# BENCH MEMORANDUM

# ELSA Moot Court Competition on WTO La w 2003/ 2004

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## I. Introduction

The purpose of this memo is outline some considerations for reviewing the moot court submissions and to provide some possible points of guidance for argumentation before the panels. Since students researching for submissions will undoubtedly find endless needles in any given haystack of facts, there is no intention here to exhaust all of the possibilities. In addition, since panellists selected will likely have more experience with WTO DSU procedures then this author, these aspects are also not the subject of focus here. Rather, the Bench Memorandum is oriented to raising some of the substantive points on the measures themselves as they relate to the regional trade agreement exceptions provided in GATT Article XXIV and GATS V. Following a statement of the issues, section two reviews the general framework for treating regional trade exceptions in WTO. Section three provides discussion of the measures, the violations possibly involved, and to the pertinent WTO regional provisions. The final section of the memo provides some broader discussion on the question of "internal" measures within regional trade agreements and notes some of the literature on this subject.

The facts of the case are presented in the distributed case problem together with the single set of clarifications requested on the facts.

For summation, the Continental Union (the CU) is a declared customs union composed of WTO members, and has further declared with WTO Member Mullavia, a new customs union and regional (economic) integration agreement. This new formation is referred to throughout as the CUMCURIA (CU-Mullavia Customs Union and Regional Integration Agreement). WTO Member Condaluza has raised points of objection to particular provisions included in the CUMCURIA arrangement and has requested a panel according to the WTO DSU, naming only Mullavia as respondent, to resolve these claims. The Continental Union has not sought to join this panel proceeding.

The problem set has been written to raise certain GATT and GATS issues regarding the formation of customs unions (GATT Article XXIV) and regional integration agreements

(GATS Article V). Some issues regarding the legal compatibility of regional trade agreements with WTO rules have been avoided in the drafting of the problem set outright. In particular, issues regarding the actual quantity of trade or amount of sectors required in an RTA plan are not being actively raised for issue by these facts.

The problem is instead oriented to raising compatibility issues dealing with particular types of measures being either adopted or eliminated by the members to the CUMCURIA. These relate to both internal and external requirements as they may be imposed upon regional members by the WTO provisions.

The substantive GATT issues raised by Condaluza in the order presented in the facts are stated as follows, and the numbering of the issues here will apply throughout the discussion.

Issue one:

> Whether Mullavia may suspend the right of recourse for the use of anti-dumping measures as to the CU territory, as an aspect of the CUMCURIA arrangement?

Issue two:

> Whether Mullavia may adopt upon its territory those anti-dumping measures taken by the CU as against 3d parties, as an aspect of the CUMCURIA arrangement?

Issue three:

> Whether Mullavia may adopt a special safeguard clause with the CU, as an aspect of the CUMCURIA arrangement?

Issue four:

> Whether Mullavia may raise its bound duty rate on bananas to WTO Members, as an aspect of the CUMCURIA arrangement?

In addition, a GATS issue is also raised.

Issue five:

> Whether Mullavia may recognise the diplomas and certificates of certain CU health care professionals, as an aspect of the CUMCURIA arrangement?

## II. General framework

### II.1 Legal character of WTO regional trade provisions

The GATT legal framework for raising legal issues relating to regional trade agreements has been significantly advanced as a result of the panel and Appellate Body reports in the *Turkey Textiles* case.[1] Turkey argued in the panel and appeal that Article XXIV did not have the character of an exceptional provision as related to other GATT obligations, but accorded a certain autonomous right to establish a customs union.[2] While earlier unreported panels

[1] *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34.

[2] Turkey AB Report, para. 9

(*Bananas I and II*) also ruled this question in favour of Article XXIV having an exceptional character, the *Turkey Textiles* case provided the first adopted report whereby the "autonomous regime" characterisation for the Article was rejected.

It should be now settled that Article XXIV operates in the manner similar to other exceptional Articles, such as GATT Article XX and XXI. Since the Article contains a number of terms dealing with the qualification of regional trade agreements necessary in order secure the possible exception, it also has been suggested to have the status of a "conditional exception". By this, the Article will serve to excuse a violation of another GATT Article where its terms and provisions have been met by the regional member invoking the exception.

> "Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency."[3]

II.2 The necessity to plead violations or inconsistencies with other WTO obligations

The above suggests that complainant's submission should plead first to the particular violations of GATT Articles in respect of the individual measures presented by the facts, and rather not to the arguable inconsistencies of the CUMCURIA arrangement as to the terms and provisions of Article XXIV itself, at least in the first instance. This follows from the orientation of the chapeau of paragraph 5 of the Article, which establishes the right of Article XXIV as an exception in relation to the other provisions of the GATT. In addition, the Article should be treated by the submissions as an *affirmative* defence whereby the burden of establishing that CUMCURIA arrangement are consistent with the WTO regional provisions should fall upon the respondent following the determination that a violation of a GATT Article has occurred.

