fees than those charged by European or American arbitration centers.

The remainder of this article is a summary of the main provisions contained in the International Commercial Arbitration Law.

II. Scope of Application and Definitions

The Law will only apply to international commercial arbitrations conducted in Chile, subject to the provisions of the parties' "arbitration agreement" and except in regard to the recognition and enforcement of awards. This is another application of the "Principle of Territoriality" established in Articles 14 and 16 of the Chilean Civil Code.[2]

Arbitration is considered to be international when (i) the parties to the arbitration have their headquarters in different states at the time they execute an arbitration agreement; and (ii) either the arbitration location, the place of performance of a substantial part of the obligations in the commercial relationship, or the place to which the purpose of the litigation is more closely related are located outside the state in which the parties have their headquarters; and (iii) the parties have expressly agreed that the matter subject to the arbitration agreement is related to more than one state.

Furthermore, the definition of the term "commercial" used by the Arbitration Law is broader than the one contained in the Chilean Commercial Code. That law stipulates that for its purposes:

> The word "commercial" must be interpreted in a broad sense so as to encompass all matters arising in relations of this type, whether or not contractual. They include, for example, any commercial transaction for the supply or exchange of goods or services, an agreement on distribution, representation or commercial mandate, the transfer of credits for collection, the lease of equipment under a purchase option, the construction of works, consulting, engineering, licenses, investment, financing, banking, insurance, exploitation concessions or agreements, joint

ventures and other forms of industrial or commercial cooperation, the carriage of merchandise or passengers by air, ocean, railroad or highway.

International, multilateral or bilateral treaties in force in Chile continue to be in force and are not affected by the Arbitration Law. Nor does the Arbitration Law affect other rules of law, in the domestic legal system, according to which certain disputes can or cannot be arbitrated solely pursuant to provisions other than those contained in the Arbitration Law.

III. Exceptional Intervention by the Chilean Ordinary Courts

The general rule is that no ordinary court will intervene in matters governed by the Arbitration Law, unless otherwise stated in the law.

The exceptions to the above rule are the following:

- The appointment of an arbitrator in absence of agreement by the parties.
- Any challenge of or petition for removal of an arbitrator.
- Any decision of an arbitral panel in regard to its own competence.
- A petition for annulment of the arbitral award.

The matters indicated in the first three bullets above will be decided by the President of the Court of Appeals of the jurisdiction where the arbitration must or is being conducted. Matters relative to the last bullet above will be decided by the Court of Appeals itself.

IV. Arbitration Agreement—Definition and Form

According to the Arbitration Law, an "arbitration agreement" is an agreement pursuant to which the parties decide to submit to arbitration all or certain disputes that have or may arise between them with respect to a certain legal relationship, whether or not contractual. The arbitration agreement may either be in an agreement as an arbitration clause or be a separate agreement.

One required formality of the arbitration agreement is that it must be set down in writing. This formality is fulfilled when the agreement is set down in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication that leave a record of the agreement, or in an exchange of briefs of claim and answer in which the existence of an agreement is asserted by one party and not denied by the other.

The Arbitration Law stipulates that reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is set down in writing and the reference implies that such a clause is part of the contract.

V. Composition of the Arbitral Panel

The general rule regarding the number of arbitrators is that the parties are free to determine the number of arbitrators. In the absence of such a determination by the parties, the number of arbitrators will be three.

The parties are also free to determine the procedure for the appointment of arbitrators. In the absence of such a determination, if the panel is composed of three arbitrators, each party will appoint one and the appointees will appoint the third one. If one party does not appoint his arbitrator or the two arbitrators appointed cannot agree on the third one, the appointment will be made by the President of the Court of Appeals of the jurisdiction where the arbitration must be conducted.

When there is to be only one arbitrator, and in the absence of an agreement on the arbitrator between the parties, the President of the Court of Appeals will make the appointment.

It is important to note that the Law does not refer to situations in which the parties have agreed to arbitral panels comprised of more than three arbitrators.

An arbitrator can be challenged only if (i) there are circumstances which generate justified doubt about his impartiality or independence; or (ii) he does not have the qualifications agreed upon by the parties.

