



Team: 019

**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

Table of Contents	I
List of References	III
1. Treaties and Conventions	III
2. WTO Reports.....	III
3. WTO Materials.....	V
List of Abbreviations	VII
Statement of Facts.....	1
Summary of Arguments.....	2
Identification of the Measures at Issue	4
Legal Pleadings.....	4
1. Preliminary findings on jurisdiction.....	4
1.1 Chilo is presumed to have acted in good faith according to Article 3.7 DSU.....	4
1.2 The FTA parties do not waive their right to initiate WTO proceedings.....	4
2. Haito's BOP import quota restrictions are inconsistent with Articles XI, XII and XVIII:8(b) GATT	6
2.1 Haito's BOP measure is inconsistent with Article XI GATT	6
2.2 The BOP measure cannot be justified under Article XII or XVIII:B GATT	6
2.2.1 On the relationship between Articles XII and XVIII:B GATT	6
2.2.2 The BOP measure is inconsistent with Article XVIII:B GATT.....	7
2.2.3 Conclusion.....	8
2.3 The import quota restrictions are inconsistent with Article XXIV:8(b) GATT	8
2.3.1 The import quota restrictions must be eliminated within a free-trade area.....	8
2.3.2 The import quota restrictions do not fall under a listed exception	8
2.3.3 Conclusion.....	9
3. Chapter I of the CHIMEHA FTA is inconsistent with Article XIII GATT	9
3.1 Chapter I of the FTA is inconsistent with Article XIII:1 GATT	9
3.2 Chapter I of the FTA is inconsistent with Article XIII:2 GATT	11
3.3 Conclusion	12
4. The S&DT provisions in favour of Haito are inconsistent with Article I:1 GATT and the Enabling Clause	12
4.1 The S&DT provisions in favour of Haito are inconsistent with Article I:1 GATT. 12	
4.1.1 The measure at issue is covered by Article I:1 GATT	12

4.1.2	The import duty exemption grants an advantage to products from Haito	12
4.1.3	The products concerned are like products	12
4.1.4	The advantage at issue is not accorded immediately and unconditionally.....	13
4.2	The S&DT provisions in favour of Haito are inconsistent with the Enabling Clause	13
4.2.1	The contested provisions are not covered by paragraph 2 of the Enabling Clause	13
4.2.2	The requirement of paragraph 3(a) is not fulfilled by the contested provisions	14
4.3	Conclusion	14
5.	Chapter V of the CHIMEHA FTA is inconsistent with Article I:1 GATT	14
5.1	The measure at issue is covered by Art. I:1 GATT	14
5.2	The measure grants an advantage, favour, privilege, or immunity.....	15
5.3	The products concerned are like products	15
5.4	The advantage at issue is not accorded immediately and unconditionally	15
6.	Chapter IV of the CHIMEHA FTA is inconsistent with Article 9.2 of the WTO Anti-dumping Agreement.	16
7.	The contested measures cannot be justified under Art. XXIV GATT	17
7.1	The requirements of Article XXIV:5(b) and XXIV:8(b) GATT have not been met	17
7.2	The contested measures were unnecessary for the formation of the free-trade area	18
8.	The contested measures cannot be justified under the Enabling Clause	19
	Request for Findings	20

*List of References***1. TREATIES AND CONVENTIONS**

1. Agreement on the Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, WTO Agreement, Annex 1A
2. General Agreement on Tariffs and Trade, 15 April 1994, 1867 U.N.T.S. 187 (1994)
3. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, 15 April 1994, WTO Agreement, Annex 1A
4. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (1969)

2. WTO REPORTS

Short Title	Full Title and Citation
<i>Argentina – Financial Services</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , WT/DS453/AB/R and Add.1, adopted on 14 April 2016
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515 Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , <u>WT/DS121/R</u> , adopted 12 January 2000, as modified by Appellate Body Report <u>WT/DS121/AB/R</u> , DSR 2000:II, p. 575
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <u>WT/DS139/AB/R</u> , <u>WT/DS142/AB/R</u> , adopted 19 June 2000, DSR 2000:VI, p. 2985 Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <u>WT/DS139/AB/R</u> , <u>WT/DS142/AB/R</u> , adopted on 11 February 2000, p. 431
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing</i>

A. General Part

Chilo (complainant)

	Products, <u>WT/DS135/AB/R</u> , adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <u>WT/DS27/AB/R</u> , adopted 25 September 1997, DSR 1997:II, p. 591 Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <u>WT/DS27/R/ECU</u> (Ecuador) / <u>WT/DS27/R/GTM</u> , <u>WT/DS27/R/HND</u> (Guatemala and Honduras) / <u>WT/DS27/R/MEX</u> (Mexico) / <u>WT/DS27/R/USA</u> (US), adopted 25 September 1997, as modified by Appellate Body Report <u>WT/DS27/AB/R</u> , DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
<i>EC – Bananas III (Art. 21.5 – Ecuador II / US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , <u>WT/DS27/AB/RW2/ECU</u> , adopted 11 December 2008, and <i>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</i> , <u>WT/DS27/AB/RW/USA</u> and <i>Corr.1</i> , adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <u>WT/DS397/AB/R</u> , adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , <u>WT/DS400/AB/R</u> / <u>WT/DS401/AB/R</u> , adopted 18 June 2014
<i>EC – Tariff Preferences</i>	Panel Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , <u>WT/DS246/R</u> , adopted on 1 December 2003, p. 402
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , <u>WT/DS146/R</u> , <u>WT/DS175/R</u> , and <i>Corr.1</i> , adopted 5 April 2002, DSR 2002:V, p. 1827
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , <u>WT/DS90/R</u> , adopted 22 September 1999, upheld by Appellate Body Report <u>WT/DS90/AB/R</u> , DSR 1999:V, p. 1799
<i>Japan – Semi-conductors</i>	GATT Panel Report, <i>Japan – Semi-conductors</i> , adopted on

	4 May 1988, BISD35S/116
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States</i> , <u>WT/DS132/AB/RW</u> , adopted on 22 October 2001, p. 47
<i>Mexico – Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , <u>WT/DS308/AB/R</u> , adopted on 6 March 2006, p. 44
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , <u>WT/DS457/AB/R</u> and Add.1, adopted 31 July 2015
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , <u>WT/DS34/AB/R</u> , adopted 19 November 1999, DSR 1999:VI, p. 2345 Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , <u>WT/DS34/R</u> , adopted 19 November 1999, as modified by Appellate Body Report <u>WT/DS34/AB/R</u> , DSR 1999:VI, p. 2363
<i>US – Certain Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and their Application to Anti-Dumping proceedings involving China</i> , <u>WT/DS471/R</u> , adopted 19 October 2016
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , <u>WT/DS244/AB/R</u> , adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <u>WT/DS381/R</u> , adopted 13 June 2012, as modified by Appellate Body Report <u>WT/DS381/AB/R</u> , DSR 2012:IV, p. 2013

