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On Submission to the
Panel of the World Trade Organization

**MULLAVIA - CERTAIN PROVISIONS OF THE CONTINENTAL
UNION - MULLAVIA CUSTOMS UNION AND REGIONAL
INTEGRATION AREA (CUMCURIA) ARRANGEMENT**

FIRST WRITTEN SUBMISSION OF THE RESPONDENT
MULLAVIA

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List of Abbreviations

AD	Anti-dumping
CET	Common External Tariff
CRTA	Committee on Regional Trade Agreements
CU	Continental Union
CUMCURIA	Continental Union-Mullavia Customs Union and Regional Integration Area
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
MFN	Most-Favoured Nation
QRs	Quantitative Restrictions
RTA	Regional Integration Agreement
WTO	World Trade Organization

B. SUBSTANTIVE SECTION

Statement of the Relevant Facts

The CU and Mullavia have recently negotiated and signed a treaty that establishes the CUMCURIA. Their closer economic integration will lead to the enhanced prosperity and welfare of both the signatories. The CUMCURIA treaty rules many different aspects: all tariff duties and QR on goods will be eliminated between the two territories; a CUMCURIA CET will also be established; another chapter of the CUMCURIA treaty is fully dedicated to services liberalization; finally, there are also some clauses relative to trade remedies, i.e. anti-dumping and safeguards measures.

In accordance with paragraphs 7(a) and 5(c) of Article XXIV of the GATT 1994, the CU and Mullavia have promptly (i.e. *before* the establishment of the CUMCURIA) notified the CRTA of the impending CUMCURIA Arrangement. During this review period, some points of contention have arisen. As (almost) usual, this examination process has ended without any CRTA consensus on recommendations regarding the compatibility of the CUMCURIA arrangement with WTO law. Even without a decision by the CRTA regarding the compatibility of their accord with WTO law, the CU and Mullavia have made the decision to proceed with the entry into force of the CUMCURIA treaty.

The process should have ended there, but Condaluza, a third country, has decided to challenge the CUMCURIA arrangement. In this regard, Condaluza requested consultations with Mullavia pursuant to Article 4 of the DSU and para. 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 in conjunction with Article XXII:1 of the GATT 1994 concerning certain aspects of the CUMCURIA arrangement which are allegedly inconsistent with WTO obligations.

During these consultations, Condaluza and Mullavia did not reach any mutually satisfactory solution. Unfortunately, these consultations have totally failed to settle the dispute. Eager and willing to pursue the process, Condaluza requested the establishment of a panel pursuant to Article 6 of the DSU. As a result, a WTO panel has been established according to Article 6 of the DSU to resolve the dispute between the two parties.

Summary of Arguments

Claim 1. Even if they infringe a WTO provision, all the measures at issue should anyway be justified by Article XXIV of the GATT 1994, because, first, they have been introduced upon the formation of a customs union, second, they are necessary to the formation of the customs union, and, third, as (a) the CUMCURIA treaty has duly been notified to the WTO, (b) it does not raise the overall level of protection neither for goods nor for services, (c) Mullavia intends to offer compensation to Condaluza for the bananas tariff adjustment and, thus, will act in compliance with the obligation of Article XXIV:6, and (d) the treaty abolishes discrimination, duties and other regulations of commerce with respect to substantially all the trade and provides only a few exceptions which are permitted by Article XXIV or the WTO adjudicating bodies, CUMCURIA is a customs union which fully meets the GATT and GATS requirements.

Claim 2. The provisions ruling AD measures are compatible with WTO law, because, first, according to Article XXIV:8(a) the elimination of AD measures between members of a customs union is necessary, second, since, according to Articles XXIV:8(a) of the GATT 1994 and 4.3 of the Agreement on Implementation of Article VI of the GATT 1994 (the AD Agreement), countries forming a customs union constitute a single and unified market, they must behave and act as one and, accordingly, must adopt an AD measure initiated by another country that participates in the customs union, and, third, as long as the rights and obligations of CUMCURIA parties towards third countries, including Condaluza, are respected under the AD Agreement, this measure will not at all breach legal security.

Claim 3. The raise of the tariff duty for bananas is compatible with WTO law, because, first, it was necessary for the establishment of a CET and, thus, for the creation of a customs union, and, second, Mullavia is determined to follow the Article XXVIII-procedure.

Claim 4. The special safeguard clause as such is WTO-compatible, because, first, WTO case law acknowledges that parties to RTAs may impose intra-regional safeguards, and, second, this measure is necessary for the parties to adjust to the new economic conditions, i.e. it is vital for the existence of CUMCURIA. As regards the conditions for applying this measure, WTO is not the appropriate forum for judging them, because, first, this clause has not any effect on third country and, hence, CUMCURIA parties can depart from the WTO rules, and, second, Article 3.3 of the DSU does not entitle Condaluza to challenge this clause.

