

On Submission to the
Panel of the World Trade Organization

at the
Centre William Rappard,
Geneva, Switzerland

DISPUTE CONCERNING MULLAVIA - MEASURES UNDERTAKEN
FOR THE
ESTABLISHMENT OF THE CUMCURIA ARRANGEMENT

ELSA Moot Court Competition Panel
CONDALUZA *versus* MULLAVIA

SUBMISSION OF THE COMPLAINANT CONDALUZA

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List of Abbreviations

AB	Appellate Body
AD Agreement	Anti-Dumping Agreement
ADM	Anti-Dumping Measure/ Anti-Dumping Measures
AJIL	American Journal of International Law
Art.	Article
CET	Common External Tariff
CRTA	Committee on Regional Trade Agreements
CSC	CUMCURIA Safeguard Clause
CU	Continental Union
CUMCURIA	CU - MULLAVIA Customs Union and Regional Integration Area
Doc.	Document
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ed./eds.	editor/editors/edition
EJIL	European Journal of International Law
<i>et seq.</i>	<i>et sequens</i> , and the following
<i>et al.</i>	<i>et alia</i> , and others
GATS	General Agreement on Trade and Services
GATT 1994	General Agreement on Tariffs and Trade 1994
ILC	International Law Commission
JIEL	Journal of International Economic Law
MFN	Most-Favoured-Nation
para./paras.	Paragraph/paragraphs
RSP	Recognition of Service Providers
RTA	Regional Trade Agreement/Regional Trade Agreements
SA	Safeguard Agreement
TBT	Agreement on Technical Barriers to Trade
U.N.	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement Establishing the WTO
ZEuS	Zeitschrift für Europarechtliche Studien

Statement of the Facts

CONDALUZA is one of MULLAVIA's major trading partners with significant trade and investment interests in this territory. MULLAVIA is a within reasonably limits wealthy state. It has recently signed a treaty with the Continental Union (CU), which provides for the establishment of the CU - MULLAVIA Customs Union and Regional Integration Area (CUMCURIA). All countries are Members of the WTO.

CONDALUZA has neither a preferential arrangement with MULLAVIA nor with the CU. Nevertheless, a number of CONDALUZIAN producers and service providers believe that their commercial interests will be detrimentally affected by the CUMCURIA arrangement. The government of CONDALUZA has asked for consultations pursuant to Article 4 DSU in order to review the legality of MULLAVIA's undertaking under the relevant WTO rules. The following contentious issues were raised during these consultations:

According to the treaty, any provisional or final **anti - dumping measure** (ADM) applied by either CUMCURIA party to goods or firms of a third party shall also be immediately instituted by the other corresponding signatory. Additionally, from the end of the interim period both signatories shall neither investigate nor apply any ADM to goods originating from the other CUMCURIA party. Furthermore, a special **CUMCURIA Safeguard Clause** (CSC) was fixed. It stipulates that either party may re-impose the original external tariff on originating goods from the other party for a single non-renewable period of five years. In the case of the CSC being implemented, a thirty day prior notice to the other CUMCURIA party shall be given while the WTO Safeguard Committee will not be notified. Another chapter in the treaty provides for the establishment of the CUMCURIAN **common external tariff** (CET). In this context, MULLAVIA's tariff duties will be adjusted to the lower CU duty rate, with the exception of the banana duty rate. The 20% banana duty which was included in the Uruguay Round schedules will be increased to 50% ad valorem. With regards to the **recognition of service providers** (RSP), MULLAVIA will accept the certificates and diplomas of nurses and doctors granted by the CU and as a reciprocal gesture, the CU will recognize the certificates and diplomas in the technical field of machine work and metal welding awarded by MULLAVIA. CONDALUZIAN health care professionals are educated on the highest quality. In order to seek temporary employment in MULLAVIA, they must undertake additional re-examination and re-certification.

Due to the consultations failing to settle any of these issues, a WTO dispute resolution Panel pursuant to Art. 6 DSU has been established upon CONDALUZA's request.

Summary of Arguments

Claim 1: The Panel possesses review competence because it is compelled to review any matter arising from the application of Art. XXIV GATT 1994.

Claim 2: MULLAVIA violates fundamental rules of the WTO law. First, the provisions governing the ADM violate (a) Art. I:1 GATT 1994 because the elimination of ADM infringes the MFN principle, (b) Art. 1, 2, 3, 9 Anti-Dumping Agreement and Art. VI:1 GATT 1994 by imposing ADM without holding investigations and thus, without evidencing neither dumping nor material injury. Further, (c) the mandatory provisions *per se* violate WTO Law. Second, the CSC infringes (a) Art. 3.1 and Art. 4 in tandem with Art. 2.1 Safeguard Agreement (SA) since no investigations will be initiated and thus, material injury cannot be determined, (b) Art. 7.1 and 7.2 SA by imposing safeguards for a period of 5 years, (c), Art. 12.1(c) SA and XIX:2 GATT 1994 as safeguards will not be notified. Further, (d) this discretionary provision *per se* violates WTO law. Third, Art. II GATT is violated by the duty increase from 20 to 50% because the duty is bound, subject to the MULLAVIAN schedule.

Claim 3: The measures codified by MULLAVIA are not justified under Art. XXIV GATT 1994 because: First, the first condition of the 'two-part' test is not fulfilled since the CUMCURIA disqualifies itself from being a customs union. (a) The CSC does not fulfil the requirements of paragraph 8(a)(i), (b) the duty increase contradicts paragraph 8(a)(ii), (c) the ADM provisions undermine paragraph 5(a), and (d), both the ADM provisions and the CSC are not exercised upon the CUMCURIA formation. Second, the second condition of this test is also not met since (a) CUMCURIA would not be prevented without the implementation of the CSC. There exist alternatives which are less burdensome and GATT-compatible for (b) the ADM provision, and (c), as well as for the increase of the banana duty. Third, negotiations concerning the duty increase under Art. XXVIII are not provided for. Fourth, an *inter se* modification is not permissible both under Art. XXIV GATT 1994 and Art. 41 VCLT.

Claim 4: A waiver under Art. XXV:5 GATT concerning these provisions was not granted.

Claim 5: The MULLAVIAN RSP, first, violates: (a) Art. II GATS as CONDALUZIAN health care suppliers are treated less favourably compared to the CU members, (b) Art. XVII since they are treated less favourably compared to MULLAVIAN service suppliers, (c) Art. VI as CONDALUZIAN doctors and nurses are not treated objectively. Second, the RSP is not justified under (d) Art. V GATS since it has no substantial coverage. It is also not justified (e), under Art. VII since MULLAVIA has infringed its notification requirements; it has failed to give adequate opportunity for CONDALUZA to demonstrate accession to this agreement and does not provide for the elimination of all discrimination under Art. VII:3 GATS.

