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Financing Sources for Trade & Investment in Latin America

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FINANCING SOURCES FOR TRADE & INVESTMENT IN LATIN AMERICA

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PANEL INTRODUCTION

MODERATOR, A. MARTIN ERIM

VISHNIA CAPITAL

Welcome to the Financing Sources Panel for Trade and Investment in Latin America. I am Martin Erim, the moderator of this panel. I am from the Washington, D.C. area, and I am a 1977 J.D. graduate from the American University Washington College of Law. I feel very fortunate to be able to serve as the moderator for this wonderful panel. Much of what is being discussed and probed in all of the sessions, particularly this one here, is really the gist of the entire conference. That is, many of the conference topics revolve

around money and financial issues.

I am involved in business development and financing activities around the world. For the most part, my experiences have been in Eastern Europe, the former Soviet Union, and Turkey. I arrived in Miami only yesterday, straight from the Gore-Chernomyrdin Commission Meeting in Moscow. I can tell you that one billion dollars of investment activity into Russia is incredibly small and pales in comparison to the more than one hundred and ten billion dollars that has gone into Latin America through United States institutional investors. There is plenty of money, plenty of profits, and many interesting topics to discuss. I would like to go ahead and introduce our panelists for today.

First is Terry Jaramillo. Terry is the Director of Corporate Finance with the Capital International Securities Group, an investment services firm here in Miami. Terry is a colleague of mine and has also been to Russia many times. Terry has over twenty years of experience in corporate finance work, specializing in environmental infrastructure and other power type projects. Often these projects require complex structures in financing. Terry has worked with many international banks, both as an employee and as a consultant working for clients. Today, Terry will speak about the private banking/private fund portion of the panel discussion.

Next to Terry is Miguel Rubio. Miguel is an attorney with the United States Export-Import Bank, or Ex-Im. He has been with the bank since 1989. Miguel is involved in a number of different activities at Ex-Im. He has worked in the areas of bankruptcy and insurance coverage and has been exposed to many different transactions. He has also been involved with many of the disputes that arose out of those transactions.

Next is Marco Monroy. Marco is here from the International Access Corporation. International Access Corporation is a Japanese consulting company that, among other areas, deals with the Inter-American Development Bank ("IDB") and the World Bank. Much of Marco's work involves environmental and management information systems consulting activities. He is a 1993 graduate of the LL.M. program at the Washington College of Law. Marco will discuss the IDB programs.

Next is Mark Johnson. Mark is a 1993 graduate of the Washington

College of Law. Also from Washington, D.C., Mark is a staff attorney and Associate Director for Policy and Partnership at the Intelligent Transportation Society of America, or ITS America. ITS America is a very interesting organization. It is involved in different public-private partnership efforts, all in the transportation area. Mark works quite a bit with the U.S. Department of Transportation on surface transportation projects.

Mark is here with his colleague, Oliver Yandle, who is a 1994 Washington College of Law graduate. Oliver is with an organization called PB Farradyne, and they are part of the Parsons Brinckerhoff Group, an engineering software group involved in different engineering and construction projects. They are an ITC of America member, and together they are looking at this very interesting area of public-private partnership solutions and approaches to infrastructure projects.

We will first talk about the conventional private financing sources that are available for Latin American trade and investment. Then we will examine the United States promotional agencies. We will focus on Ex-Im, and we'll also touch upon some of the parallels and dissimilarities in working with the other promotional agencies. In particular, we will examine the Overseas Private Investment Corporation ("OPIC"), United States Trade and Development Agency ("TDA"), and then we will come to the multilateral institutions, such as the Inter-American Development Bank ("IDB") and the World Bank. Finally, we will examine the public-private partnership concept as illustrated by transportation projects. So that is our format for the afternoon, and we definitely appreciate having you all here. With that, we will start with Terry.

PRIVATE TRADE FINANCING

PRESENTATION BY E. TERRY JARAMILLO

DIRECTOR, INTERNATIONAL CORPORATE FINANCE, CAPITAL INTERNATIONAL
SECURITIES GROUP

INTRODUCTION

I want to speak about what is going on today in trade finance in

Latin America. Miami is a great place to do that because trade is part of the fuel that keeps this "engine" going, at least in Miami.

I. DEVELOPMENT OF MIAMI AS A BANKING CENTER

Many years ago, I was very active in the Coral Chamber of Commerce, and we had a trade and international affairs committee. We thought that Miami was, in fact, *the gateway* to the Americas, when it was, in reality, *the gateway* to Homestead (Florida).

Over a period of about twenty years, a number of banks came to this town, including my alma mater, Citibank, Bank of America, First Chicago, among many others. They are still very active in this market.

Miami also saw the arrival of the *super-regionals*, First Union and NationsBank, for example. They have been here for a very long time and are doing extremely well. Large banks, including Republic National Bank of New York, also have very large operations here. There are also numerous large foreign banks in Miami. Barclays Bank is perhaps the largest. Lloyds Bank also recently moved its entire Latin American headquarters to Miami. We also enjoy a number of smaller banks such as United National Bank (recently acquired by Mellon Bank) and Pacific National Bank, a bank that you probably never heard of, but a bank that I worked in which happens to be a subsidiary of Banco del Pacifico, Ecuador's largest bank. All one has to do is look in the yellow pages in this town to see a plethora of branches, agencies, and other banking institutions. There is also one new bank that has been formed, which is what I will term a "network bank." I'm going to come back to that toward the end of my talk.

II. PRIVATE TRADE FINANCING

All of these banks have one thing in common—they have a customer base that is looking to do business both locally and internationally. Most of the banks in Miami, however, are not truly equipped to work internationally, even through Ex-Im Bank programs. For example, there are a number of little nuances that people aren't aware of. One is the fact that once goods with an Ex-Im Bank commitment have been shipped, are on the boat, and have the proper documents, you really don't yet have the Ex-Im Bank guaranty. You won't really have the guaranty until all documents have been re-

viewed and inspected by Ex-Im Bank. So there is a little gap in time where the goods have been shipped and, technically, no guaranty exists. A lot of banks don't want to assume that risk.

Fortunately, there are a number of local banks that have been very good in servicing that gap in time. Hamilton Bank, for one, has worked on such projects for a long time. Capital (recently acquired by Union Planters bank) and International Bank of Miami are examples of banks that understand the Ex-Im Bank programs, have worked with them, and feel comfortable taking that risk, because they understand the documentation side as well.

A. Specialized Institutions

Some specialized institutions also operate in Miami. One such institution is called Florida Export Finance Corporation ("FEFC"), which is modeled after a California state institution. FEFC is a non-profit company, set up by the state of Florida. It provides guarantees to banks that have a problem lending money to certain local corporations that are planning to export. PEFCO, or Private Export Funding Corporation, is also active in this market. I've seen PEFCO in several deals, and they work closely with Ex-Im Bank. The Latin American Agriculture Development Corporation, or LAAD, happens to be headquartered in Coral Gables, a suburb of Miami. BLADDEX, which is a Panama-based Latin American export-import bank, is also very active in this market, and they are involved in a number of deals, including oil and gas deals.

B. Specialized Funds

On the Latin American funds side, we have, what I would term, general funds. ING-Barings Latin American Fund, which is also Miami based, sponsors a fund to invest in private equity in Latin America. Barings, of course, and ING have many other clients around the world. One would only have to look at a directory of *emerging market* funds to see that a plethora of these funds exist. I'm not going to spend a lot of time on these general funds.