Claim 5. Justified by Article V of the GATS, the provisions on the services liberalization do not infringe Articles II, VII, XVI or XVII of the GATS.

ARGUMENTS

1. Proving the existence of the CUMCURIA and its compatibility with WTO rules

Mullavia's defence is based upon Article XXIV of the GATT 1994 to justify its behaviour and actions¹. Regarding the burden of proof, the party claiming the benefit of Article XXIV of GATT 1994 defence (in our case, Mullavia) must demonstrate that the measures at issue are introduced upon the formation of a customs union that fully meets the requirements of all sub-paragraphs of Article XXIV of the GATT 1994². Thus, Mullavia has to prove that it complies with the GATT test.

Article XXIV of the GATT 1994 imposes three basic obligations on WTO members wishing to enter into a customs union³:

1. An obligation to notify the customs union to the WTO;
2. An obligation not to raise the overall level of protection and provide access to products of third parties not participating in the customs union in a not more onerous manner than that pre-existing the customs union (the external trade requirement); and
3. An obligation to liberalise substantially all the trade among the constituents of the customs union (the internal trade requirement).

Let us prove now, one obligation after another, that all three obligations are met.

¹ See Turkey-Restrictions on Imports of Textile and Clothing Products (Turkey-Textiles), Report of the Appellate Body of 22 October 1999, para. 45 and 58.

² Ibid., para. 58; on the burden of proof, see United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India, Report of the Appellate Body of 25 April 1997, WT/DS33/AB/R, p. 12; also United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe, Report of the Panel of 29 October 2001, para. 7.142.

³ See M. Matsushita/T. J. Schoenbaum/P. C. Mavroidis, *The World Trade Organisation: Law, Practice and Policy*, p. 347.

1.1 *The procedural obligation to notify*

Article XXIV:7(a) of GATT 1994 provides for the procedural requirement that a party willing to enter a customs union must notify the WTO of its decision to do so and make available all pertinent information to this effect⁴.

In our case, there is absolutely no doubt there has been no objection formulated by Condaluzza that the CU and Mullavia notified the relevant WTO Councils of the establishment of their arrangement together with a copy of the treaty and its attached plan and schedules. Secondly, as far as the timing of the notification is concerned, this provision requires WTO members to notify a customs union to the WTO in advance, but stops short of requiring advance approval to join the customs union⁵. It is also undeniable that the CU and Mullavia notified their treaty **before** its entry into force. Thus, a prompt notification took place.

Condaluzza complains that the CRTA found no consensus recommendation regarding the compatibility of the CUMCURIA arrangement with the WTO. We would like to remind the Panel that, for the overwhelming majority of RTAs it has reviewed thus far, the CRTA has never reached such a consensus recommendation. All the parties to the reviewed RTAs, however, decide to proceed with the entry into force of their arrangement. In fact, it has become a common practice in the WTO. It is said that these RTAs, even without a consensus recommendation regarding their compatibility with WTO law, are tacitly accepted and tolerated⁶. In this regard, the CU and Mullavia have simply followed this usual way.

⁴ See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para. 7. The General Council established the CRTA on February 1996. See WTO, General Council, Committee on Regional Trade Agreements – Decision of 6 February 1996, WT/L/127. Accordingly, the CRTA is responsible for: a) carrying out examination of agreements and to present its report for appropriate action; b) considering how the required reporting on the operation of such agreements should be carried out and making appropriate recommendations; c) developing procedures to improve the examination process; d) considering the systemic implications of such agreements for the multilateral trading system and the relationship between them, and making appropriate recommendations to the General Council; and e) to carry out additional functions assigned by the General Council.

⁵ See M. Matsushita/T.J. Schoenbaum/P.C. Mavroidis, *The World Trade Organisation: Law, Practice and Policy*, p. 349.

⁶ *Ibid.*

1.2 *The external trade requirement*

With respect to customs unions, the external trade requirement is distinguished into two specific obligations (contained in Article XXIV:5(a) and XXIV:6 of GATT 1994) : an obligation not to raise the *overall* level of protection above a certain threshold and a specific obligation to compensate in cases where customs duties in some constituents of a customs union had to be raised to match the customs union level. In addition to liberalising trade among members of the RTA, customs unions aim to provide for a common external protection (which is the case in the CUMCURIA)⁷ ⁸.