VI. Arbitration Procedure

A. Equitable Treatment

The guiding principle in regard to arbitration procedure is that there is equal status between the parties. Therefore, they are to be given full opportunity to assert their rights and viewpoints. Subject to the rules in the Arbitration Law, the parties are free to set the rules of the arbitration procedure. Should they fail to do so, the panel will proceed in the manner it deems most appropriate, subject to the Arbitration Law.

The arbitral panel will decide *"ex aequo et bono,"* or as an *amigable componedor,* only when expressly authorized by the parties.

Any of the parties may, either before or during arbitration proceedings,[3] request that provisional precautionary measures be implemented.

B. Place of Arbitration

The parties are free to determine the place of arbitration. In the absence of such an agreement, the place of arbitration will be set by the arbitral panel.

C. Language of the Arbitration

The parties may freely agree on the language or languages to be used in the arbitration. In the absence of such an agreement, the language will be decided upon by the panel.

D. Applicable Rules

The arbitral panel will apply the rules chosen by the parties. Any indication of the law or legal system of one state will be deemed to refer to the substantive law of that state and not to its rules on conflicts of laws, unless there is a specific stipulation otherwise. If the parties do not indicate the applicable law, the arbitral panel will decide which law will apply, according to the rules on conflicting laws that it deems applicable.

Finally, the arbitral panel will decide in accordance with the stipulations contained in the relevant contract and it will take into account the applicable commercial customs.

E. Claim and Answer

The parties should submit their respective briefs of claim and answer within the period they or the panel has agreed upon. All documents deemed pertinent may be provided in support of the allegations made by the parties in their briefs of claim and answer, or reference may be made to documents or other proof that they may submit.

F. Hearings and Written Proceedings

The parties may freely determine whether hearings will be held to present evidence or make oral allegations or whether the arbitration will proceed using documents and other forms of proof.

If the parties have said nothing about hearings in their arbitration agreement, and unless they have expressly agreed that there will be no hearings, the arbitral panel will hold hearings at the appropriate stage if one of the parties so requests them or if the panel considers it pertinent for the submission of evidence or oral allegations. The other party will be given notice of all depositions, documents, expert reports or other information furnished by a party, and will have a period of time to respond to the same.

The arbitral panel may appoint one or more expert witnesses unless the parties have agreed otherwise.

G. The Award

When the arbitral panel comprises more than one arbitrator, all decisions will be adopted by a majority vote, unless otherwise agreed by the parties. The award is to be rendered in writing and to be signed by the arbitrator(s), indicating the date and place of arbitration.

H. Appeals

The only remedy available against the award will be annulment by the relevant Court of Appeals, which must be requested, if at all, within three months after the date of receipt of the award.

The party filing the petition for annulment must prove at least one of the following circumstances:

- One of the parties to the arbitration agreement was not competent or the arbitration agreement was invalid under the law to which the parties submitted, or under the law of the relevant jurisdiction, if there is no such indication of choice of law.
- The petitioning party was not duly notified of the appointment of an arbitrator or of the arbitration proceedings or was unable to enforce his or her rights for any other reason.
- The award refers to a dispute not foreseen in the arbitration agreement or contains decisions that go beyond the terms of the arbitration agreement. Nonetheless, if the provisions in the award that refer to matters in the arbitration can be separated from those that are not, only the latter can be annulled.
- The composition of the arbitral panel or the arbitration procedure did not adhere to the parties' agreement, unless that agreement conflicted with a provision in the Arbitration Law from which the parties could not deviate or, in absence of such an agreement, that it did not adhere to the Arbitration Law.

Alternatively, the award can be annulled upon petition if the Court of Appeals determines that (i) the subject matter of the dispute could not be arbitrated pursuant to Chilean law; or (ii) the award is contrary to the public order of Chile.

