

ELSA MOOT COURT COMPETITION ON WTO LAW 2003/ 2004

THE CASE

Dispute Concerning Mullavia - Measures Undertaken for the Establishment of the CUMCURIA Arrangement

All countries are Members of the WTO.

The Continental Union (CU) is a large declared customs union and “regional integration area” consisting of ten prosperous countries located upon the Arasian continent. For its member states, the CU treaty provides for independent regional institutions and a Union Court of Justice to enforce provisions guaranteeing that enterprises and persons can engage in the free movement of goods, services, and capital across the national borders without legal interference from the members. To assure that trade barriers are not re-instituted, the member governments have also pledged through the treaty to refrain from imposing trade remedy actions upon each other’s goods in trade. Thus, anti-dumping and safeguard actions by and between members are prohibited by the CU treaty. Of course, the Continental Union acts to protect the collective commercial interests of its members, and CU institutions have the power by the treaty to impose trade remedy measures upon third country goods and to represent the members in trade negotiations with third countries.

As an advanced integration scheme, the Union’s institutions have also enacted regional policies that provide a legal basis for various forms of “positive”, or “advanced integration”. These include rules to assure, that for the purpose of insuring whether goods and services meet domestic marketability requirements, each country member shall recognise the others’ product and service-provider standards, certificates, and diplomas, as lawfully equivalent to its own requirements. This means in principle, that what is lawful to market or provide in one member state must be presumed to be lawful to market or provide in another member state.

The Union Treaty has been duly notified to the relevant WTO Councils, and by referral, has been examined in turn by the WTO committee on Regional Trade Agreements (CRTA), according to this Committee’s terms of reference. Although the CRTA concluded its active examination of the Continental Union, it never succeeded in achieving a consensus recommendation among the WTO Members participating that the CU is either compatible or incompatible with the WTO requirements governing the establishment of customs unions and/or regional integration agreements.

The Continental Union has recently negotiated and completed a “regional trade and integration agreement” with Mullavia, a large and moderately prosperous state. Although Mullavia is not in the Arasian continent, there are significant historical and cultural ties with

most of the CU members, and as the new treaty's preamble indicates, these ties will now be strengthened by, "an ever closer economic integration leading to the enhanced prosperity and welfare of both territories."

In order to fulfil these aspirations, the Union-Mullavia treaty provides for the establishment of the "Continental Union - Mullavia Customs Union and Regional Integration Area (CUMCURIA). This consists of a number of features relating to both trade and regulation for the movement of goods and services. For goods originating in either party, all tariff duties and quantitative restrictions will be eliminated as between the two territories within ten years according to an agreed-upon plan and schedule of reductions. Over this same period, a CUMCURIA common external tariff (CET) will also be established so that goods originating from third territories will enter into free circulation within CUMCURIA from whatever point of entry, after tariff duties and other formalities of importation have been met. Since Mullavia is a more highly protected economy in almost every respect, the new CUMCURIA CET tariff will be established by Mullavia's adoption over the ten years of the lower bound tariff rates of the Continental Union. However, for one sensitive product, bananas, the Continental Union is decidedly more "protectionist" as it imposes a bound duty rate of 50% ad valorem for this product. As Mullavia only charges a bound tariff duty rate of 20% ad valorem for bananas, it has been agreed that the final CUMCURIA CET for this product will be 50% and that Mullavia will adjust its duty accordingly before the end of the interim period.

For originating services and service providers, the CUMCURIA treaty chapter on regional integration provides that all government sponsored discrimination, as within the meaning of the WTO GATS Article XVII, will be eliminated in respect of the four GATS modes of supply. This will also be accomplished within ten years by the Continental Union members and Mullavia amending or eliminating whatever applicable national regulations may be acting to discriminate against services and providers of the other party.

In order to govern the implementation of the Union-Mullavia treaty, A CUMCURIA council is also created, with representation of officials from both the parties. They have the legal capacity to take decisions and resolve difficulties in the implementation and interpretation of the treaty by the means of unanimous decisions.