3. WTO MATERIALS

1. GATT Contracting Parties, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903, 28 November 1979, GATT, BISD 26S/203 (1980)
2. Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, WTO Agreement, Annex 2

A. General Part

Chilo (complainant)

3. Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994
4. WTO, General Council, Transparency Mechanism for Regional Trade Agreements – Decision of 14 December 2006, WTO Doc. WT/L/671, 18 December 2006
5. Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, GATT Doc. L/3464

List of Abbreviations

Abbreviation	Full meaning
AB	Appellate Body
ADA	Anti-Dumping Agreement
Art.	Article(s)
BOP	Balance-of-payments
CRTA	Committee on Regional Trade Agreements
CHIMEHA FTA	Free Trade Agreement concluded between Chilo, Meco and Haito
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade 1994
MFN	Most-favoured-nation
Para(s).	Paragraph(s)
S&DT	Special & Differential Treatment
TRQ	Tariff rate quota
WTO	World Trade Organization

Statement of Facts

1. Chilo, Meco and Haito are WTO Members that produce both agricultural and industrial products. Chilo and Meco are developing countries that have an advanced agricultural sector comprising bovine meat, wheat, soya, coffee and bananas. They also produce underwear, cosmetics and electronic products. Most of these products are exported. Haito is a least developed country (“LDC”) that mainly produces bananas and coffee, as well as parts and components of bicycles and roller-skates. About 50% of its agricultural products and mainly all industrial products are exported.
2. In 2015, Chilo, Meco and Haito concluded the CHIMEHA Free Trade Agreement (“FTA”), which entered into force on 1 January 2016. This FTA was notified on 1 January 2016 under Article (“Art.”) XXIV:7(a) GATT but only on 1 March 2016 pursuant to the Enabling Clause.
3. Chapter I of the FTA provides that duties on all agricultural goods must be reduced from their current MFN applied levels. The in-quota and out-of-quota duty rates of tariff rate quotas (“TRQs”) on agricultural products must be reduced as well. Art. 404 in Chapter IV reciprocally exempts FTA parties from the application of domestic anti-dumping law. FTA parties may not initiate new anti-dumping investigations with respect to goods of the other parties and will terminate any on-going investigations. Additionally, no new anti-dumping duties may be imposed on such goods and existing duties on such goods will be revoked. Chapter V establishes a 0% import duty on 51 specified “green goods” if these products originate in a party to the FTA or in a Member that is considered by the three parties to be a “Green accredited party” because it also offers, to the FTA parties, 0% tariff duties on the same 51 green goods. Chapter VI “Special and Differential Treatment” (“S&DT”) requires Chilo and Meco to reduce import tariffs on all imports from Haito, except those on coffee, to zero within the first 3 years after entry into force of the FTA. Chapter VIII contains a dispute settlement mechanism (“DSM”) for disputes between FTA parties. Art. 808 FTA clarifies the relationship between the FTA DSM and the Dispute Settlement Body (“DSB”) of the WTO.
4. Haito introduced a system of import quota restrictions on 1 March 2016 due to perceived balance-of-payments (“BOP”) problems. This system quantitatively limits imports of all products, including all goods produced by Chilo and Meco, to the amount imported into Haito in the preceding year.
5. Chilo decided to initiate WTO dispute settlement consultations against Haito. After unsuccessful consultations, Chilo requested the establishment of a panel to the DSB.

Summary of Arguments**1. Chilo has recourse to the WTO Dispute Settlement Body in good faith**

- Chilo has recourse to the WTO Panel in good faith under Art. 3.7 and 3.10 DSU because it has not clearly waived its right to have recourse to the WTO DSB. Therefore, there is no legal impediment for the Panel to validly establish jurisdiction.
- The Panel cannot decline to exercise such validly established jurisdiction.

2. The BOP import quota restrictions applicable to all imported products are inconsistent with Articles XI, XII, XVIII and XXIV:8(b) GATT

- Haiti's BOP import quota restrictions are quantitative restrictions instituted by a WTO Member. The quotas do not meet the requirements of Art. XI:1 GATT and they do not fall under any Art. XI:2 GATT exemption. Thus, they are inconsistent with Art. XI GATT.
- Haiti's BOP measure cannot be justified under Art. XII or XVIII:B GATT because the measure causes unnecessary damage to the economic interests of Chilo and Meco and is not temporary.
- The BOP measure is inconsistent with Art. XXIV:8(b) GATT because restrictive regulations of commerce must be eliminated on substantially all trade within a free-trade area. Moreover, these restrictions do not fall under a listed exception. Therefore, Haiti's import quota restrictions must be eliminated within the CHIMEHA free-trade area.

3. The reduction of TRQs on agricultural products in Chapter I of the CHIMEHA FTA is inconsistent with Article XIII GATT

- The reduction of tariff duties for country-specific and MFN TRQs between the FTA parties is inconsistent with Art. XIII:1 GATT because imports of like products of other Members are not similarly made subject to the TRQ.
- Chapter I of the FTA is inconsistent with Art. XIII:2 GATT because it does not provide a distribution of trade approaching as closely as possible the shares that various Members may be expected to obtain in the absence of the tariff quota.

4. The S&DT provisions in Chapter VI of the CHIMEHA FTA are inconsistent with Article I:1 GATT and cannot be justified under the Enabling Clause

- The S&DT provisions constitute an advantage in favour of Haiti. This advantage is not extended "immediately and unconditionally" to like products originating in all other Members and is therefore inconsistent with Art. I:1 GATT.
- The WTO-inconsistent S&DT provisions cannot be justified under the Enabling Clause. Firstly, the contested provisions are not covered by paragraphs 2(a)-(d) of the Enabling

Clause. Secondly, the S&DT provisions raise “barriers to trade” and are therefore inconsistent with paragraph 3(a) of the Enabling Clause.

5. The provisions in Chapter V of the CHIMEHA FTA on green goods are inconsistent with Article I:1 GATT

- Chapter V FTA, which stipulates that FTA parties must provide 0% import duties on 51 specified “green goods” originating in certain countries, grants an advantage to the FTA parties and Green accredited parties. However, this advantage is not granted immediately and unconditionally to like products originating in other Members and is therefore inconsistent with Art. I:1 GATT.

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

- Art. 404 FTA prohibits the collection of anti-dumping duties from FTA producers and exporters, regardless of whether they have been dumping. Therefore, this Article leads to the collection of anti-dumping duties on a discriminatory basis from third country producers and exporters.