I. Recognition and Enforcement of Awards

Following written request filed before the competent court, the award will be enforced. Enforcement of the award will be denied, at the request of the party

against whom it is invoked, only when such party proves one of the following circumstances to the competent court in the jurisdiction where recognition or enforcement is requested:

- One of the parties to the arbitration agreement was not competent or the arbitration agreement was invalid under the law to which the parties submitted, or under the law of the jurisdiction where the award was rendered, if there is no indication of choice of law.
- The party against whom the award is invoked was not duly notified of the appointment of an arbitrator or of the arbitration proceedings or was unable to enforce his or her rights for any other reason.
- The award refers to a dispute not foreseen in the arbitration agreement or contains decisions that go beyond the terms of the arbitration agreement. Nonetheless, if the provisions in the award that refer to matters in the arbitration can be separated from those that are not, the former may be recognized and enforced.
- The composition of the arbitral panel or the arbitration procedure did not adhere to the parties' agreement or, in absence of such an agreement, it did not adhere to the law of the jurisdiction where the arbitration was conducted.
- The award is not yet binding upon the parties or has been annulled or stayed by a court in the jurisdiction where that award was rendered or according to the law of such country.

Alternatively, as in the case of a petition for annulment, the award will not be enforced if the court confirms that (i) the subject of the dispute could not be arbitrated pursuant to Chilean law; or (ii) the recognition or enforcement of the award would be contrary to the public order of Chile.

Endnotes

1. This Model Law has served as the basis for the following countries and territories; Germany, Australia, Azerbaijan, Bahrain, Byelorussia, Bermudas, Bulgaria, Canada, Cyprus, Croatia, Egypt, certain of the United States of America (California, Connecticut, Illinois, Oregon and Texas), the Russian Federation, Greece, Guatemala, Hong Kong, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macao, Madagascar, Malta, Mexico, Nigeria, New Zealand, Oman, Paraguay, Peru, United Kingdom (Scotland), Singapore, Sri Lanka, Tunisia, Ukraine and Zimbabwe.
2. Article 14: "The law is obligatory for all inhabitants of the Republic, including foreigners." Article 16: "Assets situated in Chile are subject to Chilean laws even though the owners thereof are foreigners and do not reside in Chile. This provision shall be understood to be notwithstanding the stipulations contained in contracts validly executed in a foreign country. Chilean law shall be observed for purposes of contracts executed in a foreign country that are to be performed in Chile."
3. According to Article 21 of the Arbitration Law, unless agreed otherwise by the parties, arbitration proceedings in respect of a certain dispute will begin on the date when the respondent has received notice of submission of the dispute to arbitration.

Juan Enrique Allard Serrano is a partner in the law firm Guerrero, Olivos, Novoa y Errázuriz in Santiago de Chile.

New York State Bar Association
International Law and Practice Section

SAVE THE DATES

FALL MEETING 2005

LONDON, ENGLAND
OCTOBER 18-23, 2005

"CROSS ATLANTIC LEGAL PRACTICE IN A TIME OF GLOBAL CHANGE"

The 2005 Fall Meeting of the New York State Bar Association's International Law and Practice Section will be held in London, England from Tuesday, October 18 through Sunday, October 23, 2005. The theme will be "Cross Atlantic Legal Practice in a Time of Global Change," and MCLE credit will be available. The meeting will address practice issues across a wide spectrum of legal disciplines and specialties, with a view to strengthening the quality of legal practice among the United States, United Kingdom, the countries of the European Union and the Americas.

The educational programs will be held in cooperation with, and at the Headquarters of the Law Society of England and Wales on Chancery Lane in the heart of "Legal London."

Hotel accommodations include the Chancery Court Hotel and Kingsway Hall.

Planned social events include dinner at Middle Temple and a gala dinner at Somerset House, home of the Courtauld Gallery and the Gilbert Collection. Spousal trips are also being planned.

Sponsorship opportunities for the meeting will be available soon.

Mark your calendar now and plan to attend!!

NEW YORK STATE BAR ASSOCIATION COMMITTEES

International Law and Practice Section

Great Opportunities for Involvement!

The New York State Bar Association International Law and Practice Section Committees offer both the experienced and novice practitioners excellent ways to enhance their knowledge and expertise. Through Section activities members examine vital legal developments in international law. The Section sponsors continuing legal education programs and publishes the *International Law Practicum*, *New York International Law Review* and *New York International Chapter News* to keep you informed on the latest updates in the area of international law.

International Law and Practice Section Committees are a valuable way for you to network with other attorneys from across the state and research issues and influence the laws that can affect your practice. Committees are also an outstanding way to achieve professional development and recognition. Your involvement is very much welcomed.

☐ Please consider me for appointment to the committees as indicated below.

☐ I wish to become a member of NYSBA's International Law and Practice Section. Please send me information.

