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Novel ideas spring forth in Bogota, and in Managua just as much as they can in Paris and in L.A. Strong intellectual property laws and non-discriminatory access to markets are sound trade policy, sound economic policy, and sound public health policy. And on this, from our perspective, there is very little room to compromise.

XI. SUB-REGIONAL ECONOMIC INTEGRATION PROGRAMS IN LATIN AMERICA

*Thomas Andrew O'Keefe**

It is important to keep in mind, in addition to MERCOSUR, that there are other sub-regional economic integration programs in Latin America that have produced some very significant results.

Two of them are, of course, the Andean Community, which consists of five countries: Bolivia, Peru, Ecuador, Colombia, Venezuela. The second is the Central American Integration System, which also consists of five countries, although there is a sixth one there that is always waiting in the wings. Those are Costa Rica, Nicaragua, El Salvador, Guatemala, and Honduras, and that sixth one, of course, is Panama.

The Andean Community today is a very imperfect customs union. It is imperfect for many of the same reasons why the MERCOSUR is also a very imperfect union. There is a common external tariff or CET. It is basically a four tiered system that consists of four different percentage rates, although there is a fifth one that is usually added, 0%, for certain capital goods that are not produced in the Andean sub-region.

But the reason why the Andean Community is an imperfect custom union is that the CET does not cover all products across the board. There are exceptions. In addition, while the CET is fully adhered to by Venezuela and Colombia, Ecuador has a number of exceptions. Peru right now is completely excluded, and Bolivia has its own import duty system as well.

The Andean Community is also an imperfect customs union for a second reason. The idea with a customs union is that when you pay the CET upon entering the territory of the union — one of the states in the union — it becomes nationalized and can then be circulated among the other member states without having to pay the CET again. Like the MERCOSUR, the Andean Community, unfortunately, has not been able to resolve the issue of the distribution among member states of the money that is collected by

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individual customs houses, through the imposition of the CET. So the result of that is, if you enter a product through one of the Andean states, pay the CET, and you do not do something within that state that would comply with the rules of origin requirements, you are going to get hit with the CET a second time if you re-export the product. And if you re-export it yet again without fulfilling the rules of origin requirements, you are going to find that you may be charged the CET a third or even a fourth time.

In terms of the Andean Community's intra-regional free trade system, it is almost complete, particularly in the cases of Venezuela, Colombia, Ecuador, and Bolivia. There are some important non-tariff barriers that you have to deal with, but for the most part, tariffs are no longer charged on goods that are circulated among these four states, as long as the tariffs comply with the Andean Community's rules of origin requirements. The holdout is still Peru. This has a lot to do with the fact that Peru's membership in the Andean Community was suspended in 1992. Many of you will recall that President Fujimori at that time declared a state of emergency. He shut down the courts, closed the Congress, and suspended the Constitution. Eventually a new Constitution was approved in a plebiscite and Peru gradually began to be re-incorporated into the Andean system. I would also emphasize that the suspension was not just a decision of the Andean Community versus Peru. Peru had also taken the position that the Andean Community was not moving fast enough in terms of trade liberalization. Therefore, that was at least the official excuse that was offered by Peru as to why it no longer participated in the Andean Community.

That all changed in 1997. Peru is slowly being re-incorporated into the Andean Community. There is still no firm obligation on the part of Peru, however, as to when it is going to adopt the Andean CET. But in terms of trying to bring down the tariffs on intra-regional trade and make it universal, that is a process that is being carried on right now.

There is one thing I do want to discuss with respect to the Andean Community that I think would be of particular interest to a group of lawyers or people involved in the legal field. It has to do with the institutional setup of the Andean Community.

Unlike, for example, the MERCOSUR, some of the institutional bodies within the framework of the Andean Community do have supranational authority. That is important, because it means that when the Andean Commission, which sits in the Peruvian capital, Lima, issues a decision, it has direct effect. This is the same idea that reigns in the EU in terms of decisions issued by the relevant European institutional bodies. There is no need for ratification by the individual member states, whether it be ratification by the Congress, or whether it be ratification through the

issuance of a decree by the executive power. The fact is that the decision becomes an enforceable law right then and there.

