NEW JUSTICE PROGRAM

PARTICIPATION OF THE TEAM OF TARAS SHEVCHENKO NATIONAL UNIVERSITY OF KYIV

IN THE EUROPEAN REGIONAL ROUND OF THE ELSA MOOT COURT COMPETITION ON WTO LAW

(10-14 March, 2017 in Cluj-Napoca, Romania)

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Contents

Background

The ELSA Moot Court Competition (EMCC) is a simulated hearing of the World Trade Organization (WTO) dispute settlement system and is organized by European Law Students Association (ELSA). Interested students from all over the world send written submissions for the complainant and respondent of a fictitious case written by a WTO professional. After the written preliminary round, the teams have the opportunity to present their oral submissions both for the complainant and the respondent in front of a Panel which consists of WTO and trade law experts.

There are Regional Rounds all over the world: the All-American Regional Round, the Asia-Pacific Regional Round, the two European Regional Rounds and the African Regional Round. The best 20 teams from all over the world will then be qualified to participate in the Final Oral Round which will take place at the WTO Headquarters in Geneva, Switzerland in June, 2017. From year to year the place of the competition usually differs. This year our team was allocated to the European Regional Round in Cluj-Napoca, Romania, with other teams from different universities of Europe.

Teams of the Taras Shevchenko National University of Kyiv started their active participation in EMCC in 2009. The team of the Taras Shevchenko National University of Kyiv for EMCC 2016-2017 consisted of ***Mariia Shulha, Anastasiia Koltunova, Tetiana Tanchyn*** and ***Nikita Novikov***. The team was coached by ***Nataliia Kozachuk*** (Ph.D Candidate in Institute of International Relations, Taras Shevchenko National University of Kyiv) and ***Olesia Kryvetska*** (Ph.D Candidate in Institute of International Relations, Taras Shevchenko National University of Kyiv).

Objectives

EMCC is a competition aimed to improve knowledge of students from all over the world in WTO law and WTO dispute settlement system. According to the EMCC rules the participating students act as representatives of WTO members in front of the Panel which consists of WTO and trade law experts in a fictions case written by a WTO professional. They first send in their written submissions and after the written preliminary round, the teams have the opportunity to present their oral submissions both for the Complainant and the Respondent.

In the XV edition of the EMCC the case was based on the matters of violations of General Agreement on Tariffs and Trade 1994 and Anti-Dumping Agreement which are both covered agreements to WTO Marrakesh Agreement. The major issues concerned were the Balance of Payment measures, Tariff Rate Quotas, Special and Differential Treatment, Zero-tariff treatment on 'Green Goods' and Elimination of Anti-Dumping duties. All these issues are considered within the Free Trade Agreement called 'CHIMEHA'.

Initial Preparation and Memoranda Drafting

The Case for 2016-2017 is about the CHIMEHA Free Trade Agreement between Chilo, Meco and Haito (hereinafter referred to as 'the Case'). The author of the Case is Gabrielle Marceau — Ph.D., is Counselor in the Legal Affairs Division of the WTO, which she joined in September 1994. Her main function is to advise panelists in WTO disputes, the Director-General Office and the Secretariat on WTO related matters. From September 2005 to January 2010, Gabrielle Marceau was a member of the Cabinet of the WTO Director General Pascal Lamy. Dr. Marceau is also Associate Professor at the Law Faculty of the University of Geneva and Visiting Professor at the Graduate Institute of International Affairs and Development (HEID) where she teaches WTO law and WTO dispute settlement. Before joining the GATT/WTO, Gabrielle Marceau worked in private practice in Quebec, Canada. Professor Marceau has published extensively, namely in WTO related matters.

The Case is published at the official web page of the EMCC in the second half of September each year. Followed by the case release the coaches set up selection round for the students interested to be admitted to the team to represent Taras Shevchenko University of Kyiv in the competition. Commonly, information about the moot is distributed via e-mails of the students' academic groups; announcements are made during lectures and seminars as well as placed at chairs of Private, Public and European Law Departments. Students are welcomed to send their CVs and motivation letters to coaches.

The preparation of the team to ELSA moot court competition started in October 2016. Members of the team divided the issues that were supposed to be addressed between themselves. The main task was to concentrate on their own legal problem for the positions of both Complainant and Respondent. Following substantial analysis of disputable areas in WTO law the students were working on the memoranda preparation while coaches were proofreading them and making professional recommendations on the draft improvement. The final date for submitting the memoranda was set by the organizers for 20th of January 2017.

Oral Rounds in Cluj-Napoca

Arrival

The European Regional Round of ELSA moot court competition on WTO law took place in Cluj-Napoca from 10th March till 14th March, 2017 and was attended by 14 teams originating from various European countries. Our team consisting of 4 members and 2 coaches arrived to Cluj-Napoca on 9th March. All the teams were accommodated in the Golden Tulip Hotel.

Opening Ceremony

After the arrival of teams the organizers started with the opening ceremony at the Hotel on 10th of March. The Vice President for Moot Court Competitions – Christine Beck greeted the participants and endorsed them for such activities. Finally, the drawing of the teams was held and the participants found out the numbers of the teams they should face next day. After getting that information, the participants had the opportunity to have some rest and to furnish their positions for the Oral Rounds.

According to the rules each team shall have a total of forty-five (45) minutes to present its main oral pleadings, including the time to address the questions by the Panel, not including the Team Appearance. The Panel may allocate extra time in order to allow a Team to complete its oral pleadings or answer questions during the main oral pleading. The extra time shall also be given to the opposing team. If the allocated 45 minutes are not fully used, they will not be added to the Rebuttal or Sur-rebuttal.

First Oral Round

On the 11th March the team of Taras Shevchenko National University of Kyiv played the first oral round as a Respondent in the case with the team representing Queen Mary University of London that acted as a Complainant respectively. The pleadings were conducted at high level by both teams. In addition, the Panelists were engaged, as they asked important questions. It gave an opportunity for teams to fully present their arguments.

After the round the Panelists gave an overall feedback to the teams/

Second Oral Round

During the second oral round, which took place on 12th March the team of Taras Shevchenko National University of Kyiv played as a Complainant in the case against the team representing Graduate Institute of Geneva, which which is considered one o the strongest "school" in the area of international economic law. It was reasonably dynamic round with many precise and essential questions concerning disputable

areas of WTO law.

Similar to the first round, the team impressed the Panel with the high level of preparation to difficult questions that was achieved due to the efforts of the coaches and with the high level of the arguments analysis both from legal and political perspectives.

Grand Final

All teams were invited to the Grand Final where the teams from Zurich University and University of Leuven competed. The Grand Final was judged by 9 participating panelists and was rather stressful since all panelists by the time of final pointed to the very specific questions and controversies of the Case. Consequently, the team representing University of Leuven was declared as a winner.

Closing ceremony

After the oral rounds the closing ceremony was conducted in the premises of the Golden Tulip Hotel. Participants had an opportunity to communicate and socialize between themselves as well as with the panelists discussing the Case, professional focus, education and career opportunities. All participants, coaches, judges and organizers continued communication in friendly unofficial atmosphere during the ceremony.

The following morning our team members together with coaches departed from the airport (March 14, 2017).

Education opportunities

While being in Cluj-Napoca our Team chanced to get acquainted with important world-respected programs in WTO law. Besides meeting experts and practitioners in WTO law, we open a world of opportunities for further education. Two programs were offered by representatives of such institutions to EMCC participants: MILE from the World Trade Institute (Bern, Switzerland), and IELPO (Barcelona, Spain).

IELPO

The IELPO programme revolves around 7 teaching modules whose aim is to equip participants with in-depth knowledge and the analytical tools required of cutting-edge practitioners in all major fields of international legal and economic governance today.

IELPO Programme

1.- Foundations of International Law and International Economics

1.1. Public International Law: Jan Wouters, *Katholieke Universiteit Leuven*

1.2. Introduction to the Macroeconomics of an Open Economy: Roberto Bouzas, *University of San Andrés*

1.3. Money and the External Sector of the Economy: Ramon Torrent, *University of Barcelona*

2.- Introduction to International Economics and Finance

2.1. International Finance: legal, economic and institutional perspectives: Patrick Leblond, *University of Ottawa*

3.- General Theory of International Trade

3.1. The Politics of Trade: Craig VanGrasstek, *Harvard University*

3.2. Essentials of the World Trade Organization (WTO) and Policy: Peter Van den Bossche, *WTO*

3.3. Treaty Interpretation: Graham Cook, *WTO*

3.4. Basic Obligations and Legal Philosophy of Trade in Goods: Lothar Ehring, *European Commission*

3.5. Sanitary and Phytosanitary Measures and Technical Barriers to Trade: Arthur Appleton, *Appleton & Luff, Geneva.*

3.6. Trade in Agriculture: Lee Ann Jackson, *WTO*

3.7. Trade Remedies: Edwin Vermulst, *VVGB.*

3.8. Subsidies: Victor Do Prado, *WTO*

3.9. Trade in Services: Pierre Sauvé, *WTI,* & Hamid Mamdouh, *WTO*

3.10. Trade-Related Intellectual Property Rights: Jayashree Watal, *WTO*

3.11. Trade Facilitation: Nora Neufeld, *WTO;* Mohammad Saeed, Benjamin Czapnik & Pierre Bonthonneau, *ITC*

3.12. Rules of Origin: Stefano Inama, *UNCTAD*

3.13. Dispute Settlement

3.13.1. WTO Dispute Settlement Mechanism: Panel Process and the Appeal: Valerie Hughes, *WTO* & Werner Zdouc, *WTO*

3.13.2. WTO Dispute Settlement: The Practice: Maria J. Pereyra, *WTO*

3.13.3. Commercial Arbitration: Galina Zukova, *White & Case LL.P, Paris.*

3.14. Trade and Environment: Ludivine Tamiotti, *WTO*

3.15. Trade and Development: Shishir Priyadarshi, *WTO* & Jan Bohanes, *ACWL*

3.16. Trade and Energy: Roberto Rios, *Appleton & Luff,* Warsaw.

4.- Comparative Regionalism

4.1. Introduction to Regional Trade Agreements: Lorand Bartels, *University of Cambridge.*

4.2. The European Union: Colin Brown, *European Commission.*

4.3. Asia-Pacific: Michael Ewing-Chow, *National University of Singapore.*

4.4. The Americas: Jorge Huerta Goldman, *TILPA*

4.5. Africa: David Luff, *Appleton & Luff, Brussels*

4.6. Eastern Europe: Max Shmelev, WTO & Nicu Popescu, *EU Institute for Security Studies*

4.7. Mega-Regionals: Gary N. Horlick, *Law Offices of N.Horlick*

5.- International Investment

5.1. Economic and Institutional Perspectives: Pierre Sauvé, WTI

5.2. Investment Law: Federico Ortino, *King's College London* & Roberto Echandi, *World Bank: IFC*

5.3. Settling Investment Disputes: Gaëtan Verhoosel, *Three Crowns LL.P.*

5.4. Key Strategic Intersections between Trade and Investment Law: Jürgen Kurtz, *University of Melbourne.*

6.- Competition Law and Policy

6.1. The Economics of Competition: David Elliott, *King's College London*

6.2. The Law of Competition Policy: Christopher Townley, *King's College London*

6.3. Competition Policy: Martha Martinez Licetti & Graciela Miralles, *World Bank*

6.4. Trade and Competition: Robert Anderson, *WTO*

6.5. Competition Procedures: Stefan Rating, *Rating Legis*

7.- International Trade Negotiations

7.1. International Commercial Diplomacy: Roberto A. Rogowsky, *Georgetown University*

7.2. International Trade Negotiations (Simulations): Alejandro Jara, *King & Spalding*; Maika Oshikawa, *WTO* & Maria Pérez-Esteve, *WTO*

7.3. Practical tools for Policy Modeling and Legal Foundations to Negotiate Trade Agreements: Paul Baker, *International Economics* & David Luff, *Appleton & Luff, Brussels.*

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MILE (Master of International Law and Economics)

It is considered the flagship programme of the World Trade Institute. It is one of the world's leading programmes of advanced studies in the field of international trade regulation and has close ties to the WTI's research portfolio. The programme uniquely combines a multidisciplinary perspective with a strong applied focus. In addition to our resident faculty, we bring in the world's leading trade experts from law firms, international organisations, policy research institutes and top universities.

Applying to the MILE

For admission to graduate study for the Master of International Law and Economics starting in September, the required documents need to be submitted by the deadline indicated on our website (generally the **31 January** of the year of commencement). Applications submitted after the deadline will be considered only in the event that places remain available (rolling admission).

Early applications will be given priority and first consideration for financial aid. They will be subject to a quicker decision. (Deadline for early applications: **15 December**. Date of notification of early decision: **22 December**). To apply, and for details of our requirements please click on the MILE application form on our website: www.wti.org/education/mile/

Tuition and Registration Fees

Tuition for the MILE programme is **27,000 Swiss francs** for both full and part-time studies. MILE applicants will be considered for scholarships upon request.

