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Trade with Latin America: Considerations in Export Trade

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OPENING REMARKS

L. JANÁ SIGARS¹

I would like to welcome you on behalf of the Continuing Legal Education Committee and the International Law Section of The Florida Bar, in cooperation with the Inter-American Law Committee of the ABA section of International Law and Practice, and in participation with the Inter-American Bar Association, the International Law’s Bar Association, and the ABA forum on the Entertainment and Sports Industries. The Eighth Annual Conference is entitled, “Developing Strategies, Alliances, and Markets.”

I would like to thank my steering committee who has worked tirelessly to help put this on. Every year it seems to flow very easily, and hopefully this year it will again. Behind the scenes I have had many people helping me, including Tony Santos of Patterson, Claussen, Santos & Hume; Paul Mason of Oracle Latin America; Josh Markus of Popham Haik; Salvador Huntadaia of Morgan, Lewis & Bockius; Nancy E. Guffey of my firm, Holtzman, Krinzman, Equels, Sigars and Furia; Ariel Bentata of Bentata Hoet & Asociades; and William P. or “Jay” Andrews of Hunton & Williams. I also would like to thank the members of my International Advisory Committee.

There probably could not be a more important time to hold this

1. L. Janá Sigars is a partner in the firm of Holtzman, Krinzman, Equels, Sigars & Furia in Coconut Grove, Fla.

conference. Never before has there been such a sudden change in the expectations for business in the Americas. Never before have the events of one nation, namely Mexico, had such a ripple effect in other nations. Never before has there been such a lack of understanding of the workings of each Latin American economy and of the interrelationship of these economies. Given this background, only in-depth discussion and education can lessen the potential ill will and ill effects that could occur. This is our mission today and tomorrow.

The speakers we have assembled for the seminar are most qualified to handle this mission. They are considered experts in their fields, in their respective countries. We are grateful and fortunate to have their input and insight. As many of you may be aware, just a few months ago a new expression was coined: The Miami Process. The Miami Process is the result of the Summit of the Americas, which was held in Miami in December 1994 and focused on hemispheric trade integration. In Miami, we are proud of the process and believe in the concepts contemplated. Only by removing trade barriers can our hemisphere prosper. To further discuss the process and its potential effects, we have with us someone who was deeply involved in helping to make it a reality, Ambassador Ambler Moss.

Ambassador Moss is Director of the North-South Center and Professor of International Studies at the University of Miami. He has practiced law in Washington, Brussels, and Miami, where he is presently with counsel of Greenberg, Traurig. Ambassador Moss has served as a career foreign service officer. From 1977 to 1978, he was on the negotiating team for the Panama Canal Treaties and was Deputy Assistant Secretary of State for Congressional Relations. He served as U.S. Ambassador to Panama from 1978 to 1982. You can see that Ambler Moss is well qualified to set the stage for our mission today and to enlighten our steps along the path toward achieving our goal.

OPENING ADDRESS:

THE SUMMIT OF THE AMERICAS AND THE MIAMI PROCESS

AMBASSADOR AMBLER MOSS

The reason for attending this conference is that it becomes more relevant every year. I came to Miami thirteen years ago in August 1982 with the idea of doing business in Latin America. It was not the best time to think of doing business in Latin America as it was during the depths of the debt crisis with many things going on, but since then the world has changed a great deal. Therefore, the focus of this seminar now is extremely timely.

When Janá said that a new term had been created this year, I was afraid she was going to say the "tequila effect," but in fact, she said the Miami Process, which is a better term. You have the tequila effect on the one hand

and the Miami Process on the other. Which one will prevail? I say the Miami Process will, and I will explain why. Basically, a great event for the City of Miami and an important milestone for the Western Hemisphere took place in this city from the 9th through the 11th of December 1994. It was the Summit of the Americas, and I think it will set the stage. I am going to describe how that process originated, what came of it, why I think the centerpiece of the Summit was important, and why it will continue despite the setbacks that we presently are seeing.

First, it came as a surprise to some of us who watch Latin America, when on the December 1, 1993, Vice President Gore, in Mexico City, basking in the aftermath of the success of the North American Free Trade Agreement (NAFTA)² and approval by the U.S. Congress, announced that President Clinton would invite Western Hemisphere leaders to a summit in the United States. Nobody quite knew what he had in mind at that point.

There had not been a summit in the Western Hemisphere in which a U.S. President had participated since 1967. In the interest of full disclosure, I have to say I am so old that I was actually there. The 1967 Summit was in Punta del Este, Uruguay. The centerpiece of that summit was very ambitious. It was to be the creation of a Latin American common market to begin in 1970 and to be completed by 1985. Obviously, that did not happen. It was not a badly drafted document but was totally unrealistic. Why? First, approximately half of the heads of state were, in fact, military dictators, and more military dictators, unfortunately, would make their appearance around a hypothetical similar table in years following. In contrast, the thirty-four heads of state and government at the Miami Summit were all freely elected. The only head of state who was not invited, of course, was Fidel Castro. Had he been invited, he and his political and economic system would not have been compatible with the others.