For a comprehensive submission and argument, if the parties follow the sequence outlined by the *Turkey* AB Report, the complainant should allege its violations of GATT and GATS obligations and then provide argument as to why respondent cannot justify the CUMCURIA arrangement under the Article XXIV exception. *Visa versa*, respondent's submission should initially present its arguments denying GATT Article violations in respect of its undertaken measures, and then go forward to affirmatively raise the Article XXIV defence in consideration of any violation that might be found by the panel.[4]

II.3 What provisions may be excepted by Article XXIV?

It may be generally considered that all provisions establishing obligations for WTO Members in Annex 1A (Multilateral Agreements on Trade in Goods) and in Annex 1B (General Agreement on Trade in Services and Annexes) may find an exception by the proper invocation of GATT Article XXIV or GATS V. For GATT Articles, this was raised on appeal

[3] Turkey AB Report, para. 45.

[4] An alternative theory of attacking the CUMCURIA arrangements outright as non-complying with Article XXIV or GATS V provisions could also be raised, charging the WTO regional provisions *in chief* as violations or inconsistencies. This is not the approach adopted by the AB in the Turkey Textiles case, and it would be left to argument whether the AB's characterisation of Article XXIV as exceptional has completely foreclosed this theory of complaint. This is also raised infra, note 19.

by Turkey, and the AB ruled expressly that the chapeau of paragraph 5, stating that, "the provisions of this agreement shall not prevent…", permitted the possibility of justifying a violation of GATT Article XI by reference to Article XXIV.[5] As to other GATT Agreements, where the Agreement on Textiles and Clothing (ATC) limited the possibility of new textile restrictions except in accordance with the provisions of GATT – 1994, the AB also ruled that Article XXIV would apply as an exception for ATC requirements.[6]

The AB has not yet ruled explicitly on the Article XXIV defence for violation of the obligations contained in the Agreement on Safeguards. However, in the *Argentina Footwear* case, the AB did make reference to its test developed in *Turkey Textiles*, which should suggest that Article XXIV can also operate as an exception to the requirements of that Agreement.[7] In the later case of *US-Line Pipe*, the AB indicated two circumstances by which the relationship between Article XXIV and the Agreement on Safeguards would be required to be established. To date, the legal requirements of "parallelism" as between investigated sources and application of a safeguard measure have yet to be adequately met by a respondent seeking to invoke the Article XXIV defence. Thus, what has now become a standard AB rejoinder,

> "We need not, and so do not, rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the Agreement on Safeguards."[8]

Since anti-dumping requirements also fall within the scope of the "provisions of this Agreement" Article XXIV should also in principle apply as an exception, unless complainant is able to identify a provision in either GATT Article VI or the Agreement on Implementation of Article VI (Anti-dumping Agreement) that would be viewed as limiting the operation of other GATT provisions in respect of the anti-dumping requirements established.

Although no comparable case has been raised for the GATS, the same relationship between GATS V as an exceptional provision to the general (and specific) obligations of the GATS should also be argued by the complainants. It should not be difficult for a panel to rule that GATS V shares a similar exceptional character in relation to GATS provisions as does Article XXIV.

II.4 Test to apply

As an affirmative defence, the burden for establishing that violating measures are excused by Article XXIV (or GATS V) will fall upon the respondent. For this burden, a two part test (*Turkey Textiles* test) has been enunciated by the AB.

> "First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV.

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[5] Turkey AB Report, paras. 42-45, and para. 58.

[6] Turkey AB Report, footnote 13.

[7] At least when the measure is imposed upon the formation of a customs union, a requirement that was not met by the Argentina measures. *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 109, citing Turkey AB Report, para. 58. In particular reference to Article 2.2 of the Agreement on Safeguards.

[8] WT/DS202/AB/R, para. 198

> And second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.
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> Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV."[9]

II.5 Territory status of parties

The status of regional formations that have been duly notified but have failed to receive an affirmative compatibility recommendation from a GATT working group (pre-1996) or the Committee on Regional Trade Agreements (CRTA) appears to be at issue for the first part of the test, since there would be no prior determination that an arrangement in question has fully met the requirements of the two paragraphs cited. The panel in the *Turkey Textiles* case took the position that the qualification of regional trade agreements remained the province of the CRTA, while panels should be concerned with nullification or impairment caused by particular implementing measures as GATT Article violations. By this construction, the panel went forward with its analysis and findings on the Article XI measures on the assumption that the customs union in question was compatible with Article XXIV requirements.