7. The contested provisions of the CHIMEHA FTA cannot be justified under Article XXIV GATT

- Firstly, several FTA provisions provide increased competitive opportunities for FTA parties that have a restrictive effect on the competitive opportunities of non-FTA parties. These provisions are therefore inconsistent with Art. XXIV:5(b) GATT. Secondly, the FTA provisions that have an excessively lengthy transition period are inconsistent with Art. XXIV:8(b) GATT. Lastly, several contested FTA provisions were not necessary for the formation of the free-trade area. Therefore, the WTO-inconsistent FTA provisions cannot be justified under Art. XXIV GATT.

8. The contested provisions of the CHIMEHA FTA cannot be justified under the Enabling Clause

- The WTO-inconsistent FTA provisions cannot be justified under the Enabling Clause. Several FTA provisions raise “barriers to trade” and are therefore inconsistent with paragraph 3(a) of the Enabling Clause. For the same reasons, those provisions “constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis” and are therefore inconsistent with paragraph 3(b) of the Enabling Clause.

Identification of the Measures at Issue

- Haiti introduced BOP quota restrictions applicable to all imported products. This system quantitatively limits the amount of imports of all products to the amount exported to Haiti in the preceding year.
- Chapter I of the CHIMEHA FTA introduces the reduction of TRQs on agricultural products by January 2025. More specifically, the in-quota tariff duties are to be reduced by 50% and out-of-quota tariff duties are to be reduced to 60%.
- Chapter VI of the CHIMEHA FTA introduces S&DT provisions in favour of Haiti. Import tariffs on all imports from Haiti have to be reduced to zero within the first three years after the entry into force of this FTA, except for tariffs and TRQs on coffee.
- Chapter V of the CHIMEHA FTA introduces a reciprocal zero import tariff system for green goods.
- Chapter IV of the CHIMEHA FTA introduces a reciprocal exemption from the application of domestic anti-dumping law between the FTA parties.

Legal Pleadings**1. PRELIMINARY FINDINGS ON JURISDICTION****1.1 Chilo is presumed to have acted in good faith according to Article 3.7 DSU**

1. For a Panel to validly establish jurisdiction, the complainant must act in good faith according to Art. 3.7 and 3.10 DSU.¹ When jurisdiction has been validly established, the Panel is not in a position to freely choose whether or not to exercise its jurisdiction.²
2. According to Art 3.7 DSU, Members enjoy discretion in deciding whether to bring a case and are expected to be largely self-regulating in deciding whether any such action would be "fruitful".³ Given the largely self-regulating nature of the decision whether to bring a case, a request for the establishment of a Panel must be *presumed* to be in good faith.⁴
3. Thus, Chilo's request for the establishment of a Panel must be presumed to be in good faith. The Panel cannot refuse jurisdiction unless Haiti proves that Chilo acted in bad faith.

1.2 The FTA parties do not waive their right to initiate WTO proceedings

4. Article 3.10 DSU requires WTO Members, if a dispute arises, to engage in dispute settlement proceedings "in good faith in an effort to resolve the dispute". A Member acts in

¹ AB Report, *EC – Bananas III (Art. 21.5 – US / Ecuador II)*, para. 227; AB Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89; AB Report, *Peru – Agricultural Products*, para. 5.19.

² AB Report, *Mexico – Soft Drinks*, para. 53.

³ AB Report, *Peru – Agricultural Products*, para. 5.18; AB Report, *EC – Bananas III*, para. 135.

⁴ AB Report, *Mexico – Corn Syrup*, para. 74.

bad faith if it takes legal action with respect to a certain measure for which it had previously stated that it would not take legal action before the WTO.⁵ However, in that situation, a Member only acts in bad faith if it has made a clear waiver of its right to initiate WTO proceedings.⁶ Such a waiver cannot be lightly assumed.⁷

5. Art. 808 FTA, which regulates the relation of the FTA DSM to that of the WTO, does not constitute a “clear waiver” of the right to initiate WTO dispute settlement proceedings. Art. 808:1 FTA states “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.” Thus, even from the perspective of the FTA, the parties still have the right to bring claims to the WTO DSB.⁸

6. The complainant’s right to choose the forum is not limited by Art. 808:2 FTA. Art. 808:2 FTA states that when there is continued disagreement on the forum to be used after a compulsory consultation round, the dispute is “normally” brought before the FTA DSM.⁹ The ordinary meaning of the word “normally” is “under normal or ordinary conditions; as a rule, ordinarily”.¹⁰ This word must be read in its context.¹¹ Art. 808:1 FTA, which states that the dispute “may be settled in either forum”, is part of that context. Contrary to Art. 808:2 FTA, Art. 808:3 FTA uses explicit wording (“solely”) to establish the exclusive jurisdiction of the FTA DSM for specific matters. Therefore, the word “normally” in Art. 808:2 FTA should be interpreted as merely indicating that there is a preference to use the FTA DSM. Accordingly, Art. 808:2 FTA does not constitute a “clear” waiver of the right to resort to the WTO DSB.

7. Art. 808:3 FTA grants exclusive jurisdiction to the FTA DSM with regard to BOP measures and environmental measures under the condition that a request in writing was made by the respondent.¹² Since Haiti made no such request in writing, the FTA DSM is not the exclusive forum for the BOP and environmental measures contested in this dispute.

8. Since Chilo has not clearly waived its right to initiate WTO proceedings, it is acting in good faith under Art. 3.7 and 3.10 DSU. The Panel must validly establish jurisdiction.

⁵ AB Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 228; AB Report, *Peru – Agricultural Products*, para. 5.25.

⁶ *Ibid.*

⁷ AB Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 217.

⁸ AB Report, *Peru – Agricultural Products*, para. 5.27.

⁹ EMC2 Case, para. 17.

¹⁰ “normally, adv.” OED Online, Oxford University Press, <http://www.oed.com/view/Entry/128277?redirectedFrom=normally&>.

¹¹ Art. 31.1 VCLT.

¹² EMC2 Case, para. 17.

2. HAITO'S BOP IMPORT QUOTA RESTRICTIONS ARE INCONSISTENT WITH ARTICLES XI, XII AND XVIII:8(B) GATT**2.1 Haito's BOP measure is inconsistent with Article XI GATT**

9. Art. XI GATT establishes a general ban on all import restrictions by prohibiting the institution and maintenance of non-tariff measures that prohibit or restrict the importation of any product from the territory of another WTO Member.¹³ A measure is inconsistent with Art. XI GATT when it meets four requirements. Firstly, the measure at issue must be a prohibition or restriction other than a duty, tax or other charge.¹⁴ Secondly, this prohibition or restriction must be made effective through quotas, import or export licenses or other measures that quantitatively restrict.¹⁵ Thirdly, the measure must be instituted or maintained by a WTO Member.¹⁶ Fourthly, the measure does not qualify as one of the exemptions provided by Art. XI:2 GATT.