There are also *sector* funds that various countries provide. The United Kingdom, for example, provides an overseas project fund that makes grants to contractors and consultants. The U.K. even has a "Know-How Fund," which makes grants to U.K. companies in-

volved in technology and managerial *know-how* transfers. Costa Rica has funds to support medium- and long-term financing of agricultural projects. They also have an industrialization-related fund, which provides grants for feasibility studies. Honduras has national industrial development funds funded by The World Bank and a pre-investment fund that also provides grants for feasibility studies. Even El Salvador has an agrarian reform financing fund and a local currency fund to support agro-industrial manufacturing projects. So, where is Miami headed, and where are we going in banking, in particular, as far as funding these transactions and participating in trade?

C. Network Banking

"Network banking" is a term that you have never heard before. I look at it similarly to "network marketing" in that it really provides an efficient and very cost-effective means of delivering banking and non-banking services to customers. How is all of that done? It is accomplished by forming strategic alliances. Such alliances have been around for a long time on the industrial side of commerce, but not that long on the banking side. Traditionally, banks worked with correspondent banks to complete their deals and to take on risk in foreign countries. Once again, Hamilton Bank has done a good job of that here in Miami.

III. MERGERS & ACQUISITIONS AS A MEANS TO COMPETE

Over the past couple of years, however, *spreads* are shrinking. The risk is diminishing. Latin America is becoming more creditworthy, as are its banks. Chile is a good example. A United States bank might get LIBOR (London Interbank Offered Rate) plus twenty to twenty-five basis points, or one quarter of one percent profit-margin. The Chilean bank can on-lend that to their customer at two hundred to five hundred basis points. So Chilean banks are reaping the rewards. Banks, other than Citibank which has its ubiquitous branch network no matter where you go around the world, cannot do this kind of direct lending. They must find another means to compete. Today, you see large numbers of consolidations even with the larger banks such as Banco Bilbao Vizcaya, a Spanish bank, and Banco Santander, another Spanish bank. Santander recently purchased Banco Osorno in Chile, which was a highly noted transaction.

But what happens to the medium-size players, the medium-size banks? They are going to have to become a so-called "niche player." That is the only way they are going to be able to compete. For the last year, I have been privileged to be involved, in an advisory capacity, with a group that put together such a deal. Having been referred by a former Citibank colleague now living in Switzerland, I advised the principal of the group, a 17-year Republic of New York man, in the acquisition of a Miami-based commercial bank. The group acquired a bank named, quite appropriately, The Hemisphere National Bank. The group consisted of a Mexican bank, Banco Bico; a bank in El Salvador, Banco de Comercio; a Peruvian bank, Banco de Progreso; a Chilean bank, Banco Internacional; and a bank in Argentina, Banco Patricios. The acquiring group was actually the owners of these respective banks, and not the banks themselves.

Why did they do that? They did it so that the medium-size banks in their respective countries could have a Miami operation, an operation that on a stand-alone basis, they could neither afford nor qualify for in any reasonable period of time.

How did they do it? They put together a unique deal. Each of the owners had 9.9 percent of the bank. None of the investors had over 10 percent, which would trigger a "change in control" under the U.S. banking laws. That institution then formed strategic alliances with the underlying shareholders' banks in their various countries. This provides them with a presence and gives them a Miami bank with an increased capital base that allows them to go from making a maximum six hundred thousand dollar loan to any one customer to a two and a quarter million dollar loan. This also allows the U.S. bank to do deals in Latin America with greater confidence, because they now have a true partner bank in that country that knows the "turf." Knows the "good guys," the "bad guys," and is willing to assume those risks.

CONCLUSION

I believe that this is the *new wave* of banking, where the large are always going to get larger, and the small must band together to form sufficient amounts of strength in order to compete in this market. The large being the Santanders of the world and the small being the Hemispheres. That is what I see for the future of private trade fi-

nance. Thank you for your attention.

UNITED STATES GOVERNMENT FINANCING SOURCES

PRESENTATION BY MIGUEL E. RUBIO
COUNSEL, EXPORT-IMPORT BANK OF THE UNITED STATES

INTRODUCTION

I am going to talk about the three United States Government entities that are active in the region and provide financing for different types of projects and different types of needs. My goal is to present a strategic sense about how to use these different entities for the various financing needs that you may have. These programs do not necessarily overlap each other. Some of these programs have different missions and different goals, but they all participate in the Hemisphere. At times, looking at these agencies is like looking at a jigsaw puzzle, but they all somehow fit together in the context of a project or transaction. The key is knowing how all the pieces fit together. I will talk about the Export-Import Bank ("Ex-Im"), the Overseas Private Investment Corporation ("OPIC"), and the Trade & Development Agency ("TDA") from a number of different perspectives.

One perspective is from a program basis. What are the elements that run through these programs? What are the things that you need to know to determine that you have a particular element and need to access this particular agency for this type of project? I am also going to speak very briefly about some of the key features of Ex-Im, OPIC, and TDA programs so that you will have some working knowledge of what these programs are designed to do. I will also talk about what major markets are accessed in Latin America through these particular agencies. I am also going to speak about the application of policy requirements. What are some of the nuts-and-bolts that you need to know about accessing these programs? What are some of the rules that you need to follow? What are certain features that you need to plan for when you approach these agencies?

In each of the programs, I will speak to some of the special issues that typically arise. Since the programs are designed to promote ac-

tivities of United States companies and to produce United States jobs, there are some United States content issues that run through some of the programs. Political risk coverage often confuses people. I will briefly provide a summary of what the programs cover and what they do not cover regarding political risk. I will also discuss how Ex-Im and OPIC view dispute resolution in their programs. You will see that Ex-Im Bank acts a lot like a commercial bank in approaching dispute resolution, and OPIC looks at things like a foreign investor.

Finally, I'll touch very briefly on the impact that the rules of the Organization for Economic Cooperation and Development, or OECD, have on these programs. This point can be a strategic consideration when you are choosing a financing program and putting together a deal. Let's start with the Ex-Im Bank.

I. EXPORT-IMPORT BANK OF THE UNITED STATES ("EX-IM")

A. The Ex-Im List & Ex-Im's Programs

For now, Cuba and Colombia are off-limits for Ex-Im programs. Cuba has long been off-limits, and everybody in banking knows that. Colombia is off-limits because two years ago it was decertified for narcotics trafficking. The de-certification of Colombia, the action taken by the President to remove Colombia from the list of countries cooperating with international narcotics interdiction, basically took it off the Ex-Im list. The Ex-Im list denotes countries for which businesses and projects are eligible for financing through United States government agencies.

Another thing to keep in mind is that there are two types of sales that are pretty much impossible to get through these agencies. One is military sales because Ex-Im Bank is statutorily prohibited from financing such sales. There is a new program in the Defense Department called the Defense Export Loan Guaranty Program that one can use for financing military sales. Secondly, environmentally harmful projects are also looked down upon by all three of these agencies. So, if you've got a deal that falls into one of these two categories, you won't find assistance at Ex-Im.

When you think of Ex-Im Bank, you really should be thinking "export finance": the financing of U.S. goods and services exports.

The vast majority of Ex-Im Bank programs are geared toward that end. Ex-Im Bank has three basic programs that it uses for export financing: export credit insurance, guaranteed loans, and direct loans. In the guarantee program, Ex-Im provides a guaranty to a commercial bank that is funding the export loan. Another program I didn't mention, because it deals with pre-export financing assistance, is Ex-Im's working capital guarantee program. If you've got a company that really wants to get into the foreign market for some reason and simply needs working capital to get that operation up and going, the working capital guarantee program might be a good option.

The insurance program at Ex-Im Bank has a reputation for being rather complicated and lengthy. I must say, however, that the program has undergone a lot of modification over the past couple of years, and it is still undergoing modification. Most of the items that get financed for Ex-Im Bank are capital goods and technical services. So, if you are an engineering company, and you are going to go out and do some sort of survey, the insurance program might be a program to access. If you are dealing with a major capital good that is going to be used in mechanical infrastructure projects, you might also benefit from this program.