*Arguments***I. Infringement of Obligations undertaken pursuant to the Relevant WTO Agreements**

In the following, CONDALUZA will demonstrate that, first, the Panel has review competence, second, pursuant to Art. 3.8 DSU¹ the measures, respectively the terms of the treaty, adopted by MULLAVIA constitute an unjustified infringement of the obligations assumed under the GATT 1994², the AD Agreement³, the SA⁴ and the GATS⁵. Third, MULLAVIA's actions therefore constitute a *prima facie* case of nullification and impairment to the detriment of CONDALUZA.

1. Panel has Review Competence

First of all, it is submitted that the Panel does possess review competence concerning the GATT-compatibility of a customs union. This is because Art. XXII, XXIII GATT 1994, as illustrated in the DSU provisions and in conjunction with Art. XXIV:12 GATT 1994, compel the Panel to assess any matter arising from the application of Art. XXIV GATT 1994.⁶ Consequently, complaints against measures as well as defences of compatibility must all be taken on board to give effect to the rights of WTO members to invoke the DSU.⁷ This is confirmed by the principle of effective treaty interpretation (*ut res magis valeat quam pereat*⁸), since the right of the Members to invoke the DSU would otherwise be undermined. Even in the event of the Panel not being entitled to have review competence, in cases where there is no clarifying recommendation from the CRTA⁹ yet, the customs union must be considered

¹ Understanding on Rules and Procedures Governing the Settlement of Disputes of 15 April 1994, WTO Doc. LT/UR/A-2/DS/U/1.

² General Agreement on Tariffs and Trade of 15 April 1994, WTO Doc. LT/UR/A-1A/1/GATT/2.

³ Agreement on the Implementation of Art. VI of the GATT 1994 of 15 April 1994, WTO Doc. LT/UR/A-1A/3.

⁴ Agreement on Safeguards of 15 April 1994, WTO Doc. LT/UR/A-1A/8.

⁵ General Agreement on Trade and Services of 15 April 1994, WTO Doc. LT/UR/A-1B/S/1.

⁶ *Turkey-Textiles*, Panel Report, para. 9.49.

⁷ See *India-QR's*, AB Report, paras. 84 - 88; *Mathis*, Trade Agreements, 256.

⁸ *Korea-Dairy*, AB Report, para. 80; *U.S.-Gasoline*, AB Report, 23; *Dallier/Pellet*, *Droit International Public*, para. 17.2.

⁹ Committee on Regional Trade Agreements, established on 6th February 1996.

prima facie to be GATT-incompatible. This is because the burden of proving compatibility resides upon the RTA member invoking Art. XXIV GATT 1994 as a defence.¹⁰

2. Violation of Fundamental Rules of the GATT 1994, the AD Agreement and the SA

In the following, CONDALUZA will evidence that, first, the provisions concerning both the elimination of all internal ADM and the mutual adoption of external ADM, second, the terms of the treaty governing the safeguard clause and, third, the provision providing for the increase of the banana duty by MULLAVIA all violate fundamental principles of the GATT 1994, the AD Agreement and the SA.

a) Application of the ADM

First of all, it will be explicated that all the aspects of the ADM, as stipulated by MULLAVIA, infringe constitutional principles of WTO law.

(a) Infringement of Art. I:1 GATT 1994

The elimination of any ADM implemented by MULLAVIA violates the Most-Favoured-Nation (MFN) clause embodied in Art. I:1 GATT 1994. This clause is the basic principle of the WTO multilateral trading system.¹¹ Art. I:1 GATT 1994 states that every WTO Member is obliged to treat Members equally with respect to customs duties and charges of any kind. Any elimination of ADM between MULLAVIA and the CU creates advantages for the CUMCURIA members that are not granted to third countries. Non-member countries, like CONDALUZA, are thereby discriminated against in violation of Art. I:1 GATT 1994.

(b) Violation of the AD Agreement and Art. VI:1 GATT 1994

The mutual adoption of any ADM violates Art. 1, 2, 3.1, 3.5, 9.3 AD Agreement and Art. VI:1 GATT 1994. This is because, first, no investigations shall be initiated, second, dumping will not be determined and, third, material injury will also not be determined.

(1) Violation of Art. 1 AD Agreement

First, the adoption of the Continental Union ADM by MULLAVIA *et vice versa* without the initiation of any investigations violates Art. 1 AD Agreement. According to this provision, ADM shall only be applied pursuant to investigations. The CUMCURIA treaty does not provide for such investigations before the mutual adoption of any ADM.

¹⁰ *Turkey-Textiles*, AB Report, para. 58; *Mathis*, Regional Trade Agreements, 257.

¹¹ *E.E.C.-Bananas*, Panel Report, paras. 211, 242; *U.S.-Steel Safeguards*, Panel Report, para. 7.182; *Anderson*, in: Krueger (ed.), *International Organisation*, 231 (246); *Jackson*, *Trading*, 157; *Golt*, *GATT Negotiations*, 3; *Jackson et al.*, *Economic Relations*, 423; *Hilf*, *JIEL* 2001, 111 (117, 118); *Steinberger*, *Wirtschaftszusammenschlüsse*, 46; *Tietje*, *Grundstrukturen*, 195.

(2) *Violation of Art. 2 and 9.3 in Tandem with Art 1 AD Agreement*

Second, MULLAVIA violates Art. 2 and 9.3 AD in tandem with Art. 1 AD Agreement by the mutual adoption of ADM since dumping is not determined before the levy of the measures. Art. 2 AD Agreement requires, for the purpose of the AD Agreement, the determination of dumping. Furthermore, the amount of ADM has to comply with the margin of the actual dumping following Art. 9.3 AD Agreement. This is emphasized by Art. 1 AD Agreement which requires that ADM are levied “pursuant to” investigations. The ordinary meaning of the term “pursuant” is “to be in agreement or conformity”.¹² As no investigations shall be initiated by MULLAVIA, dumping cannot be determined and therefore the ADM will not comply with the margin of dumping.

(3) *Violation of Art. 3.1, 3.5 AD Agreement in Tandem with Art. VI:1 GATT 1994*

Third, the mutual adoption of ADM violates Art. 3.1, 3.5 AD Agreement and Art. VI:1 GATT 1994 because material injury will not be determined. According to the terms of Art. 1 AD Agreement, it is clear that any ADM must conform to both this agreement and Art. VI GATT 1994.¹³ Both Art. VI:1 GATT 1994 and Art. 3.1 AD Agreement stipulate the determination of material injury as a prerequisite to levying any ADM, the so called ‘injury test’.¹⁴ Further, Art. 3.5 AD Agreement requires causality between dumped imports and material injury. If any ADM applied by either CUMCURIA party will also be instituted by the other party without investigations, material injury cannot be determined by the party adopting the ADM. As such, the presence of a necessary causal link would remain unproven.

(c) Mandatory Legislation

The mandatory CUMCURIA provision governing the ADM violates WTO law. Mandatory provisions *per se* can violate WTO law. This is because according to Art. XVI:4 WTO Agreement,¹⁵ each member shall ensure conformity of its law with the WTO agreements.¹⁶ The *raison d’être* is the adverse impact that a mandatory provision can have on competitive opportunities, through the negative influence that it exerts on the decisions of economic

¹² Collins English Dictionary, 1253.