Tuition covers all courses, master's thesis supervision, a range of extracurricular activities, several trips to Geneva with visits to the WTO and other international and non-governmental organisations. Tuition does not cover travel costs, accommodation, health insurance, or any other expenditures incurred during your stay in Switzerland.

Application for the MILE programme is free. A one-time, non-refundable registration fee of **200 Swiss francs** is required upon admission to the programme.

"MILE was a watershed in my life."

Thaïs Andrade
MILE 14 and lawyer, lecturer and analyst at Brazilian Ministry of Foreign Trade

"The WTI is second to none as a place to study international trade."

Iryna Polovets
MILE 12 and current WTO dispute settlement lawyer

"The MILE's contribution undoubtedly is unique... It has significantly enhanced my career profile."

Santanu Mukherjee
MILE 1 and senior attorney with Qualcomm's Legal & Government Affairs department

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MILE Master of International Law and Economics

Be a MILE ahead!

The World Trade Institute (WTI) is a leading academic institution dedicated to studies, teaching and research in international trade and investment regulation and economic globalisation and sustainability. As a centre of excellence at the University of Bern with an international, interdisciplinary focus, we explore the interconnections between the fields of law, economics and political science.

world trade institute

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UNIVERSITÄT BERN

Established in 1999, the Master of International Law and Economics (MILE) is the flagship programme of the World Trade Institute. The MILE programme is designed for students and young professionals who wish to broaden their knowledge of international trade and investment in the fields of law, economics and political science.

The MILE is the right programme for you if you have

- A Bachelor or Master of Law or J.D.;
- A Bachelor or Master in Economics;
- A Bachelor or Master in Political Science or International Relations;
- A Bachelor or Master in an unrelated field, plus relevant working experience and;
- A strong command of English.

What we offer

- A one-year, intensive graduate programme (can also be taken part time)
- Teaching and guidance from over 50 world-class scholars and practitioners recruited from leading universities, international organisations, think tanks and global law firms
- Highly applicable real-world knowledge and the latest research developments in international trade and investment regulation, economics and the global political economy
- A vibrant alumni network with almost 500 members worldwide
- Strong networks and mentoring programmes to help students secure internships and entry-level positions
- Development of professional skills, in particular research, writing, oral presentation, and negotiation skills

What you bring

- The MILE is designed for students and young professionals with a background in law, economics, international relations or political science who wish to embark on a career in international trade and investment

"What makes the MILE programme unique is the interdisciplinary approach to the study of international economic governance."

Professor Peter Van den Bossche
WTI Director of Studies

Programme Structure

The MILE is a Master of Advanced Studies (MAS) conferred by the World Trade Institute, University of Bern. The MILE programme awards 90 European Credit Transfer System Points (ECTS). Course work accounts for 75 ECTS and the mandatory master's thesis for 15 ECTS.

Regular course attendance is required from September until the end of June, with the master's thesis being researched and written over the summer. The programme can also be taken on a part-time basis within three years.

The MILE begins with a foundational term during which students are given a solid basis in public international law, international economic law, international micro- and macroeconomics and global political economy. The second and third terms consist of modules that deliver an in-depth analysis of relevant topics in international trade and investment.

Courses à la carte

Designed for government officials and professionals from the private and civil society sectors, our à la carte courses offer a convenient way to enhance your knowledge in selected areas of international trade and investment: join one or more weeks of the MILE programme, while taking minimal time off from your job and without needing a specific academic background or degree.

In the second and third terms all MILE modules are available as a weekly course: a thematically self-contained learning experience! You will attend the lectures alongside our MILE students. Upon completion, you will receive a certificate of attendance. With some exceptions, the price for one week is **1,800 Swiss francs**.

MILE modules can also lead to a Diploma of Advanced Studies (DAS) or a Certificate of Advanced Studies (CAS) with a specialisation in International Law and Economics. A DAS can be awarded after obtaining 30 ECTS (around 8 weeks of course work plus a scientific research paper) and a CAS after obtaining 12 ECTS (around 3 weeks of course work plus a scientific research paper). With some exceptions, the tuition fee for courses leading to a DAS is **12,000 Swiss francs** and for courses leading to a CAS it is **5,000 Swiss francs**.

Impressions of the participants

Mariia Shulha

The participation in the ELSA Moot Court Competition was a mind changing experience for me. On one hand, it was a deep exposure in the field of WTO law. On the other, it was the possibility to improve my personal growth. In the first instance, I gained invaluable practical experience in WTO law, including legal writing, oral pleading, case law analysis and comprehensive research. In the second instance, I tested my limits, stress resistance and ability to settle to new environment.

I am sure that these skills and achievements will help me in my future work as a lawyer even if it would not be devoted to WTO law. The Competition also provided realistic outlook towards the competitive nature of real life in quite a short time. Apart from that, it was a fun experience which gave a chance to meet new people and make friends from other countries.

Elaborating more on the ELSA Moot Court Competition structure, it is really challenging, because the participants must not only present their positions, but also stick to time limits, answer panelists' questions and quickly restructure their speeches, responding to their opponents' arguments. All of the above taught me not to lose self-possession and control under the arising pressure. Moreover, it was great to work with such involved teammates and experienced, talented and inspiring coaches. I highly recommend all students to take part in ELSA Moot Court Competition, because it helps to open minds and doors to opportunities that one can only dream of.

Anastasiia Koltunova

I was extremely lucky to be selected into the team of Taras Shevchenko National University of Kyiv. I decided to participate in the EMCC in order to enhance my knowledge of international trade law, master my presentation and analytical skills. Although I received something more than just enhanced knowledge and skills. I truly fall in love with WTO Law, met people from around the world who practice trade law with true passion and spent a lot of time among like-minded teammates and coaches.

As to preparation process, during the months we created position both for complainant and respondent and mastered oral presentation of our argument. Our team did a profound research while preparing for the competition and elaborated solid and consistent arguments regardless of the fact that this year's moot court problem was extremely difficult and complex. It was possible to achieve high results and get the very ideas of this year case only through hard work and at the expense of our free time. However, this price is worth paying.

Our coaches did an extremely great job! They provided us with all necessary books and articles, explained difficult issues of WTO Law and helped to navigate in complicated WTO system. What is more important, Olesia and Nataliia always supported and inspired us and this actually helped us to build a highly dedicative, motivated and passionate team. Thus, it was an utmost pleasure for me to work with my teammates and coaches during these months.

Tetiana Tanchyn

EMCC was a great opportunity for me to develop the next skills, such as legal research, legal writing, oral pleading and teamwork skills, and of course gain practical knowledge from European teams we met in Cluj-Napoca, Romania.

In my opinion, legal research is an extremely important issue in a daily work of a lawyer. When you start preparing for the moot court your attitude and approach to legal research changes. That is exactly what happened to me. I learned how to analyze plenty of sources and use the most relevant information to develop the line of argumentation in a claim I was responsible for. Thanks to EMCC, now I know how important quality research is. Moreover, structuring information in your mind and more importantly on your legal paper while preparing your written submission comes with practice.

In the same vein, I acquired legal writing together with proper legal research skills. It was of course a challenge, because typical Ukrainian law education does not teach us how to write memoranda in English. We merely learn it in Ukrainian. Thanks to outstanding and experienced coaches, that navigated us in our collective peace of art, we furnished a beautiful written submission developing these highly important skills of legal writing.

Furthermore, oral pleadings differ from what you write in your written part. Therefore, I learned how to deliver my line of argumentation in a well-structured organized manner. In a line with the structure, it was important not to omit any essential argument and substantial legal basis, while making your speech as precise as possible for the other person to understand what you are arguing about. Besides "what you say" more important is "how you say it". That is actually something, which I never understood before the EMCC. I used to believe that it does not really matter whether you use gestures, use a lower voice and make pauses and stresses in your speech or not. EMCC proved otherwise.

Importantly, the competition taught me that sometimes-distorted legally imperfect information delivered in a greatly expressed manner using all these tricky tools would grant you a better chance of winning rather than a sophisticated argument understood only for those who dived too deep into law. Being lucky to have Olesia Kryvetska and Nataliia Kozachuk as coaches, my team and I took into account all the necessary tricks for a great public speaker, while combining both sophisticated arguments and contemporary approaches of a good presentation.

Finally, I am so grateful for such a team. All of them personally taught me a huge range of interpersonal skills by showing me that WTO law is more than just our common passion. Before the moot court, we were barely acquaintances and now we have grown into a real team. I personally learned how to listen my co-counsels and feel what they need when the panelist approaches them. We have raised a common child – our line of argumentation in the case provided by the case author of this competition.

In conclusion, I am more than thankful for being a part of WTO law saga, as I personally understood what law actually is. Now I am confident that my future will be connected with this field. Furthermore, my passion for law and education only grows and it would indeed be impossible without meeting our inspiring coaches and my amazing teammates and together taking part in this competition.

Nikita Novikov

This competition was a crucial step for my personality and the beginning of my career.

Participation taught me how to think legally, how to present and argue a position and draft submissions. Moreover, we dealt not only with legal issues, but with economic ones as well. Since the WTO law expects knowledge in both disciplines.

We succeeded to build a great team. Each of us fully contributed to performance, while our coaches supported and guided us to get the most fruitful outcome. I am thankful that I met such amazing persons and worked with them. The rounds have passed, but friendship remains, and I hope for a long time.

Moreover, there were a number of receptions and our team got acquainted with our counterparts from different European countries, among them: England, Switzerland, Germany and Belgium. We as well had an opportunity to communicate with panelists and they shared with us their experience and impressions.

Several words about the place. The competition was held in Cluj-Napoca, Romania. It is a nice city with lovely and grateful citizens. The accommodation and care from organizers was at the top level. Thus, I enjoyed not merely the competition, but the city as well.

To sum up, participation in such competitions is a fundamental basis for becoming professional lawyer. It opens the door for new skills, practices and networking. EMCC puts law student to a new highly qualitative level and enables them to gain practical experience in the sphere of WTO law.

Impressions of the coaches

Nataliia Kozachuk

In Ukraine the importance of WTO law is gaining momentum. Successful economic development of our country depends on the capacity of our Government to comply with the WTO obligations and the ability to invoke WTO rules. At the same time, there is a necessity to engage private stakeholders into this process. Thus, such competitions as the EMC2 are crucial to enhance awareness about global trade problems and to build WTO knowledge among Ukraine's most significant transformation force – its students.

As coaches, we were lucky to guide our team through the complex WTO legal system. Witnessing how WTO expertise of our team was growing was the most rewarding part of the competition's experience, because helping to transform law-students into successful lawyers is a step towards prosperous future of our country.

Olesia Kryvetska

Moot court is an important practical exercise that enhances legal English writing and oral skills, time management skills, sense of responsibility and legal arguing skills. ELSA Moot Court Competition on WTO Law is an annual event that brings together trade law community from all over the world. It has opened a great career opportunities for many respectable professionals in this area.

This year the Team of Taras Shevchenko National University of Kyiv has demonstrated an exquisite deep legal research, great teamwork and excellent performance. For the recent seven months all the team members have proven themselves as hard workers and team players. Having started from very basics of the WTO Law, they managed to navigate in extremely complex legal matters, such as legitimacy of preferential trade agreement under the WTO Law; tariff rate quotas administration; regulation of trade remedies under the FTAs and WTO Law; breach of MFN principle under the Enabling Clause; Balance of Payment measures and trade on environmental goods. The Team's preliminary round against Geneva Graduate Institute was one of the best pleadings I've ever seen for the years of my "moot-and-coach" activity. I sincerely hope the team member will learn from this valuable experience.

Annex A: The Case of the 2016/17 edition

The CHIMEHA FTA between Chilo, Meco and Haito

1 INTRODUCTION

1. Chilo, Meco and Haito are Members of the World Trade Organization (WTO), and they all produce both agricultural and industrial products. Chilo and Meco are developing countries, and Haito is a least developed country (LDC).

2. Chilo and Meco each have an advanced agricultural sector, comprising bovine meat, wheat, soya, coffee and bananas - the production of each of these goods is mainly exported. In the area of agricultural goods, Haito mainly produces bananas and coffee, and about 50% of its production is exported.

3. Chilo, Meco and Haito are not self-sufficient in the production of certain agricultural products and, therefore, they import such agricultural products to cater to the diverse and sophisticated tastes of their populations.