Ex-Im Bank's export credit insurance services are essentially geared to short-term and medium-term financing, and there is a technical definition that Ex-Im Bank has for "short-term," which is basically any term less than a year. The technical definition of "medium-term" is a payment term that is seven years or less and a principal amount of financing of ten million dollars or less. The guaranteed loan program and the direct loan program are geared for the medium-term and long-term transactions. "Long-term"—repayment term of more than seven years *or* a principal amount of financing of more than ten million dollars—is a variation of the two elements that go into the medium-term definition.

Ex-Im repayment terms, however, are restrained by OECD rules. Unlike OPIC, Ex-Im repayment terms are basically level payments of principal on semi-annual schedules. The grace period between putting a project together—construction or installation—and the period of time when you start the process of making payments on the loan is guided by OECD principles.

Ex-Im Bank's credit decisions are based upon the statutory re-

quirement that its Board of Directors find a "reasonable assurance of repayment." Consequently, Ex-Im does not provide grants. It does not give the money away. There must be a determination by the Board of Directors that somehow, some way, Ex-Im is going to be paid back. Ex-Im Bank obligations are backed by the full faith and credit of the United States, which means that when it issues an insurance policy or it provides a guaranty, even if Ex-Im Bank were to go out of business, those obligations constitute direct obligations of the United States Treasury.

Another good thing about Ex-Im Bank programs is that there is a statutory requirement that guaranteed and insured obligations be made "transferable." This makes possible some financing arrangements that are built on participation, where you have numerous groups involved. You can also have asset-backed securitizations, which allow export finance groups to access the capital markets.

B. Ex-Im's Involvement in the Hemisphere

Where has Ex-Im been in the Hemisphere? Its most active markets are Mexico, Brazil, and Argentina. Don't forget that Ex-Im Bank's financing naturally follows the export market, so there is no surprise here—Mexico, Brazil, and Argentina are the primary places for U.S. exports across all sectors, public and private, big and small. Ex-Im Bank has also been involved in some smaller markets in the region. Ecuador, El Salvador, Peru, and Venezuela are four such markets.

The sectors that Ex-Im has primarily been involved in, by and large, are the power sector, the transportation sector, and the telecommunications sector. Ex-Im is involved in two of the largest telecom transactions in Mexico right now. It is also involved in oil and gas. Petrobras is a well-known entity that Ex-Im has serviced. The banking sectors are also major users of Ex-Im's program because Ex-Im is able to funnel a lot of its guarantees, insurance, and funds through a local bank. The local banks, in turn, unload their funds on their client importers to finance imports of U.S. goods and services in their respective countries.

Ex-Im recently financed a large environmental protection project in Brazil. The project involved over a billion dollars for radar systems, aircraft, and local costs. Ex-Im has also recently financed some power and telecommunications deals in Mexico. In Argentina, Ex-

Im's political risk product has been used in cellular financing. In Venezuela, Ex-Im has dealt with refinery expansion projects involving the importation of new oil-extraction and refinery technology. In Trinidad and Tobago, Ex-Im was instrumental in bringing about the completion of a natural gas and petrochemical refinery project that was on the books for a long time.

C. Doing Business with Ex-Im

If you are interested in Ex-Im programs, what are some of the things you need to know? First, there is an application fee of one hundred dollars. What are some of the things you have to tell Ex-Im before it will do business with you? You will need to provide some information on the export sale aspect of the project. You will also have to give Ex-Im some information about the financial condition of the parties involved because, as you remember, Ex-Im must find a reasonable assurance of repayment. You will also have to give a sense of the acquisition program, because you are dealing with exports of United States goods and services. In addition, Ex-Im wants to ensure compliance with local and World Bank standards and environmental regulations. Finally, a few credit references wouldn't hurt.

There are two basic fees for Ex-Im Bank products. One is called an "exposure fee" ("insurance premium" in the insurance program). That is how Ex-Im prices the risk. It is this number that Ex-Im provides to the Office of Management and Budget. There is also a "commitment fee," which is a standard fee that runs across all of the programs that offsets the cost of committing budget resources to a transaction.

Ex-Im Bank also has some policy requirements. Ex-Im does not provide one hundred percent financing. It will cover the lesser of one hundred percent of all the United States components to a contract or eighty-five percent of the total contract. Some of the groups that Terry mentioned would be in a position to make up the gap in financing.

There is also a United States content requirement. There must be at least fifty-one percent United States content in the particular goods and services that are being provided to qualify for Ex-Im financing. Ex-Im's logo says "Jobs Through Exports." Ex-Im's mission is to create U.S. jobs by facilitating U.S. exports. Therefore, there must be

at least fifty-one percent U.S. content in the goods and services.

In addition, there should be a supplier within the United States who is responsible as the exporter of record for the transactions. Ex-Im relies on certifications that it receives from the exporter. Therefore, the exporter should be within the reach of the Justice Department in case there are problems with the certifications.

Finally, the underlying financing must be in United States dollars or in some other hard currency. Ex-Im will not conduct transactions in local currency. Disbursements and payments must be in the United States, preferably through a bank that has a presence in the United States.

D. Ex-Im Commitments

The types of commitments that Ex-Im provides are three-tiered. If all you seek from Ex-Im is some indicative letter that says this is the market that we're open in, this is the type of exposure fee or the range of exposure fees that we quote, what you want is a "letter of interest." Ex-Im can turn such a request around in seven business days.

Ex-Im can also provide a "preliminary commitment" if you have a situation where you have to submit a bid on a project, and you are looking for some sort of commitment or something greater than Ex-Im's mere interest in the project. However, neither a letter of interest nor a preliminary commitment represents a financial commitment on the part of Ex-Im Bank. All that it indicates is that Ex-Im Bank is interested in this deal, and, in the case of a preliminary commitment, it indicates that Ex-Im did some of the background work and can say that it is still interested in this deal.

The place where the action really begins is the "final authorization." At that point Ex-Im has said, not only are we interested in this deal, but we are *in* this deal. We are making a commitment to provide financing for the transaction; we are going to commit resources to bring the transaction to fruition.

From time to time, there are some transactions that Ex-Im cannot do "in-house." For example, if Ex-Im has a secured transaction in a foreign country, it needs local counsel. If it has a limited recourse project or if it has an aircraft transaction where the security is very

complex, Ex-Im will get a sponsor to pay some of the costs for an outside advisor. That's the bad news. The good news, however, is the documentation. Ex-Im's documentation is built on a commercially-reasonable standard that is intended to reflect what the industry is doing in the commercial lending arena.

One of the things that you will find among the Ex-Im literature is a general information book and a kind of a quick reference guide to the Ex-Im Bank programs. If you want to get a quick read of what Ex-Im can and cannot do, this would be a good place to start. You will find it very useful.

Ex-Im's project program requirements are also in this book. There is also a nice multi-colored chart that basically tells you where Ex-Im has put its money. You will see that Ex-Im's money is evenly split between Asia and Latin America in terms of project financing. Ex-Im publishes many quick and easy guides to its programs and services that you can receive simply by calling its offices.

II. OVERSEAS PRIVATE INVESTMENT CORPORATION ("OPIC")

I am going to touch very briefly on some of Ex-Im's sister agencies in the U.S. Government, OPIC being one of them. When you think of OPIC, think "equity"; think about limited recourse projects; think about project risk. OPIC programs are available in countries that have signed bilateral agreements with OPIC. For example, you cannot get OPIC financing in Mexico, because Mexico does not have a bilateral agreement with OPIC. But you can get OPIC financing in Costa Rica because it does have a bilateral agreement. A bilateral agreement essentially provides that if OPIC pays on its cover, then the host government is the party that steps up to the plate to make the United States Government whole.

