

SIDLEY-IIEL WTO MOOT COURT COMPETITION 2005

PROBLEM

I. STATEMENT OF FACTS

A. Background

1. The high-tech manufacturing sector in the Republic of Brucia (“Brucia”) is in tatters. Brucia’s manufacturers once dominated international trade in the high-tech sector. But in recent years, these manufacturers have yielded their dominant position to rival companies from the Confederation of Arland (“Arland”) and other developing countries that offer increased efficiencies due to the presence in those countries of highly educated workers available to work for relatively low wages. Although Brucia and Arland were both founding members of the WTO Information Technology Agreement on tariff elimination, investment in Brucia’s high-tech sector has slowed to a trickle as Arland’s high-tech sector has boomed. Unemployment in Brucia’s once thriving high-tech manufacturing and services sector has increased at an alarming rate, reaching a record 15% in June 2004.

2. Arland’s high-tech companies have leveraged their highly educated workforce and relatively low labor costs to generate high-quality goods and services at prices far below those charged by developed-country competitors, catapulting Arland’s high-tech sector to a leading position in international markets. Arland has seen an increase in inbound foreign direct investment and, more generally, in living standards.

3. Arland and Brucia are both Members of the WTO. An excerpt from Brucia’s schedule of commitments under the General Agreement on Trade in Services (GATS) is attached.

B. The Bring the Jobs Back Home Program

4. In January 2004, Brucia’s Executive Branch established a Special Commission (the “Commission”), chaired by representatives from the Ministry of Science and Technology

and the Ministry of Labor, to recommend government policies that would begin to reverse the flight of jobs and capital. The Commission issued a detailed report in March 2004. Based on the Commission's recommendations, in April 2004, Brucia's legislature enacted the Bring the Jobs Back Home Program ("Program"), with the stated aim of restoring the competitiveness of Brucia's high-tech industry.

5. The Program has two main components. First, it provides tax benefits for qualifying companies or individuals ("Qualifying Employers"), in the form of tax credits and deferrals, pursuant to Article 6 of Law No. 658-04 of 23 April 2004. The stated policy objective of that provision, as reflected in the legislative debate at the time of its adoption, is to induce manufacturers to provide a source of employment to residents of Brucia, thus promoting economic development and contributing to the coffers of Brucia by increasing the amount of income tax that Brucia collects. Qualifying Employers are defined pursuant to Article 7 of the same law as those manufacturers that (i) have a commercial presence in Brucia, and (ii) employ residents of Brucia, at a ratio of at least six to one—that means that for every non-resident that the company employs, it must employ at least six Brucian residents in order for it to satisfy the second criterion of the Qualifying Employers definition. Neither the parent company's place of incorporation nor the nationality of shareholders is a relevant factor in determining whether an employer qualifies. The procedure to obtain the stated tax benefits is initiated by request of the interested company or individual. The Brucian Ministry of Labor, after verifying that the interested party is indeed a Qualifying Employer, makes a recommendation to Brucia's General Tax Directorate, noting that the company or individual is eligible to receive the stated tax benefits. The General Tax Directorate has discretion to accept or reject this recommendation.

6. Second, the Program provides for fines and other restrictions on retail stores that sell goods manufactured by companies, wherever located, that pay an average minimum wage that is below the statutory minimum wage in Brucia. Brucia's comprehensive Minimum Living Standards Act (Law No. 413-02 of 15 March 2002) mandates a minimum wage in each sector of commercial activity. Pursuant to Law No. 661-04 of 25 April 2004, the Program amended the Minimum Living Standards Act to include a new Section V. Under Article 25 of Section V, a merchant in Brucia that sells or offers for sale products manufactured by any company—domestic or foreign—failing to comply with the wage standards under Law No. 413-02 in any of

its worldwide operations shall be subject to a fine. Applicable fines range between 10 and 15 percent of the merchant's total sales in the most recent three-month period. Upon payment, the fines are deposited in a fund created and administered by the Brucian Ministry of Labor to promote labor standards abroad, in cooperation with prominent non-governmental organizations.