In our case, the overall level of protection is not **on the whole** higher or more restrictive than before the entry into force of the CUMCURIA arrangement⁹ since only one tariff duty had to be raised (bananas). All the other tariff duties being reduced, one cannot derive a general rule from an exception! The increase of the duty for bananas notwithstanding, the commerce conditions between Mullavia and Condaluza remain unchanged. Moreover, Mullavia will meet the second specific obligation by offering compensation to Condaluza on the bananas issue.

1.3 *The internal trade requirement*

As Article XXIV:8 states that, all WTO members wishing to enter a customs union are required to abolish duties and other restrictive regulations of commerce with respect to substantially all the trade in products originating from the customs union¹⁰. In our case, the CUMCURIA arrangement complies mostly with this requirement. The few exceptions where it does not are permitted either by the parenthesis of Article XXIV:8(a)(i) of GATT 1994 or the jurisprudence of the WTO adjudicating bodies, especially the rulings relative to safeguards clauses.

⁷ See Turkey-Textiles, para. 49.

⁸ See M. Matsushita/T. J. Schoenbaum/P. C. Mavroidis, *The World Trade Organisation: Law, Practice and Policy*, p. 352.

⁹ See Turkey-Textiles, para. 53 and 54.

¹⁰ *Ibid.*, para. 48.

1.4 Conclusion

Mullavia has just proven that its CUMCURIA arrangement with the CU constitutes actually a customs union that fully meets all the conditions required by Article XXIV of GATT 1994 to be declared WTO-consistent. Moreover, it can be a valid defence to justify some measures which are normally inconsistent with certain WTO provisions.

2. The Anti-dumping Issue

2.1 Reminder of the facts

The CUMCURIA arrangement, negotiated and signed by the CU and Mullavia to establish between them a customs union and a RTA, includes some provisions ruling anti-dumping measures. Condaluza has expressed the opinion that the WTO agreement on anti-dumping instruments provides clear rights and obligations that the CUMCURIA signatories must absolutely respect. Since it believes that the CUMCURIA chapter on AD violates the WTO rules and its own rights, Condaluza has decided to challenge it, too.

2.2 Condaluza's claim

Condaluza advances three arguments to challenge the CUMCURIA chapter on AD. First, Condaluza claims that Mullavia does not have the right to suspend the use of such trade measures in favour of another WTO member. This argument is based on the MFN principle contained in Article I:1 of the GATT 1994. Second, Mullavia is allegedly not allowed to adopt any anti-dumping measure without instituting a proper investigation regarding the actual circumstances as to its own territory market (legal basis: Article VI:6(a) of the GATT 1994). Third, Condaluza argues that significant trade diversion will result from these CUMCURIA provisions on AD (Article XXIV:4 of the GATT 1994 outlaws the customs unions which result to divert commerce), and that the legal security offered by the WTO Anti-dumping Agreement will be seriously undermined.

2.3 Mullavia's response

Preliminary examination: Necessity of the measure¹¹

To start with, Mullavia has eliminated the use of AD measures towards the members of the CU. Moreover, Mullavia has the right to adopt an AD measure without instituting a proper investigation regarding the actual circumstances in its own territory market if another member of the CUMCURIA has already properly conducted this investigation in its own territory market, since all countries forming the CUMCURIA constitute a single and unified market, and thus a single domestic industry. Third and last, the CUMCURIA arrangement will create trade between the signatories.

Article XXIV:5 of GATT 1994 reads as follows :

"Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union..."

In other words, the party claiming the benefit of Article XXIV of GATT 1994 defence must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue¹². In our case, according to Article XXIV:8(a)(i) of the GATT 1994, Mullavia was forced to eliminate the use of AD measures towards a member of CUMCURIA for the CUMCURIA to be a genuine customs union.

Second, Mullavia must always adopt an AD measure initiated by another member of the CUMCURIA towards a third country because of Article XXIV:8(a) of the GATT 1994 and Article 4:3 of the Anti-dumping Agreement, which state that all countries forming a RTA (in our case, the CUMCURIA) constitute a single customs territory¹³, and must therefore behave and act as one.

Article XXIV:4 of GATT 1994 demands from a customs union to create trade¹⁴. Thus, the CUMCURIA arrangement must abolish all AD measures between its constituencies to create trade and increase the exchanges within the CUMCURIA. Consequently, the CUMCURIA

¹¹ Ibid., para. 46.

¹² Ibid., para. 58.

¹³ Ibid., para. 47.

¹⁴ Ibid., para. 57.

chapter on AD is necessary for the CUMCURIA to meet all the necessary requirements of a proper customs union.

Before annihilating these three arguments of Condaluzza, let us just recall that Article XXIV of the GATT 1994 constitutes an admitted exception to some WTO rules¹⁵, such as the MFN principle. Condaluzza contends that Mullavia has no right to suspend the use of an AD measure in favour of another WTO member.