This approach was apparently rejected by the AB in citing its earlier ruling in the *India – Agriculture Products* (Balance of Payments) case. There, the BOP understanding, like the understanding on the interpretation of Article XXIV, provides for DSU review in respect to any matter arising from the application of the GATT provisions. As Marceau and Reiman have concluded,

> The WTO Appellate Body indicated – albeit in an *obiter dictum* – that WTO panels or the Appellate Body, have jurisdiction and, thus, the capacity to assess whether any specific customs union is in full compliance with all the requirements of Article XXIV of the GATT …"[10]

Besides the point that the CUMCURIA arrangements have not received an affirmative recommendation, there may also be an issue presented as to whether the CU itself has the capacity to form a separate customs union as it represents itself to be a single customs territory. Article XXIV:8 refers to a customs union as the substitution of a single customs territory for two or more customs territories. Paragraph 2 of the Article defines a customs territory as one, "with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories."

While the facts presented indicate that the CU does maintain such a standard in respect of the trade to other territories, it nevertheless cannot raise any previous finding or recommendation from a GATT body charged with its examination, in respect of having the status of a customs territory as the term is used in paragraph 2 and 8 of Article XXIV. Thus, if challenged on this aspect, Mullavia may be in the (unusual) position of having to attempt a demonstration that its partner in the CUMCURIA is also a customs territory. Since the CU has not been named as a respondent and has not chosen to join the action, it does not appear

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[9] Turkey AB Report, para. 58.

[10] G. Marceau and C. Reiman, "when and How is a Regional Trade Agreement Compatible with the WTO?", Legal Issues of Economic Integration, V. 28, No. 3, pp. 297-337, at p. 313, citing *India –Agricultural Products*, ( The BOP case), WT/DS90/AB/R/, paras. 89-109.

that this party can be compelled to respond to any issue raised regarding its legal status as a territory for the purpose of Article XXIV compatibility.[11]

II.6 Paragraph sequence of examination

The first part of the test refers to two paragraphs in the Article, and in organising the treatment in submissions and panel analysis, there can be a preferred sequence suggested as between paragraphs 8 and 5. This was noted in the AB report whereby the paragraph 5 chapeau cannot be interpreted without reference to the definition of a customs union as supplied by paragraph 8.[12] Later in the Report, the AB noted that "it may not always be possible to determine whether or not applying a measure would prevent the formation of a customs union without first determining whether there *is* a customs union."[13]

The inference that can be drawn from this is that the respondent should affirmatively submit that the CUMCURIA arrangements establish a customs union that meets the conditions of paragraph 8 and then 5 of Article XXIV, (or GATS Article V), and that the measures in question have been undertaken upon that formation, and as necessary in order to give effect to the WTO definitional requirements for establishment. As suggested in the introduction, the problem set has been designed to facilitate the raising of these definitional issues without the "interference" from coverage issues dealing with the quantity of trade or sectoral coverage requirements: the "substantially all trade" requirement of paragraph 8 and the "substantial sectoral coverage" requirement of GATS paragraph V, paragraph 1(a).

However, it is definitely left to argumentation as a central aspect of the problem set whether or not CUMCURIA measures as adopted by Mullavia fall within the definitional requirements of the respective regional Articles, and in light of the first and second parts of the Turkey Textiles test. Thus, for example, if a measure undertaken is found to be an element of the definitional requirement for what constitutes a customs union, then this measure could be understood as not only being introduced upon a formation that meets the regional requirements, but may also be found "necessary" for its completion as to the WTO requirements. Likewise, if a trade liberalising measure is not related to fulfilling a definitional component, then even though it may be introduced upon an otherwise lawful formation, it may not be necessary at all to fulfil the requirements of the WTO.

III. Discussion of the measures

III.1 Measures related to internal requirements:

Some actions being undertaken by Mullavia actively grant more favourable treatment for the CU as compared to Condaluza. These include the provision for the elimination of anti-dumping measures as between CUMCURIA members (issue one), and the provisions for the recognition of CU health care workers (issue five).

III.1.1 Issue one: anti-dumping suspension

The treatment of anti-dumping measures in the CUMCURIA has one parallel to the WTO safeguard cases noted above in that the CUMCURIA arrangement is seeking to forego the application of a trade measure regime among its regional members. However, the

[11] The issue of compelled joinder was raised as a preliminary matter before the Turkey Textiles panel. Turkey Textiles Report, para. 9.5, and citing its preliminary ruling.

[12] Turkey AB Report, para. 47.

[13] Turkey AB Report, para. 59. However, this comment made also in the context of the establishing the panel's competence to assess compatibility.

Agreement on Safeguards permits a finding of ready violation where it has a strong non-discrimination element as found in its Article 2.2, wherein a safeguard must be imposed on like products from whatever source derived. The Anti-dumping Agreement does not have an explicit MFN obligation to even undertake examination of all potential injurious sources of dumped goods on the basis of their territory of origin, and does not appear to impose any conduct obligation to otherwise treat dumped goods alike from whatever source derived. Thus, determination of a violation for this measure may be difficult.