7. In addition, Article 26 of Section V of Law No. 661-04 provides that any company that fails to comply with the wage standards under Law No. 413-02 cannot advertise its products in Brucia –either directly or through an advertising agency– and is precluded from providing customer support in Brucia. The restriction on customer support would thus preclude a non-abiding company from providing technical support to its customers either directly –by onsite visits or service centers– or via telephone, online, or any other form of support service to the buyer of the good. The record of the legislative debate on the approval of Law No. 661-04 includes statements made by several legislators noting that the restrictions on advertisement and customer support would also help domestic service providers regain the business that they have lost as a result of the increase in sales by distributors of products manufactured abroad. The prohibition on advertisement and customer support is established by a Decree issued by the Brucian Ministry of Labor in each instance.

8. Investigations under Section V of Law No. 413-02 are initiated either *sua sponte* by the Enforcement Unit in Brucia's Ministry of Labor ("Enforcement Unit") or upon request of an interested party. Article 28 of Law No. 413-02 provides that a company that is subject to a Section V investigation must make available for inspection its payroll and other accounting records. Failure to comply with Enforcement Unit inspection requests may result in an adverse determination and subsequent imposition of a fine and a prohibition on advertising or providing customer support in Brucia.

C. Events Leading to the WTO Dispute

9. Advanced Electronics, Inc. ("Advanced Electronics") is an electronics company that is incorporated and headquartered in Arland. The company built its stellar reputation and impressive economic record on a single product—the hugely successful Personal Digital Assistant (PDA) known as the TotalADPro PDA. TotalADPro revolutionized the PDA market

upon its introduction in December 2002. TotalADPro offers an endless list of features and performs functions never before associated with a PDA. In addition to offering standard features such as calendar, contacts, memo, task list, email, and cellular phone, the TotalADPro integrates Wi-Fi connectivity, MP3 player, voice recorder, and two-way radio, in a scented water-resistant titanium casing. The device fits in the palm of the hand and weighs less than an empty CD case.

10. OmegaDay is a company incorporated in Brucia. Advanced Electronics acquired a 51% participation in OmegaDay and later entered into a long-term exclusive contract with that company, by virtue of which OmegaDay would distribute and sell, at the retail and wholesale level, TotalADPro in Brucia and would provide technical support to the many consumers in Brucia who organize their professional and personal lives with the TotalADPro. Customer support is provided primarily via telephone. To obtain support, a consumer would call OmegaDay locally in Brucia and then would be transferred to technicians located in Advanced Electronics's headquarters in Arland. The technicians in Arland would assist the consumer located in Brucia in resolving any problems that might have arisen concerning the TotalADPro. If the consumer's problem could not be resolved by telephone, a technician from OmegaDay would visit the consumer to provide on-site support.

11. M-Lap, Inc. ("M-Lap") manufactures computers and electronics equipment, including PDAs, in Brucia, and has begun downsizing its operations due to a dramatic drop in sales since July 2003. M-Lap officials claim that the loss in market share is the result principally of the consumer craze for the TotalADPro PDA. As a result of its lost sales, M-Lap has laid off approximately 2000 employees in Brucia. These layoffs have contributed to a general rise in unemployment in Brucia. The rise in unemployment has had both commercial and social repercussions. For example, Brucia has experienced a sharp decline in consumer spending, the flight of qualified workers to other countries, a decrease in real estate property values, and an increase in petty crime and alcohol consumption.

12. When asked to explain why Arland's high-tech companies have outperformed M-Lap in recent years—and why the TotalADPro outperforms all M-Lap PDAs—company officials have pointed to the lower operating costs and the lower costs of labor in Arland. In light of these

factors, and in an effort to enhance its economic position, M-Lap decided to request a Section V investigation against OmegaDay pursuant to Law No. 413-02.