¹³ See also *Argentina-Footwear*, AB Report, para. 83.

¹⁴ *Jackson et al.*, Economic Relations, 727; emphasized by *U.S.-1916 Act*, AB Report, para. 110.

¹⁵ Marrakesh Agreement Establishing the WTO of 15 April 1994, WTO Doc. LT/UR/A/2.

¹⁶ See also *U.S-Section 301*, Panel Report, para. 7.41; *U.S.-Malt-Beverages*, Panel Report, paras. 281-282; *Palmeter/Maovroidis*, Dispute Settlement, 24;

operators.¹⁷ The CUMCURIA treaty requires that any ADM shall be eliminated and that their mutual adoption shall take place after the interim period. The word “shall” infers that provisions are mandatory.¹⁸ Consequently, this provision compels the MULLAVIAN executive to act in a WTO-inconsistent manner. In adopting any ADM without investigations by MULLAVIA, CONDALUZA has to face additional and unjustified trade barriers. As a result of the uncertainties created, investment plans and interests of CONDALUZA’s producers would be detrimentally affected. The ADM provisions being actually executed in just ten years does not at all affect this *raison d’être*. The ‘chilling effect’¹⁹ on CONDALUZA’s market, decisions and investments already occurs at present and in the interim period. Thus, transaction costs are incurred in an immediate time frame.

b) Safeguard Measures

Next, it is submitted that the CSC is not in conformity with the GATT 1994 and the SA.

(a) Violation of Art. 3.1 and Art. 4 in Tandem with Art. 2.1 SA

MULLAVIA violates Art. 3.1 and Art. 4.2(c) SA, and Art. 4.2 in conjunction with 2.1 SA since no investigations will be initiated. Therefore no findings are published and material injury is not determined. Both Art. 3.1 and 4.2 (c) SA require investigations before a safeguard action is imposed and recognize the need to publish these investigations. Under the CSC, the enacting party of a safeguard is not required to initiate investigations and consequently, no published report will exist. Further, Art. 2.1 and 4 SA require the determination of serious injury or threat thereof. The CSC does not provide for the determination of injury.

(b) Violation of Art. 7.1 and Art. 7.2 SA

The CSC provision violates Art. 7.1 and 7.2 SA since the period of an imposed safeguard will be 5 years. Art. 7.1 SA states that this period shall not exceed four years. Following Art. 7.2 SA an extension would require the procedures set forth in Art. 2, 3, 4, 5 SA. The CUMCURIA treaty states a five year period of validity for an imposed safeguard measure.

(c) Violation of Art. 12.1(c) SA and Article XIX:2 GATT 1994

Moreover, MULLAVIA violates both Art. 12.1(c) SA and Art. XIX:2 GATT 1994 since under the CSC, safeguard actions will not to be notified to the WTO Safeguards Committee.

¹⁷ *U.S.-Section 301*, Panel Report, para. 4.159; *U.S.-Malt-Beverages*, Panel Report, para. 5.60; *U.S.-Superfund*, Panel Report, para. 5.22; *Bhuiyan*, JIEL 2002, 571 (585).

¹⁸ Webster’s Dictionary, 2085-2086.

¹⁹ *Bhuiyan*, JIEL 2002, 571 (597).

Art. 12.1(c) SA requires the immediate notification of any decision to apply or extend a safeguard measure. Art. XIX:2 GATT 1994 states that any contracting party shall issue written notice to the WTO Members. The CSC stipulates that any safeguard measure shall not be notified by either party to the WTO Safeguards Committee. The word “shall” infers the mandatory nature of provisions.²⁰ Thus, once the CSC will be executed there will not even be the possibility for its execution to be WTO-consistent.

(d) Discretionary Legislation

MULLAVIA cannot argue that the CSC as a discretionary provision that possibly remains unexecuted does not violate WTO law, because even discretionary legislation can *per se* violate WTO law. This is based on the *ratio* and central objectives of the GATT according to customary rules of treaty interpretation and on the resulting effects of the provision at issue. The Panel in *US – Section 301* explicitly stated that discretionary provisions *per se* can violate WTO Law.²¹ Further it emphasized that the central objectives of the WTO are to provide legal security and predictability.²² This is confirmed and re-affirmed by the Preamble of the SA which recognizes the need to re-establish multilateral control over safeguard measures under the principles of WTO law. Thus, provisions allowing measures that contradict the SA, as the CSC does, substantially undermine this control and certainty. This *ratio* must be assessed by the principle of public international law *pacta sunt servanda* (Art. 26 VCLT²³) and through customary rules of treaty interpretation as codified in Art. 31 of the VCLT and referred to in Art. 3.2 DSU²⁴. Under the latter provision, the object and purpose of the relevant agreement have to be examined. Guaranteeing legal security and predictability as the WTO’s central purpose means in practice, that the mere possibility for the Members executive authorities to act consistently with WTO Law is not sufficient.²⁵ Instead, Members

²⁰ Webster’s Dictionary, 2085-2086.

²¹ *U.S.–Section 301*, Panel Report, paras. 7.47–7.94; *Bhuiyan*, JIEL 2002, 571 (571); *Wang*, *Perspectives* 2001, para. III 2.

²² *U.S.–Section 301*, Panel Report, para. 4.30; *Hilf*, JIEL 2001, 111 (115); *Wang*, *Perspectives* 2001, III 2e; also *Pauwelyn*, *Conflict of Norms*, 27.

²³ 1969 Vienna Convention on the Law of Treaties of 23 May 1969, I.L.M. 8 (1969), 679; see also *Neumann*, *Koordination des WTO-Rechts*, 346-348.

²⁴ *U.S.–Gasoline*, AB Report, 15; *India–Patents*, AB Report, paras. 45-46; *U.S.–Section 301*, Panel Report, paras. 5.20, 7.22; *Ehlermann*, JIEL 2003, 695 (698); *Pauwelyn*, *AJIL* 2001, 535 (542).

²⁵ *U.S.–Section 301*, Panel Report, para. 7.22; *Bhuiyan*, JIEL 2002, 571 (596).

are obliged to provide "a sound legal basis"²⁶ in domestic law for the measures required to implement their WTO obligations.

Also, with discretionary provisions the same detrimental effects as those of mandatory provisions can occur. A 'chilling effect' on the market and economic activities is also caused when trading partners know *ex ante* that their partners have enacted provisions which allow them to disregard their international obligations.²⁷ As likewise pointed out above, this will also have a contemporaneous effect and not just after the interim period.

c) Violation of Art. II GATT 1994 by Increasing the Banana Duty

Next, CONDALUZA will evidence that MULLAVIA violates Art. II GATT 1994 and therefore fundamental GATT obligations by increasing the banana duty. Tariffs which were included in the Uruguay Round schedules are binding and thus part of the contractual obligations determined in Art. II.²⁸ These bindings are vital to the process of securing trade agreements.²⁹ The 20% banana duty was included in the Uruguay Round schedules and is thereby binding and part of MULLAVIA's contractual obligations. Although not being implemented yet, this mandatory provision *per se* violates Art. II GATT as evidenced above.