10. Haiti, a WTO Member, imposes a system of import quota restrictions that prohibits all imports of a given product into Haiti that exceed the imports of that product in the preceding year.¹⁷ Therefore, this measure meets the first, second and third condition of Art. XI GATT. Furthermore, Haiti's notification of its import restriction quotas to the BOP Committee and its invocation of Art. XVIII:B GATT as a justification for this measure imply recognition that the measure constitutes a quantitative restriction under Article XI GATT.¹⁸ Lastly, none of the exemptions under Art. XI:2 GATT apply to the situation in this dispute. Based on the facts of the case, Haiti cannot show that critical shortages of essential products, the application of standards or regulations, or governmental measures concerning agricultural products justify its imposition of import quota restrictions. The burden of proof lies with Haiti to demonstrate that the conditions of any of those exemptions are met.¹⁹ Thus, all requirements are met by Haiti's system of import quota restrictions and they are therefore inconsistent with Art. XI GATT.

2.2 The BOP measure cannot be justified under Article XII or XVIII:B GATT**2.2.1 On the relationship between Articles XII and XVIII:B GATT**

11. Articles XII and XVIII:B GATT both allow the exceptional use of import restrictions that are otherwise inconsistent with Art. XI GATT, if they are taken for BOP purposes and meet

¹³ Panel Report, *India – Quantitative Restrictions*, para. 5.128; GATT Panel Report, *Japan – Trade in semi-conductors*, L/6309, adopted 4 May 1988, BISD 35S/116, para. 104.

¹⁴ Art. XI:1 GATT.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ EMC2 Case, para. 19.

¹⁸ *Ibid.*; Panel Report, *India – Quantitative Restrictions*, para. 5.124.

¹⁹ AB Report, *US – Wool Shirts and Blouses*, p. 15-16.

certain conditions.²⁰ The legal test is similar in Art. XII and XVIII:B GATT. Firstly, the measure must fall within the scope of the Article. This is the case when a measure is taken in order to remedy a real BOP issue. Secondly, the BOP measure may not exceed what is necessary in order to address the BOP problem.²¹ Thirdly, the BOP measure must avoid unnecessary damage to the commercial and economic interests of other Members.²² Finally, the BOP measure must be a temporary measure and Members applying new restrictions shall announce publicly, as soon as possible, time-schedules for the removal of the restrictive import measures.²³

12. The differences between Art. XII and XVIII:B GATT lie, first, in the applicability of Art. XVIII:B GATT to developing country Members.²⁴ Secondly, the conditions of Art. XII GATT are more demanding.²⁵ Since Art. XII GATT is essentially a stricter version of Art. XVIII:B GATT, an inconsistency under Art. XVIII:B GATT would likely also constitute an inconsistency under Art. XII GATT. It therefore suffices to assess the consistency of the BOP measure with Art. XVIII:B GATT.

2.2.2 The BOP measure is inconsistent with Article XVIII:B GATT

13. Chilo must present a prima facie case that Haito's BOP measure is not justified under Art. XII and XVIII:B GATT. The burden of proof lies with Haito to justify its BOP import quota restrictions.²⁶ The import quota restrictions have been imposed in response to a genuine BOP problem and these restrictions are effective.²⁷ However, the BOP measure does not avoid causing unnecessary damage and is not temporary. Therefore, the BOP measure is inconsistent with Art. XVIII:B GATT.

2.2.2.1 The BOP measure causes unnecessary damage to Chilo and Meco

14. BOP measures must avoid causing unnecessary damage to the commercial and economic interests of other Members.²⁸ The Ad Note with Art. XII GATT clarifies that this condition requires contracting parties applying restrictions to endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.²⁹ Chilo and Meco are developing countries whose economy mainly depends on

²⁰ AB Report, *Argentina – Textiles and Apparel*, para 73.

²¹ Art. XII:2 GATT; Art. XVIII:9 GATT.

²² Art. XII:3(c)(i) GATT; Art. XVIII:10 GATT.

²³ Art. XII:2(b) GATT; Art. XVIII:11 GATT; BOP Understanding, para. 1.

²⁴ Panel Report, *India – Quantitative Restrictions*, para. 5.155.

²⁵ Art. XII:2(a)(i); Art. XVIII:9 GATT.

²⁶ Panel Report, *India – Quantitative Restrictions*, para. 5.119; Panel Report, *India – Autos*, para. 7.288.

²⁷ EMC2 Case, case author note.

²⁸ Art. XVIII:10 GATT.

²⁹ Ad Note Art. XII:3(c)(i) GATT.

exports.³⁰ Due to the trade liberalising effect of the CHIMEHA FTA, in force since 1 January 2016, exporters from Chilo and Meco could reasonably expect to increase their exports to Haiti in 2016. However, Haiti's BOP measure prevents this increase in exports. Since Chilo and Meco's economies mainly depend on exports, they are strongly restricted by the BOP measure. Haiti's BOP measure therefore causes unnecessary damage to these two countries.

2.2.2.2 The BOP measure is not imposed temporarily

15. A justification under Art. XVIII:B GATT for the implementation of a BOP measure is only allowed if this measure is temporary.³¹ Haiti has not announced any time-schedules for the removal of the restrictive import measures nor has it indicated when it will do so. Therefore, Haiti's measure is not taken on a temporary basis.

2.2.3 Conclusion

16. Haiti's BOP measure, which is inconsistent with Art. XI GATT, cannot be justified under XVIII:B GATT because it causes unnecessary damage to Chilo and Meco's economy and is not temporary. Since Art. XII GATT is essentially a stricter version of Art. XVIII:B GATT, a violation of Art. XVIII:B GATT likely also violates Art. XII GATT.

2.3 The import quota restrictions are inconsistent with Article XXIV:8(b) GATT

2.3.1 The import quota restrictions must be eliminated within a free-trade area

17. Chilo and Meco should be exempted from the BOP import restrictions because such restrictions should be eliminated within the CHIMEHA free-trade area pursuant to Art. XXIV:8(b) GATT. Art. XXIV:8(b) GATT stipulates that in a free-trade area duties and other restrictive regulations of commerce must be eliminated on substantially all the trade between the FTA parties.³² Haiti's BOP measure introduces a system of import quota restrictions in which imports of all products are limited to the amount exported to Haiti in the preceding year.³³ These quantitative restrictions imposed on all products exported to Haiti run contrary to the trade liberalising objective of the CHIMEHA FTA. Therefore, the import quota restrictions, which are restrictive regulations of commerce, must be eliminated within the CHIMEHA free-trade area pursuant to Art. XXIV:8(b) GATT.