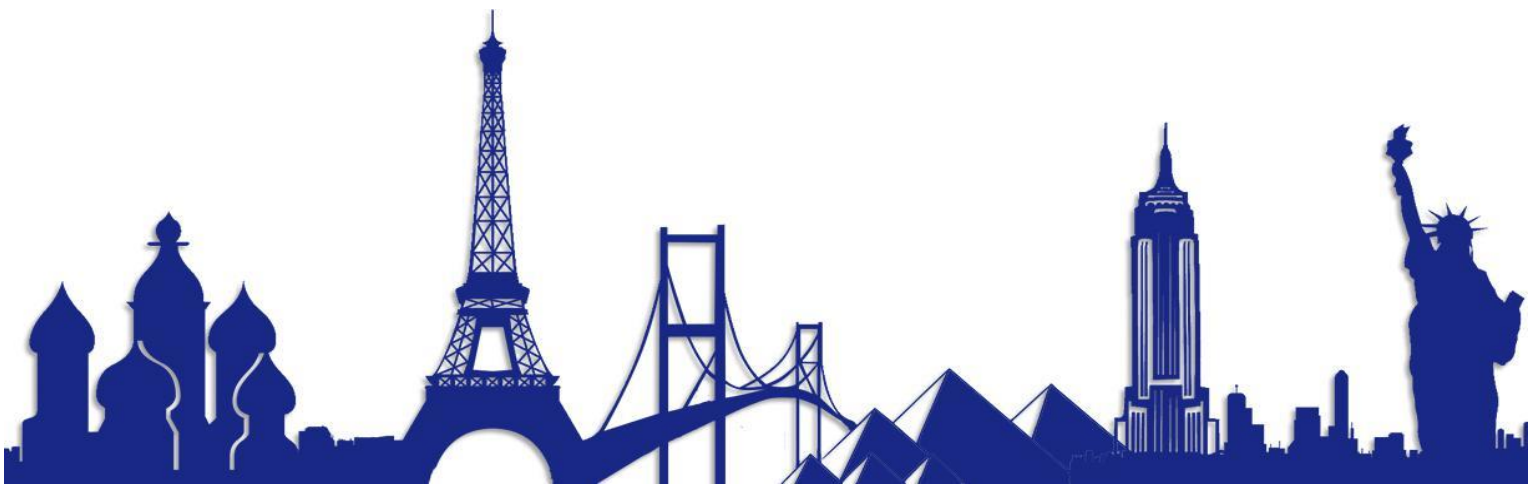
4. In 2015, on most of those imported agricultural products, the applied import tariffs maintained by Chilo, Meco and Haito varied between 30% and 40% *ad valorem*, and, on average, the applied rates were at least 20% below the bound rates. A few products were subject to tariff rate quotas (TRQs), either most-favoured-nation (MFN) or country-specific TRQs.

5. In its WTO Schedule of Concessions on goods, Chilo has a bound MFN TRQ for coffee, comprising a 30% *ad valorem* duty for a first in-quota of 70 tonnes of its imports, with out-of-quota imports being subject to a 90% *ad valorem* duty. The in-quota is allocated on a first-come-first-served basis to all exporters of coffee from WTO Members. Last year the in-quota was essentially used by exports from Aga (a neighbouring country, also WTO Member) and Meco. Note, however, that pursuant to a previous confidential agreement between Meco and Chilo, Meco benefitted from a preferential rate of 5% *ad valorem* duty for the first 70 tonnes of coffee exported to Chilo, and from an out-of-quota preferential duty of 60% *ad valorem*. With respect to coffee, Meco has a bound MFN import tariff of 25% *ad valorem* and Haito has a bound MFN import tariff of 70% *ad valorem.*

6. Chilo and Meco also produce several finished and semi-finished industrial products, mainly underwear, cosmetics and electronic products, most of which are exported. Haito produces parts and components for bicycles and roller-skates, also mainly for export.

2 THE CHIMEHA FTA

7. In 2015, Chilo, Meco and Haito concluded a trilateral trade agreement called the "CHIMEHA Free Trade Agreement" (CHIMEHA FTA) which entered into force on 1 January 2016, and has been incorporated by each country into its domestic law. Chilo, Meco and Haito have reported to the press that the CHIMEHA FTA covers "substantially all the trade" between them, and all WTO Members seem to agree with them.



8. This CHIMEHA FTA includes the following Chapters:

2.1 Chapter I – Duties on agricultural products

9. Chapter A provides that duties on all agricultural goods must be reduced from their current MFN applied levels (on average between 30% and 40% *ad valorem*) to 10% *ad valorem* by 2050. However, for TRQs, in-quota tariff duties are to be reduced by 50% by 1 January 2025, and out-of-quota tariff duties are to be reduced to 60% by the same date.

2.2 Chapter II – Duties on industrial products

10. Chapter II provides that tariff duties on all industrial goods (including finished and semi-finished goods) must be reduced to 5% by 2020. However, import tariff duties on all electronic goods shall be maintained below 15% *ad valorem*, which is in fact the applied tariff level that has been in place for the last 5 years. (Note that for most of those electronic goods the bound MFN import tariffs were above 35% *ad valorem*).

2.3 Chapter III– Basic rights and obligations

11. Chapter III contains general provisions and includes the following text in Article 303:

> "Articles III, XI, XII, XVIII, XX and XXI of the GATT 1994 are applicable *mutatis mutandis* as part of this FTA."

2.4 Chapter IV – Anti-dumping

12. Chapter IV contains the following provision in Article 404:

> "Reciprocal Exemption from the Application of Anti-dumping duty Law:
>
> 1. As of the date of entry into force of this FTA each Party agrees not to apply its domestic anti-dumping laws and regulation to goods of the other Parties. Specifically:
>
> (i) no Party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Parties;
>
> (ii) each Party shall terminate any ongoing anti-dumping investigations or inquiries in respect of such goods;
>
> (iii) no Party shall impose new anti-dumping duties or other measures in respect of such goods; and
>
> (iv) each Party shall revoke all existing orders levying anti-dumping duties in respect of such goods.
>
> 2. Each Party shall amend, and publish, as appropriate, its relevant domestic anti-dumping law in relation to goods of the other Parties to ensure that the objectives of this Article are achieved."

2.5 Chapter V - Environment

13. According to Chapter V, the parties may initiate dispute settlement proceedings under Chapter VIII if certain listed multilateral environmental agreements (MEAs) with trade components (such as CITES and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal) are not complied with. In addition, each of the parties agrees to provide a 0% import duty on 51 specified "green goods", if these products originate in a party to the FTA or in a WTO Member that is considered by the three parties to be a "Green accredited party" because it also offers, to the CHIMEHA FTA parties, 0% tariffs duties on the same 51 green goods (for example solar panels, wind-turbines and biodiesel).

2.6 Chapter VI - Special and Differential Treatment (S&DT)

14. All parties agree to promote the development of all developing countries. A set of special and differential treatments directed at Haito has been introduced in the FTA. Chapter VI contains an Article 606 stating:

> "Considering Haito's status as LDC, and with a view to assisting its economic diversification, Chilo and Meco shall reduce their import tariffs on all imports from Haito to zero within the first 3 years after the entry into force of this FTA, with the exception of tariffs and TRQs on coffee."

2.7 Chapter VII – Trade in services

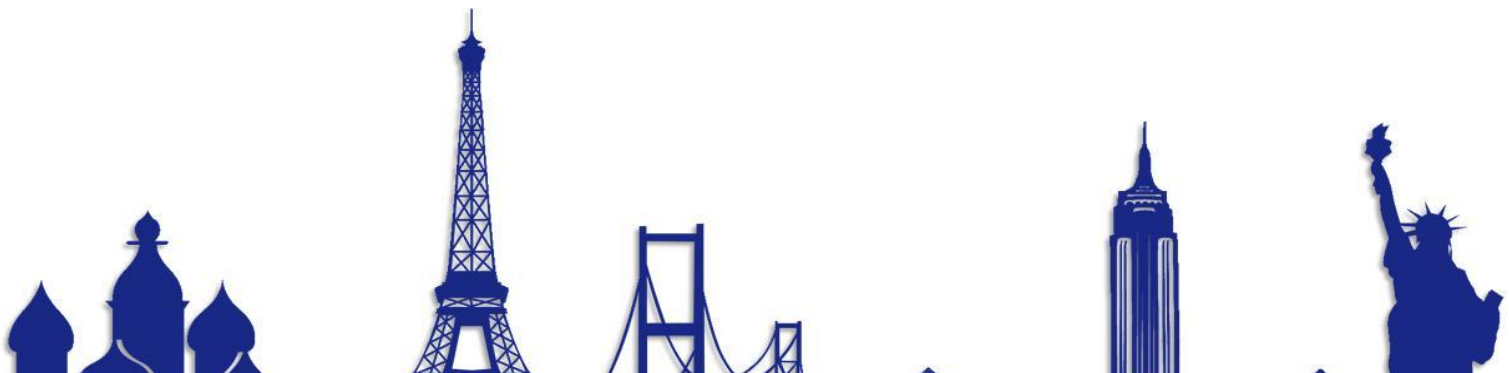
15. Chapter VII contains a long positive list of services covered by this free trade agreement to which the national treatment obligation (as defined in GATS Article XVII) and market access obligation (GATS Article XVI) are applicable.

2.8 Chapter VIII – Dispute settlement

16. The FTA contains a dispute settlement mechanism (DSM) for settling disputes between FTA parties. This FTA DSM is fairly similar to that of the WTO (the DSU), but it contains some different provisions. Notably, (i) there is a possibility for retroactive financial compensation when parties agree, (ii) there is a requirement that the FTA panel assesses the trade effects and the nullification of benefits caused by the measure found inconsistent with the FTA, and (iii) there is no appeal procedure provided under the FTA DSM.

17. In addition, Chapter VIII regulates the settlement of disputes under the WTO and the FTA. It states in Article 808:

> "Relationship to Dispute Settlement under the WTO:
>
> 1. Subject to this Article, disputes regarding any matter arising under both this FTA and the WTO Agreement, may be settled in either forum at the discretion of the complaining Party only.
>
> 2. Before a Party initiates a dispute settlement proceeding in the WTO against another Party on grounds that are substantially equivalent to those available to that Party



under this FTA, that Party shall notify the responding Party and any other FTA Party of its intention. If another FTA Party wishes to have recourse to dispute settlement procedures under this FTA regarding the matter, it shall inform promptly the (initial) notifying Party and those other Parties shall consult with a view to reaching consensus on the forum to be used. If the Parties cannot agree, the dispute normally shall be settled under this FTA.

3. In any dispute concerning:

(a) measures taken in the context of balance-of-payment problems; or

(b) a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

where the responding Party requests in writing that the matter be considered under this FTA, the complaining Party must, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this FTA."

3 NOTIFICATION OF CHIMEHA FTA TO THE WTO

18. Chilo informed all WTO Members of the detailed features of the CHIMEHA FTA and, on 1 January 2016, unilaterally notified it to the WTO under Article XXIV:7(a) of the GATT 1994 and Article V:7(a) of the GATS. In its notification Chilo refers to paragraph 3 of the WTO 2006 Transparency Mechanism Decision, which requires that "notification be made before the application of preferential treatment between the parties". However, Meco and Haito are surprised by this notification and believe that the agreement should rather be notified pursuant to the GATT Enabling Clause, because it was concluded by two developing countries and one LDC. Accordingly, Meco and Haito jointly submit a notification on 1 March 2016 to the WTO Committee on Trade and Development (COMTD) pursuant to paragraph 4(a) of the GATT Enabling Clause. The WTO Secretariat staff tried, unsuccessfully, to persuade Chilo, Meco and Haito to file a single notification to the WTO.

4 HAITO'S BALANCE-OF-PAYMENT (BOP) QUOTAS AND THE INCREASING TENSIONS BETWEEN THE PARTIES TO THE CHIMEHA FTA

19. Due to a serious BOP problem, Haito introduced a system of import quota restrictions on 1 March 2016. According to this system, imports of all products are limited to the amount exported to Haito in the preceding year (i.e. by March 2015). In its notification to the WTO BOP Committee, Haito invoked Article XVIII:B of the GATT 1994 to justify its measure. All exports from all WTO Members, including those from Meco and Chilo, are subject to Haito's BOP quota restriction scheme.

20. This created severe tensions between the parties to the CHIMEHA FTA.

21. Chilo and Meco considered that their exports to Haito should be exempted from such a BOP import restriction since they are entitled to preferential treatment pursuant to the FTA. Chilo argued that if Haito failed to remove its BOP import restrictions – at least with respect to imports

from Chilo – it will have to initiate WTO dispute settlement proceedings. Haito asserted that only the FTA dispute settlement mechanism can be used for initiating a dispute concerning a BOP measure implemented within the FTA.

22. Chilo responds by stating that an FTA cannot modify the fundamental right of WTO Members to access the WTO dispute settlement system. Chilo also states that the MFN application of Haito's BOP scheme across all WTO Members, including the parties to the CHIMEHA FTA, is WTO-inconsistent. Unless the BOP-scheme is removed, Chilo will initiate a dispute before the WTO Dispute Settlement Body (DSB).