Taking into account that Article XXIV constitute an accepted exception to Article I:1¹⁶, Mullavia affirms that Article XXIV:8 requires the elimination not only of duties but also “*other restrictive regulations of commerce*” between the constituencies of a customs union. In other words, Mullavia is obliged by the WTO rules themselves to eliminate the use of AD measures between the members of the customs union. Article XXIV:8(a)(i) corroborates our position by stating:

“For the purposes of this Agreement:

- a) *A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that*
 - i) *duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories”*

Condaluzza also complains that Mullavia may adopt an AD measure without instituting a proper investigation regarding the actual circumstances in its own territory market. Mullavia disagrees totally with Condaluzza’s view. Two provisions are pertinent here; First, Article XXIV:8(a) envisages:

“A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories”

Secondly, and most importantly, the Article 4:3 of the Anti-dumping Agreement reads:

¹⁵ Ibid., para. 45 and 58.

¹⁶ Ibid.

“Where two or more countries have reached under the provisions of paragraph 8 (a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1”.

These two articles confirm that now the parties to the CUMCURIA arrangement (the CU + Mullavia) form a single and unified market. Economically, they form one single country and therefore a single economy and a single domestic industry¹⁷. Thus, for example, if one country of the CU adopts an AD measure after having properly completed an investigation confirming a material injury to the industry of its territory (which is a part of the domestic industry of the CUMCURIA country), all the other partners of the CUMCURIA treaty (with – among them – Mullavia) will have to adopt (since they constitute a single economic entity) this same AD measure, too, without having to conduct another investigation since it has already been done.

The country of the CU which has led and successfully achieved the investigation proving the damage to the domestic industry of the CUMCURIA parties, has already met all the necessary conditions (among them the investigation and the material injury) to impose an AD measure. The other parties to the CUMCURIA arrangement and to their common economic zone (or country), including Mullavia, will just have to follow by imposing the same AD measure, so that this common economic zone acts coherently as a single, unified territory.

Regarding the trade diversion and the legal security arguments of Condaluzza, Mullavia believes that the CUMCURIA arrangement will not divert commerce, but will instead create trade and increase the exchanges between the signatories (Article XXIV:4 warmly welcomes the trade-creating customs unions !)¹⁸. No commerce diversion will happen because the conditions for a third country to trade with the CUMCURIA parties remain unchanged, since the duties and other regulations of commerce imposed to countries not parties to the CUMCURIA accord will not be on the whole higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the CUMCURIA. Moreover, the WTO rules on AD are still

¹⁷ Ibid., para. 47.

¹⁸ Ibid., para. 57.

applicable by the CUMCURIA parties towards third countries. The only change is that instead of facing many different countries (prior to the CUMCURIA accord), Condaluza will trade with only one new territory, CUMCURIA, substituting all those different countries as far as AD is concerned.

Finally, the legal security argument is completely unfounded. The commercial relations between a third country like Condaluza and the CUMCURIA customs union will still be ruled by the Anti-dumping Agreement. The rights and obligations of CUMCURIA parties towards third countries, including Condaluza, remain clear under the Anti-dumping Agreement.

2.4 Conclusion

The CUMCURIA arrangement provisions on AD are fully compatible with WTO law.

3. The Bananas Issue

3.1 Reminder of the facts

As it is well known, the CU and Mullavia have signed a treaty establishing a customs union; this new customs union provides for the establishment of a CET. This new CET will force the parties either to reduce some of their tariff rates or unfortunately to raise one or a few of their tariff rates. For one single product (among so many other ones), bananas, Mullavia will have to adjust its duty upwards from a 20% ad valorem rate to a 50% rate.

3.2 Condaluza's claim

Condaluza strongly opposes the upward adjustment made on the bananas duty rate (from 20% to 50%). Condaluza argues that the duty rate of 20% on bananas is included in Mullavia's Uruguay Round tariff schedule. This duty on bananas is bound. In any case, Mullavia cannot raise this consolidated duty. Otherwise, this would infringe Condaluza's rights. Condaluza's legal basis on this argument is Article II:1(a) of the GATT 1994 entitled "Schedules of Concessions". The latter reads as follows:

“Each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement”.

3.3 Mullavia's response

Preliminary examination: necessity of the measure¹⁹

Mullavia had to raise its tariff duty on bananas, from a 20% to a 50% ad valorem rate. Article XXIV:5 of GATT 1994 reads as follows:

“Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union...”