2.3.2 The import quota restrictions do not fall under a listed exception

18. Art. XXIV:8(b) GATT allows for exceptions to the required elimination of duties and restrictive regulations by providing that restrictive measures permitted by certain listed Articles are also allowed within the free-trade area. However, since measures permitted by

³⁰ EMC2 Case, paras. 1, 2 and 6.

³¹ Art. XVIII:4(a) GATT; Art. XVIII:11 GATT; BOP Understanding, para. 1.

³² Art. XXIV:8(b) GATT.

³³ EMC2 Case, para. 19.

Art. XVIII GATT are not included within that list, restrictions permitted under Art. XVIII GATT must still be eliminated within the FTA. Art. XII GATT is on the list of exceptions, but restrictive measures can only be taken within a free-trade area if they are “permitted under” Art. XII GATT. As has been demonstrated above, Haito’s BOP measure does not meet the requirements of Art. XII GATT.³⁴ Since Art. XVIII GATT is not included in the list of exceptions and Art. XII GATT has not been complied with, Haito’s BOP measure is not allowed within the CHIMEHA free-trade area.

2.3.3 Conclusion

19. Haito’s system of import quota restrictions is inconsistent with Art. XXIV:8(b) GATT and may therefore not be applied between the FTA parties.

3. CHAPTER I OF THE CHIMEHA FTA IS INCONSISTENT WITH ARTICLE XIII GATT

3.1 Chapter I of the FTA is inconsistent with Article XIII:1 GATT

20. For TRQs on agricultural products, Chapter I of the FTA requires that in-quota tariffs be reduced by 50% and out-of-quota tariffs to 60% between the FTA parties by 2025.³⁵

21. Art. XIII GATT requires the non-discriminatory administration of quantitative restrictions. As provided in paragraph 5, Art. XIII GATT also applies to tariff quotas.³⁶ Art. XIII:1 GATT requires that no tariff quota shall be applied by a Member on the importation of any product of the territory of any other Member, unless the tariff quota similarly restricts the importation of the like product of all third countries.³⁷ If a Member is excluded from access to, and participation in, the tariff quota, then imports of like products from all third countries are not “similarly restricted” and the condition of Art. XIII:1 GATT has not been met.³⁸ To establish inconsistency with Art. XIII:1 GATT, evidence of the following must be provided: (i) the existence of a TRQ on the importation of any product from another Member, (ii) the likeness of the products concerned, (iii) the fact that imports of like products from all other countries are not *similarly* made subject to the tariff quota.³⁹

22. Firstly, each FTA party subjected certain products to either MFN or country-specific TRQs.⁴⁰ Thus, each FTA party had TRQs on the importation of products from other Members. Secondly, the products subject to the FTA TRQs with reduced tariffs and those

³⁴ See para. 16.

³⁵ EMC2 Case, para. 9.

³⁶ AB Report, *EC – Bananas III*, para. 160; AB Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 335.

³⁷ AB Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 337.

³⁸ *Ibid.*

³⁹ Panel Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 7.673.

⁴⁰ EMC2 Case, para. 4.

subject to the TRQ regime for non-FTA parties are like products. There are two main approaches to determine “likeness”: the traditional approach and the presumption approach.⁴¹ The traditional approach considers the likeness of products on the basis of all relevant criteria, including the following four in particular: (i) the physical characteristics of the products, (ii) their end-use, (iii) their tariff classification and (iv) consumers’ perceptions and behaviour in respect of the products.⁴² The presumption approach allows a complainant to establish “likeness” by demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product.⁴³ Chapter I FTA applies to TRQs on *all* agricultural products, but distinguishes between imports originating in FTA parties and imports from non-FTA parties.⁴⁴ Since origin is the sole criterion distinguishing the relevant products, the likeness of the products concerned is presumed.

23. Thirdly, like products of other Members are not similarly made subject to the reduced TRQs for FTA parties. With regard to MFN TRQs administered on a first-come-first-served basis, the considerable reduction of import tariffs grants imports from FTA parties better competitive opportunities than the like products from non-FTA parties. Within the free-trade area, imports from FTA parties will thus fill up more of the demand for the product concerned. This leads to reduced access to, and participation in, the MFN TRQs by non-FTA Members. Therefore, imports from non-FTA parties are not “similarly restricted”. Accordingly, the reduction of the tariff rates of first-come-first-served MFN TRQs for FTA parties only is inconsistent with Art. XIII:1 GATT.

24. To illustrate, Chilo has a bound first-come-first-served MFN TRQ for coffee with a 30% ad valorem in-quota duty and a 90% ad valorem out-of quota duty.⁴⁵ This MFN TRQ applies to *all* coffee, but the reduction of tariffs is only granted to FTA parties. Given that origin is the sole criterion distinguishing between the relevant products, the likeness of coffee originating in FTA parties and non-FTA parties is presumed. Reducing the MFN TRQ on coffee only for FTA parties leads to reduced access to, and participation in, this TRQ for non-FTA parties.⁴⁶ Accordingly, the reduced TRQ on coffee does not similarly restrict imports from non-FTA parties and is therefore inconsistent with Art. XIII:1 GATT.

⁴¹ AB Report, *Argentina – Financial Services*, paras. 6.35-6.36.

⁴² Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, para. 18; AB Report, *Philippines – Distilled Spirits*, paras. 171-172; AB Report, *EC – Asbestos*, para. 101.

⁴³ AB Report, *Argentina – Financial Services*, para. 6.36.

⁴⁴ EMC2 Case, para. 9.

⁴⁵ *Id.*, para. 5.

⁴⁶ See para. 23.

25. With regard to country-specific TRQs, Chapter I FTA requires the FTA parties to reduce tariffs on imports from the FTA parties. Under the country-specific TRQs, fixed quotas at a reduced tariff are reserved for a specific FTA party. Non-FTA parties do not have access to these tariff quotas and therefore, imports of like products from non-FTA countries are not “similarly made subject to this TRQ”. Importantly, even though the pre-FTA TRQs may have been justified, by substantially lowering the tariff rates, these TRQs are arguably no longer the same and therefore it cannot be assumed that the conditions of the applicable justifications or waivers are still fulfilled. Accordingly, the reduction of tariff rates of the country-specific TRQs is inconsistent with Art. XIII:1 GATT.

3.2 **Chapter I of the FTA is inconsistent with Article XIII:2 GATT**

26. Art. XIII:2 GATT requires a distribution of trade approaching as closely as possible the shares that various Members may be expected to obtain in the absence of the tariff quota.