Committees

__ Asia Pacific Law
__ Awards
__ Central & Eastern European and Central Asian Law
__ Communications
__ Corporate Counsel
__ Customs and International Trade
__ Immigration and Nationality
__ Inter-American Law/Free Trade in the Americas
__ International Banking, Securities & Financial Transactions
__ International Dispute Resolution
__ International Employment Law
__ International Entertainment Law
__ International Environmental Law
__ International Estate & Trust Law
__ International Human Rights
__ International Intellectual Property Protection
__ International Investment
__ International Litigation
__ International Matrimonial Law
__ International Privacy Law
__ International Sales & Related Commercial Transactions
__ International Transportation
__ Multinational Reorganizations & Insolvencies
__ Publications
__ Public International & Comparative Law/Arms Control & National Security
__ Real Estate
__ Seasonal Meeting
__ South Asia Law
__ Tax Aspects of International Trade & Investment
__ Trade Compliance
__ United Nations & Other International Organizations
__ U.S.-Canada Law
__ Western European (EU) Law
__ Women's Interest Networking Group

Name ______________________________

Office Address ______________________________

Home Address ______________________________

Office Phone No. ______________ Office Fax ______________ Home Phone No. ______________

E-mail Address ______________________________

Please return this application to:

Membership Department
New York State Bar Association
One Elk Street
Albany, NY 12207
Telephone: 518 487-5577
E-mail: membership@nysba.org

International Law and Practice Section—Executive Committee—Officers

Chair ..... Robert J. Leo
(212 949-7120)

Chair-Elect ..... John F. Zulack
(212 412-9550)

Executive Vice-Chair ..... Oliver J. Armas
(212 912-7627)

Secretary ..... Calvin A. Hamilton
(3491 319-9686)

Assistant Secretary ..... Joyce M. Hansen
(212 720-5024)

Treasurer ..... Lawrence E. Shoenthal
(212 375-6847)

Vice-Chair ..... Sydney M. Cone, III
(212 225-2090)

Delegates to House of Delegates ..... James P. Duffy, III
(516 228-0500)

Paul M. Frank
(212 210-9540)

Kenneth A. Schultz
(212 818-9200)

Vice-Chair/CLE ..... John E. Blyth
(585 325-1710)

Vice-Chair/Membership ..... Joyce M. Hansen
(212 720-5024)

Vice-Chair/Membership ..... Allen E. Kaye
(212 964-5858)

Vice-Chair/Committees ..... Mark H. Alcott
(212 373-3179)

Vice-Chair/Annual Meeting ..... Marco A. Blanco
(212 696-6128)

Vice-Chair/Publications Editorial Board ..... David W. Detjen
(212 210-9416)

Vice-Chair/Domestic Chapters ..... Dr. Kathryn Bryk Friedman
(716 845-2102)

Vice-Chair/Liaison w/Other International Bar Associations ..... Steven C. Krane
(212 969-3435)

Vice-Chair/Liaison w/Canadian Bar Associations and Law Societies ..... Leonard V. Quigley
(212 373-3320)

Vice-Chair/International Division ..... Eduardo Ramos-Gomez
(212 692-1074)

Vice-Chair/Awards ..... Saul L. Sherman
(631 537-5841)

Vice-Chair/Diversity ..... Lorraine Power Tharp
(518 487-7730)

Section Committee Chairs and Co-Chairs

Asia Pacific Law ..... Junji Masuda
(212 258-3333)

Awards ..... Jonathan I. Blackman
(212 225-2000)
Michael M. Maney
(212 558-3800)
Lauren D. Rachlin
(716 848-1460)

Central & Eastern European and Central Asian Law ..... Serhiy Hoshovskyy
(646 619-1123)

Communications ..... John F. Zulack
(212 412-9550)

Corporate Counsel ..... Carole L. Basri
(212 982-8243)
Michael J. Pisani
(516 849-0508)

Customs and International Trade ..... Claire R. Kelly
(718 780-0398)
Stuart M. Rosen
(212 310-8000)

Immigration and Nationality ..... Jan H. Brown
(212 397-2800)

Inter-American Law/Free Trade in the Americas ..... Carlos E. Alfaro
(212 698-1147)