Second, in 1967, most Latin American economies were practicing protectionism, xenophobia against foreign investment, the growth of state-owned industries, import substitution, and industrialization. The political atmosphere at the Summit of the Americas was notably different.

Furthermore in 1967, when they saw Lyndon Johnson come into the room, there was basically one thing on most of their minds: How much money is this guy bringing to the table? At the 1994 Summit, they knew perfectly well that President Clinton was not bringing any money to the table. United States aid programs have shrunk drastically and, in terms of percentage of gross domestic product (GDP) devoted to foreign aid, the United States falls very low on the list. In fact, it ranks about twenty-third

2. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 [hereinafter NAFTA].

now. Most of its foreign aid goes to the Middle East and to nations of the former Soviet Union, so there was no thought of aid programs. However, what was interesting to Latin American leaders was the possibility of engaging with the United States as a partner in the economic development of their countries in terms of access to the U.S. market and to capital from the United States for investment in their countries.

In fact, the economies of Latin America have become totally different since 1967. Now we have privatization, the growth of capital markets, and active seeking of foreign investors, all of which create the conditions that level out the flow of capital and goods throughout the Americas.

Another major difference is NAFTA. When Vice President Gore announced that there would be a summit, the looming question for Latin America was whether the United States was serious about it? After NAFTA, Latin America pondered whether a summit could provide anything further. NAFTA is, after all, only one of twenty-four free-trade agreements that presently crisscross the hemisphere.

NAFTA was surrounded by tremendous political controversy in the United States. The fight over NAFTA was between two types of gringos: the nationalist protectionists and the internationalist free traders. The internationalist free traders ultimately won after a series of battles on Capitol Hill.

When President George Bush gave his famous "Enterprise for the America's Initiative" speech on June 27, 1990, he ushered in a new era for a Western Hemisphere free-trade area. That concept was succeeded by NAFTA, which was succeeded by an Asian-Pacific Economic Cooperation (APEC) meeting.³ After the APEC meeting, it was not clear whether the United States would approve the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).⁴ However, the United States did approve it, only days before the Summit took place in Miami. So there was a continuous bipartisan effort, stretching over two administrations, in the direction of opening trade and joining with the rest of Latin America and the Western Hemisphere in a free-trade arrangement.

How did this happen? There were three contributing factors. First, is the change in the importance of U.S. and Latin American relations due to the end of the Cold War. From 1948-1989, the United States and Latin America were on opposite courses. The United States, even during relatively

3. APEC was established in November 1989. Its aim is to promote trade and investment in the Pacific basin.

4. Final Act Embodying the Results of the Uruguay Road of Multinational Trade Negotiations, opened for signature Dec. 15, 1993, I.L.M. 9; Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). GATT was established after World War II to promote the expansion of international trade on a nondiscriminatory basis. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

enlightened periods such as Kennedy's Alliance for Progress, was primarily concerned with security issues, by that I mean Communism. The United States tended to view practically everything, even north-south issues, from an east-west perspective. Because that perspective and the ideological rhetoric between North and South generated by it has disappeared, anti-Americanism in Latin America and, on the other hand, anti-Communism in the United States, which blamed Latin America for all sorts of things, have virtually disappeared. Consequently, we can dedicate ourselves to genuine north-south issues. In other words, both the United States and Latin America are singing out of the same songbook for once.

The second factor is the disastrous experience throughout Latin America during the debt crisis of the 1980s. This so-called lost decade caused Latin America to abandon its protectionist and xenophobic economic doctrines. It dropped them completely and went toward an open-market philosophy. We are seeing this change play itself out in dramatic ways throughout Latin America, more in some countries, less in others, but all moving very quickly in the same direction. This cooperation has led to the proliferation of free-trade agreements throughout Latin America in the search for capital, while desperately competing with each other and the rest of the world for foreign direct investment.

The third factor is the realization in the United States that we are interdependent with the rest of the world. The United States cannot have a self-sufficient market in splendid isolation, running our own affairs and dealing with the rest of the world only when it suits our convenience. The United States is part of an international system, and it better get with it. In 1990, it was not clear to anyone whether the Uruguay Round of GATT would be successful. In fact, it looked at that time as if it would be unsuccessful. If unsuccessful, then the vision of the free-trading internationalist would be of a world divided into trading blocks, and the United States had better have one to call its own. The logical block would be the Western Hemisphere, where the United States enjoys a tremendous entry into its markets, seventy percent of the market in Mexico and about sixty percent overall. It would seem that the United States better get moving.