3. No Justification under Art. XXIV GATT 1994

Art. XXIV GATT 1994 is an exception to GATT requirements and it is generally accepted and repeatedly stated by the Dispute Settlement Body (DSB) that exceptions must be interpreted narrowly and a high standard of interpretation has to be applied.³⁰ To determine whether Art. XXIV GATT 1994 can be granted as an exception or not, the so-called 'two-part' test has to be employed.³¹ In *Turkey - Textiles*, the Appellate Body held that, subject to the chapeau of its sub-paragraph 5, Art. XXIV may justify a measure which is inconsistent with certain

²⁶ *India-Patents*, AB Report, paras. 56 *et seq.*; *Wang*, Perspectives 2001, 2 IIIa.

²⁷ *U.S.-Section 301*, Panel Report, para. 4.276; *Bhuiyan*, JIEL 2002, 571 (596, 597).

²⁸ *Brazil-Dessicated Coconut*, AB Report, para. E 3; *Jackson, Trading*, 142; *Jackson et al., Economic Relations*, 348 *et seq.*; *McGovern, Trade Regulation*, 5.11-2 *et seq.*

²⁹ *Francois/Martin*, in: Hoekman/Mattoo/English (eds.), Handbook, 540 (540).

³⁰ *Turkey-Textiles*, AB Report, para. 45 fn. 13; *U.S.-Underwear*, Panel Report, para. 7.21; *U.S.-Customs User Fee*, Panel Report, para. 84; *E.E.C.-Dessert Apples*, Panel Report, para. 12.3; *U.S.-Pork*, Panel Report, para. 3.3; *Bhagwati*, Trading System, 76; *Cottier/Evtimov*, ZEuS 2000, 477 (485); *Tietje*, Grundstrukturen, 311; *Mathis*, WTO Seminar, 2.

³¹ *Turkey-Textiles*, AB Report, para. 58; *Mathis*, Trade Agreements, 257; see also *Srinivasan*, in: Krueger (ed.), International Organization, 329 (330).

other GATT provisions only when two conditions are fulfilled.³² First, the measure must be introduced upon the formation of a customs union in the meaning of Art. XXIV:5(a), 8(a) GATT 1994. Second, the formation of the customs union must have been prevented without introducing the measure at issue; it must be a *conditio sine qua non*. Both these conditions must be met to have the benefit of defence under Art. XXIV GATT 1994.³³ In connecting Art. XXIV to these conditions, the Appellate Body underlines its strictly exceptional status. This status is reaffirmed by the Panel in *Turkey – Textiles* by holding that Art. XXIV is not *lex specialis*.³⁴ Following the principle of effective treaty interpretation (*ut res magis valeat quam pereat*³⁵), Art. XXIV cannot be *lex specialis* because otherwise the remaining GATT articles would become meaningless. The WTO is a single undertaking and Art. XXIV is a part of it.³⁶ In the following, CONDALUZA will demonstrate that the criteria for the exceptional justification of GATT-incompatible measures under Art. XXIV GATT 1994 are not fulfilled. First, the measures are not introduced upon the formation of a customs union under Art. XXIV:8(a), 5(a) GATT 1994. Second, there exist alternative, less burdensome and GATT-compatible means to establish a customs union in the meaning of these sub-paragraphs. Third, the prerequisites to increase a duty rate according to Art. XXIV:6 GATT 1994 are not met. And fourth, with regards to the CSC, a modification *inter se* according to Art. 41 VCLT is also not permitted because Art. XXIV:5(a), 8(a) GATT 1994 are not fulfilled.

a) Formation of Customs Union under Art. XXIV:5(a), 8(a) GATT 1994

Below, CONDALUZA will evidence that the first condition of the ‘two – part’ test is not fulfilled by MULLAVIA since the measures at issue are not introduced upon the formation of a customs union in the meaning of sub-paragraph 8(a) and 5(a).

(a) Safeguards - No Customs Union under Art. XXIV:8(a)(i) GATT 1994

CUMCURIA does not meet the requirements of sub-paragraph 8(a)(i) as safeguard actions are forbidden in trade among RTA parties.

³² *Turkey–Textiles*, AB Report, paras. 45, 58, 63; *Mathis*, Trade Agreements, 211.

³³ *Turkey–Textiles*, AB Report, paras. 58, 63; *Argentina–Footwear*, AB Report, paras. 109–110; *Marceau/Reiman*, Legal Issues of Economic Integration 2001, 297 (313); *Mathis*, Trade Agreements, 211.

³⁴ *Turkey – Textiles*, Panel Report, paras. 9.186-9.189.

³⁵ See footnote 8.

³⁶ *Mathis*, Regional Trade Agreements, 217.

First, safeguard measures are not excluded from the “substantially” criterion. Sub-paragraph 8(a) provides that customs union members may maintain measures permitted under certain provisions which are explicitly stated in its bracketed list. This list of exceptions is exhaustive.³⁷ The wording does not indicate that the listed articles are only examples, because this would be explicitly identified as for example in Art. 2.2 TBT³⁸ by the term “*inter alia*”. Further, exceptions have to be interpreted narrowly. Therefore, RTA parties are not permitted to apply any restrictive measures against each other, especially safeguard measures, other than those specified in the bracketed list.³⁹ Second, there is only one “domestic industry”. Thus, even if the Panel may consider the list in sub-paragraph 8(a)(i) not to be exhaustive, safeguard measures between RTA members would only be permissible when it has been determined that serious injury to a domestic industry was caused.⁴⁰ The definition of “domestic industry” is stated in Art. 4.1(c) SA. For further details, Art. 4 AD Agreement has to be referred to.⁴¹ At the end of the interim period, CUMCURIA as a customs union plans to have reached such a level of integration that the entire industry has to be regarded as a “domestic industry” according to Art. 4.3 AD Agreement. If this is the case, it is not possible for one party to cause injury to the domestic industry of another party under Art. 4.1 SA. Third, MULLAVIA disregards the qualitative element in the “substantially” criterion. Art. XXIV:8(a) GATT 1994 provides for both qualitative and quantitative components⁴². Even if the CSC may only affect trade in a marginal quantitative sense, this can occur in product sectors which are of substantial qualitative concern, for example agricultural products because they directly satisfy human needs. To this effect even the exclusion of one entire sector, such as agriculture, is not compatible with Art. XXIV.⁴³ The CSC allows that entire sectors can be excluded from the “substantially” criterion. Therefore this requirement is not met.

³⁷ CRTA, WT/REG/W37, para. 58; see CRTA, WT/REG/W/17, para. 12.

³⁸ Agreement on Technical Barriers to Trade of 15 April 1994, WTO Doc. LT/UR/A-1A/10.

³⁹ CRTA, WT/REG/W37, para. 58; CRTA, WT/REG/W/17, para. 12.

⁴⁰ CRTA, WT/REG/W37, para. 58(c).