5 CHILO'S COMPLAINTS TO THE WTO DISPUTE SETTLEMENT SYSTEM

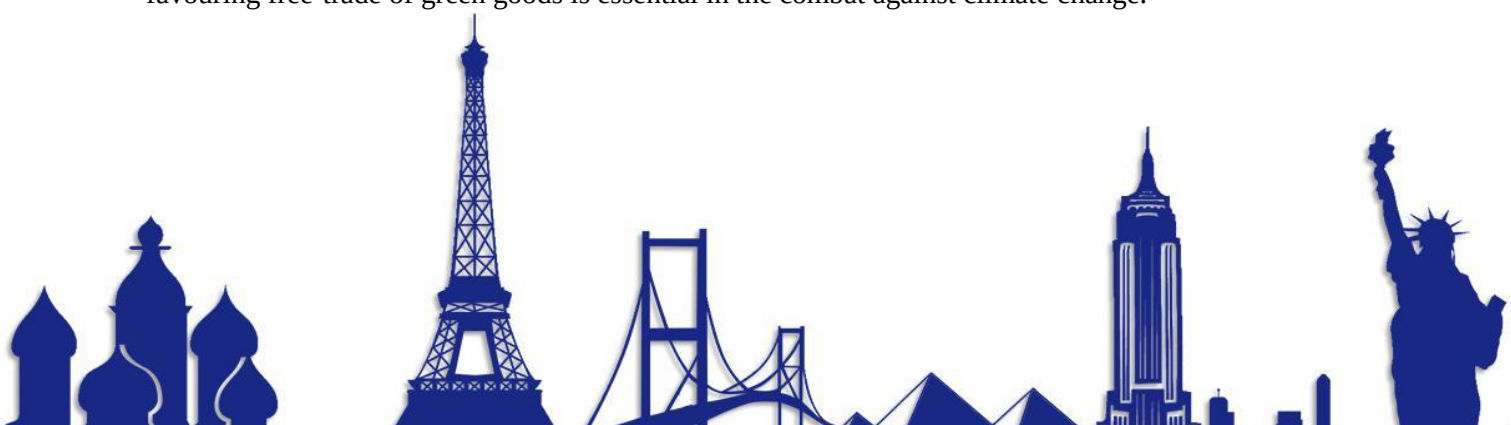
23. Chilo decided to initiate WTO dispute settlement consultations against Haito. After the confidential consultation meeting, the FTA parties rushed to the press and reported the following points which were, by no means, exhaustive of the arguments that could be raised with respect to Chilo's complaints and Haito' defences.

24. Chilo claimed that the BOP import restrictions imposed by Haito constitute internal restrictions that should be eliminated within an FTA pursuant to Article XXIV:8 of the GATT 1994. Haito responded that, in principle, BOP import restrictions must be applied on an MFN basis and that exempting the FTA parties from such BOP safeguard would be contrary to the WTO principle of "parallelism"; Haito was even able to refer to some excerpts from the *EC – Banana III* jurisprudence in this regard. In addition, Haito points to the fact that the only internal restrictions allowed within an FTA are those mentioned within the parentheses included in paragraph 8(b) of Article XXIV of the GATT 1994.

25. Haito added that, since this FTA was notified under the Enabling Clause, FTA parties can make use of all related flexibilities under the Enabling Clause, including exceptions to MFN, especially when the provisions of the Enabling Clause are more flexible than those of Article XXIV of the GATT 1994.

26. Chilo responded, first, that only Article XXIV of the GATT 1994 could potentially be invoked since the CHIMEHA FTA was notified first pursuant to Article XXIV of the GATT 1994. However, Chilo added that Haito cannot successfully invoke either Article XXIV of the GATT 1994 or the Enabling Clause because several provisions of the CHIMEHA FTA are inconsistent with basic rules of the WTO, including the conditions of Article XXIV of the GATT 1994. For example, the period for phasing out internal duties among the FTA parties; the obligation not to use anti-dumping duties against imports from FTA parties; the discriminatory levels of the coffee TRQs in favour of the parties to the CHIMEHA FTA; and the complete elimination of all tariffs on products imported from Haito only, appear not to meet the basic conditions for a WTO-consistent FTA. Haito expressed its surprise that Chilo was challenging the WTO-consistency of the FTA they had just concluded and accused Chilo of acting in bad faith in using the WTO dispute settlement mechanism to mount such a challenge.

27. Finally, Chilo argued that the zero tariff scheme on the list of green goods applicable only to the parties to the CHIMEHA FTA and to a few other WTO Members is inconsistent with Article I of the GATT 1994 and is not justified by Article XXIV of the GATT 1994. Haito responds *inter alia* that favouring free-trade of green goods is essential in the combat against climate change.



6 CLAIMS IN CHILO'S PANEL REQUEST TO THE DSB AND CIRCULATED TO WTO MEMBERS

28. After unsuccessful consultations, Chilo submitted a request for the establishment of a panel to the DSB, containing the following claims:

1. The BOP quota restrictions applicable to all imported products are inconsistent with Articles XI, XII XVIII, and Article XXIV:8(b) of the GATT 1994;

2. The reduction of the TRQs on agricultural products provided for in Chapter I of the CHIMEHA FTA (i.e. the reduction by 50% of the in-quota tariff level, as well as the reduction by 60% of the tariff level applicable for the out-of-quota), are inconsistent with Article XIII of the GATT 1994;

3. The S&DT provisions of Chapter VI of the CHIMEHA FTA in favour of Haito are inconsistent with Article I:1 of the GATT 1994 and the Enabling Clause;

4. The provisions of Chapter V of the CHIMEHA FTA providing zero import tariffs to listed green goods from parties of the CHIMEHA FTA and a few other WTO Members are inconsistent with Article I:1 of the GATT 1994;

5. The provisions of Chapter IV of the CHIMEHA FTA on anti-dumping are inconsistent with Article 9.2 of the WTO Anti-dumping Agreement.

7 NOTE FROM THE CASE-AUTHOR

For strategic reasons, claims, defences and arguments relating to the "substantially all the trade" references in Article XXIV:8(b), are not to be raised or developed by the participants in their written or oral submissions. In addition, the participants are not be expected to provide any economic discussion or assessment under Article XXIV:5, since they were not provided with any data. They should nonetheless know the legal test. Moreover, claims, defences and arguments relating to Article XX of the GATT 1994 to justify any of the potential inconsistencies invoked in this dispute, are not to be raised or developed by the participants in their written submissions. Finally, the participants should assume that the CHIMEHA FTA does cover substantially all the trade. The participants should also assume that Haito does face real balance-of-payment (BOP) problems and has imposed effective BOP import restrictions.

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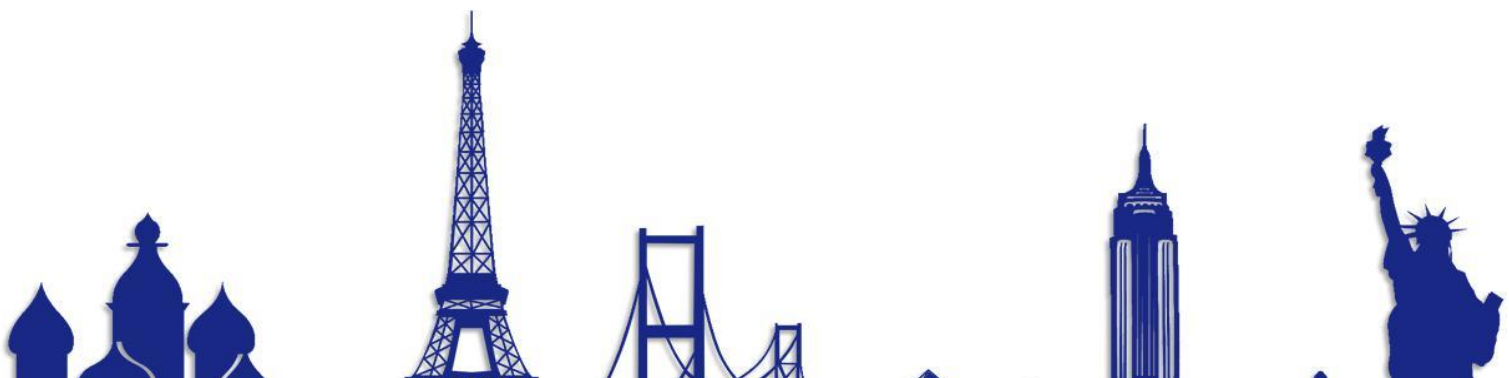

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- Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, (*EC – Poultry*), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031

- Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (*EC – Bananas III (Article 21.5– Ecuador II) / EC – Bananas III (Article 21.5 – US)*), WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165;

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- *Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, (*EC – Tariff Preferences*), WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925.

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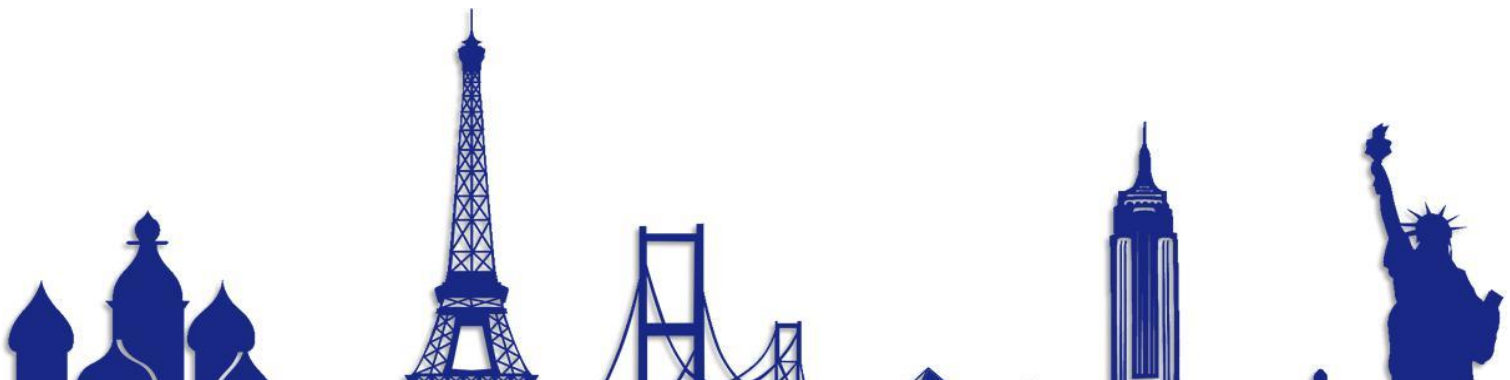

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Team: 050

ELSA MOOT COURT COMPETITION ON WTO LAW 2016-2017

Haito – The CHIMEHA FTA between Chilo, Meco and Haito

Chilo
(Complainant)

vs

Haito
(Respondent)

SUBMISSION OF THE COMPLAINANT

***Table of** Contents*

List of References

Short Form	Full Citation
TREATIES AND AGREEMENTS	
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ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CCFTA, EEA, EFTA	Canada – Chile Free Trade Agreement (1997), European Economic Area (1994), European Free Trade Association (2002)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) 33 I.L.M. 112
GATT	General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187
SCRFTA, EUCPFTA, EUSKFTA	Singapore – Costa Rica FTA (2010), EU – Colombia and Peru FTA (2013), EU – South Korea FTA (2011)
VCLT	Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331
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Understanding on BOP	Understanding on the Balance-of-Payments provisions of the General Agreement on Tariffs and Trade 1994
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Problem	Problem, ELSA Moot Court Competition (EMC2) on WTO Law, Case 2016-2017 amended, *The CHIMEHA between Chilo, Meco and Haito*
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EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (September, 25 1997)
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EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (April 20, 2004)

EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (April 20, 2004)
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List of Abbreviations

Abbreviation	Description
AB	Appellate Body
ABR	Appellate Body Report
AD	Anti-dumping
ADA	Anti-dumping Agreement
ADM	Anti-dumping measure
AP	Agricultural product
Art. I:1	Article I:1 of the GATT 1994
Art. II	Article II of the GATT 1994
Art. XI	Article XI of the GATT 1994
Art. XII	Article XII of the GATT 1994
Art. XIII	Article XIII of the GATT 1994
Art. XVIII	Article XVIII of the GATT 1994
Art. XXIV	Article XXIV of the GATT 1994
Art./arts.	Article/articles
BOP	Balance-of-payments
BOP system	BOP quota restriction system introduced by Haito
Ch.	Chapter
CTD	Council for Trade in Goods
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ENC	Enabling Clause
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade 1994
GG	Green good
MFN	Most Favoured Nations
ORRC	Other restrictive regulation of commerce
Para./paras.	Paragraph/paragraphs
PR	Panel report

S&DT	Special and differential treatment
SCMA	Agreement on Subsidies and Countervailing Measures
Secret agreement	Secret agreement between Chilo and Meco
The CHIMEHA	Free Trade Agreement between Chilo, Meco and Haito
The FTA partners	Chilo, Meco and Haito
The S&DT of Art. 606	The S&DT of Article 606 of Chapter VI of the CHIMEHA in favour of Haito
TM	Transparency Mechanism
TRQ	Tariff rate quota
TRQs on AP	TRQs on agricultural products provided for in Chapter I of the CHIMEHA
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Summary of Arguments

I. THE WTO JURISDICTION APPLIES TO THE DISPUTE IN QUESTION

- Chilo as a complainant used its discretion and submitted the request for the establishment of the panel to the WTO DSB. The DSB cannot decline a case, because it will '*diminish*' the right of Chilo under Art. 23 of the DSU.
- Haito did not fulfil procedural condition of Ch. VIII required to bring a dispute in the FTA forum. Chilo fulfilled '*good faith*' principle of DSU Arts. 3.7, 3.10 as there is no relinquishment of Chilo's right, because it depends upon Haito's recourse to the FTA's DSM.