It may be that the complainant will attempt to construct a violation that is analogous to the parallelism requirement developed in the AB approach to the safeguards cases, that by eliminating outright the possibility of asserting any anti-dumping measures against a regional member, the party has not clearly excluded the possibility that goods dumped by the regional member may not be causing injury that may be attributed to other sources. There may also be a most-favoured nation theory raised in relation to Mullavia's adopted regulations whereby this party has established a requirement that another territory of origin cannot be made the subject of any anti-dumping action.

If a violation can be arguably identified, then the question of suspension raises the internal requirements imposed by Article XXIV paragraph 8(a)(i) and asking, whether the scope of application of the term "other restrictive regulations of commerce" (ORRC) includes the use of anti-dumping measures as defined by GATT Article VI. Since regional members are required to eliminate ORRCs, if this term includes GATT Article VI measures, then accordingly regional members should (or must) eliminate them as an aspect of their formation. Respondent should therefore argue that elimination of anti-dumping measures in the CUMCURIA is necessary in order to complete the formation in accord with the WTO requirements.

Argumentation on this point will also likely raise the status of the listing of GATT Articles stated in paragraph 8 (Articles XI-XV and XX), since this listing of Articles may also inform the scope of the ORRCs. Thus, whether the listing was considered to be "exhaustive" or "non-exhaustive" in nature would have a bearing on whether Article VI (anti-dumping) measures may be required by the provisions of paragraph 8 to be eliminated as between regional members, as an ORRC.[14]

III.1.2 Issue five, service provider recognition

GATS Article VII contains explicit conditions for granting autonomous and bilateral recognition of the degrees and certificates held by foreign service providers. Parties are not discouraged from recognising foreign certificates as equivalent to their own domestic requirements, but are required to respect certain rights of other WTO Members. This is institutionalised in the GATT VII provisions whereby parties commencing the process of recognition shall notify the GATS Council prior to substantive progress, and shall permit the opportunity of other WTO Members to demonstrate the equivalency of their provider qualifications. While no unconditional right of most-favoured nation is accorded by this Article, the procedures appear to be designed to guarantee that other Members are granted a certain conditional right of participation where they may able to meet the qualifications imposed. The procedures guarantee respective notice of recognition activities, without which other WTO Members cannot exercise their WTO rights.

[14] Some additional discussion on this point is provided in the final section.

Thus, the question of whether parties in GATS V arrangement may "roll in" their recognition activities without reference to the provisions of GATS VII should raise the issue of whether GATS V can operate as an exception to GATS VII requirements. As a defence, the issue of whether a qualified economic integration agreement may encompass the recognition of foreign service providers may call for argumentation on the scope of the GATS national treatment obligation, as this is incorporated into GATS Article V as a requirement of a qualified formation. Since GATS XVII:3 provides that formally identical treatment may accord less favourable treatment to foreign service providers, then respondent may consider an argument as to whether this requirement can (or should) encompass acts of recognition as a necessary or chosen means of eliminating the *de facto* discrimination which occurs as a result of local examination and certification procedures. Essentially this is arguing that the scope of the national treatment obligation is broad enough to encompass recognition itself. Since national treatment in the GATS is not a general obligation, this treatment can be accorded to a regional member without the application of most favoured nation. If national treatment cannot be interpreted to incorporate concepts of recognition as a means of giving the principle actual legal effect, then there does not appear to be any other internal or definitional requirement in GATS V that would suggest that this Article operates as an exception to GATS VII requirements.

To summarise, both of these issues above require an identification of a GATT/GATS violation, and then a response indicating that the measures implemented fall within the internal requirements of RTA formations and are therefore necessary to implement as meeting the conditions imposed for qualified regional formations.

III.2 Measures relating to external requirements: issues two and four.
Two issues focus more on the legal implications of raising barriers to the trade of non-members, what we may characterise as the "external" requirements of Article XXIV.

III.2.1 Issue four, tariff duty on bananas
For the adjustment of the tariff duty on bananas (issue number four), argumentation should not likely dwell upon Article XXIV's paragraph 8 requirements, as there is little question that regional members may (shall) eliminate duties on their respective goods of origin. Rather, after identifying the obvious GATT violation (Article II, Schedules of Concessions), arguments for justification would consider Article XXIV paragraph 5(a) requirements referring to the overall level of barriers after formations as compared to prior. Respondent may argue that given Mullavia's reduction of other duty barriers, that overall barriers are not being raised, or cannot be proved to be raised overall, and that this measure should therefore be permitted without any requirement of compensation. However, since Article XXIV has explicit compensation provisions to deal with increases in duty imposed by a customs union formation, complainant's focus will be upon the paragraph 6 provisions together with the elaboration provided in the GATT – 1994 Understanding on the Interpretation of Article XXIV. This issue might call for a determination on whether compensation is required in a case where overall barriers may not be raised to non-members in contravention of paragraph 5 requirements. In addition, there may be some focus on whether the inconsistent measure is in any case necessary for the completion of the CUMCURIA arrangements.