In other words, the party claiming the benefit of Article XXIV of GATT 1994 defence must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue²⁰. In our case, the measure at issue is the raising of the bananas tariff duty. The formation of a customs union strictly requires the establishment of a common external tariff²¹. In case of asymmetrical external protection (these represent the vast majority of cases because the case of perfect symmetry where no adjustments are needed are in practice very hard to find) between the prospective members of the customs union (some being more and some being less open to foreign products) adjustments will have to be made²². One could sometimes reduce some tariff duties, and one could sometimes raise one tariff duty. Mullavia had no choice but raising its bananas tariff duty to match the CU-level.

Mullavia agrees with Condaluzza that Article II of GATT 1994 is a general obligation, and that it should be normally respected. However, there can be and there are indeed exceptions to this general obligation. It is widely accepted that Article XX, XXI as well as Article XXIV

¹⁹ Ibid., para. 46.

²⁰ Ibid., para. 58.

²¹ Ibid., para. 49 and 50.

²² Ibid.

of the GATT 1994 constitute tolerated exceptions²³ to the MFN principle of Article I of the GATT 1994 (and also to Article II which is based on the MFN principle).

Article XXIV refers to the conditions that a customs union must meet to be compatible with WTO law. In our case, Article XXIV:5 is the most interesting and relevant:

“Accordingly, the provisions of this agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that:

- a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not **on the whole** be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be ;”*

This paragraph, and especially the terms “*on the whole*”, stipulates that one of the two obligations of Mullavia is not to raise the overall level of protection above a certain threshold²⁴. In our case, bananas is the only product whose tariff duty is due to be raised. For the numerous remaining products, there will not be any change in their tariff duty. It seems obvious and clear that by raising the tariff duty of just one single product, barriers to trade for Condaluzza are certainly not on the whole being raised. Bananas is the only exception and represents just one product, not the majority of products whose tariff duties are not raised. The Understanding on the interpretation of Article XXIV of the GATT 1994 confirms this view. Paragraph 2 reads:

“The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and

²³ Ibid., para. 45 and 58.

²⁴ Ibid., para. 49, 53-54.

quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required”.

Its first sentence is one of the most explicit ones.

It is now established that the first obligation of the external trade requirement of Article XXIV, not to raise the overall level of protection above a certain threshold, has been met. Furthermore, this external trade requirement contains a second specific obligation in case where a custom duty in a constituent of the customs union had to be raised to match the customs union level. In our case, the bananas tariff duty rate has been raised. Thus, Article XXIV:6 of the GATT 1994 is applicable. The latter reads:

“If, in fulfilling the requirements of sub-paragraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union”.

Therefore, Mullavia is willing and ready to initiate talks with Condaluzza in order to provide for compensatory adjustment pursuant to the paragraphs 4-6 of the Understanding on the Interpretation of Article XXIV of the GATT 1994. In these consultations, however, account shall be taken of the fact that, but for bananas, Mullavia will reduce other bound tariff duties across the large range of all other products in accord with the CUMCURIA treaty.

To conclude, trade barriers are certainly not on the whole higher now than before the entry into force of CUMCURIA. In addition, Condaluzza will widely benefit from the new lower tariff duties that Mullavia will apply due to the new treaty by expanding its exports of other products to Mullavia and CU and, thus, increasing its revenues.

4. The Safeguard Clause Issue

4.1 Reminder of the facts

While negotiating the CUMCURIA treaty, both the CU and Mullavia admitted the need to include in the accord a special safeguard clause. Finding that this provision is not in conformity with the WTO rules, Condaluzza strongly opposes it, and wants to challenge this part of the treaty in order for this special safeguard clause to abide by the WTO rules.

4.2 Condaluzza's claim

Condaluzza accuses Mullavia of not respecting the WTO agreement on Safeguards and Article XIX of the GATT 1994 while applying a safeguard measure. Condaluzza complains that the CUMCURIA parties never notify their actions to the other WTO members as required by the WTO rules. Condaluzza also argues that the CUMCURIA parties should only apply a safeguard measure after having successfully met all the necessary conditions of Article XIX.

4.3 Mullavia's response

Preliminary examination: necessity of the measure²⁵

The CUMCURIA arrangement contains a special safeguard clause. Article XXIV:5 of GATT 1994 reads as follows :

“Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union...”

In other words, the party claiming the benefit of Article XXIV of GATT 1994 defence must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue²⁶.

²⁵ Ibid., para. 46.

²⁶ Ibid., para. 58.

In our case, the safeguard clause at issue is necessary for the parties to adapt to the new economic conditions due to liberalisation. If the signatories were not allowed a five-year period to adjust (in other words either by modernising or reconverting), they would not want to enter a customs union because the sudden entry into force of the customs union would totally disrupt or cause very serious damages to their entire economy. Without this special safeguard clause, no CUMCURIA arrangement would have been signed because the parties would not have found any economic interest in it.