II. THE BOP SYSTEM IS INCONSISTENT WITH GATT ART. XI:1

- The BOP system is a *de jure* restriction, because it limits import on all products to the amount exported to Haito in the preceding year.

III. THE BOP SYSTEM IS INCONSISTENT WITH GATT ARTS. XII, XVIII:B AND XXIV:8(B)

- The application of the BOP system to the FTA partners is inconsistent with Art. XXIV:8(b).
- Haito is subject to the provisions of Art. XII because the list is '*exhaustive'* and Haito is not a country that can support only low standards of living.
- The BOP system did not meet all the requirements either of Art. XII or XVIII:B. It has caused '*unnecessary damage*' to the interests of Chilo.
- The BOP system was *not necessary* for the formation of the CHIMEHA.

IV.THE REDUCTION OF THE TRQs ON AP IS INCONSISTENT WITH GATT ART. XIII

- The reduction of the TRQs on AP falls within the ambit of Art. XIII since in fact it will result in *re-allocation of* the TRQs' *shares* among suppliers.
- The measure at hand does not comply with rules of TRQs allocation under Art. XIII:2(d). Aga and Meco as two major suppliers on Chilo's coffee market have '*a substantial interest*' in supplying it. The secret agreement between Chilo and Meco is not an agreement under Art. XIII:2(d). It was reasonably practicable to seek an agreement with Aga as to the allocation of shares in the coffee TRQ. However, this requirement was not met as well as the TRQ shares were not allotted to Members having a 'substantial interest' in supplying to Chilo.
- Also the reduction of TRQs on AP did not meet the *non-discriminatory requirement* of Art. XIII:1 and the purpose of TRQs allocation set out in the chapeau of Art. XIII:2.

V. THE S&DT PROVISIONS OF ART. 606 ARE INCONSISTENT WITH GATT ART. I:1 AND THE ENC

- The S&DT provisions of Art. 606 create '*an advantage*' for the export of origin based '*like products*', which is not granted '*immediately and unconditionally*' to the '*like*' products originating

in other WTO members, thus violating Art. I:1.

- The S&DT provisions of Art. 606 cannot be justified under ENC para. 2(c) by not granting the reduction of tariffs on the '*mutual*' basis to the FTA partners and thus *imposing unjustifiable burdens on trade* of other WTO members.

VI. ZERO IMPORT TARIFFS TO THE LISTED GGs FROM THE FTA PARTNERS AND A FEW OTHER WTO MEMBERS IS INCONSISTENT WITH GATT ART. 1:1

- Imposition of a zero import tariffs to the listed GGs from parties of the CHIMEHA and a few other WTO Member measure grants an '*advantage*' that is not provided '*immediately and unconditionally'* to all other WTO Members inconsistently with Art. 1:1.

VII. THE PROVISIONS OF CH. IV OF THE CHIMEHA ON AD ARE INCONSISTENT WITH ART 9.2 OF THE ADA

- Paras. 1 (iii) and (iv) of Art. 404 of Ch. IV of the CHIMEHA are *de jure* inconsistent with Art. 9.2 of the ADA, as these provisions amount to discrimination against non-FTA partners.
- Paras. 1 (i) and (ii) of Art. 404 of Ch. IV of the CHIMEHA are potentially inconsistent with Art. 9.2 of the ADA, as the investigating authority may limit the scope of initiation/review/termination to the imports from non-CHIMEHA countries.

VIII. THE CHIMEHA IS INCOMPITABLE WITH GATT ART. XXIV

- The 10-year condition of Art. XXIV:5(c) is not met as it is not an exceptional case.
- The CHIMEHA was not notified in accordance with WTO law as it was done separately without the consent of all parties.
- The tariffs were not eliminated, but only reduced in the non-reciprocal manner.
- The reduction of the TRQ on AP was not necessary for the formation of the CHIMEHA.
- The tariff preferences granted to certain listed GGs originating in the accredited Members that are not parties to the CHIMEHA falls beyond the scope of this FTA and is not justified under Art. XXIV.
- The violation of Art. 9.2 of the ADA is unjustifiable under Art. XXIV, since Art. 404 of Ch. IV of the CHIMEHA does not meet the requirements Art. XXIV: 8(b) and the necessity test.

Statement of Facts

1. Chilo, Meco and Haito are Members of the World Trade Organization (WTO), and they all produce both agricultural and industrial products. Chilo is a developing country and Haito is an LDC.
2. Chilo, Meco and Haito concluded a trilateral trade agreement (the CHIMEHA) which covered 'substantially all the trade' and entered into force on 1 January 2016. On the same date, Chilo unilaterally notified it to the WTO under Article XXIV:7(a) of the GATT 1994 and Article V:7(a) of the GATS. However, Meco and Haito jointly submit a notification on 1 March 2016 only to the WTO Committee on Trade and Development under para. 4 (a) of the ENC despite the fact that the CHIMEHA covers both trade in goods and trade in services.
3. Haito introduced a system of import quota restrictions on 1 March 2016, because of BOP problem, limiting the amount of exports to Haito to the amount of the preceding year (i.e. by March 2015 before the formation of the CHIMEHA). The FTA partners were subject to Haito's BOP system.
4. Pursuant to Ch. I of the CHIMEHA the levels of TRQs on AP among the parties to the CHIMEHA must be reduced. In-quota tariff duties must be reduced to 50% by 1 January 2025, and out-of-quota tariff duties must be reduced to 60% by the same date.
5. Ch. II constitutes the reduction of tariff duties on all industrial products to 5% by 2020. Pursuant to Ch. II all import duties on electronic good must be maintained below 15% ad valorem.
6. Ch. III contains general provision on the basic rights and obligations.
7. Ch. IV refers to AD proclaiming the reciprocal exemptions from the application of AD laws among the CHIMEHA parties.
8. According to Ch. V of the CHIMEHA, zero import tariffs were provided to listed 51 GGs from the CHIMEHA parties and a few other WTO members.
9. Ch. VI refers to a set of S&DT introduced to Haito as an LDC by the reduction of the import tariffs to zero within the first 3 years after the entry into force of the FTA with the exception of tariffs and TRQs on coffee.
10. According to the CHIMEHA there is an established dispute settlement mechanism.

Identification of the Measure at Issue

Measure 1: The Haito's BOP system of quotas unduly applied to the FTA partners.

Measure 2: The reduction of TRQs on AP.

Measure 3: The reduction of import tariffs to zero within 3 years on all imports from Haito, except for coffee.

Measure 4: Zero import duty on the GGs accorded only to the 'green accredited parties'.

Measure 5: Reciprocal exemption from initiation of AD investigation or review, imposition of AD duties as well as an obligation to terminate ongoing investigations and to revoke AD orders with regard to the products originating in the CHIMEHA parties.

Measure 6: The CHIMEHA as generally inconsistent with WTO law.

Legal Pleadings

I. THE WTO JURISDICTION APPLIES TO THE DISPUTE IN QUESTION

1. Chilo claims that the WTO DSB has jurisdiction over the current dispute. Because the choice of selecting one forum over another remains on a challenging Member,[1] by submitting a request for the establishment of a panel to the WTO DSB,[2] Chilo has enjoyed discretion in deciding that it is '*fruitful to bring a case*'[3] and chosen the WTO as an appropriate forum. Absence of an appeal procedure in the FTA DSM[4] gives the WTO DSB an additional advantage over the FTA's DSM.

2. The WTO DSB always has authority and even obligation to consider cases of violations of WTO obligations.[5] No provisions in the CHIMEHA can '*diminish*' the right of a complaining Member[6] to seek the redress of a violation of obligations within the meaning of Art. 23 of the DSU.[7] Thus, deciding to decline WTO jurisdiction, a panel will '*diminish*' Chilo's rights.

3. It's true that the provisions of GATT Arts. XXII and XXIII can be invoked in the context of BOP measures in the WTO DS.[8] In any event, the current dispute is not limited to BOP and environmental measures, but also covers inconsistency of the FTA with GATT Arts. I:1, XIII and 9.2 of the ADA. Consequently, jurisdiction over this dispute cannot be limited to the FTA's DSM.

4. Importantly, Haito has breached the following requirements to bring the dispute under the CHIMEHA DSM: first, even if Haito had an intention to bring a dispute before an FTA DSM it did not notify all the FTA partners[9] as required by para. 2 of Art. 808 of the CHIMEHA; second, Haito

[1] Marceau (2015), 7.
[2] Problem, [28].
[3] ABR, *Peru – Agricultural Products*, [5.18]; Marceau (2015), 6.
[4] Problem, [16].
[5] PR, *US – Section 301 Trade Act*, [7.43]; Marceau, Tomazos (2008), 61.
[6] DSU, Arts. 3.2, 19.2.
[7] ABR, *Mexico – Taxes on Soft Drinks*, [53]; Marceau, Wyatt (2010), 71-72.
[8] Understanding on Article XXIV, [12].
[9] Clarifications, [7].

failed to submit a written request to Chilo to consider a dispute under an FTA DSM as prescribed by para. 3 of Art. 808 of the CHIMEHA.[10] The respondent did not fulfil procedural requirements of Art. 808. Accordingly, no clear stipulation of a relinquishment of Chilo's right to have recourse to the WTO DSM exists,[11] because it is conditional upon Haito's recourse to the FTA's DSM, which did not happen. Thus, Chilo complied with good faith requirements of Arts. 3.7 and 3.10 of the DSU.

II. THE BOP SYSTEM IS INCONSISTENT WITH GATT ART. XI:1

5. Art. XI:1 establishes a general prohibition of import or export restrictions. The term '*restriction*' means '*a limitation on action, a limiting condition or regulation.*'[12] It covers *de jure* and *de facto* prohibition.[13] Haito introduced a system of import quota restrictions on all products, limiting its import to the amount exported to Haito in the preceding year.[14] Consequently, this limitation constitutes *de jure* restriction, which falls under Art. XI:1.

III. THE BOP SYSTEM IS INCONSISTENT WITH GATT ARTS. XII, XVIII:B AND XXIV:8(B)

a. Art. XVIII:B is not applicable to the FTA partners under Art. XXIV:8(b) because the list is 'exhaustive'

6. Art. XVIII is not allowed between FTA partners because the parenthesis of Art. XXIV:8(b) is *exhaustive*. First, the AB when addressing this issue did not indicate that the list is illustrative; it rather referred to '*certain restrictive regulations.*'[15] '*Certain*' is interpreted in its ordinary meaning as '*specific*',[16] i.e. expressly stated in Art. XXIV:8(b). Second, Haito should not overrule the intention of the drafters purposely not included some Arts. in the list.[17] Moreover, the internal requirement for an FTA reads as follows: '…d*uties and ORRC are eliminated*…'[18] between the FTA partners, i.e. the FTA partners must be excluded from the BOP system. For this purpose the parenthesis of Art. XXIV:8(b) includes Art. XIV which is an exception to an MFN application of the BOP measures. The application of the BOP system to Chilo and Meco impedes the purpose of the CHIMEHA, thus, violating Art. XXIV:8(b).

[10] Problem, [17], Clarifications, [101].
[11] ABR, *Peru – Agricultural Products*, [5.26].
[12] PR, *India – Quantitative Restrictions*, [5.129].
[13] PR, *India – Autos*, [7.269 - 7.270]; PR, *Argentina – Hides and Leather*, [11.17].
[14] Problem, [19].
[15] ABR, *Turkey – Textile*, [48].
[16] Oxford Dictionary - https://en.oxforddictionaries.com/definition/certain
[17] Bartels (2006), 144.
[18] GATT, Art. XXIV:8(b).

b. Haito cannot invoke either Art. XII or XVIII:B as an exception

i. Art. XII cannot be used as the BOP system was notified under Art. XVIII:B

7. Art. XII can be invoked by any country.[19] However, Haito failed to notify the BOP system under Art. XII:4(a)[20] and, thus, cannot use this Art. as justification.

ii. Haito does not meet eligibility requirements under Art. XVIII:B

8. Art. XVIII:B is designated only for developing countries eligible under para. 4 of this Art.[21] A member's economy must '*only support low standards of living*'.[22] Otherwise, a developing country may submit applications to the contracting parties seeking eligibility.[23] Haito does not fall under Art. XVIII:4(a). First, the main occupation in developing countries is generally agriculture.[24] However, as an LDC Haito is not only dependent on agriculture sector, but also produces and trades with industrial products.[25] Second, Haito imports APs to satisfy the diverse and sophisticated tastes of their populations,[26] which demonstrates higher economic level of its development as people of Haito are able to buy not only the products of a basic necessity. Thus, Haito's standards of living cannot be described as low.