III.2.2 Issue two, Mullavia's application of CU anti-dumping measures to non-members
This question is likewise directed to Article XXIV paragraph 5 considerations, but for this issue it may be most appropriate to consider the external requirements of paragraph 8 prior, and in the light of the underlying GATT violations that may be raised. Complainant may

choose to formulate its arguments at the outset to infringements of paragraph 5 requirements, but this approach may not be consistent with the case treatment identifying Article XXIV as overall exceptional, and requiring the identification of a GATT Article or provision that is being violated. The primary violation considered is that basket of obligations contained in the Agreement on Implementation of Article VI (GATT Anti-dumping Agreement) whereby anti-dumping measures may only be imposed pursuant to actual conducted investigations initiated and conducted in accordance with Article VI and the terms of the Agreement.[15] Since Mullavia is adopting another territory's measures for application upon its territory without any investigations or substantive findings, it would seem that the host of procedural and substantive obligations under the Anti-dumping Agreement should be cited for violation.

Both paragraphs 5 and 8 in Article XXIV employ the term "other regulations of commerce" and there is a relationship established between these provisions.[16] Both parties may focus their submissions on whether the application of the measure contributes to an overall raising of ORC in the meaning of paragraph 5. The paragraph 5 question considers whether an undertaking to adopt (harmonise) another party's external anti-dumping regime would constitute an "other regulation of commerce" (ORC) within the meaning of paragraph 5(a) [17]; and related, whether duties and ORCs in paragraph 5(a) shall be treated cumulatively for meeting the test of paragraph 5.[18] However, as suggested above, the requirement to examine paragraph 8 external requirements may well be a pre-condition to taking up paragraph 5 arguments, since if the customs union is not lawfully formed according to paragraph 8 in the first instance, then its external effects may not be relevant for examination at all. Thus, this issue is raised not only to argue the relationship between the requirements of the Anti-dumping Agreement and those of Article XXIV paragraph 8 for customs union formations, but also as between paragraph 8 and 5 requirements in regard to the establishment of a common external regime for a customs union.

The *Turkey Textiles* panel found that "comparable" regulations were sufficient for the requirement of paragraph 8(a)(ii). The AB ruled that the term "substantially" required more than comparable regulations as it modified the term "same". This ruling would allow respondent to plead the necessity of harmonising these trade measures externally in order to meet the burden imposed by paragraph 8(a)(ii). However, it may be suggested that the CUMCURIA arrangement should provide for some sufficient institutional authority that would assess dumping cases as to the entire territory rather than to merely transfer measures taken by one party to the territory of the other, especially as the facts indicate that this treatment will apply after the interim period. If this is raised by complainant, then it may also be considered whether the principle of effective interpretation is also at hand as between the procedural requirements of the Anti-dumping agreement and the provisions mandating substantially the same external requirements in a customs union formation. Since a customs union can provide for a mechanism that can fulfil the obligations of both sets of

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[15] GATT – 1994, Agreement on Implementation of Article VI, Article 1.

[16] Paragraph 8 requirements are all definitional, but not all "internal". Para. 8(a)(ii) requires a custom union to establish substantially the same duties and other regulations of commerce to the trade of non-members.

[17] The Turkey panel's definition of ORC for paragraph 5, not rebutted by the Appellate Body, is certainly broad enough to include anti-dumping measures. Turkey Panel Report, para. 9.120.

[18] Mullavia is lowering tariff duties. See clarifications requested.

provisions, as the CU itself does in respect of its own territory, then the question arises whether Article XXIV compels such a mechanism in light of the Anti-dumping Agreement.

In this way complainant may find its best line of attack by following the implied sequence suggested in the *Turkey* case, of treating definitional requirements of paragraph 8 prior to the operational requirements of paragraph 5, a sequence that for this measure is not so evident at first examination.

III.3. Issue three, the safeguards question

Issue number three may present substantive elements of first impression that may likely be raised as preliminary matters dealing with notions legal interest and standing. It is likely that complainant would cite as violation the provisions of the GATT Agreement on Safeguards, including the requirement of notification to the Committee on Safeguards and its subsequent supervision of imposed safeguard measures. Also likely is the possibility that respondent would raise the preliminary issue of whether complainant could demonstrate any interest that its own trade could be detrimentally affected by the implementation of the measure. The complainant will likely recall the often-cited ruling by the AB from the *EC Bananas* case, and arguing that the DSU does not require the showing of a legal interest by a complainant.[19] The respondent should distinguish the case, or make reference to the literature critical of this ruling.[20]

Previous panels and the AB have considered, without completing the analysis, the question of whether regional members may *eliminate* the use of safeguard measures in a regional trade agreement. The *Argentina Footwear* AB indicated that the analysis of this question must also accord by the basic test outlined in the Turkey Textiles Report upon a violation of a GATT obligation (in that case, Article 2.2 of the GATT Safeguard Agreement). Here the question is not whether regional members can establish a less trade restrictive measure, but by their *inter se* agreement, establish an arguably more trade restrictive safeguard mechanism, at least as compared to the procedures and substantive requirements provided by the GATT Agreement on Safeguards and Article XIX.