A. *OPIC Programs*

There are two basic programs offered by OPIC: investment insurance and investment finance. Traditionally, OPIC has focused its programs on large infrastructure projects, especially oil and gas and natural resource extraction. Unlike the program limits for Ex-Im Bank, which are based on OECD requirements, OPIC's program limits are solely based on its experience in dealing in the areas of infrastructure project financing and political risk.

OPIC can offer up to twenty-year financing for equity investment, which is a real draw for a lot of United States investors. It can offer political risk insurance of up to two hundred million dollars. OPIC can provide direct loans as well. It can also provide guarantees on debt financing between ten million and one hundred million dollars. In some special cases, OPIC has guaranteed up to two hundred million dollars.

There is also the infamous combination limit. This particular limit rewards the person that really knows how to use the OPIC programs. For example, if you can find a way to combine OPIC's political risk insurance with its investment finance program, OPIC will give you up to two hundred million dollars for *each*, resulting in a total coverage of four hundred million dollars. The big catch, however, is that there is a ten percent risk retention in the OPIC insurance program, so you should seek either self-insurance or some private sector insurance to insure that risk.

B. OPIC's Involvement in the Hemisphere

OPIC's major markets are Brazil, Argentina, Bolivia, Guatemala, and Costa Rica. Since 1991, OPIC has financed seventeen power projects, and the number is growing. OPIC is also involved in the telecommunications and financial services sectors. Basically, OPIC wants to be where the growth is going to be. That is why OPIC targeted these particular sectors in addition to the traditional power sector. OPIC has said that it wants to target the main growth sectors and engage in environmentally beneficially projects, including waste water management.

C. Doing Business with OPIC

OPIC has some application and policy requirements that you should be aware of. The investment finance program and the investment insurance program have different application methods. OPIC's fees are based upon the project itself. It charges a premium that is risk-based and it charges some retainer fees for due diligence and such. First, you have to make sure that you have a project with private ownership and at least twenty-five percent United States-owned cash equity. The U.S. sponsor needs to sign a completion agreement to assume the risk of project completion. You will also have to show

that there is no negative impact on the United States trade balance from the project. It also has to comply with environmental regulations and internationally-recognized workers' rights standards. You have to show a contribution to local development. You also have to show that the host country has an incentive to keep this project in business because, if the project that you are entering into doesn't promise any sort of contribution to local development, it raises the risk of expropriation or some other political event. There has to be a rhyme or a reason in terms of the technical aspects of getting in the deal.

For the investment finance program, OPIC has a document called "Form 115" that you must submit along with a business plan. The business plan has a number of specified elements and is similar to what a financial advisor would request in assessing a limited recourse project. It includes, for example, a general description of the project, an identification and description of the project's owners, an assessment of the supply and distribution markets for the project, a description of the procurement program, a statement of the financing plan along with financial projections, pro forma financials (along with the assumptions that went into the pro forma financials so OPIC can perform sensitivity analysis on the data), and a statement about the contributions that the project will make to social and economic development in the host country.

The investment insurance program is a two-step procedure. The first thing you have to do is notify OPIC of the deal, which is done through OPIC "Form 50," the registration for political risk. Registration does not represent a financial commitment on the part of OPIC; it simply gives OPIC a period of time to address any project problems and put into place whatever arrangements are necessary for OPIC to feel comfortable with the political risk. The registration is good for two years and can be renewed for one year at a time. If OPIC is ready to commit to the project, it will ask you to submit an OPIC "Form 52," which is an application for political risk. Form 52 begins the due diligence process, and that is where you are going to pay some real money for some real experts to take a look at details of the project.

III. UNITED STATES TRADE & DEVELOPMENT AGENCY ("TDA")

What if you don't yet have a finalized deal? Let's say you have not arranged a big export sale, or you have not found a sponsor group for an infusion of equity. Perhaps you are just looking for business. You are a United States company, and you want to become a player in the region. The place for you to go is the United States Trade and Development Agency ("TDA").

A. TDA Definitional Missions and Desk Studies

TDA provides grants that help United States companies pursue foreign business opportunities. The grants support feasibility studies, which include orientation visits and trade missions to facilitate business relationships and strategic partnerships abroad. TDA coordinates meetings between prospective foreign buyers and United States suppliers. TDA assists U.S. businesses in fully exploring business opportunities abroad, including assessing the economic strengths and particular needs of overseas markets. TDA publishes these studies.

TDA predicts that the greatest U.S. business opportunities are in the areas of agriculture, energy, environment, health care, mining, telecommunications, transportation, and water resources. TDA believes these are the growth markets. So, you might want to make that your short list for future projects.

TDA grant money basically goes toward "definitional missions" and "desk studies." Typically what happens is that an interested entity will ask TDA about the prospects of a particular project and about the opportunities for United States business. TDA will contract with somebody to assess the opportunity. The contractor will visit the location, which is called a definitional mission, or will assemble the relevant literature that is available, which is called a desk study. Next, TDA will review the market opportunities to determine if there is need for a feasibility study. This is how TDA is able to fully fund those projects that have promise and potential for United States companies and weed out those projects that are on the margin.

B. TDA's Involvement in the Hemisphere

TDA publishes a list of what it calls "target markets." These are the places that have been studied and reviewed by TDA and for

which TDA has determined that United States businesses are likely to experience growth if they invest in these markets. The list should not surprise you. It consists of Argentina, Bolivia, Brazil, Chile, Ecuador, Mexico, and Venezuela. In the past year, TDA has suggested these countries as good places for U.S. business. For the 1996-97 year, TDA stated that environmentally beneficial projects and air traffic control would be significant sectors. In 1996 and 1997, TDA put a lot of its money into these two sectors in the Hemisphere.

C. Doing Business with TDA

Even though TDA is a grant program, there is some cost sharing in that there are success fees for private sector ventures. If you make use of a TDA-sponsored feasibility study and pursue the opportunity, and that opportunity produces a significant amount of United States revenue, you pay a success fee. In essence, TDA will get to recoup some of the costs that it incurred in putting up the grant.

TDA's application process is very informal. TDA itself consists of a small group of people, so it is not slowed by a bureaucracy. TDA's purpose is to chase business; therefore, it does not have very much red tape. When you contact TDA about the prospects for a particular market opportunity, TDA will put out a request for a market study proposal in a publication called the *Commerce Business Daily*, asking people who know something about the particular market or the particular opportunity to prepare a definitional mission or a desk study that will eventually become a feasibility study available to United States businesses.

What are some of the things that TDA looks for in the application? If you can present allegations of heavily-subsidized competition against United States suppliers in a particular market, that is a persuasive argument for TDA. If you can show that the project or the particular sector development is a priority issue for the host country, and the United States embassy agrees, that is also persuasive. You will also have to show that there will be a sales opportunity in the market because TDA is interested in creating United States jobs. There has to be a significant opportunity for United States goods and services in an amount greater than a TDA grant for a feasibility study. Currently, TDA expects an opportunity providing a one hundred percent greater benefit. You should also be able to demonstrate

that a likely financing source is available for the particular type of project. Finally, you should determine whether the target country is open to procurement by United States firms, especially if you are dealing with parastatals.

IV. COMMON ISSUES

What are some of the issues that are common to the three agencies that I have discussed?

A. United States Content

First, each agency has United States content considerations. The Ex-Im Bank's basic mission is to create United States jobs. It also seeks to offset subsidized foreign competition to United States companies that are doing business abroad. Ex-Im, therefore, has rigid United States content requirements. You must have at least fifty-one percent United States content in the goods and services that are going to be provided, based on direct production cost. Ex-Im's coverage, as I said before, is limited to the lesser of one hundred percent of United States costs that go into the export deal or eighty-five percent of the entire contract price.

For OPIC, the big question is what level of United States investment is in the project? OPIC wants to see a United States presence in the foreign direct investment for that project. This desire is reflected by OPIC's requirement of at least twenty-five percent United States ownership and the existence of a significant management role for a United States company or a United States sponsor in the venture.