27. With regard to first-come-first-served MFN TRQs, the abovementioned discrimination of non-FTA parties results in a reduction of their access and participation in those quotas.⁴⁷ Accordingly, non-FTA parties will not approach shares they would have expected to obtain in the absence of the tariff quota.

28. Chilo’s MFN TRQ on coffee is allocated on a first-come-first-served basis to all exporters of coffee from WTO Members.⁴⁸ Last year, the in-quota was essentially used by exports from Aga and Meco.⁴⁹ Given the increased competition with products from FTA parties, it is highly unlikely that imports from Aga and other Members will remain at their current levels.

29. With regard to country-specific TRQs, the exclusion of non-FTA countries from the preferential country-specific tariff quotas 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, as required by the chapeau of Art. XIII:2 GATT.⁵⁰ Allocating all shares in the TRQs with reduced tariffs exclusively to FTA parties, while reserving no quota shares for non-FTA suppliers, cannot be considered to be based on the respective shares of FTA and non-FTA supplier countries in the agricultural products market.⁵¹

⁴⁷ See para 23.

⁴⁸ EMC2 Case, para. 5.

⁴⁹ Ibid.

⁵⁰ AB Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 340; AB Report, *EC – Bananas III*, para. 163.

⁵¹ AB Report, *EC - Bananas III (Article 21.5 - Ecuador II / US)*, para. 340.

30. Chapter I FTA is inconsistent with Art. XIII:2 GATT because the reduction of TRQs between FTA parties prevents a distribution of trade approaching as closely as possible the shares that various Members may be expected to obtain in the absence of the tariff quota.

3.3 **Conclusion**

31. The reduction of the country-specific TRQs results in an exclusion of non-FTA parties that is inconsistent with Art. XIII:1 and XIII:2 GATT. The reduction of the MFN TRQs results in a reduced access to and participation in those TRQs for non-FTA parties, which is inconsistent with Art. XIII:1 and XIII:2 GATT.

4. THE S&DT PROVISIONS IN FAVOUR OF HAITO ARE INCONSISTENT WITH ARTICLE I:1 GATT AND THE ENABLING CLAUSE

4.1 **The S&DT provisions in favour of Haito are inconsistent with Article I:1 GATT**

32. For a measure to be consistent with the MFN treatment obligation of Article I:1 GATT four requirements must be met.⁵² The S&DT provisions in Article 606 of the FTA do not meet all requirements and are therefore inconsistent with Art. I:1 GATT.

4.1.1 **The measure at issue is covered by Article I:1 GATT**

33. The S&DT provisions stipulate that Chilo and Meco shall reduce their import tariffs on all imports from Haito to zero within the first three years after entry into force of the FTA, except for tariffs and TRQs on coffee.⁵³ This non-reciprocal import duty exemption falls within the category of custom duties and is therefore covered by Art. I:1 GATT.

4.1.2 **The import duty exemption grants an advantage to products from Haito**

34. A measure that creates more favourable competitive opportunities for products of a certain origin is a measure granting an advantage within the meaning of Art. I:1 GATT.⁵⁴ By exempting Haito's imports from import duties, these imports receive more favourable competitive opportunities than imports from other Members. The measure is therefore an advantage in the meaning of Art. I:1 GATT.

4.1.3 **The products concerned are like products**

35. Likeness between products is presumed when it is demonstrated that the measure at issue makes a distinction based exclusively on the origin of the product.⁵⁵ The S&DT provisions reduce import tariffs to zero solely for products originating in Haito.⁵⁶ The provisions thus make a distinction based exclusively on the origin of the imports. Therefore, likeness

⁵² AB Report, *EC – Seal Products*, para. 5.86.

⁵³ EMC2 Case, para. 14.

⁵⁴ Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239-7.240; AB Report, *EC – Bananas III*, paras. 206-207.

⁵⁵ See para. 22; AB Report, *Argentina – Financial Services*, para. 6.36.

⁵⁶ EMC2 Case, para. 14.

between Haito's products subject to a zero import tariff and products originating in other countries is presumed.

4.1.4 **The advantage at issue is not accorded immediately and unconditionally**

36. The S&DT provisions must grant the advantage immediately and unconditionally to all like products irrespective of their origin or destination.⁵⁷ The import duty exemption is only granted to imports from Haito and like products from other Members are excluded from this advantage. Given that the advantage is not extended to other Members, it is also not extended "immediately" and "unconditionally".

4.2 **The S&DT provisions in favour of Haito are inconsistent with the Enabling Clause**

37. The Enabling Clause allows for differential and more favourable treatment among developing countries in derogation from the MFN principle if several conditions are met.⁵⁸ Firstly, these measures must fall under one of the categories of measures in para. 2 of the Enabling Clause.⁵⁹ Secondly, these measures must be consistent with the requirements under para. 3 of the Enabling Clause.⁶⁰ The burden of proof lies on Haito to show that these requirements have been met.⁶¹ The import duty exemption in Article 606 FTA cannot be justified by the Enabling Clause because the requirements have not been met.

4.2.1 **The contested provisions are not covered by paragraph 2 of the Enabling Clause**

38. The S&DT provisions do not fall within the scope of paras. 2(a) and 2(b) of the Enabling Clause because the measure at issue is, respectively, not taken by developed countries and not a non-tariff measure. They also do not fall under subparagraph 2(c) because the S&DT provisions do not call for a *mutual* reduction of tariffs. The preferential treatment is not granted to all FTA parties, but it is only granted to Haito.⁶²

39. Para. 2(d) of the Enabling Clause concerns preferential treatment on "the least developed among the developing countries". This should be interpreted as to require preferential treatment on *all* LDCs. As to its ordinary meaning, the phrase refers to "the" least developed countries instead of "some" of those countries. As to its context, the AB has stated that, pursuant to para. 2(a), preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries.⁶³ However, pursuant to para. 2(d), preference-granting countries need not establish that differentiating between developing and

⁵⁷ Art. I:1 GATT; AB Report, *EC – Seal Products*, para. 5.88.

⁵⁸ AB Report, *EC – Tariff Preferences*, paras. 90 and 112.

⁵⁹ *Id.*, para. 112.

⁶⁰ *Ibid.*

⁶¹ *Id.*, para. 105.

⁶² EMC2 Case, para. 14.

⁶³ AB Report, *EC – Tariff Preferences*, para. 154.

LDCs is "non-discriminatory".⁶⁴ The AB thus recognizes LDCs as an identifiable sub-category of developing countries with special economic difficulties and particular development, financial and trade needs.⁶⁵ The AB does not allow discrimination within this sub-category. This should be read together with the Enabling Clause's objective of eliminating the fragmented system of special preferences that are based on historical and political ties between developed countries and their former colonies. Thus, based on the context of para. 2(d) and the purpose of the Enabling Clause, para. 2(d) of the Enabling Clause should be interpreted to require preferential treatment on *all* LDCs. Since the S&DT provisions only grant the advantage to Haito, Art. 606 FTA falls outside the scope of para. 2(d) of the Enabling Clause.