However, GATT was successful, and we could shift from a concept of having a trading block of our own to what is termed, "open regionalism." Open regionalism means consolidating with regional trading blocks and keeping within an open process so that any member of the Free Trade Area of the Americas (FTAA), which turned out to be the centerpiece of the Summit, can continue to negotiate and conclude free-trade arrangements with countries elsewhere in the world. That is open regionalism, as opposed to closed regionalism, which implies the formation of trading blocks.

The Summit's Declaration of Principles and its accompanying Action Plan called for the establishment of the FTAA by the year 2005. Although

it is not clear exactly what should happen by the year 2005, the date was necessary because APEC had specified a date. The path has been chosen, and we are moving in that direction. At the beginning of this process in 1994, the probable end result had not been at all clear. From the beginning, even after the announcement that there would be a summit and President Clinton, revealing some of its content, announced that it would be held in Miami, it still was not clear that the FTAA would be the final product. There was a great deal of bureaucratic wrangling during the summer months, which distressed many of us because we knew that the FTAA should be the centerpiece of the Summit, but it was not clear that it would.

Nevertheless, every voice coming out of Latin America realized that the FTAA had to be the end result. In fact, one Latin American head of state said to me, "Look, face it. If a free-trade area and investment are not the centerpieces of the summit, they might as well not have the summit. It is going to be useless." And another put it more directly, "Look, if we are going to be asked to come to Miami to listen to a sermon about democracy, we do not want to hear it. There are things we do want to hear, but that is not it." These were the sentiments coming out of Latin America.

At the same time, the business and academic communities in the United States were promoting free trade. The Institute for International Economics issued a news release, "Western Hemisphere Free Trade Area Should Be Goal of Upcoming Inter-American Summit," in July 1994. In August 1994, the Council of the Americas, the Association of American Chambers of Commerce in Latin America, and the U.S. Chamber of Commerce, which together comprise the Inter-American Dialogue, put out a white paper on the goals of the Summit. In September, the Inter-American Dialogue published its report entitled, "A Time for Leadership: The 1994 Policy Report of the Inter-American Dialogue to the Summit of Presidents and Prime Ministers of the Americas." The Organization of American States (OAS), the Inter-American Development Bank, and the U.N. Economic Commission for Latin America also put out a Summit-related report, promoting consensus "around a process that can effectively construct a hemispheric free trade area." They were saying the same thing: trade, trade, trade, and investment; get with it.

I credit Thomas "Mack" McLarty, a senior White House counselor who came onto the scene in late September as Summit coordinator, for capturing that message and turning it into a reality. He sharpened the focus of the overly diffuse agenda, making economic issues the centerpiece of the Summit. It is no secret that despite extensive consultations throughout the early months of 1994, the final documents, the Declaration of Principles and the Plan of Action, were hammered out in the final six weeks leading up to the meeting. In a very short period of time, the product was delivered in time for the Summit. Everybody signed it. The Summit was, in that sense, a great success.

The question remains: How successful will this really be? To return to 1967, we drew up a great document, everybody signed it, and then it got shoved in the archives and was not dusted off until the next summit came along, when everybody wondered, "What did we do last time and did it make any sense?" The planners of the 1994 Summit had the foresight to realize that this would happen again if the Summit was portrayed as the closing of a deal but actually nothing more got closed than a desk drawer. So a Plan of Action for the Summit was set forth in which it would be very hard for countries to avoid carrying out tasks and assignments, which would lead toward the objective of a FTAA.

The first milestone will be the meeting of the Ministers of Trade to be held on June 30, 1994 in Denver. At this meeting, a yet to be prepared OAS report will be reviewed and will address how these twenty-four different free-trade agreements are to be articulated and what is to be done by way of consolidating them into this free-trade agreement. Are they ready for the Denver meeting? Of course not! However, the fact that a meeting has been scheduled imposes a certain discipline on the process. Many tasks have been parceled out, some to the OAS, some to the Inter-American Development Bank, and most to national governments for putting together the FTAA. Other parts of the Summit document deal with democratic governance and sustainable development, however, I am going to concentrate on its economic and business aspects.

Questions come up about the peso devaluation, the tequila effect. Does it derail the Summit? No, not at all. It obviously represents a setback. I am not sure, honestly, that a meeting as early as June 30th would have been scheduled had the peso devaluation and the crisis it precipitated been in full swing at the time of the Miami Summit. It is a setback in the sense that it had a ripple effect through capital markets and stock exchanges with the postponement of investment plans, amongst others. However, the good news is that since there finally is a long-range blueprint of where free trade is going, temporary setbacks are not as important.