TDA's main mission is to help United States businesses pursue foreign business opportunities. Its definitional mission and desk study contracts are awarded to United States firms.

B. Risk Coverage and Recovery

Ex-Im and OPIC have similar approaches to their political risk coverage. Both Ex-Im and OPIC products cover the inconvertibility of local currency into United States dollars. They do not cover the risk of devaluation, but they do cover convertibility risks. Both Ex-Im and OPIC also have the same approach to expropriation coverage. They both cover arbitrary and discriminatory action with the lack of

prompt, adequate, and effective compensation. Ex-Im and OPIC, however, differ with their expectation of coverage for political violence. With political violence, we are talking about war, *not* labor unrest and *not* student uprisings.

What is interesting is that Ex-Im Bank and OPIC have different approaches for how they bolster recoveries. Ex-Im requires that the guaranteed parties subrogate Ex-Im to the assured party's claims. Therefore, Ex-Im is going to pay a lot of attention to the underlying finance documents to make sure that they are legally sound and that the interests are assignable and enforceable. Ex-Im's ability to recover, however, depends on the extent it has access to United States courts in order to enforce its rights. Consequently, Ex-Im's recovery strategy has a bias toward litigation as a last way to obtain recovery.

OPIC operates a little differently. OPIC will not provide cover in a country where it does not have a bilateral agreement with the host government. Its practice is to look at the compensation arrangements that are already in place before any money is recovered. This creates the ability for OPIC to collect in local currency. I have heard some anecdotes about OPIC collecting local currency in a particular market and then taking that money, which it cannot convert to dollars, and giving it to the local United States embassy because the United States embassy can use it to offset its local expenses. You can see that OPIC's bias is toward arbitration devices where, ahead of time, you create a business resolution mechanism that does not require resort to a court or more traditional forms of dispute resolution.

Ex-Im Bank's focus is similar to a commercial bank. A commercial bank will want a submission of jurisdiction in New York. A commercial bank will want New York law as the governing law. Ex-Im Bank, in dealing with sovereigns, will seek waivers of sovereign immunity and will negotiate long and hard to get these waivers.

OPIC, on the other hand, approaches the issue like a foreign investor. It will accept international arbitration, whereas Ex-Im Bank will not. OPIC will agree to apply generally recognized principles of international law for the resolution of disputes, whereas Ex-Im Bank is going to insist on New York law. OPIC always takes the point of view that it is dealing directly with a foreign government. Instead of trying to get the bundle of rights that are wrapped up in the documents that Ex-Im is subrogated to, OPIC will simply go straight to

the local government and claim that the local government is responsible for this problem and must make OPIC whole. This is a completely different approach than Ex-Im Bank.

C. The OECD Arrangement

The last major topic that I want to discuss is the impact of the OECD on some of these programs and issues. The key thing to remember here is that Ex-Im Bank is subject to the OECD Arrangement, but OPIC is not. The effect of the OECD Arrangement is basically that Ex-Im Bank's repayment schedules must consist of level payments of principal, so the payment schedules will ordinarily not fit the economics of a particular project. The OECD Arrangement sets out when repayment is to begin. The grace period is not very long for any particular project. In addition, repayment terms are determined by the types of goods and the types of categories. For example, locomotives have a useful life of more than seven years, but Ex-Im Bank will only offer financing up to seven years because these terms are set by the OECD Arrangement.

OPIC programs are not subject to or in any way influenced by the OECD Arrangement. OPIC payment schedules will match the economics of the project. If level payments of principal do not fit the project, but some other method does, you can utilize the method that fits the project. OPIC will also accept a "balloon" payment arrangement. Whatever works in terms of the project timeline will determine the payment schedule for OPIC financing. The project economics will guide the payment terms.

Finally, there are certain special sector understandings among the OECD countries to which Ex-Im Bank is subject, but OPIC is not. For example, special OECD rules apply to certain sectors that the OECD has determined are very competitive. Large aircraft and ships, for example, are special sectors to which special OECD rules apply. Therefore, when you approach Ex-Im Bank, keep these special rules in mind for these types of goods.

That is a basic introduction to the United States programs. Thank you very much for your time.

INTER-AMERICAN DEVELOPMENT BANK

PRESENTATION BY MARCO G. MONROY

DEVELOPMENT PROJECTS COORDINATOR, INTERNATIONAL ACCESS CORPORATION

INTRODUCTION

Good afternoon. My name is Marco Monroy. My presentation will focus on the Inter-American Development Bank.

I. INTER-AMERICAN DEVELOPMENT BANK

A. Overview

The Inter-American Development Bank ("IDB") was created in 1959 to promote the economic and social development of Latin America and the Caribbean. The United States has thirty percent of the voting power in the IDB. Fifty-one percent of the voting power remains with the Latin American countries. Despite its minority position, the United States substantially influences IDB policies. The IDB, contrary to popular perception, is actually composed of forty-six countries: twenty-eight regional members from the Western Hemisphere and eighteen non-regional members. This diverse composition of the IDB is a recognition of the fact that world development is a win-win proposition; in addition to helping developing countries, it provides donor countries with a very good excuse to do business. By the end of 1996, the IDB had disbursed eighty-one billion dollars into the region, and it had mobilized 261 billion dollars since its inception. The IDB loans approximately seven billion dollars each year, and it will loan at least that amount again this year.

The majority of the financial resources of the IDB come from the subscription capital contributed by its members. To raise funds, the IDB also taps international markets and administers some interesting trust funds. For example, Norway, Sweden, and Japan have established trust funds that the IDB administers and channels into the Latin American and Caribbean region.

Developed countries have a strong interest in expanding markets for their products and services. Most investment in developing countries stays in the country. Developing countries implement the

projects, gaining expertise in the process. Donors have two primary goals: (1) to assist development in developing countries, and (2) to help private entrepreneurs in their own countries expand their international network and experience.

B. Multilateral Investment Fund

In 1992, the IDB created the Multilateral Investment Fund ("MIF"), recognizing that the changing global economic situation would have strong social and economic impacts in Latin America. The MIF comprises forty-four countries. In its first four years, the MIF had 215 million dollars wrapped up in 134 transactions. A primary focus of the MIF is the development of human resources. It seeks to create an environment in the region that will facilitate foreign investment.

C. Inter-American Investment Corporation

The IDB also administers the Inter-American Investment Corporation, an institution similar to the International Finance Corporation ("IFC") of the World Bank, which provides funds to private entities. The Inter-American Investment Corporation focuses on encouraging the establishment and expansion of small and medium-sized enterprises in the region. It lends money to comparatively small companies in Latin America. The Inter-American Investment Corporation is private sector oriented, and it retains ownership shares in the companies in which it invests. It is much more efficient for small and medium-sized businesses to deal with the Inter-American Investment Corporation than with commercial banks. From 1989 to 1996, the Inter-American Investment Corporation had mobilized 415 million dollars.

D. Social Projects

The IDB is dedicated to in-depth research of the region and to achieving maximum development—not profits. Many of its projects' purposes may not be as attractive for businessmen, but the goals are nonetheless very important for the people in the region.

The privatization movement has had a tremendous impact on multilateral financial institutions. It has forced these institutions to change their attitudes toward development finance and other assis-

tance. A top priority for the IDB and other multilateral financing institutions is social sector projects, including programs to improve education, health, and the environment in the region.

The IDB has also begun some very interesting micro-enterprise programs, where large amounts of capital are funneled through non-profit organizations to fund low interest small business loans. The goal of these programs is to encourage new entrepreneurs. One interesting aspect of these micro-enterprise programs is their focus on women. The IDB bases these programs on the assumption that women are better suited to handling money. The IDB, therefore, disperses much of its funding to women entrepreneurs. This tends to encourage parallel programs designed for women and development.