4.2.2 **The requirement of paragraph 3(a) is not fulfilled by the contested provisions**

40. If the Panel deems the provision to fall within the scope of para. 2(d), it still does not satisfy the *cumulative* requirements of para. 3. Paragraph 3(a) of the Enabling Clause contains the obligation to not raise barriers to the trade of other Members.⁶⁶ The obligation for Chilo and Meco to exempt all imports from Haito from import duties raises barriers to trade between Haito and non-FTA parties because Haito is incentivized to trade with the FTA parties. This considerably reduces the competitive opportunities of non-FTA parties to trade with Haito. Accordingly, the condition of para. 3(a) is not met.

4.3 **Conclusion**

41. The S&DT provisions are inconsistent with Art. I:1 GATT. The S&DT provisions do not meet the conditions of paras. 2 and 3 of the Enabling Clause. Therefore, the S&DT provisions cannot be justified under the Enabling Clause.

5. CHAPTER V OF THE CHIMEHA FTA IS INCONSISTENT WITH ARTICLE I:1 GATT

42. Four requirements must be met for a measure to be consistent with Art. I:1 GATT.⁶⁷ Chapter V of the CHIMEHA FTA does not satisfy all of those requirements.

5.1 **The measure at issue is covered by Art. I:1 GATT**

43. Chapter V of the FTA stipulates that the parties must provide 0% import duties on 51 specified "green goods" originating in certain countries. This import duty exemption falls within the category of customs duties and is therefore covered by Art I:1 GATT.⁶⁸

⁶⁴ AB Report, *EC — Tariff Preferences*, para. 172.

⁶⁵ *Ibid.*

⁶⁶ *Id.*, para. 179.

⁶⁷ AB Report, *EC — Seal Products*, para. 5.86.

⁶⁸ Panel Report, *Canada — Autos*, para. 10.16.

5.2 The measure grants an advantage, favour, privilege, or immunity

44. A measure that creates more favourable competitive opportunities for products of a certain origin is a measure granting an advantage within the meaning of Art. I:1 GATT.⁶⁹ The FTA's "green measure" exempts selected imports from the FTA parties and other potential participants (the so-called "Green accredited parties") from import duties. Due to being exempt from the financial burden of import duties, imports originating in those countries enjoy more favourable competitive opportunities.

5.3 The products concerned are like products

45. Likeness between products is presumed when it is demonstrated that the measure at issue makes a distinction based exclusively on the origin of the product.⁷⁰ Chapter V of the FTA exempts 51 green goods from duties, only on the basis that they originate in the FTA parties or in countries recognized as Green accredited parties. The same 51 green goods from other Members are not exempted from import duties because they do not originate in an FTA party or a Green accredited party. Accordingly, the measure at issue distinguishes the products exclusively on origin and likeness should be presumed.

5.4 The advantage at issue is not accorded immediately and unconditionally

46. Art. I:1 GATT finally requires that an advantage granted to products of any country must immediately and unconditionally be accorded to like products of all WTO Members. "Immediately" means that the measure at issue must be granted without delay.⁷¹ "Unconditionally" means that the extension of the advantage to other countries may not be made subject to conditions with respect to the situation or conduct of those countries.⁷² This means that an advantage granted to the product of any country must thus be accorded to the like products of all WTO Members without discrimination as to origin.⁷³

47. Under Chapter V of the FTA, the FTA parties have agreed to provide Green accredited parties the advantage of a 0% import duty on 51 green goods.⁷⁴ Other Members can only be granted the same advantage if two conditions are met. Firstly, Members must exempt green goods from import duties when originating in the FTA parties.⁷⁵ This condition requires Members to change their conduct in order to receive the advantage. Secondly, the FTA

⁶⁹ Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239-7.240; AB Report, *EC – Bananas III*, paras. 206-207.

⁷⁰ See para. 22; AB Report, *Argentina – Financial Services*, para. 6.36.

⁷¹ Panel Report, *US – Tuna II (Mexico)*, para. 7.412.

⁷² Panel Report, *Canada – Autos*, para. 10.23.

⁷³ *Ibid.*

⁷⁴ EMC2 Case, para. 13.

⁷⁵ *Ibid.*

parties must “consider” these Members to be Green accredited parties.⁷⁶ This condition leaves discretion to the FTA parties when deciding on granting green accredited-status. This allows the FTA parties to selectively extend the advantage by differentiating as to origin. For those reasons, the advantage was granted to the FTA parties and Green accredited parties, but was not immediately and unconditionally extended to other Members. Therefore, Chapter V of the FTA is inconsistent with Art. I:1 GATT.

6. CHAPTER IV OF THE CHIMEHA FTA IS INCONSISTENT WITH ARTICLE 9.2 OF THE WTO ANTI-DUMPING AGREEMENT.

48. Art. 9.2 ADA requires that when an anti-dumping duty is imposed on a certain product, anti-dumping duties on imports of this product must be collected on a non-discriminatory basis from all sources found to be dumped and causing injury. The term “all sources” refers to individual producers and exporters subject to the anti-dumping investigation.⁷⁷ This means that Art. 9.2 ADA requires the non-discriminatory collection of anti-dumping duties from all individual producers and exporters subject to the investigation. Given that Art. 404 FTA does not allow anti-dumping duties to be collected from FTA producers and exporters, it discriminates against third-country producers inconsistently with Art. 9.2 ADA.

49. Art. 404(iii) FTA prohibits the imposition of anti-dumping duties on goods of FTA parties. This makes future collection of anti-dumping duties from FTA exporters impossible, regardless of whether they have been dumping. In contrast, anti-dumping duties can still be collected from non-FTA exporters. As a consequence, any collection of anti-dumping duties from non-FTA exporters will be discriminatory in those cases when FTA parties are equally engaged in dumping. Therefore, Art. 404(iii) is inconsistent with Art. 9.2 ADA.

50. Art. 404(i)-(ii) FTA prohibits the FTA parties from initiating and continuing anti-dumping investigations with respect to goods of FTA parties, and thus from determining whether FTA exporters have been dumping. Since it cannot be determined whether FTA exporters have been dumping, no anti-dumping duties can be imposed on their goods.⁷⁸ This means that, for the collection of anti-dumping duties, Art. 404(i)-(ii) FTA has the same restrictive effect as a prohibition of the imposition of anti-dumping duties. Art. 404(i)-(ii) FTA is therefore inconsistent with Art. 9.2 ADA, for the same reason as Art. 404(iii) FTA.