⁴¹ *Berrisch*, in: Prieß/Berrisch (eds.), WTO-Handbuch, 479 (483).

⁴² *Turkey-Textiles*, AB Report, para. 49; *Turkey-Textiles*, Panel Report, para. 9.148; see also *Marceau/Reiman*, Legal Issues of Economic Integration 2001, 297 (316).

⁴³ *India-QR's*, Panel Report, para. 5.238; *Australia*, CRTA, WT/REG/W/18, paras. 5, 7, 12; *Marceau/Reiman*, Legal Issues of Economic Integration 2001, 297 (316).

(b) Duty Increase - No Customs Union in the Meaning of Art. XXIV:8 (a)(ii) GATT 1994

By increasing the banana duty, MULLAVIA disqualifies itself from being a member of a customs union under Art. XXIV:8(a)(ii) GATT 1994 because: First, the “substantially” criterion is not met and, second, the additional requirements of sub-paragraph 4 are not fulfilled. First, Art. XXIV:8(a)(ii) GATT 1994 provides for the application of substantially the same duties by each customs union member *vis á vis* third countries. The ‘substantially-all-trade’ criterion is accepted by GATT scholars as the key to avoiding protectionist-oriented agreements that exclude broad ranges of “sensitive” sectors.⁴⁴ Bananas are recognized as a “sensitive” product and are thereby not to be excluded with regard to this provision. As MULLAVIA concedes, the CU is “decidedly more protectionist” as they impose a higher banana duty. Thus, on the basis of the “substantially” criterion, on which MULLAVIA bases its justification for the increase, MULLAVIA increasing the duty would constitute a protectionist-oriented measure which must be avoided while introducing a CET. To meet this criterion the 20 % duty rate has to be kept and the 50% rate has to be decreased.

Second, in *Turkey – Textiles*, the Appellate Body held that sub-paragraph 4 “sets forth the overriding and pervasive purpose of Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV”⁴⁵. Thus, this must also apply to an interpretation of sub-paragraph 8 (a)(ii). Sub-paragraph 4’s objectives “to facilitate trade” and “not to raise barriers” are confirmed by the Preamble of the Understanding of Art. XXIV⁴⁶ and based on the ‘no-increase-in-protection’ premise and the GATT’s three main principles.

The ‘no-increase-in-protection’ premise is infringed by MULLAVIA’s provisions as stated above. The resulting increase in protection due to increasing the banana duty would make it less profitable for CONDALUZA to import goods into MULLAVIA. Thus, CONDALUZA’s trade opportunities would be detrimentally affected. Further, non-discrimination, tariff reduction and economic integration are the three main principles of the GATT 1994.⁴⁷ In this

⁴⁴ See, *inter alia*, *Blackhurst/Henderson*, in: Anderson/Blackhurst (eds.), *Regional Integration*, 408 (423); *Roessler*, in: Anderson/Blackhurst (eds.), *Regional Integration*, 311 (314).

⁴⁵ *Turkey-Textiles*, AB Report, para. 57.

⁴⁶ Understanding on the Interpretation of Article XXIV of GATT 1994 of 15 April 1994, WTO Doc. LT/UR/A-1A/1/GATT/U/4.

⁴⁷ *Imhoof*, *Le GATT*, 9; *Matsushita et. al.*, *World Trade Organization*, 114; *Hong-Kong/China*, CRTA, WT/REG/W/19, para. 12; *Bhagwati*, *The World Economy 1992*, 535 (546).

context, economic integration is "*un moyen indirect de réaliser les buts du GATT*"⁴⁸. Consequently, MULLAVIA's measures have to correlate with these aims. Contrary to this, the banana duty provision contradicts these objectives by establishing trade barriers through protectionist-oriented measures. Therefore MULLAVIA cannot refer to paragraph 5 of the Understanding of Art. XXIV and Art. XXIV:6 GATT 1994 to justify the increase while contradicting basic principles of the Understanding of Art. XXIV as well as Art. XXIV:4, 8(a)(ii) GATT 1994's criteria. This is because all of the listed criteria must be met for MULLAVIA's provisions to be justified.

(c) ADM – No Customs Union under Art. XXIV:5(a) GATT 1994

The CUMCURIA treaty does not meet the requirements of sub-paragraph 5(a) since the mutual adoption of any ADM would lead to regulations of commerce being overall higher than prior to the formation. Under sub-paragraph 5(a) the 'economic assessment'⁴⁹ must be fulfilled. Following paragraph 2 of the Understanding of Art. XXIV, the assessment of this incidence may involve "the examination of individual measures". Thereby potential benefits might offset certain deficiencies.⁵⁰ If MULLAVIA adopted any new, additional ADM from the CU without determining material injury, imports from CONDALUZA would have to overcome additional and unjustified trade barriers. Further, MULLAVIA would not abolish any of their previous ADM. Thus, there are no benefits to offset the resulting deficiency.

(d) Introducing Measures upon the Formation of a Customs Union

Both the mutual adoption of ADM and the implementation of the CSC do not take place upon the formation of a customs union. The deviation from WTO rules must take place upon such a formation. As such, the measures causing violation cannot be adopted after the completion of the RTA.⁵¹ CUMCURIA provides that the law concerning ADM and the CSC shall be executed after the interim period. Hence, these measures are not the means to establish a customs union but shall only be applied after its completion.

b) No Prevention of the Customs Union without Measures at Issue

Moreover, CONDALUZA respectfully submits that the measures established in the CUMCURIA treaty do not find justification under Art. XXIV GATT since the customs union

⁴⁸ *Imhoof*, Le GATT, 9.

⁴⁹ *Turkey-Textiles*, AB Report, para. 25.

⁵⁰ CRTA, WT/REG/W/37, paras. 63, 64(b).

⁵¹ *Marceau/Reiman*, Legal Issues of Economic Integration 2001, 297 (313).

would not have been prevented without introducing the measures at issue. The second condition for a successful defence under Art. XXIV is that the formation of the customs union must have been prevented without the measure at issue. As *argumentum e contrario*, if there are GATT-compliant, 'less evil'⁵² measures available that fulfil the requirements of Art. XXIV:5(a), 8(a) GATT 1994, these must be applied instead of the GATT-incompatible ones.⁵³

(a) No Prevention without CSC

The CUMCURIA formation would not be prevented without the CSC. In the case of an interim period, internal safeguard measures can only be applied during this time period. This is because once the customs union is established, the harmonization of competition and law obviates the need for parties to take commercial defence measures against each other.⁵⁴ Contrary to the above, the CSC shall only be applied after the interim period. Also, the CU did not have a similar clause, both ADM and safeguard actions were even forbidden amongst members. Nevertheless it constituted a declared and functioning customs union.