Moreover, as this safeguard clause is vital for the formation of the CUMCURIA, we believe that the defence of Article XXIV of the GATT 1994 is still available in the context of the Agreement on Safeguards. Although Articles 2.1 and 2.2 of the Agreement on Safeguards are seemingly necessitate the non-discriminatory imposition of a safeguard measure, Article 11.1(c) of the Agreement on Safeguards reads:

“This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX...”

This means that as long as the measure is necessary for the formation of a customs union according to Article XXIV of the GATT 1994, this exception to fundamental WTO obligations (such as the non-discrimination) may still be invoked in the context of the Agreement on Safeguards.

Furthermore, Article XXIV: 8(a)(i) stresses:

“For the purpose of this Agreement:

- a) *A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that*
 - i) *duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories”,*

When one reads Article XXIV: 8(a)(i), one could plausibly suppose that anything not mentioned in the parenthesis is not tolerated after the formation of a customs union. This would mean, for instance, that no safeguard measure could be taken by a member of the

customs union towards another member of the same customs union, as Article XIX of the GATT 1994 is not included in the aforementioned list.

However, subsequent practice has developed in the opposite direction. In its report *Argentina-Safeguard Measures on Imports of Footwear*, the Appellate Body ruled that a party to a customs union could impose safeguards against other parties of the same customs union²⁷. In two other occasions²⁸, the WTO adjudicating bodies held that parties to a RTA may impose safeguards against other parties to the RTA. Consequently, the parenthetical list described in Article XXIV: 8(a)(i) is not an exhaustive one.

The CUMCURIA parties do not need to notify the other WTO members (except the ones which are parties to the CUMCURIA arrangement) because the special CUMCURIA safeguard clause has only been instituted between the two members of the CUMCURIA arrangement.

No injury to domestic producers has to be demonstrated because of the nature and length of the safeguard measure at issue. A safeguard measure is an exceptional one whose nature differs completely from the one of an AD measure or a countervailing duty²⁹.

The safeguard measure at issue has no protectionist goal. It is a temporary measure that intends to facilitate the internal adjustment process. It seems obvious that the domestic industry needs time (five years seem here very reasonable) to modernise or reform. The economic liberalisation implies huge consequences and changes. In order to face this new deal, the domestic producers need an appropriate period of time to adapt and be competitive again. The safeguard clause at issue does not want to protect the domestic producers. It just aims at allowing them to prepare for the new economic conditions.

The length of the safeguard measure at issue confirms the aim of this clause. It is a non-renewable measure of five years. This five-year period aims at providing enough time to the domestic producers to prepare for the new deal and it can never be extended whereas in the WTO practice such safeguard measures can even last 8 years pursuant to Article 7.3 of the Agreement on Safeguards.

²⁷ See *Argentina-Safeguard Measures on Imports of Footwear (Argentina-Footwear)*, para. 107-108.

²⁸ See *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, para.98-100; also *US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe)*, para. 181-194.

²⁹ See *US-Line Pipe*, para. 80.

The special safeguard clause at issue will only be instituted between the two members of the CUMCURIA arrangement, i.e. intra-regionally. As such, this particular arrangement for safeguards made by the CU and Mullavia in their treaty will never impinge on the WTO rights of other members, including those of Condaluz. Condaluz's rights are not and will never be infringed by this particular CUMCURIA provision. In its argumentation, Condaluz abused its rights and shows its bad faith. Condaluz has just raised this argument out of frustration, jealousy and anger because it has no preferential agreements with either the CU or Mullavia although it would want to. Let us recall that Condaluz has found this famous safeguard clause interesting and perhaps novel!

Condaluz's rights are not jeopardised. Article 3:3 of DSU reads as follows:

«The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members».

Thus, Condaluz does not have any legal interest and, therefore, the compatibility of the CUMCURIA safeguard clause with the WTO rules should not be examined here before a WTO panel. The only parties that are entitled to challenge this safeguard clause are the signatories of the CUMCURIA accord because they are the only ones really concerned by this clause³⁰. Hence, a dispute for the imposition of an intra-regional safeguard is most likely and appropriately to be submitted to the CUMCURIA Council, which has the legal capacity to tackle difficulties in the implementation and interpretation of the treaty. Towards a third country like Condaluz, the parties to the CUMCURIA arrangement will obviously and faithfully continue to respect and apply Article XIX of the GATT and the Agreement on Safeguards if they consider imposing a safeguard measure against a third country.