International Banking, Securities
& Financial Transactions........................Joyce M. Hansen
(212 720-5024)
Eberhard H. Rohm
(212 773-5771)
International Dispute Resolution ....Peter H. Woodin
(212 594-4454)
International Employment Law................Aaron J. Schindel
(212 969-3090)
International Entertainment Law...................Gordon Esau
(604 443-7105)
International Environmental Law ....John Hanna, Jr.
(518 487-7600)
Andrew D. Otis
(212 696-6000)
Mark F. Rosenberg
(212 558-3647)
International Estate & Trust Law..........Michael W. Galligan
(212 841-0572)
International Human Rights ....Arthur L. Galub
(212 595-4598)
Rachel Kaylie
(212 406-7387)
International Intellectual
Property Protection ....Gerald J. Ferguson
(212 589-4238)
L. Donald Prutzman
(212 355-4000)
International Investment ....Lawrence E. Shoenthal
(212 375-6847)
International Litigation...........................Thomas N. Pieper
(212 912-8248)
International Matrimonial Law ....Rita Wasserstein Warner
(212 593-8000)
International Privacy Law ....Nava Bat-Avraham
(212 217-0088)
Laura Lee Becking
(212 773-3829)
Andre R. Jaglom
(212 508-6740)
International Sales & Related
Commercial Transactions ....John P. McMahon
(803 980-1800)
International Trade Compliance ......Timothy Michael Ward
(212 899-5560)

International Transportation..........William Hull Hagendorn
(914 337-5861)
Alfred E. Yudes, Jr.
(212 922-2211)

Multinational Reorganizations &
Insolvencies ....Robert W. Dremluk
(212 696-8861)
Publications ....Prof. Charles Biblowit
(718 990-6760)
David W. Detjen
(212 210-9416)
Lester Nelson
(212 983-1950)
Richard A. Scott
(212 218-2995)

Public International & Comparative Law/
Arms Control & National Security ....Prof. Charles Biblowit
(718 990-6760)
Ambassador Edward R. Finch, Jr.
(212 327-0493)
Real Estate ....Thomas Joergens
(212 284-4975)
Seasonal Meeting.................................Gerald J. Ferguson
(212 589-4238)
Michael W. Galligan
(212 841-0572)
South Asia Law ....Babar Sattar
(212 859-8776)
Tax Aspects of International Trade
& Investment ....Marco A. Blanco
(212 696-6128)
Javier Asenio
(212 784-8791)
United Nations & Other
International Organizations...............Jeffrey C. Chancas
(212 431-1300)
Edward C. Mattes, Jr.
(212 308-1600)
U.S.-Canada Law ....David M. Doubilet
(416 865-4368)
Western European (EU) Law........................Stefano Crosio
(212 424-9174)
Michael Lee Sher
(212 421-1311)
Women's Interest
Networking Group ....Jennifer King
(212 412-9537)
Meryl P. Sherwood
(212 644-2343)

International Division—Chapter Chairs and Co-Chairs

Amsterdam
Steven R. Schuit
Allen & Overy
Postbus 75440
Amsterdam 1070AK
Netherlands

Barcelona
Jaime Malet
Malet, Abogados
Avda. Diagonal 490, Pral.
Barcelona 08006
Spain
(34) 93 238-7711

Berlin
Dr. Jens Eggenberger
Freshfields Bruckhaus Deringer
Potsdamer Platz 1
Berlin 10785
Germany
(212) 455-2616

Brussels
George L. Bustin
Cleary Gottlieb et al.
57 Rue De La Loi
Brussels 1040 Belgium
011-(322) 287-2000

Budapest
Andre H. Friedman
Nagy & Trocsanyi, LLP
1114 Avenue of the Americas
Suite 4250
New York, NY 10036
(212) 626-4202

Buenos Aires
Juan Martin Arocena
Allende & Brea
Maipu 1300
10th Floor
Buenos Aires 1006 Argentina
54-1-1-4318-9930

Guillermo Malm Green
Brons & Salas
Maipu 1210, 5th Floor
Buenos Aires C1006ACT Argentina
5411-4891-2707

Alberto Navarro
G. Breuer
25 De Mayo 460
Buenos Aires C1002ABJ Argentina
5411-4313-8100