The date of entry into force of the "CUMCURIA arrangement" is approaching and the Continental Union and Mullavia have notified the relevant WTO Councils of the impending establishment of the arrangement together with a copy of the treaty and its attached plan and schedules. These demonstrate the means by which the parties will act to accomplish the completion of this formation within the ten year period (the interim period). Following referral to the CRTA for examination in accord with WTO procedures, a number of questions and concerns have arisen from other participating WTO Members regarding certain provisions of the treaty. Some points of contention have been identified from the CRTA's minutes of the meetings as follows:

1. As in the Continental Union, the CUMCURIA treaty provides that the two signatories from the end of the interim period shall neither investigate nor apply any anti-dumping actions in regard to goods originating from the other party. In addition, in order to respect the proper functioning of the common external tariff, that following the interim period, any provisional or final anti-dumping measure applied by either CUMCURIA party to the goods or firms of a third party, shall also be immediately instituted by the other CUMCURIA party. This will insure, that for any entering third country goods

subject to anti-dumping duties, once the duty is paid, these products will also freely circulate within the CUMCURIA customs territory.

2. Both CUMCURIA parties have recognised that a special safeguards clause must be included in the treaty. This provision states that either party may re-impose the applicable external tariff duty rate on originating goods of the other party for a single non-renewable period of five years, on thirty days prior notice to the other party. No allegation or demonstration of injury to domestic producers is required to be shown by the enacting party. Since this special CUMCURIA safeguard provision is not intended to be applied to the trade of other WTO Members, the parties also indicate that any safeguard undertaken under the CUMCURIA provision shall not be notified by either party to the WTO Safeguards Committee.
3. In order to facilitate the movement of service providers for which each party has some significant real advantage, the CUMCURIA treaty provides a framework for future service provider recognition. To commence this process with a “sectoral down payment”, Mullavia has agreed to recognise, on entry into force, the certificates and diplomas granted by Continental Union member authorities for all health care professionals, including certified nursing personnel and medical doctors. These will now be treated as equivalent to those granted by Mullavia governmental authorities. To reciprocate, the Continental Union has agreed to recognise the certificates and diplomas awarded by Mullavia educational authorities for several manufacturing technical fields, including machine work and metal welding, which will then be considered as equivalent to the degrees and certifications issued by all of the CU member states. This means that for these respective fields, a worker in one country can freely seek temporary employment in the territory of the other without having to obtain the degree or certificate diploma of that other party. Since the two parties have notified these provisions as an aspect of the CUMCURIA regional integration area, it is also provided by understanding that the parties need not and therefore shall not notify the GATS Council of CUMCURIA service-provider recognition activities, irrespective of GATS Article VII provisions.

The review of the CUMCURIA in the CRTA has been interesting but somewhat acrimonious. While a number of WTO Members participating in the review process have expressed satisfaction as to the comprehensive nature of the agreement, the provisions noted above have also been met with various objections. For the CRTA, this has led to (yet) another inconclusive recommendation regarding the compatibility of a regional trade agreement with the relevant WTO provisions. While the CRTA has been able to formulate and issue a report to the WTO Councils outlining the details of the CUMCURIA plan, and has also been able to secure the CUMCURIA parties’ promise to be responsive to further questions, and to provide further information upon request, the CRTA’s report ultimately states in relevant part,

“ ...that while some Members were of the opinion that the CUMCURIA treaty met the requirements of WTO provisions for the establishment of a customs union and a regional integration agreement, other Members were of the opinion that certain treaty provisions could not be viewed as compatible with the WTO requirements.”

Thus, the examination has ended without any CRTA consensus recommendation regarding the compatibility of the CUMCURIA treaty with the WTO. As has become a common practice in the WTO, the Continental Union and Mullavia have decided to proceed with the

entry into force of the CUMCURIA treaty, as outlined according to the provisions discussed above.