(b) Alternatives for both the Elimination and Mutual Adoption of the ADM

The formation of CUMCURIA would not be prevented without the ADM provisions because there is a GATT-compatible alternative for both the elimination and the mutual adoption of ADM, as well as simultaneously meeting Art. XXIV:8(a)(i) and (ii) GATT 1994. This is to be done by starting new investigations under the relevant provisions. The consequent imposition of ADM would then still lead to both elimination of internal barriers and application of the same set of external barriers. These investigations according to Art. 1 AD Agreement shall include the determination of material injury to a "domestic industry" under Art. 3 AD Agreement. The term "domestic industry" is defined in Art. 4.3 AD Agreement. After the interim period MULLAVIA and the CU intend to have reached, under Art. XXIV:8(a) GATT 1994, the level of integration as provided for in Art. 4.3 AD Agreement. Thus, the industry in the entire RTA shall be taken to be the "domestic industry". To impose any ADM, new investigations referring to this "domestic industry" have to be initiated. Lastly, the CUMCURIA formation is not a mere CU enlargement and not analogous to the

⁵² *Palmer*, in: Anderson/Blackhurst (eds.), *Regional Integration*, 326 (326).

⁵³ *Turkey-Textiles*, AB Report, para. 62.

⁵⁴ CRTA, WT/REG/W/37, para. 58(c); E.C., CRTA, WT/REG/M/15, para. 44; see also *Steinberger*, *Wirtschaftszusammenschlüsse*, 160 fn. 662.

enlargement of the EU⁵⁵ as an example. After an ‘enlargement’ a pre-existing customs union merely has a new member party. The CUMCURIA treaty explicitly provides for the ‘establishment’ and thus for the new formation of another customs union, because the basic principle of interpretation is to proceed from the literal meaning of a term. The new customs union consists of the two parties MULLAVIA and CU, and is not a mere CU ‘enlargement’.

(c) Alternatives for the Increase of the Banana Duty

The CUMCURIA formation would not be prevented without the increase of the banana duty because there is a GATT-compatible alternative to establish the CET while fulfilling Art. XXIV:8(a)(ii) GATT 1994. An alternative to meet the ‘substantially-all-trade’ criterion of subparagraph 8 (a)(ii), hence neither excluding a sensitive sector nor being protectionist-oriented, is for the CU to adopt the 20% duty rate of MULLAVIA. This would also facilitate trade between the CUMCURIA parties while establishing no trade barriers for CONDALUZA. In so doing, both Art. XXIV:4 and 5 GATT 1994 would also be fulfilled.

c) No Negotiations Directed to Duty Increase

MULLAVIA cannot increase the banana duty under the procedure of Art. XXIII GATT 1994 because, first, negotiations are not included in MULLAVIA’s schedule and, second, as a result the prerequisites to increase the duty rate in the absence of attaining a consensus, according to paragraph 5 of the Understanding of Art. XXIV, are not met.

First, there is no indication in MULLAVIA’s otherwise detailed schedules providing for the initiation of negotiations under Art. XXVIII GATT 1994 as prerequisite to increasing the bound duty rate. In contrast, the CUMCURIA parties have already determined a mandatory provision that the duty rate “will be” 50%; there are no plans providing for “negotiation and agreement with any contracting party” pursuant to Art. XXVIII:1 GATT 1994. Second, the provision of paragraph 5 of the Understanding of Art. XXIV, as relied upon by MULLAVIA to justify the treaty provisions concerning the banana duty is conditional upon the execution of actual negotiations under Art. XXVIII GATT prior to MULLAVIA implementing its plans.

d) Inter Se Modification is not Permissible

MULLAVIA cannot argue that the CSC is a permissible *inter se modification* under Art. 41 VCLT because: First, the premises for such modification under Art. 41.1(a) are not fulfilled. Second, the chapeau of Art. 41.1(b) is not fulfilled. And, third, Art. 41.1(b)(i),(ii) are not met as the CSC has an effect on third parties and undermines the WTO’s legal security.

⁵⁵ CRTA, WT/REG3/2, paras. 65 *et seq.*

First, Art. 41.1(a) VCLT grants the conditional right to members of a multilateral agreement, such as the WTO Agreement, to modify the treaty as between them, provided that such a modification is provided for in the relevant agreement. Taking into consideration that Art. XXIV GATT 1994 can be seen as the relevant provision, one has to observe that Art. XXIV GATT 1994 is also conditional.⁵⁶ These conditions are not fulfilled with regards to the CSC as stated above. Second, according to the chapeau of Art. 41.1 (b) VCLT, the modification shall not be prohibited by the multilateral treaty, in this case the WTO Agreement. Art. 11 SA clearly states that emergency actions can only be taken if the measure conforms with both Art. XIX GATT 1994 and the SA. As stated, the CSC violates both these agreements. Third, the modification may not have a negative effect on third party's rights or undermine the objectives of the treaty. According to Art. 3.2 DSU, the elements of security and predictability in the WTO indicate a collective interest for all Members; thus, each provision that violates WTO law necessarily violates the rights of all Members.⁵⁷ This is confirmed by Art. 2(b) ILC-Draft⁵⁸ and by the principle *pacta tertiis nec nocent nec prosunt* under Art 34 VCLT⁵⁹, whose premises are not met if the WTO's legal security is undermined. In being contrary to Art. XXIV GATT 1994 and the SA, the CSC undermines the legal security and basic fundamentals of the WTO and therefore the collective interest of all Members.

4. No Waiver under Art. XXV:5 GATT 1994

CONDALUZA respectfully submits that in this case the only way to justify the provisions governing the measures at issue would be a waiver under Art. XXV:5 GATT 1994 with regards to the relevant obligations. Such waiver has not been granted by the WTO Members.

5. The RSP is not in Conformity with the GATS

In the following, it will be demonstrated that with regards to the RSP, MULLAVIA infringes fundamental provisions of the GATS. This is because MULLAVIA violates, first, Art. II GATS, second, Art. XVII GATS and, third, Art. VI GATS. These violations are, fourth, neither justified under Art. V GATS nor, fifth, under Art. VII GATS.

⁵⁶ *Turkey-Textiles*, AB Report, para. 57; *Turkey-Textiles*, Panel Report, para. 9.103.

⁵⁷ *Tietje*, *Grundstrukturen*, 167; see also *Sicilianos*, EJIL 2002, 1127 (1134).

⁵⁸ ILC-Draft Articles on State Responsibility, in: Report of the International Law Commission on its Fifty-third Session, U.N. Doc. A/56/10, 43; see also *Tietje*, *Grundstrukturen*, 167.

⁵⁹ *Pauwelyn*, EJIL 2003, 907 (915, 951); *Rauschning*, Vienna Convention, 303; see also *Lennard*, JIEL 2002, 17 (48).

a) Violation of Art. II GATS

MULLAVIA violates Art. II:1 GATS because, first, the measure at issue is covered by the GATS and, second, it grants less favourable treatment to CONDALUZIAN service suppliers.

(a) Threshold Determination

First, the MULLAVIAN RSP must be covered by the GATS; a threshold determination must be made. There must be trade in services in one of the four stipulated modes of supply.⁶⁰ In that respect, mode 4 of supply is subject to Art. I:2(d) pertaining to the presence of natural persons of a Member in the territory of any other Member.⁶¹ Further, the measure must “affect” trade in services within the meaning of Art. I:1. The ordinary meaning of “affecting” comprehends a measure that has “an effect on”; this indicates a broad scope of application.⁶² Consequently, the measure at issue cannot be *a priori* excluded from the scope of the GATS.