To summarise, we face here two possible ways depending on whether Mullavia trades with a CUMCURIA party or a third country like Condaluz. On the one hand, if Mullavia trades with a member of the CU, it will just have to respect the conditions set by the CUMCURIA safeguard clause in the case it wants to impose a safeguard measure. Mullavia can act that way because the parties to the CUMCURIA arrangement have freely agreed to and accepted this accord. The other WTO members, not parties to the CUMCURIA treaty, are not infringed on their rights. This CUMCURIA safeguard clause is a strictly internal matter (the

³⁰ J. Pauwelyn, *The Puzzle of WTO Safeguards and Regional Trade Agreements*, p. 18.

WTO adjudicating bodies have accepted internal measures within a customs union which do not necessarily respect all the «normal and usual» requirements of the WTO rules) concerning only the signatories of the CUMCURIA arrangement.

On the other hand, if Mullavia trades with a third country not member of the CUMCURIA, it will of course treat it by fully meeting the conditions of Article XIX of the GATT 1994 and the WTO Agreement on Safeguards in case it wants to impose a safeguard measure against the imports of this third country.

5. The Services Liberalization Issue

5.1 Reminder of the facts

The CUMCURIA treaty contains also a specific chapter on the services liberalization. These Articles illustrate how discriminatory measures between the two signatories will be abolished for the four modes of supply, as described in Article 1:2(a)-(d) of the GATS. Feeling discriminated vis-à-vis the parties to the CUMCURIA arrangement, Condaluzza wants to profit from it, too, even though it is just a third country.

5.2 Condaluzza's claim

Basing its allegations on Articles II:1, V, VII, XVI:1 and XVII:1 of the GATS, Condaluzza requires to be also able to benefit from the CUMCURIA arrangement chapter on services for its health care professionals. In Condaluzza's view, it is intolerable that CU health care professionals can be granted free access to Mullavia's employment market, whereas its own health care professionals must mandatorily re-examine and re-certify to obtain that same free access to Mullavia's employment market.

5.3 Mullavia's response

Preliminary examination: necessity of the measure³¹

³¹ See Turkey-Textiles, para. 46.

Mullavia has granted free access to its own employment market to CU health care professionals. The chapeau of Article V:1 of the GATS reads as follows:

“This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement...”

In this case too, the party claiming the benefit of Article V of GATS defence must demonstrate that the formation of the customs union would be prevented if it were not allowed to introduce the measure at issue³². The measure at issue is granting free access to Mullavia’s employment market to CU health care professionals.

Article V:1(b) of GATS requires the absence or elimination of substantially all discrimination between or among the parties, in the sectors covered under subparagraph (a), through elimination of existing discriminatory measures. Therefore, Mullavia was obliged to grant this free access to its employment market to comply with all the necessary requirements to form an actual and effective customs union.

It is widely admitted that Article V of the GATS is analogous to Article XXIV of the GATT 1994³³. These two articles share the same goal and, hence, they are identical³⁴. Therefore, we can argue the same way we have just done in our argument relative to the Bananas Issue. Article V is a tolerated and accepted exception to the MFN principle upon which Article II, XVI and XVII of the GATS are based³⁵. When reading Article V of the GATS, one can plausibly infer that it is this very Article which requires that a RTA encompassing services

³² Ibid., para. 58.

³³ B. Hoekman/M. Kostecki, *The Political Economy of the World Trade System: From GATT 1994 to WTO*, p. 221.

³⁴ For a comparative analysis of Article XXIV of GATT 1994 and Article V of GATS, see B. Hoekman/M. Kostecki, *The Political Economy of the World Trade System: From GATT 1994 to WTO*, 1995, p. 221.

³⁵ As the Appellate Body pointed out in its decision on Bananas III, «...*Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV*». See European Communities-Regime for the Importation, Sale and Distribution of Bananas (Bananas III), Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R, para. 191.

be more ambitious in its objectives and ensure a greater depth than that of the GATS in terms of liberalisation³⁶.

Article V of GATS provides the right for WTO members to form RTAs under certain conditions. In our case, we have to examine whether the three conditions which are stated in Article V of the GATS in order for an agreement liberalizing trade in services to be compatible with WTO law, are met.

These three conditions are envisaged in Article V:1 and V:4 of the GATS³⁷. Article V:1 of the GATS states:

“This agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

a) has substantial sectoral coverage (this condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply), and

b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through :

i) elimination of existing discriminatory measures, and/or

ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis”.

Moreover, Article V:4 of the GATS stresses:

“Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement”.

³⁶ See S. M. Stephenson, Can Regional Liberalisation of Services go further than Multilateral Liberalisation under the GATS?, World Trade Review, Volume 1, Number 2, July 2002, p. 22.

³⁷ See also B. Hoekman/P. Sauvé, Liberalising International Trade in Services, World Bank Discussion Paper No. 243, 1994, p. 56.