Cyprus
Christodoulos G. Pelaghias
27 Gregory Afxentiou Avenue
PO Box 40672
Larnaca, 6306 Cyprus
(357) 2465-4900

Dublin
Eugene P. Fanning
EP Fanning & Co.
71 Ailesbury Road
Ballsbridge
Dublin 4 Ireland
(353) 1219-5935

Frankfurt
Dr. Rudolf Colle
Oppenhoff & Raedler
Linklaters Mainzer Landstrasse 16
Frankfurt 60325 Germany
49-69-71003-440/250

Geneva
Nicolas Pierard
Borel & Barbey
2 Rue De Jargonnant
Case Postale 6045
Geneva 1211 6 Switzerland
4122-736-1136

Israel
Mitchell C. Shelowitz
Nixon Peabody, LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3090

Eric S. Sherby
Sherby & Co., Advs.
South African Building
12 Menahem Begin Street
Ramat Gan 52521 Israel
972-3-753-8668

Istanbul
Dr. Mehmet Komurcu
Birsel Law Offices
Inonu Caddesi No. 53 Kat 4
Gumussuyu
Istanbul 34437 Turkey
90-212-245-5015

Lima
Guillermo J. Ferrero
Estudio Ferrero Abogados
Av. Victor Andres Belaunde 395
San Isidro
Lima, 27 Peru
511 442-1320

Jose Miguel Morales
Estudio Aurelio Garcia Sayan
Av. El Rosario
San Isidro Lima 27 Peru

Jose Antonio Olaechea
Estudio Olaechea
Bernardo Montegudo 201
San Isidro Lima 27 Peru
511-264-4040

Lisbon
Pedro Pais De Almeida
PACSA Law Firm:
VAT PT 503 655 511
Av. Liberdade, 144, 7 DT.
1250-146 Lisbon Portugal
351-21-324-1600

London
Jonathan P. Armstrong
Eversheds, LLP
Senator House
85 Queen Victoria Street
London EC4V 4JL UK
44-0-113-200-4658

Randal John Clifton Barker
Genworth Financial
80 Strand
London WC2R 0GR
England
(442) 075-991-514

Anne E. Moore-Williams
310 The Whitehouse
9 Belvedere Road
London SE1 8YS UK
(0044) 7802-756-776

Lugano
Lucio Velo
Velo & Associati
Piazza Riforma #5
6900 Lugano 1, Switzerland
0041 91 924 0451

Luxembourg
Alex Schmitt
Bonn Schmitt & Steichen
44, Rue De La Vallee
L-2661 Luxembourg
011-352-45-5858

Madrid
Calvin A. Hamilton
Monereo, Meyer & Marinel-lo
C/Bárbara De Braganza 11, 2º
Madrid 28004 Spain
(3491) 319-9686

Clifford J. Hendel
Araoz & Rueda
Castellana 164
Madrid 28046 Spain
3491 319-0233

Manila
Efren L. Cordero
44 Aberiquet Street B.F. HEVA
Las Pinas City
Metro Manila Phillipines
(632) 631-1177

Milan
Maurizio Codurri
Frau & Partners
Via C. Poerio 15
Milano 20129 Italy
+39 02764271

Montevideo
Nicolas Jorge Herrera
Guyer and Regules
Plaza Independencia 811
11100 Montevideo, Uruguay

Moscow
Mads Stanley Robert Loewe
Ulitsa Pudovkina, Dom 3, Kv. 46
Moscow 119285 Russia
+7095-790-7558

Panama
Alvaro J. Aguilar
P.O. Box 55-1110
Paitilla
Panama City 99999 Panama
011-507-263-5553

Juan Francisco Pardini
Pardini & Associates
PO Box 9654, Zone 4
Panama City, Panama
(507) 223-7222

Paris
Douglas Glucroft
51, Rue Dumont D'Urville
Paris 75116 France
(331) 4501 4501

Rome
Cesare Vento
Gianni Origoni & Partners
Via Delle Quattro Fontane, 20
Rome 00184 Italy
(0039) 06-478-751

San Jose
Hernan Pacheco
Pacheco Coto Attorneys at Law
517 11th Avenue
San Jose 01000 Costa Rica

Santiago
Francis Lackington
Baeza, Larrain & Rozas
Av. Apoquindo 3001
Piso 13
Santiago, 7550227 Chile
(562) 335-7340