E. State Modernization Programs

Presently, one of the most important issues for the IDB is modernization of the state. This includes administrative reform, judicial reform, the elimination of corruption, and increasing the availability of legal services. The desire to strengthen democracy in Latin America is the driving force behind state modernization programs.

The IDB has specific projects that focus on fiscal administration. These projects support technological advances in government administration, for example, by providing geographic information systems to countries to help regulate land titles established by satellite pictures. These systems enable countries to store land titles and land histories electronically. The rationale behind such fiscal administration reform programs is the belief that if countries are better able to raise money from fiscal sources, they will be self-supporting in future development.

Many current projects also exist in the area of judicial reform. There are currently twenty-three projects in which the IDB has hired consultants for assistance in judicial reform. The idea is that once foreign investors perceive a stable judicial system, they will be more likely to invest in that country.

Modernization programs provide a great opportunity for lawyers. The projects are very complex, and there are a lot of considerations. These considerations include dealing with existing bureaucracies in the local governments and in the various international organizations, and the problems associated with intervening in the affairs of a sov-

foreign state. The countries resent the intervention in their internal affairs. The IDB is aware of this concern and must be careful when engaging in such a project so as to minimize the perceived interference in the internal affairs of these nations.

The elimination of corruption is another focus of the IDB modernization programs. In my opinion, corruption will not end. Regardless of the Latin American laws, there will always be an economic force behind corruption. Corruption will not end until the large companies stop paying bribes to government employees to secure approval of their projects. In that particular respect, the IDB is examining the procurement laws of Latin American countries in an effort to help develop a procurement system that will be strong enough to attract investors.

F. Infrastructure Development

The IDB has also given priority to infrastructure projects. In the 1960s, 70s, and 80s, governments financed most of the infrastructure projects. This was partly because the IDB used to lend money exclusively to governments. The IDB's loans are sub-loans, and all of its loans require a government warranty.

Many IDB projects still focus on infrastructure development, however, private investment now finances most of these projects. The IDB, as well as the World Bank, have realized that the emerging economies in the region will be based on the private sector, a change from the last twenty or thirty years where the state was the primary market participant. Private sector development is, therefore, currently one of the most important issues. To promote private sector development, for example, the IDB may lend money to a private company to construct toll roads in Colombia. The IDB has also been involved in gas pipelines and electrification projects, in which it competes with private banking sources.

II. OPPORTUNITIES FOR LAWYERS

The last subject I want to touch on is a good one for some of us. The World Bank and the IDB have started actively advising countries on trading and investment policies, focusing on how to create a framework by which companies can safely invest. The World Bank and the IDB provide consulting services to the countries. They are

competing against private consulting firms, engineering firms, and investment banks that offer the same type of services. The World Bank and the IDB have a lot of funding to sub-hire consulting companies and individuals to do this type of work. There are, therefore, a number of opportunities available for lawyers. Thank you for your attention.

PUBLIC-PRIVATE PARTNERSHIPS

PRESENTATION BY OLIVER P. YANDLE
ITS ANALYST, PB FARRADYNE, INC.

INTRODUCTION

My name is Oliver Yandle. I am a legal consultant for a transportation and engineering firm named PB Farradyne. One of the issues in which are clients are particularly interested is public-private partnerships. That is what I am going to discuss today.

I. ELEMENTS AND TYPES OF PUBLIC-PRIVATE PARTNERSHIPS

Essentially, public-private partnerships are arrangements where resources of both the public and private sectors are pooled together to provide the delivery of a particular service—one that is traditionally provided by the public sector. The pooling of resources helps achieve the objectives of both the public and private partners. The key aspect of the public-private partnership is that the partners share resources—not only money and technology—but also assets. In addition, the partners share liability, as well as financial, commercial, and political risks.

Partners also share the rewards. In some instances, the rewards are profits from a particular project. In almost all instances, the rewards come from the efficiencies gained by jointly employing public and private resources, cutting costs, and developing new technology.

A. Concessions

There are several types of public-private partnerships. The most familiar type in the Latin American context is concessions. Conces-

sions involve a government grant to a private party for the exclusive right to provide a particular service and are usually combined with restrictions on pricing and other types of regulations that control this exclusive right.

B. Resource Sharing

Another type of partnership is resource sharing. In this particular public-private partnership, a private company grants consideration to a public agency. The private company, in return for providing services, receives access to a public resource. Resource sharing is, in essence, a barter arrangement. For example, in the transportation context the public entity may provide access to the right of way along a public road to a private company. The private company may use the access for certain operations, such as digging trenches and laying fiber optic cabling. The public entity can then use the fiber optic cable for telecommunications services. At the same time, the private company laying the fiber optic cable can lease the excess capacity to third party providers and generate a profit.

II. NECESSITY OF PUBLIC-PRIVATE PARTNERSHIPS

Infrastructure demands and the need for new technology are growing at a rapid rate, particularly in transportation and telecommunications. Telecommunications are a driving force in economic growth and business, and local competition requires access to the technology. Money is tight, especially for public entities. Public entities simply do not have the funds to make the necessary investments in infrastructure, especially in areas of rapid economic change or growth and, to some extent, where entering the market is difficult.

Insufficient and inefficient human resources are also a current problem. There are simply not enough public sector staff to keep up with the increased demands. As a result, the public sector needs assistance in delivering services. In addition, in order to become more efficient, the public sector needs to function more like a business. Accordingly, the public sector is increasingly turning to the private sector for help in this regard.

III. BENEFITS OF PUBLIC-PRIVATE PARTNERSHIPS

A. Public Sector

The primary benefit to the public sector of public-private partnerships is the efficient use of assets. The public sector owns much of the infrastructure and has the use of many valuable resources that are necessary in delivering public services. By leveraging its assets and resources, the public sector can benefit private sector companies while improving the delivery of necessary public services in the process.

Another benefit of public-private partnerships is that these partnerships allow the public sector to utilize private sector experts, rather than trying to develop its own expertise in a particular area. This increases efficiency, and the public sector saves needed funds that can be used for other public sector projects.

B. Private Sector

On the private side, public-private partnerships can provide private entities with a foothold in an emerging market. For example, fiber optic companies that provide the conduit for telecommunications services are in a very good position to take advantage of the liberalization of the telecommunications market in Latin America. Private companies can gain access to public resources rather than building an infrastructure of their own. For instance, a telecommunications company wanting to provide telecommunications services in the region would only have a few options. One option is to build its own communications network to provide those services, which is very expensive. Another option is to look to the public sector to gain access to an existing network of roads, pipelines, and waterways. The private company can then use its right of way to build its network, which is much more cost effective than developing its own.

IV. CHALLENGES IN FORMING PUBLIC-PRIVATE PARTNERSHIPS

A. Public Sector

There are many challenges to the public sector in engaging in these partnerships. First, can the public sector legally enter into these

partnerships. Do the laws and regulations allow it to engage in such activities? What types of problems will it encounter with exclusivity issues? Will the partnership disrupt the public sector responsibility to deliver certain services? Must the public sector grant access to more than one company? How can it regulate a partner? How can a public entity reconcile the fact that it may have a private partner in one of the industries for which it has a regulatory responsibility? What are the consequences of giving up traditionally public sector services and turning them over to the private sector? Finally, the public, which pays a lot of tax dollars for the delivery of certain services, may be uncomfortable with a private company handling the delivery of vital services because of the private company's profit motives.

B. Private Sector

There are important issues for the private sector as well. One challenge to the private sector is that the market for service delivery may not be well defined. The private entity in charge of delivering a traditionally public utility may not know the real supply and demand or what price it should charge. Another issue is whether or not the public sector will support the private sector in its new role and whether political forces are likely to change or disrupt private sector business.