(b) “Treatment no Less Favourable”

Second, the CONDALUZIAN health care professionals are treated “less favourably” in the meaning of Art. II:1 GATS because, (i), they are “like” service suppliers and, (ii), they are treated differently compared to CU professionals. First, (i), a service supplier is to be considered “like” if it supplies the same service.⁶³ Unlike professions where the country specific component is substantial, such as the practise of law or accountancy, in medicine and health care professions the universal component is very high.⁶⁴ Therefore the country-specific substance of the profession is not substantial enough to justify the disparity in treatment of identical qualifications. Thus, the CONDALUZIAN health care professionals supply the same service as the MULLAVIAN ones. Further, (ii), to determine whether different treatment exists, the measure has to be assessed in comparing the type of treatment accorded to respective countries. This treatment must have a discriminating character, based on its effects on conditions of competition.⁶⁵ In this respect Art. II:1 GATS applies to both *de*

⁶⁰ *Canada–Autos*, AB Report, paras. 170-171.

⁶¹ *Hoekman/Sauvé*, Services, 3; WTO, Council, S/C/W/75, 1-9; *Yi-Wang*, Journal of World Trade 1999, 93 (94).

⁶² *E.C.–Bananas*, AB Report, para. 220.

⁶³ *Canada–Autos*, Panel Report, para. 10.248; see also *E.C.–Asbestos*, AB Report, para. 91; *E.C.–Bananas*, Panel Report, para. 7.322.

⁶⁴ See *Mattoo*, in: Cottier/Mavroidis (eds.), *Regulatory Barriers*, 51 (70).

⁶⁵ See *Korea–Beef*, AB Report, paras. 135-137.

jure and *de facto* discrimination.⁶⁶ The MULLAVIAN treatment with regards to the CU on one hand and CONDALUZA on the other hand has to be compared. *Tertium comparationis* is the health care profession. The CONDALUZIAN professionals have to re-certify in order to obtain the right to work in MULLAVIA while the CU ones do not have to face this additional requirement. In constituting a material disadvantage for CONDALUZIAN health care professionals, the CUMCURIAN RSP must necessarily be regarded as discriminatory in nature. Thus, CONDALUZIAN health care professionals face discrimination both *de jure* and *de facto* since they are treated differently in a discriminatory manner and are disadvantaged by the negative changes to the conditions of competition.

b) Violation of Art. XVII GATS

Furthermore, MULLAVIA violates Art. XVII GATS because it grants less favourable treatment to CONDALUZIAN service suppliers than it accords to its own service suppliers. Subject to Art. XVII GATS, it is an obligation for every WTO Member to provide “treatment no less favourable” as stated in its GATS schedule⁶⁷, if it has made any specific commitments to another Member. MULLAVIA has made specific commitments by granting unconditional market access and is obliged to grant treatment no less favourable to CONDALUZIAN health care professionals in the meaning of Art. XVII GATS. The national treatment obligation under Art. XVII GATS pertains to both *de jure* and *de facto* discrimination.⁶⁸ MULLAVIA treats both CONDALUZIAN and MULLAVIAN health care professionals formally identically as both of them have to pass an examination to receive a MULLAVIAN certificate or diploma. According to Art. XVII:3 GATS, formally identical treatment may nevertheless result in a less favourable treatment if it modifies the conditions of competitions to the detriment of foreign service providers. *De facto*, the MULLAVIAN health care professionals only have to take this examination once, whereas CONDALUZIAN professionals have to re-certify, through a second examination, although they enjoyed equivalent education and certification. This additional complexity, *exempli gratia* concerning costs or time, leads to less favourable conditions of competition in the meaning of Art. XVII:3 for the CONDALUZIAN doctors and nurses. Further, MULLAVIA cannot argue that

⁶⁶ *E.C.-Bananas*, AB Report, paras. 231-234; *E.C.-Bananas*, Panel Report, para. 3.123.

⁶⁷ *Trebilcock/Howse*, *International Trade*, 286; *Pitschas*, in: Prieß/Berrisch (eds.), *WTO-Handbuch*, 495 (531); *Matsushita et al.*, *WTO*, 247; *Weiß/Hermann*, *Welthandelsrecht*, 365.

⁶⁸ *E.C.-Bananas*, AB Report, paras. 231-234; *U.S.-Textiles*, Panel Report, para. 3.123; *Koehler*, *GATS*, 129.

no compensation for this competitive disadvantage is required, according to footnote 10 of Art. XVII, since the CONDALUZIAN professionals do not have “foreign” character. The health care profession has a high universal component. Thus, the CONDALUZIAN doctors and nurses cannot be considered “foreign” under Art. XVII merely because of their origin.

c) The Requirements of Art. VI GATS are not met

Further, CONDALUZA submits that MULLAVIA cannot rely on Art. VI GATS since: First, the treatment of CONDALUZIAN health care suppliers is not reasonable in the meaning of VI:1 GATS. Second, the requirements of Art. VI:5 GATS are not fulfilled.

First, Art. VI:1 GATS, *inter alia*, obliges a Member that has undertaken specific commitments in its sectors regarding trade in services to ensure that all measures of general application are administered reasonably. The ordinary meaning of “reasonable” is having modest or moderate expectations and not making unfair demands.⁶⁹ MULLAVIA has granted unconditional market access under Art. XVI GATS with regards to the health care sector for CONDALUZIAN service suppliers. CONDALUZIAN health care professionals have already taken an examination and it would be unreasonable to demand full re-certification in order to get the right to work in MULLAVIA.

Second, the Council for Trade in Services has not established appropriate bodies for the health care sector in order to develop necessary disciplines in the meaning of Art. VI:4. Thus, Art. VI:5 applies.⁷⁰ MULLAVIA does not meet the requirements of sub-paragraph 5(a)(i) since they fail to fulfil the prerequisites set forth in sub-paragraphs 4(a), (b). This is because: (i) the qualification requirements do not comply with subparagraph 4(a) since a complete re-certification cannot be regarded as an objective criteria for CONDALUZA to meet. On the matter of (ii) the requirements of Art. VI:4(b), CONDALUZA submits that the infringement on the issue of recognition matters is conceptually identical to the concerns addressed in the submissions relating to Art. VII:3 GATS and will be accordingly addressed subsequently.

d) No Justification under Art. V GATS

The contravention of Art. II, XVII, VI GATS is not justified under Art. V GATS because the CUMCURIA arrangement has no substantial sectoral coverage in the sense of Art. V:1(a). According to the footnote of Art. V GATS, “substantial sectoral coverage” should be understood, *inter alia*, in terms of number of sectors. In *Turkey - Textiles*, the Appellate Body held that the term “substantially” qualifies the word “the same” and therefore the flexibility

⁶⁹ Collins English Dictionary, 1284.