9. Haito failed to submit application to the contracting parties under Section D of Art. XVIII to be considered eligible under Art. XVIII:4(b). The BOP system was only notified under Article XVIII:B.[27] Consequently, Haito cannot invoke Art. XVIII:B as a justification.

c. The BOP system is in any case inconsistent with Arts. XII and XIII:B

10. In any case, Haito's BOP system violates Arts. XII and XVIII:B, because: (i) they cause unnecessary damage to the commercial and economic interests of Chilo.[28]

i. The BOP system has caused unnecessary damage to the interests of Chilo

11. The BOP system violates both Arts. XII:3(c)(i) and XVIII:10, causing *unnecessary damage* to the interests of Chilo. Art. XII:3(c)(i) requires to avoid causing *serious prejudice* to exports of a commodity on which the economy of the party is largely dependent.[29] The interpretation of serious prejudice pursuant to the VCLT[30] is available under the SCMA and corresponding case law. First, serious prejudice should provide for negative effects on trade because of the introduced measure.[31]

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[19] Max Planck Commentaries (2011), 304.
[20] Problem, [19].
[21] Max Planck Commentaries (2011), 412.
[22] GATT, Art. XVIII:4(a).
[23] GATT, Art.XVIII:4(b).
[24] See http://www.fao.org/docrep/003/X4829e/x4829e04.htm
[25] Problem, [6].
[26] *Idem*, [3].
[27] *Idem*, [19].
[28] GATT, Arts. XII:3(c)(i), XVIII:10.
[29] GATT, Text of Note Ad Article XII.
[30] VCLT, Art. 31.
[31] PR, *Korea – Commercial Vessels*, [7.578].

In our case, *serious prejudice* to Chilo's interests exists, because the BOP system has the effect of *impediment* of exports in the market of Haito.[32] By concluding the CHIMEHA, Chilo expected to increase the capacities of its industries due to the liberalization of trade and more favourable trade conditions, namely, for the agricultural sector,[33] comprising bovine meat, wheat, soya, coffee and bananas,[34] and the industrial sector.[35] Haito's introduction of import quota restrictions on all products held back the exports of the products from Chilo and Meco[36] causing *serious prejudice*. Thus, Chilo is facing *unnecessary and unexpected damage* to its economic interests, which is inconsistent with both Arts. XII:3(c)(i) and XVIII:10.

d. The BOP system cannot be justified under GATT Art. XXIV

12. In order to have a benefit of defence under Art. XXIV an otherwise GATT-inconsistent measure must meet the following requirements: (i) the measure at issue must be introduced upon the formation of an FTA; (ii) the FTA has to meet the requirements of sub-paras. 8 (b) and 5 (b); (iii) the measure at issue must be necessary for the formation of the FTA.[37]

i. The BOP system was not introduced upon the formation of the CHIMEHA

13. The BOP system was introduced on 1 March 2016.[38] However, the CHIMEHA was notified on 1 January 2016 and formed before this date.[39] Thus, the BOP system was introduced after and *not upon the formation* of the CHIMEHA.

ii. The BOP system was not necessary for the formation of the CHIMEHA

14. A measure is necessary when there is no less trade restrictive measure available.[40] Back by the 1970s contracting parties understood that quantitative restrictions are inefficient mechanism for dealing with BOP problems.[41] It is preferred *to use price-based mechanisms* for dealing with the BOP problems, because they are less trade restrictive.[42] Import surcharge is available in the current situation as well as less trade disruptive,[43] because it does not completely block the trade as quota does and is a more transparent mechanism. Thus, Art. XXIV cannot justify the BOP system.

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[32] SCMA, Art. 6.3.
[33] Problem, [9].
[34] Problem, [2].
[35] Problem, [10].
[36] ABR, *US – Large Civil Aircraft (2nd complaint)*, [1071].
[37] ABR, *Turkey – Textile*, [58].
[38] Problem, [19].
[39] Problem, [18].
[40] ABR, *Turkey – Textile*, [62]; Understanding on BOP, [2].
[41] Max Planck Commentaries (2011), 344.
[42] See https://www.wto.org/english/tratop_e/bop_e/bop_info_e.htm; Max Planck Commentaries (2011), 345.
[43] Understanding on BOP, [2].

IV.THE REDUCTION OF THE TRQs ON AP IS INCONSISTENT WITH GATT ART. XIII

a. The measure at issue falls within the ambit of GATT Art. XIII

15. Under Art. XIII:5, Art. XIII applies to the administration of tariff quotas.[44] TRQs must comply with the requirements of both Art. I:1 and XIII which apply to different elements of the measure at issue.[45] *In casu*, the CHIMEHA reduces tariffs in the TRQs on AP what in fact will result in re-allocation of the TRQs' shares among the suppliers. Having cut in half AP in-quota TRQs for the CHIMEHA partners,[46] it obviously leads to mutual enlargement of the CHIMEHA parties' export shares. That will lead to re-allocation of the shares and the requirements of Art. XIII:1 and XIII:2 apply.[47]

b. The reduction of the TRQs on AP violates the requirements of GATT Art. XIII:2(d)

16. Art. XIII:2(d) should be analysed first as *lex specialis* that allows for discrimination between Members having and not having a substantial interest in supplying the product at issue.[48]

i. Aga and Meco have a 'substantial interest' in supplying coffee

17. Aga and Meco have *'a substantial interest'* in supplying coffee because last year they essentially used this Chilo's in-quota.[49] The term 'essentially' means substantially or in the main.[50] Performing comparative exercise based on the structure of its coffee market Chilo involves an assessment of the different position of the different coffee suppliers.[51] In that way Chilo considers that two major coffee suppliers on its market – Aga and Meco have 'substantial interest' in supplying coffee to Chilo.

ii. The secret agreement does not amount to an 'agreement' under GATT Art. XIII:2(d)

18. Art. XIII:2(d) imposes an obligation *to seek an agreement* regarding the allocation of TRQ shares from members having a 'substantial interest'.[52] However, the secret agreement between Chilo and Meco[53] does not constitute an agreement within the meaning of Art. XIII:2(d) because it was reached without Aga who has a 'substantial interest'.[54]

iii. The agreement with Aga under GATT Art. XIII:2(d) was neither sought nor reached

19. It was *reasonably practicable* to seek an agreement with Aga regarding the allocation of shares in the coffee TRQ. 'Practicable' is defined as feasible.[55] 'Reasonably' indicates that Members do not have to resort to allocation by agreement only where it is theoretically feasible, but practically

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[44] Max Planck Commentaries (2011), 338; ABR, *EC – Bananas III (Art. 21.5)*, [335].
[45] ABR, *EC – Bananas III (Art. 21.5)*, [343].
[46] Problem, [9].
[47] ABR, *EC – Bananas III (Art. 21.5)*, [343].
[48] PR, *EC – Bananas III (Ecuador)*, [7.75].
[49] Problem, [5].
[50] The Free Dictionary - http://www.thefreedictionary.com/essentially
[51] PR, *US – Steel Safeguards*, [7.1856].
[52] GATT, Art, XIII:2(d).
[53] Problem, [5].
[54] ABR, *EC – Poultry*, [93].
[55] Collins Dictionary - https://www.collinsdictionary.com/dictionary/english/practicable

expensive, cumbersome and lengthy.[56] Since only Aga and Meco have a 'substantial interest' in supplying coffee – it was feasible and not extremely expensive to seek an agreement with them as Art. XIII:2(d) obliges, but this obligation was breached.

iv. TRQ shares are not allotted to Members having a 'substantial interest' in supplying coffee

20. Assuming that the first method was not reasonably practicable, it was necessary to allocate shares among the Members having a 'substantial interest' in AP supplying on the basis of their trade during a previous representative period.[57] Since, one-year[58] could be considered as a representative period,[59] Aga's coffee export had to be taken into account. In turn, the CHIMEHA failed to do it and excluded suppliers from non-CHIMEHA partners (Aga, in particular) from the reduced levels of TRQs in violation of the requirements of Art. XIII:2(d).

21. What is more, as far as Art. XIII:2(d) is a permissive 'safe harbour', compliance with its requirements is presumed to lead to a distribution of trade as foreseen in the chapeau of Art. XIII:2 when substantial suppliers are concerned.[60] Since specific rules of TRQ allocation were not fulfilled, the whole purpose of Art. XIII enshrined in its chapeau was disregarded.

c. In any event, the reduction of TRQs on AP is incompatible with the chapeau of GATT Art. XIII:2 and Art. XIII:1

22. Even accepting the doubtful premise that Aga and Meco do not have a 'substantial interest' in supplying coffee, the measure at hand is inconsistent with the chapeau of Art. XIII:2 and Art. XIII:1.[61]

i. The reduction of TRQs on AP violates requirements of the chapeau of GATT Art. XIII:2

23. The exclusion of non-CHIMEHA AP suppliers from the reduced levels of TRQs is not aimed 'at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions'.[62] Exclusion of efficient suppliers, such as Aga, would not serve the purpose of using past trade performance to approximate the shares in the absence of the restrictions.[63] Hence, the measure at hand is not aimed at a distribution of trade that affords access to, and competitive opportunities under, the TRQs to all supplying Members reflecting their comparative advantage.[64]

[56] Max Plank Commentary (2011), 333.
[57] Van den Bossche (2013), 1029.
[58] Problem, [5].
[59] PR, *US – Steel Safeguards*, [7.1861].
[60] ABR, *EC – Bananas III (Art. 21.5)*, [338].
[61] ABR, *EC – Bananas III*, [161].
[62] GATT, Art. XIII:2.
[63] PR, *EC – Poultry*, [230].
[64]Max Planck Commentaries (2011), 340.

ii. The reduction of TRQs on AP violates non-discriminatory principle of GATT Art. XIII:1

24. In respect to the TRQs, Art. XIII:1 stipulates that no TRQ can be applied by a Member on the importation of any product of the territory of any other Member, *unless the importation of the like product of all third countries is similarly made subject to the TRQ*.[65] To the contrary, the CHIMEHA provides reduction of TRQs for exports of AP from its parties[66] while TRQs levels for non-FTA AP export remain unreduced. In turn, such a benefit for the CHIMEHA parties represents a disadvantage for other Members.[67] The differential treatment does not *'similarly prohibit or restrict'* imports of third-country AP.

25. Moreover, once the CHIMEHA reduces TRQs levels on coffee for Haito as a Member which does not have a 'substantial interest' in supplying it to Chilo's market it must provide such a benefit for all other Members without a 'substantial interest'.[68] Having not done so, the CHIMEHA leads to *the discrimination between the Members without a 'substantial interest'* in supplying AP which are also subject to the basic principle of non-discrimination.[69] Hence, the measure at issue is inconsistent with Art. XIII:1.

d. When administering TRQs it is necessary to comply with GATT Art. II

26. Measures taken by Members under Art. XIII must comply with Art. II and the respective tariff schedule.[70] Art. II:1(b) establishes not only market access conditions, but also conditions of competition[71] and competitive opportunities of imported products'.[72] Meanwhile, the reduction of TRQs on AP among CHIMEHA Members adversely affects the conditions of competition for a non-CHIMEHA Member's products and provides for them less favourable treatment under Art. II:1(a).[73] By affecting expectations of a competitive relationship of the other contracting parties, the CHIMEHA failed to take into account Art. II and acted inconsistently with its requirements.

V. THE S&DT PROVISIONS OF ART. 606 ARE INCONSISTENT WITH GATT ART. I:1 AND THE ENC

a. The S&DT provisions of Art. 606 are inconsistent with Art. I:1

27. The S&DT provisions of Art. 606 violate an MFN obligation of Art. I:1 which is the 'cornerstone of the GATT'.[74] As an exception from Art. I:1[75] the ENC *does not exclude the applicability of Art.*

[65] ABR, *EC – Bananas III*, [161].
[66] Problem, [9].
[67] PR, *EC – Bananas (Ecuador)*, [5.109].
[68] ABR, *EC – Bananas III*, [161].
[69] *Idem*, [163].
[70] Max Planck Commentaries (2011), 338.
[71] PR, *Russia – Tariff Treatment*, [7.18].
[72] *Idem*, *Russia – Tariff Treatment*, [7.12].
[73] PR, *EC – IT Products*, [7.757].
[74] ABR, *EC – Tariff Preferences*, [101], ABR, *Canada – Autos*, [69].
[75] ABR, *EC – Tariff Preferences*, [99].