13. Advanced Electronics, as the manufacturer of the goods sold by OmegaDay, refused to make available its payroll and accounting records to the Enforcement Unit inspectors. Consequently, on 13 August 2004, the Ministry of Labor imposed a fine on OmegaDay equivalent to 15 percent of that company's sales in the period between May and July 2004, pursuant to Article 28 of Law No. 413-02. The Ministry of Labor also issued Decree No. 73-04/ML on 13 August 2004, prohibiting Advanced Electronics from advertising the TotalADPro PDA and from providing customer support, either directly or indirectly, through its subsidiary, OmegaDay.

II. PROCEDURAL BACKGROUND

14. The government of Arland, assisted by an international law firm retained by Advanced Electronics, then requested consultations with Brucia on 7 September 2004 pursuant to Article 4 of the DSU, Article XXII:1 of the GATT and Article XXII of the GATS regarding Section V of Law No. 661-04 of 25 April 2004 and Decree No. 73-04/ML of 13 August 2004. Consultations were held in Geneva on 23 September 2004. In the consultations, Arland argued that the Brucian measures were inconsistent with Brucia's commitments under the GATT and the GATS. Brucia argued in response that the measures were consistent with its GATT obligations; that the measures were not "measures affecting services" and, therefore, were not regulated by the GATS; and, even if they are regulated by GATS, that none of Brucia's services commitments were infringed by Brucia's actions against OmegaDay. Brucia decided not to defend the measures on the basis of like product distinctions.

15. After consultations, Arland's trade officials were informed by Advanced Electronics that M-Lap had applied for tax benefits under Law No. 658-04. The Ministry of Labor of Brucia confirmed that M-Lap is a Qualifying Employer and recommended that the Brucian General Tax Directorate grant the tax benefits under Law No. 658-04. However, the General Tax Directorate exercised its discretion and rejected the Ministry of Labor's recommendation. M-Lap appealed the General Tax Directorate's decision to the Brucian

Administrative Tax Court. The public administrative proceeding before the Tax Court was ongoing at the time that the Panel was established.

16. Having failed to settle the matter in consultations, Arland requested on 14 November 2004 the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT and Article XXIII:2 of the GATS. In its request for the establishment of a panel, Arland asked that the panel find nullification or impairment of benefits accruing to Arland as a result of the violation by Brucia of Article III of GATT 1994, and Articles XVI and XVII of GATS. Arland indicated in its request for the establishment of the panel that the specific measures at issue in the dispute were Articles 25 and 26 of Section V of Law No. 661-04, and Decree No. 73-04/ML of 13 August 2004. Even though Arland had not explicitly mentioned Law No. 658-04 in its request for consultations, it also included in its request for the establishment of a panel a claim under Article III:2 of GATT against Article 6 of Law No. 658-04. Arland officials concluded internally that Arland did not have sufficient grounds on which to bring a claim against Law No. 658-04 under the Agreement on Subsidies and Countervailing Measures.

17. A panel was established on 19 December 2004 with standard terms of reference. The Panel was composed on 20 December 2004. According to the Panel's timetable for the proceedings, the first written submission of the parties is due on January 31, 2005. The Panel will hold its first substantive meeting with the parties on February 24-25, 2005.

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REPUBLIC OF BRUCIA
SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
I. HORIZONTAL COMMITMENTS			
<u>ALL SECTORS COVERED BY THIS SCHEDULE:</u>			
All Sectors: Subsidies	1) Unbound 2) Unbound 3) Unbound 4) Unbound	1) Unbound 2) Unbound 3) Unbound 4) Unbound	
II. SPECIFIC COMMITMENTS			
1. DISTRIBUTION SERVICES			
A. Commission agents' services	1) Unbound	1) Unbound	
B. Wholesale trade services	2) Unbound	2) Unbound	
C. Retail trade services	3) None 4) Unbound	3) None 4) Unbound	
2. COMMUNICATIONS SERVICES			
A. Value-Added Telecommunications Services	1) None 2) Unbound 3) None 4) Unbound	1) None 2) None 3) None 4) Unbound	