Let us now examine these conditions in detail.

A. « Substantial sectoral coverage »

This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

In our case, a great number of sectors are – or will be – concerned by the agreement between the CU and Mullavia. In order to start the whole process of liberalization, Mullavia has already agreed to recognise, on entry into force of the CUMCURIA treaty, the certificates and diplomas granted by the CU member authorities for all health care professionals, including certified nursing personnel and medical doctors. On the other hand, the CU has agreed to recognise the certificates and diplomas awarded by Mullavia educational authorities for several manufacturing technical fields, including machine work and metal welding.

And this is just the beginning. The CU and Mullavia allowed themselves a ten-year period (which is a reasonable time-frame in the sense of Article V:1(b) of the GATS) to progressively liberalise other sectors of their economy.

The volume of trade affected by the agreement is – or will be – a considerable one. First example: being a nation where the industrial sector is the most important, Mullavia lacks many health care professionals. Thus, by committing to recognise the certificates and diplomas granted by CU member authorities for all health care professionals, important exchanges of services are expected to occur for the benefit of the consumers.

Second example: in the CU member states, services constitute the most important of the three economic sectors. In their industrial sector, a more numerous workforce is needed. By agreeing to recognize the certificates and diplomas of Mullavia for several manufacturing technical fields, the CU will increase the exchanges of services and subsidiarily resolve its workforce problem.

Furthermore, in the coming ten years, other sectors of services will be liberalised for sure. One must always keep in mind that this entire liberalisation process takes time and it has just started.

Finally, the CUMCURIA treaty chapter on services provides also that the four modes of supply will be concerned, and therefore, no one will be *a priori* excluded.

B. “Absence or elimination of substantially all discrimination”

From the entry into force of the agreement or, in the worst case, in a reasonable time-frame (in our case, ten years), the CUMCURIA treaty chapter on services states that all government-sponsored discrimination, in the meaning of Article XVII of the GATS, will be dismantled. Full national treatment will be granted to service and service providers of the two parties of the CUMCURIA. Both the CU and Mullavia will also amend or eliminate whatever applicable national regulations discriminating against services or service providers of the other party. In addition, Article V:2 of the GATS stipulates that a wider process of economic integration should be taken into account when examining the requirements that paragraph 1 sets out. CU and Mullavia have indeed initiated this long process with a view to strengthening their ties and proceeding apace as regards the economic growth of the two parties. It is for that very reason that the provisions concerning services trade should be viewed and judged in a flexible manner.

C. “The overall level of barriers to trade in services is not raised”

For Condaluzza, the agreement between the CU and Mullavia does not change anything as regards the commitments that Mullavia has undertaken in its schedule of specific commitments. The overall level of obstacles to trade in services is not raised at all. Mullavia has already made a market access and national treatment concession without condition for these professions on its services schedule in the GATS (“None” in our schedule). Thus, Mullavia’s obligation to grant non-discriminatory national treatment is in no way undermined. Mullavia will for sure continue to avoid renegeing on its commitments, even though a further positive integration with CU beyond the GATS (and, hence, a departure from GATS obligations, notably Articles II, XVI and XVII of the GATS) cannot be excluded in line with Article V of the GATS³⁸. In this case, the extension of recognition privileges pursuant to Article VII of the GATS would not apply, since the exception of Article V of the GATS supersedes and, consequently, permits such a special treatment between Members of a RTA³⁹.

³⁸ See A. Mattoo, MFN and the GATS, World Bank, January 1999, p. 8.

³⁹ See OECD, Working Party of the Trade Committee, The Relationship between Regional Trade Agreements and the Multilateral Trading System – Services, TD/TC/WP(2002)27/FINAL, 9 October 2002, p. 12; also OECD, Working Party of the Trade

5.4 Conclusion

The CUMCURIA treaty chapter on services respects all the requirements of Article V of the GATS. Therefore, it is fully compatible with WTO law. Furthermore, the manner we treat Condaluza's services and service providers remains the same compared to the situation before the entry into force of the CUMCURIA treaty.

Prayer for Relief

Considering the relevance and the righteousness of its arguments, Mullavia respectfully submits that Condaluza's claims are without merit and, consequently, asks the Panel to:

- 1. Reject all the claims of Condaluza in their entirety; and**
- 2. Declare that the CUMCURIA meets all the requirements of WTO provisions, and especially those of the Articles XXIV of the GATT 1994 and V of the GATS, for the proper establishment of a customs union and a RTA, and is thus compatible with WTO law.**

Committee, Service Providers on the Move: Mutual Recognition Agreements, TD/TC/WP(2002)48/FINAL, 6 February 2003, p. 14.