One WTO Member, Condaluzza, has determined that this inconclusive CRTA review should not be the end of the matter. While Condaluzza has no preferential arrangements with either the Continental Union or Mullavia, it has significant trade and investment interests in respect of Mullavia as one of its major trading partners. A number of its producers and service provider organisations believe that their commercial interests will be detrimentally affected by the CUMCURIA, and they have requested the government to initiate a review of the legality of Mullavia's undertakings under the relevant WTO rules. Following a determination by the Condaluzza trade administration that the agreement may be challengeable on a number of issues within the context of the WTO Dispute Settlement Understanding (DSU), Condaluzza notified Mullavia according to DSU Article 4 in order to initiate consultations regarding alleged inconsistencies with WTO obligations.

At the consultations, the Condaluzza trade representative thanked Mullavia for providing such detailed information regarding the CUMCURIA arrangement and expressed her country's opinion, that while most aspects of the CUMCURIA appeared to be compatible with the WTO rules regarding the formation of regional trade agreements, that a number of specific concerns still needed to be addressed by Mullavia. In respect of the use of contingent trade measures such as anti-dumping and safeguard instruments, the Condaluzza representative expressed her opinion that the WTO Agreements negotiated and agreed upon by all WTO Members for the use of these instruments established clear rights and obligations. As such, it was her country's opinion that the Anti-dumping Agreement could not be interpreted to allow Mullavia any right to suspend the use of such trade measures in favour of another WTO Member. Nor could it be read to permit Mullavia to adopt an anti-dumping measure without instituting a proper investigation regarding the actual circumstances as to its own territory market. It was her opinion that significant trade diversion would result from the operation of these CUMCURIA provisions, and that the legal security sought to be provided by the WTO Anti-dumping Agreement would be seriously undermined.

Likewise for safeguards, WTO Members had pledged themselves as a result of the Uruguay Round to only adopt these types of measures in accord with the provisions of the WTO Agreement on Safeguards and GATT Article XIX. While her country found the CUMCURIA safeguards clause to be interesting and perhaps novel, the clause was nevertheless not in conformity with the WTO rules as they clearly require that Members notify their actions to the other Members, and then to only apply their safeguards following an appropriate injury determination, all under the auspices of the WTO Safeguards Committee.

In respect to the problem of bananas, the Condaluzza representative reminded Mullavia that the 20% duty on bananas was included in Mullavia's Uruguay Round tariff schedule, was thereby "bound", and now a part of Mullavia's contractual obligations according to GATT Article II. Her country was therefore of the opinion that Mullavia could not undertake any upward adjustment in this tariff duty rate without infringing Condaluzza's legal rights.

Finally, as to the recognition of Continental Union health care professionals, the Condaluzza representative noted that her country maintained the highest quality of education and certification for nurses and doctors alike, and that that it would be intolerable that Continental Union professionals could now be granted free access to the Mullavia

employment market while her own professionals would necessarily have to re-examine and re-certify in order to obtain the right to work in Mullavia.

In response, the Mullavia trade minister thanked the Condaluza representative for clarifying these points of difficulty for her country, but went on to explain that the CUMCURIA arrangement was wholly dedicated to forming a customs union and a regional integration agreement within the meaning of GATT Article XXIV, paragraph 8, and GATS Article V. As such, there was little question that the arrangement as submitted had been formulated by the parties to be entirely compatible with the provisions of GATT Article XXIV in respect to the elimination of duties and other restrictive regulations of commerce upon substantially all of the trade originating between the two CUMCURIA members.