The facts of the safeguard measure as framed here may raise a number of public international law and treaty interpretation considerations. As mentioned, these include preliminary issues of standing (legal interest) regarding the complainant's capacity to make a claim on this measure. An additional possibility could include an invocation of alternative Article XXIII:1 theories of complaint such as the "attainment of any objective of the Agreement" and/or paragraph 1(c) "the existence of any other situation". Here the objectives sought to be realised by the GATT Agreement as expressed in its preamble may be called forth to argue that trade restrictive agreements made between members undermine the larger set of objectives, including the elimination of discrimination in international commerce.

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[19] *EC- Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 133.

[20] For example, Pauwelyn (2003), cited infra, note 28, at pp. 941-945; or, R. Bustamante (1997), "The Need for a GATT Doctrine of Locus Standi …", 6 Minn J. Global Trade 533, cited in F. Weiss (2003), Transatlantic Economic Disputes, The EU, US, and the WTO, (Petersmann and Pollack, Eds), Oxford, pp. 121-139 at p. 126. The question could be raised by a party asserting a right to challenge directly a regional trade agreement by alleging inconsistency with an Article XXIV (or GATS V) provision, without first demonstrating some other GATT or GATS Article violation.

As a mater of treaty interpretation, VCLT Article 41 regarding bilateral modifications or *inter se* agreements between subsets of members to multilateral treaties may also be raised. The applicability of this Article to WTO Agreements may also be considered, as documentation can be provided that this particular VCLT Article may not fall within the group of VCLT provisions recognised as expressing the codification of the customary rules of interpretation of public international law, as these are made available to the panels according to the DSU.[21] In addition, public international law considerations regarding the bilateral or interdependent nature of GATT obligations may be raised as controlling the issue of bilateral modifications more generally. Finally, the question of significant subsequent practice by WTO Members in light of the ubiquity of specialised safeguard provision in the larger number of notified regional trade agreements.

If the challenge to this measure is determined as being admissible as raised by the complainant, then the Article XXIV analysis to treat it is also definitional in considering the terms of paragraph 8. Here, there is similarity to issue number one (suspension of anti-dumping measures), as this question also turns upon whether safeguard measures are themselves ORRCs, and in view of the paragraph 8 Article listing (XI-XV and XX), contemplates a finding that the elimination of safeguards between members to a completed customs union is mandated by this paragraph. If so, then no safeguard procedure, specialised or otherwise, could be included in the final CUMCURIA arrangement or any other Article XXIV arrangement. If safeguards are however permitted in a customs union, then the question may go on to consider whether regional members are also bound to apply the provisions of the GATT Agreement on Safeguards, and if not, the legal basis upon which parties may modify those WTO obligations by way *inter se* agreements. This raises the question of whether this measure, inconsistent with the Agreement on Safeguards procedures, is necessary in order for the otherwise lawful RTA formation to be completed.

Also as between issues number one and three, there is a certain strategic difficulty presented for both complainant and respondent in order to frame their cases. Complainant may argue on issue number one that Article XXIV:8 does not permit the elimination of anti-dumping measures between regional members, while at the same time arguing on issue number three that the same paragraph mandates the elimination of safeguards. In the same sense, Respondent may argue that the Article requires the elimination of trade measures in the form of anti-dumping duties, while at the same asserting that safeguard measures are permitted by the Article for regional members.

## IV. Additional discussion on internal measures

### IV.1 WTO Member positions in the CRTA regarding internal requirements

There are three overall positions that have been forwarded in the CRTA systemic issue discussion for the interpretation of the paragraph 8 requirements as relating to the application or suspension of contingent protectionist measures among regional members. These can be grossly characterised as the Japan, Australia and EC positions. Japan has argued that there can not be any suspension of either safeguards or anti-dumping actions in the context of regional trade agreements, as this would result in certain trade diversion as to

[21] DSU Article 3.2., "…to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Not every provision of the VCLT is claimed to have this status of codification of customary rules of interpretation, and not all Members of the WTO have ratified the VCLT. In support however, The Turkey Textiles Panel Report did make a reference to VCLT Article 41, para. 9.181.

non-members.[22] This position has been supported on occasion by reference to paragraph 4 of Article XXIV, and emphasising that the purpose of a regional trade agreement is not to raise new barriers to the trade of non-members, and suggesting that this expression may incorporate or be interpreted to be a "non trade diversion" requirement.[23] Since the AB has formulated a parallelism requirement for safeguards, it is not clear whether the Japan position is still maintained.