I:1, which should be examined as a first step.[76] Art. I:1 requires any '*advantage*' granted to any product originating in any WTO Member to be accorded '*immediately and unconditionally*' to the '*like*' products originating in any other Members.[77]

i. The S&DT provisions of Art. 606 fall within the scope of application of Art. I:1

28. The S&DT provisions that provide for elimination of import tariffs for products from Haito, except coffee,[78] *fall within the scope* of Art. I:1 since they relate to customs duties.[79]

ii. The products of Haito's origin comply with the 'likeness' requirement

29. In current case, 'a hypothetical likeness approach on the premise of an origin-based distinction' should be adopted.[80] There is a '*hypothetical origin based distinction*'[81] between the *'like'* products from Haito and other WTO Members since S&DT is granted only to products from Haito.

iii. The S&DT provisions of Art. 606 provide an 'advantage' to Haito that is not granted 'immediately and unconditionally' to the 'like' products originating in all other Members

30. According to the meaning of the *'advantage'* pursuant to Art. I:1, elimination of import tariffs on all imports from Haito, excluding coffee, creates 'more favourable competitive opportunities' exclusively for Haito, affecting trade relationships among the products of the CHIMEHA as well as of the other Members.[82] A beneficial market access in favour of Haito affects the flow of trade in goods[83] and constitutes an *'advantage'* that is not accorded to the 'like' products originating in other Members *'immediately and unconditionally',* because imported products must face the '*condition*' to originate in Haito. Since the CHIMEHA is in force from January 1, 2016,[84] the S&DT provisions create *de jure* discrimination *vis-a-vis* like products from other Members in violation of Art. I:1.

b. The S&DT provisions of Art. 606 are inconsistent with the ENC

31. Having demonstrated Art. I:1 inconsistency Chilo proceeds with the second step of the required test[85] claiming that the S&DT cannot be justified under the ENC because it violates the following requirements of the ENC (i) para. 2(c); (ii) para. 3(a); (iii) para. 3(b). Additionally, the CHIMEHA is not covered by the ENC and is inconsistent with para. 4(a). Chilo has complied with its burden of proof [86] by identifying the provisions of the ENC violated by Haito.

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[76] *Idem*, [101].
[77] PR, *EC – Tariff Preferences*, [7.58].
[78] Problem, [14].
[79] PR, *EC – Tariff Preferences*, [7.55].
[80] PR, *US – Poultry*, [7. 428].
[81] PR, *Columbia – Ports of Entry*, [7.356]
[82] PR, *EC – Bananas III (Guatemala and Honduras)*, [7.239].
[83] PR, *Colombia – Ports of Entry*, [7.352].
[84] *Ibidem.*
[85] ABR, *EC –Tariff Preferences*, [101].
[86] *Idem*, [115].

i. The S&DT provisions of Art. 606 are inconsistent with para. 2(c) of the ENC

32. Para. 2(c) of the ENC establishes the requirements for an FTA among '*less-developed*' contracting parties, which are interpreted as '*developing*' WTO Members.[87] Such an FTA must provide for either mutual reduction or mutual elimination of tariffs.

33. The dictionary interpretation of the word '*mutual*' means '*experienced or expressed by each of two or more people or groups about the other; reciprocal.*'[88] In the present case, reduction of tariffs is not *'mutual'.* While electronic products from Haito enjoy elimination of tariffs, same products from Chilo and Meco face no tariff reduction since 15% tariff has been applied for the last 5 years.[89] In fact, electronic products are among the three industrial goods that Chilo and Meco mainly export.[90] Moreover, Chilo and Meco each have an advanced agricultural sector and mainly export these goods.[91] Similarly, the reduction of tariffs on AP to 10% until 2050[92] is not *'mutual'* contrary to the elimination of tariffs on the same products from Haito until 2018.[93]

ii. The S&DT provisions of Art. 606 are inconsistent with paras. 3(a) and 3(b) of the ENC

34. In fact, the FTA partners agreed 'to promote the development of all developing countries,'[94] however, the S&DT of Art. 606 makes this provision hardly applicable to the other Members. Para. 3(a) requires the measure not to *impose unjustifiable burdens on other Members.*[95] The reduction of all tariff duties on import of electronic goods below 15% and elimination of them in 3 years in case of Haito,[96] when the bound MFN import tariffs were above 35% *ad valorem,*[97] violate para. 3(a), as the other Members cannot enter the market of the FTA partners on the same conditions. Furthermore, never been interpreted in any PR, para. 3(b) must be applied within the scope of para. 2(c) as an obligation to reduce tariffs among the FTA parties on an MFN basis. Thus, by introducing the S&DT provisions, Chilo and Meco face impediment for the reduction of tariffs on an MFN basis.

iii. The CHIMEHA is not covered by the ENC and is inconsistent with para. 4(a) of the ENC

35. The scope of the CHIMEHA is broader than required by the ENC since it relates to not only trade in goods, but also to trade in services,[98] and the elimination of tariffs on GGs for non-FTA parties.[99]

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[87] GATT, [2(a)].
[88] Collins Dictionary - https://www.collinsdictionary.com/dictionary/english/mutual
[89] Problem, [10].
[90] *Idem*, [6].
[91] *Idem*, [2].
[92] *Idem*, [9].
[93] *Idem*, [14].
[94] *Ibidem.*
[95] ABR, *EC – Tariff Preferences*, [167].
[96] Problem, [14].
[97] *Idem*, [10].
[98] *Idem*, [9-10], [13-15].
[99] *Idem*, [10].

Also, the CHIMEHA violated para. 4(a), which resulted in a double notification, which establishes negative systemic implications in the WTO law.[100]

c. The S&DT provisions of Art. 606 cannot be justified under Art. XXIV

36. The S&DT provisions of Art. 606 cannot be justified under Art. XXIV as well due to the CHIMEHA's inconsistency with the requirements of Art. XXIV demonstrated in Ch. VIII below.

VI. PROVIDING ZERO IMPORT TARIFFS TO LISTED GGs FROM THE FTA PARTNERS AND A FEW OTHER WTO MEMBERS IS INCONSISTENT WITH GATT ART. 1:1

a. The provisions of Ch. V of the CHIMEHA violate Art. I:1

37. Ch. V of the CHIMEHA does not fulfil the legal test under Art. I:1 stated above.[101] *Firstly,* elimination of import tariffs for 51 specified GGs under Ch. V relates to customs duties, so, *falls within the scope* of Art. I:1.[102] *Secondly,* as electronic products and components for bicycles could be considered GGs,[103] originating from non-CHIMEHA partners without accreditation they are subject to 15% and 5% tariff respectively.[104] Thus, the CHIMEHA parties and 'green accredited parties' with 0% import duty on 51 GGs', including abovementioned, grants them *'more favourable competitive opportunities'*[105] which is an '*advantage'* within the meaning of Art. I:1. *Thirdly,* 51 specified GGs from the CHIMEHA partners and 'green accredited parties' are '*like*' the same GGs from non-accredited parties based on an origin distinction.[106] *Finally,* this advantage is not accorded *'immediately and unconditionally'* to all other Members. Tariff preferences on GGs under the CHIMEHA are accorded only on the *condition* that the WTO Member grants 0% import duty to the CHIMEHA partners on GGs and, on this basis, becomes a 'Green accredited party'.[107] Moreover, tariff preferences are not granted *immediately* since the term means that no time should lapse between the granting of an advantage in the first instance, and its extension to all like products originating in WTO Members.[108] Waiting for an approval from the FTA partners will require some time and the time will lapse which violates Art. I:1.[109]

[100] Dual Notification Issues, [4(d)].
[101] Legal Pleading, [27]
[102] PR, *EC – Tariff Preferences*, [7.55].
[103]Tothova (2005), 13; Sugathan (2013), 10.
[104] Problem, [10].
[105] Max Planck Commentaries (2011), 64.
[106] PR, *Columbia – Ports of Entry*, [7.356].
[107] Problem, [13].
[108] Mavroidis (2005), 120.
[109] PR, *EC – Tariff Preferences*, [7.60].

b. Ch. V inconsistency under Art. I:1 cannot be justified under Art. XXIV

38. Art. XXIV clearly cannot justify a measure which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement.'[110]

VII. THE PROVISIONS OF CH. IV OF THE CHIMEHA ON AD ARE INCONSISTENT WITH ART. 9.2 OF THE WTO ADA

39. The provisions of Ch. IV of the CHIMEHA can be *'challenged as such'* independently from its applications, [111] as the parties to a dispute incorporated the CHIMEHA into its domestic legislations**.**[112]

40. In principle, AD duties fall within the scope of the MFN treatment obligation of Art. I:1,[113] which applies to *the imposition and revocation of AD measures.* In particular, Art. 9.2 of the ADA envisages a non-discrimination principle. As a consequence, obligations in paras. 1 (iii) and (iv) of Art. 404, first, *not to impose new AD duties* on the goods from the CHIMEHA partners and, second, *to revoke all existing orders levying AD duties* on such goods[114] are *de jure inconsistent* with Art. 9.2 of the ADA. At the same time, obligations in paras. 1 (i) and (ii) of Art. 404, third, *not to initiate any AD investigations or reviews* and, fourth, *to terminate any ongoing AD investigations* with respect to products from the FTA parties[115] may amount to discrimination, therefore, are *potentially inconsistent* with Art. 9.2 of the ADA. Moreover, excluding the CHIMEHA partners from the scope of AD duties application results in the breach of the principle of 'parallelism'.

a. Paras. 1 (iii) and (iv) of Art. 404 of Ch. IV of the CHIMEHA are de jure inconsistent with Art. 9.2 of the ADA

41. *First*, Art. 9.2 of the ADA should apply *to the imposition* of the ADMs. It technically only applies to *the collection* of the AD duties.[116] However, some investigating authorities have invoked the non-discrimination principle of Art. 9.2 to refrain from *the imposition* of AD duties in an attempt of selective application of ADMs against certain countries.[117] Moreover, **'**the method of levying duties and charges (of any kind)' and 'all rules and formalities in connexion with importation' of Art. I: 1 covers '*the imposition of AD duties…* '[118]

[110] PR, *Canada – Autos*, [10.55].
[111] PR, *Russia – Tariff Treatment* [7.46].
[112] Problem [7].
[113] Van den Bossche (2013), 322.
[114] Problem [12].
[115] *Ibidem*.
[116] Vermulst (2005), 173.
[117] *Ibidem*.
[118] Note by the DG

42. *Second*, since the ADMs and CVDs are both the trade remedies that have similar substantive, as well as procedural conditions, *the revocation of ADMs must be also made on a non-discriminatory basis*, the same way as in the case of an anti-subsidy investigations.[119]

43. *Consequently*, paras. 1 (iii) and (iv) of Art. 404 of the CHIMEHA are *de jure* inconsistent with the non-discrimination obligation of Art. 9.2 of the ADA, as these provisions amount to discrimination against non-CHIMEHA partners.

b. Paras. 1 (i) and (ii) of Art. 404 of Ch. IV of the CHIMEHA are potentially inconsistent with Art. 9.2 of the ADA

44. The CHIMEHA encompasses selective approach to *initiation, review and termination* of AD investigations.[120] When there is *prima facie* case of dumping regarding the same goods from the CHIMEHA and non-CHIMEHA partners, selective application of the AD rules on different stages of an investigation will amount to a violation of the non-discrimination principle of Art. 9.2. Similarly, selective application of ADMs resulting from a *review*[121] was challenged[122] and eliminated because similar situations must be treated in a non-discriminatory way.[123]

c. Art. 404 of Ch. IV of the CHIMEHA violates the principle of 'parallelism'

45. Excluding the CHIMEHA partners from the scope of AD duties application results in breach of *the principle of 'parallelism'*, which was developed in the AB jurisdiction on Arts. 2.1 and 2.2 of the SA.[124] By analogy, Art. 9.2 envisages *the 'parallelism'* requirement. Prof. Macrory states that *'the authorities may not choose to assess duties on imports from one country subject to an anti-dumping measure but not on imports from another*.'[125] Therefore, paras. 1 (i),(ii),(iii) and (iv) of Art. 404 *create a 'gap' between*; on the one hand, imports covered by the investigation (including those originating from the CHIMEHA partners) and, on the other hand, import falling within the scope of the ADMs (excluding those originating from the CHIMEHA partners).[126]

d. Ch. IV inconsistency with Art. 9.2 cannot be justified under Art. XXIV

46. The textual interpretation of the chapeau to Art. XXIV: 5 suggests that Art. XXIV can serve as a justification for violation of *'this Agreement'*, i.e. the GATT 1994. Thus, inconsistency with Art. 9.2 of the ADA cannot be justified under Art. XXIV. Alternatively, even if found justifiable under GATT Art. XXIV the exception would not apply to the extent of inconsistency with the ADA.[127] Within the

[119] PR, *US – MFN Footwear*, [6.8].
[120] Problem, [12].
[121] MAS EC – India Flat Rolled Iron, [4].
[122] *EC – India Flat Rolled Iron* (2004), [3-4].
[123] MAS EC – India Flat Rolled Iron, [6].
[124] ABR, *US – Steel Safeguard*, [441].
[125] Macrory *et al* (2005), 519.
[126] ABR, *US – Line Pipe*, [181].
[127] Nsour (2010), 76.