São Paulo
Pablo M. Bentes
Machado, Meyer, Sendacz e Opice Advogados
Rua Da Consolacão
247, 3° Andar
São Paulo, 01301-903 Brazil
55-11-3150-7623

Stockholm
Carl-Olof Erik Bouveng
Advokatfirman Lindahl HB
Box 14240
SE-104 40 Stockholm, Sweden
(+46) 670-5800

Toronto
David M. Doubilet
Fasken Martineau DuMoulin, LLP
Box 20, Toronto Dominion Ctr.
Toronto M5K 1N6 Canada
(416) 865-4368

Vancouver
Donald R. Bell
Davis & Company
2800 Park Place
666 Burrard St.
Vancouver V6C 2Z7 BC Canada
(604) 643-2949

Vienna
Dr. Christoph Kerres
Baker McKenzie-Kerres and Diwok
Schubertring 2
A-1010 Vienna
(431) 516-60-100

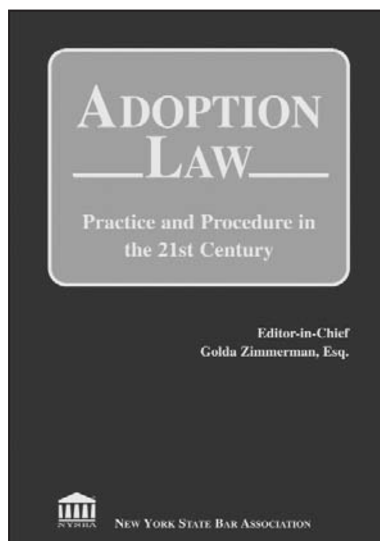
Zurich
Dr. Erich Peter Ruegg
Schumacher Baur Hurlimann
Oberstadtstrasse 7
5400 Baden Switzerland
41 56 2000707

Martin E. Wiebecke
Anwaltzburo Wiebecke
Kohlrainstrasse 10
Kusnacht
Zurich, CH-8700 Switzerland
(41) 1914-2000

Council of Licensed Legal Consultants
Hernan Slemenson
Marval O'Farrell & Mairal
509 Madison Avenue
Suite 506
New York, NY 10022
(212) 838-4641

From the NYSBA Bookstore

Adoption Law: Practice and Procedure in the 21st Century



2004 • PN: 40204 • Approx. 942 pp.

List Price: $165
Mmbr. Price: $140

Golda Zimmerman, Esq.
Editor-in-Chief

"Golda Zimmerman's latest effort is an excellent example of what other guides should strive to be. I found the book to be clear and concise, and I would recommend the book to any attorney in the field of adoption law."

Robert D. Tuke
Trauger, Ney & Tuke
Nashville, Tennessee

Adoption is a specialized field, calling for skill in maneuvering through the maze of regulations within the state, among the states and, often, those of other countries. Some of the joy in practicing adoption law comes from successfully working through the obstacles, but in all cases, the attorney must be wary of pitfalls.

Adoption Law: Practice and Procedure in the 21st Century is here to lead your way. Written by adoption law experts from across the country, this text of first reference will guide adoption lawyers through the many challenges they face practicing in the area of adoption law. It includes comprehensive coverage of agency adoptions; private-placement adoption; interstate adoptions; federal laws and regulations governing intercountry adoptions; adopting a foster child; homestudy; contested adoptions; the Indian Child Welfare Act; wrongful adoption; facilitators; assisted reproductive technology and the law; adoption assistance and the special needs of children; adoption mediation; sibling rights; and over 250 pages of forms. This is an indispensable resource for any attorney practicing in the adoption law arena.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs Mention Code: CL2463

INTERNATIONAL LAW PRACTICUM

Editorial Board

Editor in Chief
David W. Detjen

Executive Editors
Thomas Backen
David W. Detjen

The *Practicum* is a publication of the International Law and Practice Section of the New York State Bar Association. It is distributed free of charge to members of the Section.

The New York State Bar Association wishes to acknowledge the generous contribution of Mead Data Central, Inc. in donating access to the LEXIS®/ NEXIS® service for our use in the preparation of this publication.

© 2005 by the New York State Bar Association.

ISSN # 1041-3405

International Law and Practice Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155