A traditional Australia position has been contra, that at least for a completed (post-interim) qualified regional trade agreement, that the Article requires that parties must suspend the use of intra-regional contingent trade protectionist measures.[24] From this view, the purpose of the Article is to establish a high enough threshold of compatibility to insure that only agreements undertaking serious free-trade commitments can receive the benefit of the exception from most-favoured nation.

The EC has taken an optional or "permissive" view, that parties to any particular agreement may choose to suspend or not suspend trade measures.[25] The panel in the Argentina Footwear case adopted this approach, but since on appeal the measures were determined to not have been instituted by a customs union at all, but rather by Argentina, this finding was also rendered arguably moot.[26] As the law stands, until such time as the Article XXIV defence is raised by a party who has properly excluded its regional members from the source of investigation and respective safeguard application, the panels and AB body will not be presented with the issue on point for consideration, at least as to the right to eliminate measures. However, it should be noted that even while the AB might rule that there is a right to eliminate these measures from a customs union, this is not the same thing as determining that members must so eliminate, an issue that has not been raised in a case. While also not at issue in the Turkey Textiles case, the AB did say there,

> "…that members of a customs union may maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under article XI through XV and under Article XX of the GATT 1994."[27]

IV.2 Commentary regarding *inter se* agreements and the scope of ORRCs.

There is argumentation in the literature supporting the legality of later-in-time agreements between subsets of WTO Members "contracting out" and applying restrictive measures as between them only. Pauwelyn develops this position in his review of Fitzmourice's ILC

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[22] Japan, WT/REG/M/16, para. 18

[23] The Turkey AB Report ruled that paragraph 4 contains purposive but not operative language. However, the conditions of Article XXIV must be interpreted in light of the purpose set forth in paragraph 4. Turkey AB Report, para. 57. Ken Dam (1963) first called for the functional interpretation of this paragraph to incorporate a trade diverting standard. The EC and US have taken positions in the CRTA that there is no trade diversion standard applied in Article XXIV. WT/REG/M/15, para. 25

[24] Australia, WT/REG/M/14, para. 19.

[25] EC, WT/REG/M/14, para. 19, and the EC arguments in Argentina Footwear panel report, para. 8.84. The EC has also suggested however that this permissiveness may be different for a customs union than for a free trade area, a distinction that is in any case supported by the text of paragraph 8 (a) as compared to 8 (b). WT/REG/M/15, para. 44.

[26] Argentina Panel Report, para. 8.97 and 8.99. AB ruling, "we make no ruling on whether … a member of a customs union can exclude other members from the application of a safeguard measure." Argentina AB Report, para. 114.

[27] Turkey AB Report, para. 48.

commentary and proposed classification of treaties as either collective, bilateral, or interdependent. He argues that WTO and GATT obligations are bilateral in nature.[28] As to *inter se* modifications, he refers to the objectives of the WTO and applies VCLT Article 41(b) to determining that any "prohibition" of *inter se* agreements by WTO Members would be applicable only to those modifications that adopt trade liberalising measures. While not exactly prohibited, these actions are nonetheless multilateralised by the MFN principle. The regional trade agreement provisions permit a deviation from MFN and those agreements not meeting the requirements for RTAs established in WTO must still be subject to MFN. However, according to him, The *lex specialis* provision allowing derogation from MFN as found in Articles XXIV and GATS V, relates,

> "only to *inter se* agreements that *further liberalize trade*. The WTO treaty is silent on *inter se* agreements that *limit trade* between some WTO members only, for example, in order to protect cultural diversity, human rights or ethical standards in a way not permitted under normal WTO exceptions such as GATT Art. XX. Given the WTO treaty's silence on such *trade restricting* agreements, the rules of conflict under general international law continue to apply. This means that if WTO obligations are, indeed, bilateral in nature, other non-WTO treaties that restrict trade *inter se* must be permitted and stand as between the WTO Members that concluded them, as long as they are tailored in such a way that they do not affect the rights of other WTO Members."[29]

On the other hand, by specifying the degree of trade liberalisation required within an RTA to earn the MFN exception, it might appear evident by the text of XXIV:8, that the requisite degree of "liberalisation" to be obtained is also being defined by reference to the types of trade restrictions that must be eliminated by the members to achieve it. To the extent that RTA members shall "eliminate" duties and other restrictive regulations of commerce, submissions certainly can argue that the GATT provision is seeking to expunge certain types of trade restrictions, at least in those cases where the members are attempting to obtain the legal cover of a customs union or free-trade area exception.