Regulation is another issue. For instance, how well will the public sector regulate the private sector? Are disruptive regulatory schemes likely to arise? Will there be adequate intellectual property rights protection, especially for partnerships in the more technological areas. There are many issues that must be considered in evaluating a public-private partnership opportunity.

CONCLUSION

These are the fundamentals of public-private partnerships and some of the issues that are key to their success. I will now turn it over to Mark Johnson to discuss how public-private partnerships play out in Latin America.

PUBLIC-PRIVATE PARTNERSHIPS IN LATIN AMERICA

PRESENTATION BY MARK D. JOHNSON
STAFF ATTORNEY, POLICY & PARTNERSHIPS, ITS AMERICA

I. THE ENVIRONMENT IN LATIN AMERICA FOR PUBLIC-PRIVATE PARTNERSHIPS

A. Historical Impediments

Latin America has endured a history of government monopolies in infrastructure, power generation, telecommunications, road maintenance, and water and waste systems. It also has a long history of inflation and even hyper-inflation. For example, in 1990 the inflation rate in Brazil was over twenty-seven hundred percent, the highest rate ever for the country. High interest rates, coupled with large foreign debt throughout the 1980s, suppressed personal savings as well as the size of the domestic capital markets. These conditions also affected the availability of financing, both public and private, for infrastructure projects. In Latin American countries, constitutions and laws have often prevented governments from participating in private sector partnerships. Behind all of these concerns was the problem of corruption.

B. Changing Conditions in Latin America

Conditions in Latin America have changed. There has been much discussion about how markets have taken off in Latin American countries. In Argentina, for example, the changes began in 1989 with the Economic Emergency Law. Later, the Argentinean peso was pegged to the United States dollar and inflation subsequently decreased. Argentina also adopted a national administrative reform law that deals with regulatory agencies. Another piece of legislation, the Public Works Concession Law, opened up opportunities for public-private partnerships through concessions. Concessions allowed the private sector to enter the previously state-owned market in Argentina through infrastructure projects and actually make a profit.

In Brazil, the Real Plan of 1994 dramatically reduced inflation.

The “Real” is the name of the Brazilian currency. This plan essentially pegged one real to one U.S. dollar. By the end of 1996, inflation was reduced to less than one percent per month. In addition, constitutional changes in Brazil have facilitated the development of public-private partnerships, as well as the development of a stable regulatory framework.

C. Infrastructure Development

There is a significant need for infrastructure development in Latin American countries and a significant role for the private sector to play in that development. The World Bank estimates that over the next decade Latin America requires approximately sixty billion dollars in annual infrastructure investments—i.e., power generation, road maintenance and construction, water and sewage, and telecommunications—which will account for four or five percent of the gross domestic product in Latin American countries. The investment requirements in transportation alone are estimated to be about one percent of the gross domestic product over the next ten years. The cost of maintaining the current infrastructure is estimated to be seven billion dollars annually.

Public sector services suffer from two basic inefficiencies: unnecessary staff and hampered access for the poor. For example, in Brazil it is estimated that one-quarter of the highway department staff is unnecessary. In Colombia and Uruguay, labor costs in the railroad sector almost equal the total revenues. Not only does infrastructure development require improvement, but access to the infrastructure for lower income individuals needs to improve as well. As Mr. Monroy mentioned earlier, the IDB is focusing on alleviating poverty. Improving infrastructure can help in this regard. For example, in Guatemala sixteen percent of the poor do not have access to electricity, while eighty-four percent of the rich do enjoy access. Moreover, the poor often pay at a higher marginal rate than the rich for the public service. The IDB and other agencies are trying to reduce this disparity.

Another concern are the constraints on the public sector ability to make these improvements. As Mr. Yandle discussed, the public sector has limited financial resources, human capital, expertise, and access to advanced technology. The private sector can provide these

resources.

II. CONSIDERATIONS FOR EVALUATING A PUBLIC-PRIVATE PARTNERSHIP OPPORTUNITY

I am going to discuss three general policy and legal considerations with regard to public-private partnerships in Latin America: 1) financial considerations and the structure of public-private partnerships, 2) the regulatory framework, and 3) project risks.

A. Financial Considerations

A very important element of public-private partnerships is the application of user fees. For example, expected revenues from toll roads are often a source of collateral for long-term project financing. However, there are difficulties in estimating those revenues, particularly for tolls.

Most projects utilize a combination of debt and equity financing. The Mexican toll road system, for example, was initially financed through the issuance of domestic debt. Gradually, Mexico increased its use of equity and international debt financing for the project. In the United States, a federal securities rule called Rule 144A enables foreign project developers to introduce private bond placements in the United States market. Latin American countries utilize Rule 144A placements for many projects. For example, in the 1993 telecommunications reform in Argentina, the government telecommunications entity issued a five million dollar bond, commonly referred to as an infrastructure investment fund, in both the United States and Asia.

The World Bank, IDB, and export-import banks are all different sources of funds that project developers can look to in order to diversify financing and risk coverage. The advantage of World Bank and IDB loan guarantees is that they have lower rates, and their conditions are less stringent than some of the other types of financing.

Public-private partnerships are frequently structured as a limited liability company or trust, which will actually administer the project, construction, and operations. Under such a structure, each of the entities, including the private partner company, the construction company, and the operating company, will sit together at the managing table as partners.

Other significant financial considerations include, but are not limited to: (1) mitigation of commercial risks, (2) liquidated damages in contracts, (3) performance bonds, (4) contingency funds, and (5) collateral accounts to secure the debt.

B. Regulatory Framework

Latin America is in the process of establishing a stable regulatory environment. One important issue is the extent of regulatory powers at the federal level versus regulatory powers at the state or provincial levels. Brazil is dealing with this issue right now. Who will regulate a project is an important consideration for project developers. Will the federal, state, or local governments regulate the project, or will regulation be some combination of all three levels of government? Overlapping regulatory agencies can drive up the costs of a project and potentially slow it down.

Another issue for Latin American countries is whether there should be a common agency to regulate different sectors or whether different agencies should regulate separate sectors. In the early 1990s, for example, Argentina established different regulatory agencies for each of the various sectors.

How can these countries ensure the independence of these regulators? Should they be elected? Should they be appointed? Who should make the appointment? The regulatory body must also be accountable and its rules transparent. There should be public hearings on the regulations. Another panel discussed telecommunications regulation and mentioned that in a situation where there is a partnership between a telecommunications company and the public sector, where the public sector holds a fifty-one percent stake or greater in the partnership, the project will essentially regulate itself.

Many of these infrastructure sectors are basically natural monopolies. Part of the thrust of public-private partnerships is the desire to increase efficiency through competition. Governments can inject competition into a natural monopoly situation through the bidding process. In Argentina, for example, there is a new concession for telecommunications service that expires in the year 2000. AT&T is vying to be one of the players in that country. Unfortunately, there are already allegations of corruption in the concession process based on taped telephone conversations between the head of AT&T in Ar-

gentina and the regulatory agency.

I have spoken about reforming public institutions in order to make the delivery of services more efficient and cost effective. Creating and sustaining a regulatory environment, enhancing the efficiency of administrative information, and prioritizing investments are important issues for many Latin American countries as they become more decentralized at both the federal and state levels. Who will ultimately determine the area of emphasis in infrastructure development is an important factor. The private sector is unique in the manner in which it defines its goals. Perhaps public institutions could benefit by mimicking private sector strategies.

C. Risks

There are four principal risks associated with entering into a public-private partnership: political risks, currency risks, commercial risks, and demand uncertainties.

Political risk involves the political stability of the government, the government's attitude toward foreign investment, the credibility of the government commitment to the project, and the degree of government involvement in the particular sector and the economy in general.

There are also risks involved in dealing with foreign currency. If a United States company is involved with a Latin American partner and the project revenues are in local currency, is the local currency convertible to United States dollars? Devaluation is a related concern. Devaluation of the Mexican peso had a significant impact on toll road concessions.