I remember a meeting with Mr. McLarty and his team before the Summit agenda was finally decided. People were looking at the then raging debate in Washington on whether there would or would not be a fast track with respect to Chile's entry into NAFTA. Of course, the Administration was so scared of not getting the GATT legislation passed that they pulled out the fast track provision and put it aside. Some of us who were arguing for going ahead with that economic centerpiece said, "Look, the fast track with respect to Chile's entry into NAFTA is important." As Ambassador Biehl has said, "Chile only wants to negotiate with the NAFTA powers once, not several times, so a fast track is essential to get it in." However, the U.S. government should not focus solely on that aspect. After all, it took decades for the European Union to be put together. What is important is not whether some

particular deadline is made but rather that a broader process is underway, and this is why the tequila effect will be overcome.

There are a lot of unresolved issues, including different schemes for the articulation of the various free-trade agreements. However, there are a number of things that need to be done before that issue is decided upon. For example, there has to be a common acceptance of the rules of origin, customs procedures, and intellectual property (IP) issues. All of these issues are in themselves far more important than whether there is a merger of this agreement or that agreement or how many new countries after Chile come into NAFTA. It is really the work of technicians and lawyers to put these kinds of understandings together in order to compose an operative FTAA.

There is a very interesting feature of the Declaration of Principals of the Summit. It is the open invitation to nongovernmental organizations to get involved. It is an open process, much more open than we saw in 1967 or have ever seen in any other governmental process, because the door is genuinely open for nongovernmental organizations from business, labor, environmental, and legal sectors — and anybody else — to come up with recommendations, and their considerations will be taken seriously by those who are carrying out the goals of the Summit and the Miami Process.

One such issue open for suggestions is dispute resolution. A leader in that cause is a member of one of our steering committees; he is Salvador Huntadaia. Dispute resolution mechanisms are the weak point in the Summit process and have not attained the degree of organization in the Western Hemisphere that they have in Europe. The North-South Center, in fact, put on three pre-Summit conferences: one in Buenos Aires, one in Cartagena, and one in Kingston, bringing together multisectoral and multinational groups. The results were published, and the recommendations were well received. The challenge for nongovernmental groups, such as bar associations, is to make positive suggestions and become involved in this open process.

One of the weakest links, which is imponderable and which even Europe has not resolved, is the coordination of a monetary policy. As one who practiced law within the context of the European Common Market in the 1970s, I look with great skepticism upon Mercosur⁵ and whether it will be able to adopt a workable monetary policy that will make it function as a common market. You cannot have a common market without a workable monetary policy. Incidentally, another thing that Mercosur does not have, which amazes me because I spent several years working on this, is a common competition law. The European Union has its law on competition in Articles

5. Mercosur is the Southern Cone Common Market, comprised of Argentina, Brazil, Paraguay, and Uruguay. It is known as Mercosul in Portuguese-speaking Brazil.

85 and 86 of the European Economic Treaty.⁶ However, this does not exist in Mercosur. There is a common market, but without a common competition law.

There are many gaps that need to be filled. Despite the good news of the removal of trade and investment barriers, a great deal needs to be done in the construction of this FTAA. There are still many instances of high-tariff barriers in the Americas. There are still a number of restrictions, sometimes of a purely bureaucratic nature, to capital flow. The infrastructure of capital markets and the leveling of obstacles to investment in the Americas need to be addressed. In many cases in individual countries, there is still, by world class standards, inadequate IP and anti-trust protection. These need to be worked on. Not only the laws on the books but also the enforcement of those laws need to be examined in many instances.

Clearly, there are a number of challenges to be met along the way. If there are any Argentines in the room, they would say that consistent with their government's position, there are still too many subsidies. Guess where! From the Argentine position right here in this country. There are a lot of things that need to be smoothed out if there is going to be a credible and happy ending to the Miami Process. The good news is that now it is the common policy of all the countries of the Americas to move in that direction, and there is an open invitation to the private sector, to professional organizations, and to nongovernmental organizations to get involved. Now, there is a general framework present that creates a setting in which the opportunities for success are better than ever.

The U.S. Department of Commerce issued optimistic news for U.S. exporters in December 1993. They stated that U.S. exports to Latin America increased from about thirty billion dollars at the low point of the debt crisis in 1986 to over eighty billion dollars in 1993. The Department of Commerce states that Latin America will be more important than Europe for U.S. exports by the year 2000, and that by the year 2010, it will be more important than Europe and Japan combined. I do not know how accurate these projections are but they give an indication of what is possible in a FTAA. I would like to conclude on the note that the opportunity is better than ever, and the process is moving in the right direction. Do not be distracted by temporary setbacks, because the process is a healthy one, and everybody wants it. It is up to us to get engaged, keep it moving, and take advantage of it.

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY arts. 85-86, Feb. 7, 1992, [1992]

1 C.M.L.R. 573 [hereinafter EC TREATY].