Given these stated requirements, Mullavia was of the opinion that the CUMCURIA parties were obliged by the WTO rules to eliminate the use of anti-dumping measures as between the regional members, and in any case, the elimination provision was necessary in order for the members to complete their lawful customs union. Since GATT Article XXIV:8 also required customs union members to impose substantially the same duties and other regulations of commerce upon the trade of non-members, the parties to the CUMCURIA arrangement understood this to also require that a common external tariff and a common commercial policy must be adopted. This GATT Article XXIV requirement could not possibly be met unless the anti-dumping measures applied by one CUMCURIA party were also applied by the other as to all third parties. Although the requirement of external conformity in a Common External Tariff might necessarily raise the tariff duty of a single product to the possible detriment of Condaluza banana producers, other bound duties were being lowered by Mullavia across the far larger range of all other products. As such, barriers to trade were certainly not on the whole being made higher as a result of the customs union plan, and Condaluza would likewise derive meaningful new trading opportunities from these overall lower tariff duties.

On the question of safeguards, the Mullavia minister noted that the special CUMCURIA safeguard clause would only be instituted as between the two members, and that both parties remained committed to applying the provisions of the WTO Safeguards Agreement for any safeguard that might be instituted upon another WTO Member. As such, the particular arrangements for safeguards made by the regional partners in CUMCURIA could not possibly affect the WTO rights of other Members, including those of Condaluza. In any case, many regional trade arrangements had instituted special safeguard provisions over the years and these had become at least tacitly accepted by the other Members as a matter of GATT/WTO practice.

In respect to the recognition of certificates and diplomas for health care professionals, the Mullavia minister noted that his country had already made a market access and national treatment without condition for these professions on its services schedule in the GATS, as according GATS Article XVI and XVII. As such, Condaluza health care professionals were free to seek temporary employment within Mullavia following their receipt of a Mullavia certificate or diploma. No discrimination was being applied against the health care professionals of Condaluza since they would certainly continue to be have the right to take and pass the same national examinations and receive the same national certificates and diplomas according to the same rules and conditions that applied to all Mullavian nationals themselves. Thus, Mullavia's obligation to accord nondiscriminatory national treatment was certainly being honoured. Since GATS Article V provided a further right for WTO Members to form regional integration agreements, and while the CUMCURIA arrangements were

comprehensive in meeting those coverage requirements, it seemed clear to the Mullavia minister that recognition activities undertaken by the CUMCURIA partners should also be considered as a necessary and desirable aspect within the notion of “regional economic integration” itself.

While these consultations failed to settle any issues to the satisfaction of Condaluza, the country has made its additional request, and a WTO dispute resolution panel has been established in accord with DSU Article 6. The standard terms of reference have been adopted, “(T)o examine in light of the relevant provisions in the WTO GATT-1994 and WTO GATS Agreements ... ” A date has been set for the filing of the first submissions due from the parties. These submissions must identify the legal issues and the relevant provisions and cases to be considered for the purpose of permitting the panel to resolve the dispute between these parties. As of this time, no other WTO Members, including neither the Continental Union nor any of its individual country members, have chosen to participate in these proceedings.

Indicative references to provisions:

Marrakesh Agreement Establishing the WTO

- GATT Articles I, II, III, VI, XIII, XIX, XXII, XXIII, XXIV, XXV.
- Understanding on the Interpretation of Article XXIV of the GATT-1994.
- Agreement on Implementation of Article VI of the GATT-1994 (Anti-dumping Agreement)
- Agreement on Safeguards.
- GATS Article I, II, V, VII, XVII
- WT/L/127 (mandate of the Committee on Regional Trade Agreements)
- WTO Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU)
- 1969 Vienna Convention on the Law of Treaties, UN Doc A/Conf 39/28, UNTS 58 (1980), 8 ILM 679.

Indicative GATT/WTO cases:

- EC - Bananas III (WT/DS27)
- Canada - Automobiles (WT/DS 139, 142)
- Turkey - Textiles (WT/DS34)
- Korea - Dairy (WT/DS98)
- Argentina - Footwear (WT/DS121)
- US - Wheat Gluten (WT/DS 166)
- US - Cotton Yarn (WT/DS192)
- US-Korea Line Pipe (WT/DS202)
- US - Steel safeguards (WT/DS248, 249 ...)