⁷⁰ Working Party on Domestic Regulation, S/WPDR/M/22, paras. 33, 41.

is limited.⁷¹ Moreover, it is not within the purpose and objectives of Art. V GATS to provide legal coverage for the extension of more favourable treatment only to a few service suppliers of parties to an RTA on a selective basis.⁷²

The CUMCURIA treaty provides for the recognition of CU health care professionals by MULLAVIA and as a reciprocal gesture MULLAVIAN manufacturing technical field workers are recognized by the CU. This will be done by the mutual recognition of certificates and diplomas granted by the relevant authorities. However, on the other hand MULLAVIAN doctors and nurses are not recognized by the CU and CU technical field workers are not recognized by MULLAVIA. Hence, only partial recognition of the respective medical and metal work sectors occurs. This mere partial recognition of only two sectors cannot meet the substantial coverage requirement of Art. V:1(a) GATS.

Furthermore, this partial state of recognition also contradicts the objectives of Art. V GATS.

e) No Justification under Art. VII GATS

Further, the violation of Art. II GATS is not justified under Art. VII GATS because, first, the requirements of Art. VII:4(b) GATS are not met since the Council for Trade in Services had not promptly been informed, second, the requirements of Art. VII:2 GATS are not fulfilled since MULLAVIA did not afford adequate opportunity for further negotiations and, third, MULLAVIA discriminates against CONDALUZA health care professionals in the meaning of Art. VII:3 GATS.

(a) The Requirements of Art. VII:4(b) GATS are not met

The requirements of Art. VII:4(b) are not met because, first, the Council for Trade in Services has not promptly been informed and, second, the notification requirement is not covered by Art. V:7 GATS.

First, according to Art. VII:4(b) GATS, the Council for Trade in Service has to be informed “promptly”. The ordinary meaning of “promptly” is performed or executed without delay.⁷³ Therefore MULLAVIA would have had to inform the Council for Trade in Services without delay, in order for CONDALUZA to at least have had the chance to initiate its participation in the negotiations. Instead, CONDALUZA learned that the CUMCURIA treaty was notified to the relevant WTO Councils only after the parties had finished their negotiations on the

⁷¹ *Turkey-Textiles*, AB Report, para. 49.

⁷² *Canada-Autos*, Panel Report, para. 10.271.

⁷³ Collins English Dictionary, 1237.

CUMCURIA agreement. Consequently, CONDALUZA had no possibility of participating in the negotiations prior to it entering a substantive phase. Second, Art. VII GATS cannot be applied in tandem with Art. V GATS. This is because Art. VII is a self contained provision as it also applies independent of an existing RTA. Therefore all MRA's, regardless of whether they are concluded by parties to a regional integration agreement or other Members, are covered by Art. VII and its disciplines cannot be circumvented by appealing to Art. V.⁷⁴ Also, with regards to the notification requirements stipulated in Art. VII:4(b) GATS, MULLAVIA cannot refer to the notification requirements set out in Art. V:7 GATS.

(b) The Requirements of Art. VII:2 GATS are not met

MULLAVIA does not fulfil the requirements of Art. VII:2 GATS. This Article requires that a Member shall afford adequate opportunity for other interested Members to negotiate a comparable agreement. The ordinary meaning of the term "adequate" means the ability to fulfil a need or requirement without being abundant or outstanding.⁷⁵ Although bilateral agreements are allowed, prior to their conclusion, the two parties must be receptive to the possibility of letting other interested parties join the negotiations.⁷⁶ As stated above, MULLAVIA failed to inform the Council for Trade in Services in the meaning of Art. VII:4(b) GATS. Thus, CONDALUZA had no possibility of demonstrating their interest in the agreement. Over and above this, CONDALUZA has significant trade interests in MULLAVIA. It is one of MULLAVIA's major trading partners; as such the government of MULLAVIA must have been conscious of these interests.

(c) The RSP is not in Conformity with Art. VII:3 GATS

Moreover, MULLAVIA does not fulfil the requirements of Art. VII:3. This is because by creating the CUMCURIAN bilateral framework, the parties in reality instate a means of discrimination with regards to the recognition of service providers within the health care sector. The Art. VII:3 GATS criteria can also be found in the chapeau of Art. XX GATT 1994. In that respect, in *US-Gasoline* the Appellate Body held that these criteria's purpose was to prevent abuse of the exceptions permitted by that Article, this is particularly so if the discrimination was deliberate and/or avoidable.⁷⁷ As *argumentum e contrario*, these criteria

⁷⁴ *Mattoo*, in: Cottier/Mavroidis (eds.), *Regulatory Barriers*, 51 (59).

⁷⁵ Collins English Dictionary, 18.

⁷⁶ *Zampetti*, in: Sauv /Stern (eds.), *GATS 2000*, 283 (299).

⁷⁷ *U.S.-Gasoline*, AB Report, 4.

imply that the requirements on Members have to be interpreted with particular rigour⁷⁸ and therefore narrowly. This means, that with regards to professions with a high universal component, a service supplier from a third country shall have the possibility to demonstrate equivalent training obtained in its own country. In the case of legitimate doubts about the authenticity of the training, the incremental burden imposed on such a supplier should be no greater than that necessary to achieve the regulatory objective. Thus, a test of competence has to be implemented in lieu of re-certification. This test is less burdensome than complete re-certification.⁷⁹ As demonstrated above, in medicine and health care professions the universal component is very high. MULLAVIA cannot have legitimate doubts about the authenticity of the training as CONDALUZA maintains the highest quality of education for health care professionals. Even if these doubts may be considered legitimate, CONDALUZA submits that MULLAVIA has to implement a test of competence instead of demanding re-certification and thus constituting a means of discrimination in the sense of Art. VII:3.

II. Nullification and Impairment

Since MULLAVIA acts inconsistently with the provisions of the covered agreements without justification, CONDALUZA submits respectfully that MULLAVIA has nullified and impaired benefits accruing to CONDALUZA under these agreements. Under Art. 3.8 DSU, in cases where is an infringement of the obligations assumed under a covered agreement, the action is considered to constitute a case of nullification or impairment of benefits under that agreement.⁸⁰

Prayer for Relief

The government of CONDALUZA therefore asks the Panel to recommend that the DSB requests that MULLAVIA brings its measures and provisions found to be inconsistent with Art. I, II, VI, XIX GATT 1994, Art. 1, 2, 3 AD Agreement, and Art. 2, 3, 4, 7, 12 SA and not justified under Art. XXIV GATT 1994, as well as the measures found to be inconsistent with Art. II, XVII, VI GATS and not justified under Art. V, VII GATS, into conformity with its obligations under these agreements.

⁷⁸ See *McGovern*, International Trade Regulation, para. 31.142.

⁷⁹ *Mattoo*, in: Cottier/Mavroidis, Regulatory Barriers, 51 (80).

⁸⁰ *Canada-Autos*, Panel Report, para. 11.2; *Uruguayan Recourse to Art. XXIII*, Panel Report, paras. 14-21; *Tietje*, Grundstrukturen, 157-158; *Waincymer*, WTO Litigation, 91.