WTO law, if a conflict arises between the GATT and other WTO agreements, the other WTO agreement prevails.[128] There is a conflict because, following the language of the WTO case-law,[129] the adherence to the GATT Art. XXIV: 8(b) i.e. elimination of any ADMs between the CHIMEHA parties, will lead to a violation of the non-discrimination principle under ADA Art. 9.2. ADA is a more specific agreement than the GATT and must prevail to the extent of a conflict,[130] hence, Art. XXIV exception does not apply.[131]

VIII. THE CHIMEHA IS INCOMPATIBLE WITH GATT ART. XXIV

47. Art. XXIV provides the conditions for the formation of an FTA. The CHIMEHA violates paras. 5 and 8 that contains substantive requirements which should be interpreted in conjunction with para. 4,[132] as well as para. 7 which sets a procedural requirement. In addition, the responding party bears the burden of proof to establish that the measure can be justified under Art. XXIV if the test is fulfilled,[133] but anticipating such arguments the complainant asserts that alleged violations cannot be so justified.[134]

a. *The period for phasing out internal duties among the FTA partners is inconsistent with Art. XXIV:5(c)*

48. Art. XXIV:5(c) provides that an FTA must be formed within a reasonable period of time, i.e. 10 years under a general rule.[135] Though Chilo and Meco mainly export APs,[136] the CHIMEHA establishes that duties on all APs must be reduced from their 2016 levels by 2050.[137] Extensions are possible in practice.[138] However, a 34-year implementation period concerning AGs is not reasonable and undermines the purpose of the CHIMEHA. Moreover, legal obligation to provide full explanation for obtaining longer transitional period to the CTD[139] was not fulfilled. Thus, the requirement of Art. XXIV:5(c) is not satisfied.

b. The CHIMEHA is inconsistent with Art. XXIV:7

49. 'The parties shall specify under which provision(s) of the WTO agreements it is notified.'[140] As the TM refers to 'the parties' in plural, not 'a party' in singular, this should have the meaning that the parties must together notify regarding the FTA. The Secretariat also persuaded the CHIMEHA

[128] Note to Annex 1A.
[129] ABR, *Guatemala – Cement*, [65]
[130] Note to Annex 1A.
[131] Nsour (2010), 76.
[132] ABR, *Turkey – Textile*, [57].
[133] Legal Pleadings, [11], ABR, *Turkey – Textile*, [58].
[134] PR, *Turkey – Textile*, [9.57-9.58].
[135] Understanding of Article XXIV, [3].
[136] Problem, [2].
[137] *Idem*, [9].
[138] See https://ustr.gov/issue-areas/industry-manufacturing/industrial-tariffs/free-trade-agreements
[139] Understanding of Article XXIV, [3].
[140] Transparency Mechanism, [4].

partners to make a single notification.[141] Moreover, the CHIMEHA includes Ch. VII devoted to trade in services,[142] which is out of scope of the ENC, but was not notified by Meco and Haito under GATS Art. V:7(a). Thus, the CHIMEHA was not notified in accordance with WTO law.

c. The CHIMEHA is inconsistent with the requirements of Art. XXIV:8(b)

i. Tariffs were not eliminated within the meaning of Art. XXIV:8(b)

50. Tariffs must be eliminated under Art. XXIV:8(b).[143] The elimination means the abolishment of tariffs.[144] The CHIMEHA does not eliminate the tariffs, they are only reduced.[145] Moreover, the concessions must be reciprocal.[146] Only Chilo and Meco are required to eliminate tariffs for Haito,[147] but not with respect to each other.[148] Even more, Haito must merely reduce the tariffs. Moreover, it blocked the trade using the BOP system, which is inconsistent with Art. XXIV:8(b).

ii. The reduction of the TRQ on AP and coffee, in particular, was not necessary for the formation of the CHIMEHA

51. Regardless whether Ch. I violates the requirements of Art. XIII or not it was not '*necessary*' to reduce TRQs on AP to be able to enter into the CHIMEHA. The measure cannot be deemed as *'necessary'* when there existed less trade restrictive alternatives.[149] In turn, there were reasonably available other alternatives, such as tariffs,[150] which have less trade restrictive effect than TRQs, at least with respect to Aga. Since no use was made of the possibility to avoid adverse effect of the measure alleged violation of Art. XIII cannot be justified under Art. XXIV.

iii. The CHIMEHA eliminated tariffs not only between the FTA partners

52. GATT Art. XXIV:8(b) foresees elimination of duties and ORRC only between the constituent territories of the FTA in products originating in such territories.[151] In turn, the CHIMEHA provides for a 0% import duty on GGs for products originating not only in the CHIMEHA partners, but also in any other WTO Member considered as a 'Green accredited party.'[152] However, GATT Art. XXIV does not provide a right to depart from GATT Art. I:1 in favour of non-FTA parties. Therefore, the measure at issue violates Art. XXIV:8(b) because it is out of scope of the CHIMEHA and is not justifiable under GATT Art. XXIV.

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[141] Problem, [18].
[142] *Idem*, [15].
[143] Hamanaka (2012), 6.
[144] Bartels (2006), 137.
[145] Problem, [9-10].
[146] Analytical note, [14].
[147] Problem, [14].
[148] *Idem*, [9-10].
[149] ABR, *Turkey – Textile*, [68].
[150] See https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd10_access_e.htm.
[151] GATT 1994.
[152] Problem, [13].

iv. The provisions of Ch. IV of the CHIMEHA on AD are inconsistent with Art. XXIV:8(b)

53. Art. 404 of Ch. IV of the CHIMEHA does not meet the requirements of sub-para. 8(b). ADMs are not 'duties' within the meaning of Art. XXIV:8(b), as French and Spanish versions of terms have more specific meaning.[153] On the other hand, ADMs are not ORRCs, since ADMs are designed to offset unfair trading practices of other Members and accordingly do not represent restrictive measures that must be eliminated among the FTA partners.[154]

54. The case-law supports that safeguards apply on the imports from FTA members as well, if imports from all sources was initially included in the investigation.[155] *De facto* in *US – Steel Safeguards* the AB interpreted the parentheses in para. 8(b) as allowing the application of one type of trade remedies among the FTA parties. This approach should be also adopted with for another type of trade remedies – AD. In practice, about 90 % of FTAs made no changes to WTO rules on trade remedies, thus, allowed application of ADMs for intra-trade purposes. Even if parties to an FTA decide to abolish AD measures between themselves, they generally substitute it with competition law.[156]

55. The elimination of ADMs in the CHIMEHA is not 'necessary' under para. 8 (b) since application of a *'lesser duty rule'* [157] and introduction of *the public interest clause* [158] constitute less trade restrictive alternatives to liberalize trade in the CHIMEHA.

Request for findings

56. For the abovementioned reasons, Chilo respectfully requests the Panel to find that:

1. the Haito's BOP system of quotas unduly applied to the FTA partners violates GATT Art. XI;
2. the Haito's BOP system of quotas unduly applied to the FTA partners is unjustifiable under GATT Arts. XII and XVIII:B;
3. the Haito's BOP system of quotas unduly applied to the FTA partners violates GATT Art. XXIV:8(b);
4. the reduction of TRQs on AP is inconsistent with GATT Art. XIII;
5. the reduction of import tariffs to zero on all imports from Haito within 3 years, except for tariffs and TRQs on coffee, is inconsistent with GATT Art. I:1;
6. the reduction of import tariffs to zero on all imports from Haito within 3 years, except for tariffs and TRQs on coffee cannot be justified under ENC para. 2(c);

[153] Bartels (2006), [118].
[154] Voon (2009), 35.
[155] ABR, *US – Steel Safeguards*, [441].
[156] ACZERTA, ESFTA and ECFTA.
[157] ADA, Art. 9.1.
[158] SCRFTA, Art. 7.12; EUCPFTA, Art. 39; EUSKFTA, Art. 3.10.

7. zero import duty on the GGs accorded only to the ‘green accredited parties’ is inconsistent with Art. I:1;

8. reciprocal exemption from initiation of AD investigation or review, imposition of AD duties as well as an obligation to terminate ongoing investigations and to revoke AD orders with regard to the products originating from CHIMEHA partners are inconsistent with Art. 9.2 of the ADA;

9. the CHIMEHA is generally inconsistent with paras. 5(c), 7, 8(b) of GATT Art. XXIV.

Annex C: Participation Certificates

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10th-14th of March 2017

PARTICIPATION CERTIFICATE

Mariia Shulha

Christine Beck
Vice President for Moot Court Competitions
ELSA International

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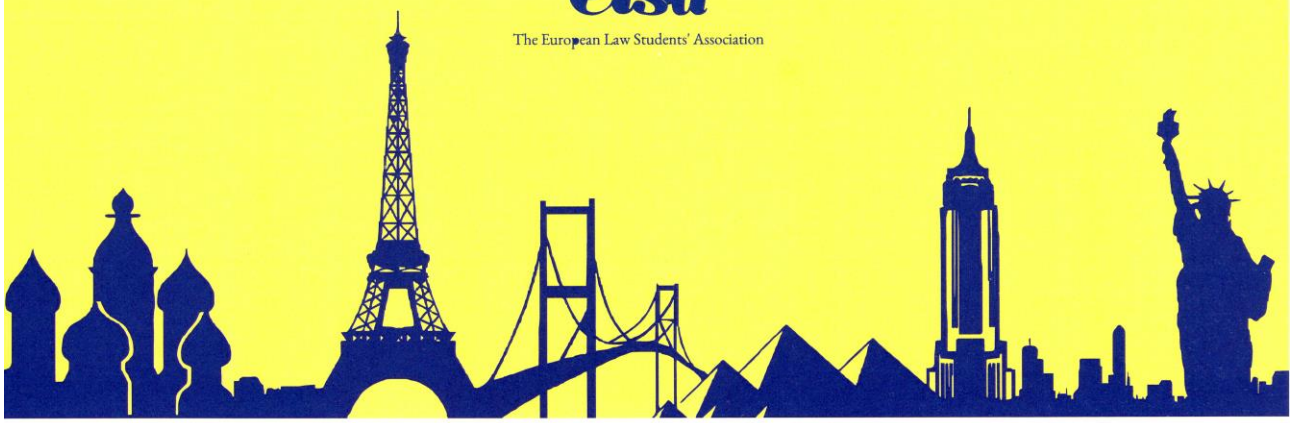

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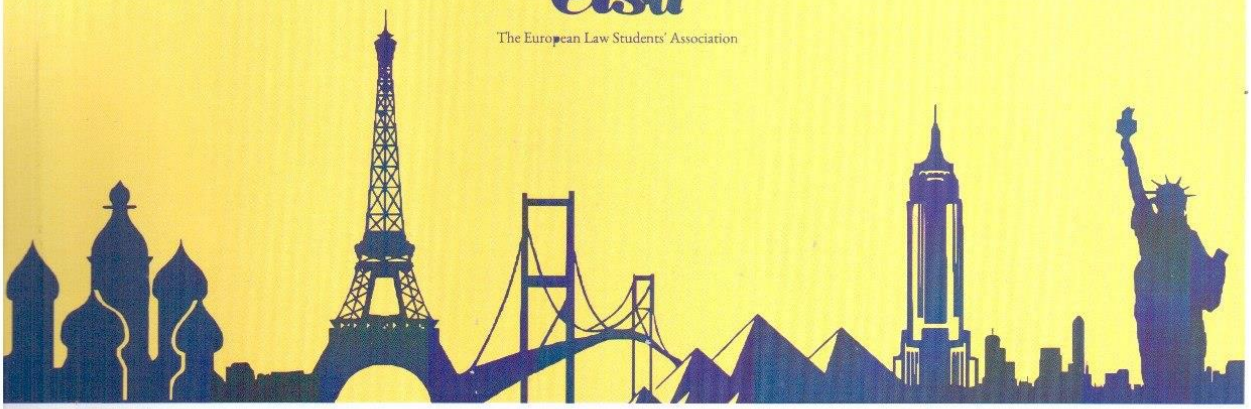

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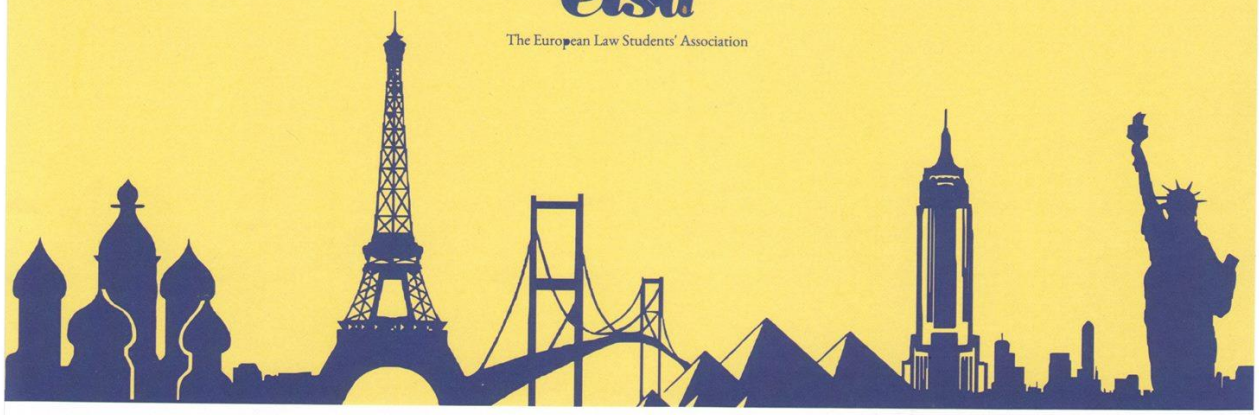

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