Now, it is important to keep this in mind, particularly those of you who deal with the world of IP law. As you know, I.P. legislation in each of the Andean states is not really national legislation, but it is community-wide, at least in theory. Unfortunately, there have been instances where this idea of direct effect has not been fully implemented. But for the most part, it has. And so therefore, it is important to keep that in mind when doing business in the Andean countries.

The MERCOSUR, unlike the Andean Community, does not have a permanent court of justice. The Andean Community does indeed have one which sits in the Ecuadoran capital, Quito. The reason why that is important is that there are a whole series of issues and disputes that can be referred to that court. That court has the right to issue uniform interpretations of Andean regulations and norms — something that does not, unfortunately, exist in the MERCOSUR. The fact that the MERCOSUR does not have institutions with supranational authority, perhaps is one reason why a court may not yet be that important.

The Andean Tribunal of Justice also has the right to review decisions that have been made by the institutions of the Andean Community to ensure that they are in compliance with the obligations under the treaties which created the Andean Community. The court also has the right of nullification. That is, laws passed by the member states that are not in compliance with Andean Community obligations can also be nullified by the court as well.

Interestingly enough, individuals also have a right of access to the Andean Community. It used to be that they did not have the right to complain of non-compliance by a state of its Andean obligations. There was a reform, though, that was recently introduced. Therefore, once that has been ratified by all the member states, that will have changed as well.

So, in the Andean system there exists the idea of nullification. As I mentioned earlier, we also have the idea of consistent review in the Andean community by any national court. It does not have to be highest court of the land, but any court that is confronted with an issue of interpretation of the application of an Andean norm has the right to directly refer the matter for an advisory opinion to the Andean Tribunal of Justice.

Moving right along to Central America, the Central American system does not have any institutions as of yet that have supranational authority, although it does have a Court of Justice. Interestingly enough, this court is not particularly effective. Only three of the five Central American states — El Salvador, Honduras and Nicaragua — have ratified the statute that brings the Central American Court of Justice into existence. Guatemala and

Costa Rica have not ratified it. One of the reasons why Costa Rica does not participate in the activities of the Court is because of the type of disputes that this court is authorized to hear. The statute creating the Central American Court makes very clear that you cannot make any derogations so that all of the states have to agree to whatever the statute says the court is authorized to hear. Unfortunately because of this provision, the Costa Ricans could not ratify the statute creating the Court and thereby participate in its activities, because one of the types of disputes that the Central American court is authorized to hear is disputes that arise between different branches of a national government. According to the Costa Rican Supreme Court, this would be unconstitutional. In any event, the court does exist, and it sits in Managua. As I previously mentioned, there are at least three states that participate in that judicial system, but it has not been particularly effective to date. For example, some of you may have heard that in the last two months, there was a dispute between Nicaragua and Honduras, dealing with a claim of sovereignty over certain portions of the sea that lie off the coast of both countries on the Caribbean side. When the government of Honduras signed off on a treaty with Colombia that recognized Colombian claims over that territory, Nicaragua responded by imposing a 35% import duty on all goods imported from Honduras. The dispute, one would have thought, should have been resolved by the Central American Court of Justice. Unfortunately, because this whole dispute arose over a territorial matter, the approval of the two states involved was needed in order for this matter to be referred to court.

Because of that, one of the states — Honduras — did not agree, and that is the reason why the Central American court has not been able to resolve the particular dispute that has arisen between Honduras and Nicaragua. In fact, it was eventually referred to the WTO.

Since we have been talking about the World Trade Organization in this conference, I want to emphasize that while the Central Americans did have their own rules of origin and their own system for the application of safeguard measures, after 1994, both these sets of rules were reformed. They were reformed with the specific idea of making them compatible with the new obligations that had been undertaken by the five Central American states in the context of the WTO.

Finally, I want to note that right now, in terms of the actual situation involving the Central American integration system, there is free trade on the majority of goods traded among the five member states. There are some significant exceptions though, including the current 35% duty Nicaragua imposes on Honduran products. There is also a CET, which again, like the Andean Community, is a multi-tiered system that ranges anywhere from 0 to 15% and also has some important exceptions.