In an infrastructure project, commercial risks include the cost of production and cost overruns. One advantage of partnering with the private sector is that the private sector can drive down some of these costs, and it can mitigate the potential size and likelihood of cost overruns.

The concept of demand uncertainty is best understood by examining the Mexican toll road example. In this instance, toll revenues did not meet the projections. This example is rather infamous, but it provides a learning model for concession projects in the Americas.

III. LESSONS FROM PRIOR PUBLIC-PRIVATE PARTNERSHIPS

A. The Mexican Toll Road Failures

During the late 1980s, there was a major effort to develop highway systems in Latin America, particularly in Mexico. President Salinas wanted to construct 6000 kilometers of highways in Mexico. The plan was to concession fifty-two of these highways to the private sector. The total project involved roughly fourteen billion dollars in concessions. The way the project was structured is interesting because the concessionaire, a highway construction company, used Mexican domestic financing to support the construction. Domestic financing, however, because of the weakened domestic capital markets at the time, was more expensive due to higher interest rates. In addition, the financing was not fixed, so financing costs varied over time.

A factor that significantly contributed to the cost increase of the project was that the Mexican Government had projected the estimated traffic and resulting revenues from the toll roads. These toll projections were the foundation for revenue estimates, which would be used to repay the loans. The government then guaranteed the total revenues that they projected.

After the highways were completed, the traffic did begin to flow, and there were revenues. However, it became apparent that original traffic projections were greatly exaggerated. In fact, the traffic projections were as much as sixty percent higher than the actual traffic. Consequently, the revenues were much lower than estimated.

Some problems surfaced quickly and continue to this day. Construction costs, for example, exceeded three times the original estimates. Domestic financing was at high rates and subject to even higher variable rates. The duration of the concessions only ranged from eight to fourteen years—a very short period of time in the highway business. The devaluation of the peso occurred at the time when many of these toll roads became operational. In addition, there was little international financing in place. As a result, the interest on the domestic short-term variable loans was much higher.

Another element that hampered the project from the very beginning was a Mexican law that required the construction of three par-

allel roads for every one of these toll highways constructed. Because of this condition, the concessionaires had to raise the toll price in order to cover the gap in construction costs of the parallel roads. As a result of the higher tolls, there was very little traffic flow on the toll highways and well below projected levels. It was a catch-22 situation. For example, a one-way trip on the toll highway between Mexico City and Acapulco cost sixty dollars for cars and 630 dollars for trucks. As a result, motorists chose the parallel roads and the traffic was worse on the parallel roads than on the toll highways, which, from an engineering perspective, are some of the best in the world.

In August 1997, the Mexican government stepped in and seized control of twenty-five of these fifty-two toll roads. The government assumed over five billion dollars in debt and paid the construction companies almost three billion dollars in construction costs. The construction companies, however, lost about three billion dollars of their own investment. The remaining debt is going to be restructured as long-term bonds. They have reduced the toll at the gates by fifty percent for cars and thirty percent for trucks. Now, half of the highways actually receive the originally projected level of traffic.

I think there are four important lessons to learn from the Mexican toll road example. In general, this example demonstrates that there must be a determined effort to project reasonable user revenues. This applies not only for toll roads, but also to all other public sector infrastructure projects. The first lesson that we can take from this example is that operations must be sustainable, taking into account government projections and reasonable revenues. One of the things that Mexico did was to award the concession to the bidder that estimated the shortest completion time. Argentina, which has some experience in toll roads, awarded its concession to the company with the lowest projected tolls. This is an important distinction. The second lesson is that the government must encourage competition. Third, infrastructure projects must be consistent with user needs and demands. Finally, no single model is perfect for all infrastructure projects. The types of financing available can change the rules of the concession.

The Mexican toll road project does not invalidate the concept of a successful public-private partnership, rather it shows that there is much that can be learned from previous partnerships. The concept of

public-private partnerships is still evolving.

B. The New York State Thruway Successes

The New York State Thruway Authority participated in a successful public-private partnership. The Thruway Authority had previously leased telecommunications services from a private sector provider. The agency was spending a significant proportion of its money for these telecommunications services, which are essential to its operation. The Thruway Authority anticipated that in its effort to upgrade its toll collection system and provide additional services it would need additional telecommunications capacity. The agency was concerned that it could not meet the costs of providing these additional services under its current lease arrangement with the telecommunications service provider.

The Thruway Authority was able to increase its access to telecommunications services within its budgetary constraints by entering into a public-private partnership with a fiber optic company. The private company was selected for participation in this project through a competitive bidding process. The company would develop, install, market, and operate a fiber optic network along the highway right-of-way that the Thruway Authority owned. The fiber optic company contracted to operate and maintain the network for twenty years. In return, the Thruway Authority received use of a fiber optic network large enough to service all of its telecommunications needs. The Thruway Authority then leased the excess network capacity to third parties and received a percentage of the fees. The fiber optic company also received a percentage of the fees from third parties for use of its right of way. Thus, it was a win-win situation for both parties—a *quid pro quo* arrangement.

IV. THE FUTURE OF PUBLIC-PRIVATE PARTNERSHIPS IN LATIN AMERICA

Latin American countries have tremendous physical infrastructure needs, including the estimated sixty billion dollars in annual investment required for water, power, transportation and other infrastructure improvements. Current telecommunications demands greatly exceed the available supply. For example, there is an immediate demand for twenty-four million telephone lines in the region. Latin

American governments control many important public assets, including roads, water, railroad, power, and telephone lines. Thus, there are real opportunities in Latin America for utilizing public-private partnership arrangements to meet the existing needs in infrastructure development.

Telecommunications regulators in many Latin American countries are inviting private consortiums to buy shares in national telephone companies. Private entities can offer capital, technology, and expertise to improve existing services and to increase capacity to meet demand.

Roads also require improvement in Latin America. Many Latin American countries are offering concessions to private companies to build, rehabilitate, operate, and maintain roads and highways. Toll revenue is used to operate and maintain these roads for a profit. Electronic toll collection is one way to collect user fees both efficiently and cost effectively, and it is the best way to keep the traffic moving. Electronic toll collection, however, requires fiber optic systems. This situation provides a perfect opportunity for the implementation of a public-private partnership. Concessionaires can take over management and maintenance of roads and install the necessary fiber. If the concessionaires add additional fiber optic capacity, the potential for profit will increase as the public-private partnership can lease the excess fiber lines to telecommunications companies for telephone, television, Internet, and a whole range of other telecommunications services that are already in demand in Latin American countries. Similar arrangements can be structured for power companies, railroads, or any sector that has an existing network running through high population centers. Together these sectors can provide the networks and infrastructure necessary to support the delivery of services throughout the country.

There are many benefits of public-private partnerships. Through these arrangements, Latin American countries can improve their physical infrastructure in order to remain competitive in the world economy. The public sector can save money by taking advantage of more abundant private sector capital. Governments can provide better services because they will have a more advanced infrastructure by which to deliver services, and they can fully utilize their public assets. Furthermore, public-private partnerships will assist private

sector development in the region.

V. CONCLUSION

The current reforms in the political, legal, and regulatory frameworks in Latin America present a ripe environment for the establishment of public-private partnerships. Smart investors can take advantage of these opportunities, particularly in the telecommunications market, to put themselves in a good position to make money, while, in the process, improving the infrastructure and creating an environment that will enable Latin American countries to aggressively compete not only in the Western Hemisphere, but worldwide.

What does this mean for lawyers? There are a number of political, legal, and regulatory changes that still must occur before an environment that fully encourages the use of public-private partnerships will exist. Lawyers are needed to help resolve some of these issues and to create and structure the public-private partnerships that will allow Latin America to develop and flourish.