VCLT Article 41 presents two alternative possibilities. Subparagraph 1(b) applies where the modification in question is *not prohibited* by the treaty, and thereby acknowledges the right of *inter se* modification with due regard to treaty rights of other Members and the object and purpose of the treaty. The alternative approach is presented in subparagraph 1(a) whereby the possibility of modification *is provided for* by the treaty. Article XXIV (and GATS V) may be argued to function in this role as well to the extent that they appear to define the conditions required for any modification in the form a regional trade agreement that seeks to suspend the MFN obligation as to all other Members.

If so, then what matters in resolving the questions presented by issues number one and three is the definition of ORRC. In Trachtman's review of whether the term ORRCs encompasses internal regulatory measures such as TBT and SPS requirements, he calls attention to India's point in the Turkey Textiles case, that what is "inherent" to a customs union should frame this issue, and that the definition of ORRCs should also be evolutionary. "This evolutionary

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[28] J. Pauwelyn (2003), "A Typology of Multilateral Treaty Obligations", EJIL, Vol. 14, No. 5, pp. 907-951.
[29] Ibid., p. 947, emphasis in original.

approach might lead us to the conclusion that only protectionist (discriminatory or unnecessary) TBT/SPS measures are included in "ORRC" [30]

While Trachtman does not discount the possibility that the listing of Articles is non-exhaustive, he does argue that to the extent the term might cover regulatory (internal) requirements, that the purpose of the construction should be to require regional members to eliminate those regulatory barriers that are protectionist in nature. According to him these are the measures that are discriminatory (as between domestic and imported products of other regional member origin) or those that may be found "unnecessary". However, if Trachtman is correct that ORRC can encompass protectionist *regulatory* measures, then the provision may certainly also be read to have the scope to encompass protectionist *trade* measures as well.

An additional theory of construction has been raised that favours the more permissive or optional approach. This is found in the Hudec and Southwick proposition that the requirement to eliminate ORRCs and the Articles' listing poses a sort of "may or must" construction. By this, regional members *may* eliminate restrictive regulations of commerce as they choose, but *must* impose the listed Articles (XI-XV, XX) upon other regional members if invoked at all, since to not to so would cause significant damage to non-members. This is to say that the non-discrimination requirements for exceptional measures such as GATT Article XIII and XX are being made clear as remaining in force as between regional members.[31] This construction would allow regional members to either suspend or impose other (non-Article listed) restrictive measures as they chose in their own course of evolution.

A difficulty with this constructions, as noted also by the authors, is that Article XIX measures also may fall within this rubric of causing universal damage, at least as considered prior to the parallelism requirement conceived by the Appellate Body in order to clearly eliminate applications that deviate from sources investigated.

It can be suggested, this author's opinion only, that underlying the three different perspectives remains the inherent character of the listed Articles as distinct from measures that are purely protectionist in nature. Articles XI-XV and XX accord rights to interrupt trade on the basis of emergencies (agriculture shortages - XI:2, balance of payments problems - XII, etc.) or in light of higher legitimate objectives as in Article XX, these restrictions all permitted "when necessary". Necessity may also reflect Hudec and Southwick's consideration that if taken against other WTO Members, that these measures must be taken regionally as well.

However, there is also a distinct difference between the types of measures listed by the included Articles and the use of tariff duties and quantitative restrictions that are purely protectionist mechanisms serving the primary objective of granting domestic production an economic benefit at the expense of importation.[32] This would tend to concur with Trachtman

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[30] J. Trachtman, (2003), "Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT", Journal of International Economic Law, pp. 459-492, at p. 485. A working draft dated April 22, 2002 is on the WTO website, (Trade Topics / Regionalism / April 2002 Seminar, see page 27. Citing, Turkey AB Report, para. 21.

[31] R. Hudec and J. Southwick (1999), "Regionalism and the WTO", in Rodriquez, Low and Kotschwar (Eds), Trade Rules in the Making, OAS and Brookings, pp. 47-80.

[32] J. Mathis (2002), Regional Trade Agreements in the GATT/WTO, TMC Asser Press, Den Hague, at p. 246, et. seq.

that the point of eliminating ORRCs is to require the elimination of protectionist measures. Likewise, while Pauwelyn's construction would not prevent *inter se* agreements from incorporating higher (more trade restrictive) standards concerning human rights provisions, etc.., these regulatory measures are likewise also not imposed for the *purpose* of providing for domestic economic protection.

Since at least one panel, *Argentina Footwear*, has expressly ruled that safeguard measures may be retained by members in a customs union, respondent has some initially easier burden since that case holding can be cited on the point. Complainant's argumentation must draw the inferences from the reversal by the Appellate Body on the attribution of the measures, and then from its ruling, as also repeated in the later safeguard cases, that no ruling has been formed as to whether regional members may eliminate safeguard measures. Both parties must draw the analogy accordingly in order to fit the anti-dumping suspension issue into this incomplete judicial framework as treating safeguards, and where necessary, attempt to distinguish between the regimes governing the use of them respectively.

J.H.M., 12/03