51. Art. 404(iv) FTA requires the FTA parties to “revoke all existing orders levying anti-dumping duties” in respect of goods of the FTA parties. This makes the collection of anti-

⁷⁶ Ibid.

⁷⁷ AB Report, *EC – Fasteners (China)*, para 338; Panel Report, *US – Certain Methodologies (China)*, para. 7.344.

⁷⁸ Art. 9.1 ADA.

dumping duties from FTA exporters impossible, even though they *have been* subjected to an investigation and *have been* found to be dumping. Here again, any continued collection of duties from non-FTA exporters is discriminatory because no duties can be collected from FTA exporters. Art. 404(iv) FTA is therefore inconsistent with Art. 9.2 ADA.

52. For those reasons, the reciprocal exemption from the application of anti-dumping law under Art. 404 FTA is inconsistent with Art. 9.2 ADA.

7. THE CONTESTED MEASURES CANNOT BE JUSTIFIED UNDER ART. XXIV GATT

53. Art. XXIV GATT can justify a measure that is inconsistent with certain other GATT provisions when this measure meets certain requirements.⁷⁹ In *Turkey – Textiles*, the AB set out a two-part test for allowing such a justification in the context of a customs union.⁸⁰ The AB confirmed that this test also applies in the context of free-trade areas.⁸¹ Firstly, the measure must be introduced upon the formation of a free-trade area that fully meets the requirements of paras. XXIV:5(b) and 8(b) GATT.⁸² Secondly, the formation of the free-trade area would have been prevented if the introduction of the measure were not allowed.⁸³ The burden of proof lies with the party invoking Art. XXIV GATT as a defence, in this case Haiti.⁸⁴

7.1 The requirements of Article XXIV:5(b) and XXIV:8(b) GATT have not been met

54. Art. XXIV:5(b) GATT provides that duties and other regulations of commerce applicable after the formation of a free-trade area shall not be higher or more trade restrictive than those existing in the constituent territories prior to the FTA. This requirement constitutes an economic test that is clarified by para. 2 of the Understanding on Article XXIV for custom unions.⁸⁵ Given the almost identical wording of paras. 5(a) and (b), the economic test should also be considered applicable to para. 5(b). The test requires an overall assessment of weighted average tariff rates and of customs duties collected.⁸⁶ Although duties have not risen within the free-trade area, several FTA provision provide increased competitive opportunities to the FTA parties that have a disadvantageous and therefore “restrictive” effect on the competitive opportunities of non-FTA parties.

⁷⁹ AB Report, *Turkey – Textiles*, para. 58.

⁸⁰ *Id.*, 45-46 and 58.

⁸¹ AB Report, *Peru – Agricultural Products*, para. 5.115.

⁸² AB Report, *Turkey – Textiles*, para. 58; AB Report, *Argentina – Footwear (EC)*, para. 109.

⁸³ *Ibid.*

⁸⁴ AB Report, *Turkey – Textiles*, para. 58.

⁸⁵ AB Report, *Turkey – Textiles*, para. 55; Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para. 2.

⁸⁶ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para. 2.

55. Art. XXIV:8(b) GATT requires the constituent members of a free-trade area to eliminate duties and other restrictive regulations of commerce with respect to substantially all trade between them. Art. XXIV:5(c) GATT stipulates that a free-trade area must be formed within a reasonable length of time, which may not exceed 10 years, except in exceptional cases.⁸⁷ In practice, WTO Members apply the conditions formally applicable to interim agreements *de facto* also to full regional trade agreements with a transition period.⁸⁸ The FTA prescribes both a prolonged existence of duties and long phase-out periods for tariffs on agricultural goods.⁸⁹ This transition period considerably exceeds the 10 years “reasonable length of time”. Therefore, the FTA provisions with such a lengthy transition period are inconsistent with Art. XXIV:8(b) GATT and are therefore not justified within the free-trade area.

7.2 The contested measures were unnecessary for the formation of the free-trade area

56. The second requirement of the two-part test can be read in the chapeau of Art. XXIV:5 GATT.⁹⁰ A measure that is inconsistent with certain other GATT provisions will only be justified by Art. XXIV GATT if it is necessary for the formation of the free-trade area.⁹¹ The AB has stated that para. 4 of Art. XXIV GATT is an important element of the context of the chapeau of para. 5.⁹² According to para. 4, the purpose of a free-trade area is “to facilitate trade” between the constituent members and “not to raise barriers to the trade” with third countries. Various FTA provisions do not correspond to this purpose with the result that they cannot be deemed “necessary for the formation of the free-trade area”.

57. Firstly, the reduction of TRQs under Chapter I FTA leads to a lower participation in in-quota tariffs by non-FTA parties.⁹³ “Barriers to trade” with third countries are raised because the imports from non-FTA parties will now fall under the restrictive out-of-quota tariffs. Secondly, the S&DT provisions have the purpose of granting preferential treatment to Haiti and thus do not facilitate trade between FTA parties. This measure also raises “barriers to trade” between Haiti and the non-FTA parties.⁹⁴ Thirdly, Chapter V FTA provides 0% import tariffs on certain green goods when originating in an FTA party or a Green accredited party. By granting this import duty exemption not only to FTA parties but also to a selection

⁸⁷ Id., para. 3.

⁸⁸ CRTA, Examination of the Interim Agreement between the EC and Chile – Note on the Meeting of 28 July 2005, WT/REG164/M/1, 6 October 2005, para. 10 and CRTA, Examination of the Free Trade Agreement between Bulgaria and the Former Yugoslav Republic of Macedonia, WT/REG90/M/1, 10 August 2000, para. 7.

⁸⁹ EMC2 Case, paras. 9, 10 and 14.

⁹⁰ AB Report, *Turkey – Textiles*, para. 45.

⁹¹ Id., para. 46.

⁹² Id., para. 56.

⁹³ See para. 23.

⁹⁴ See para. 40.

of third countries, the measure does not correspond to the purpose of Art. XXIV GATT.⁹⁵ Finally, Chapter IV FTA provides a reciprocal exemption of anti-dumping law. Anti-dumping duties have the purpose to remedy certain trade-restrictive practices. The abolishment of these trade defence measures between the FTA parties therefore does not contribute to facilitate trade. By only exempting the FTA parties, this measure also has a disadvantageous effect on the competitive opportunities of non-FTA parties.

58. The contested measures are thus *unnecessary* for the formation of the free-trade area and do not satisfy the second requirement under Art. XXIV GATT. Accordingly, Haito cannot justify its WTO-inconsistent FTA provisions pursuant to Art. XXIV GATT.

8. THE CONTESTED MEASURES CANNOT BE JUSTIFIED UNDER THE ENABLING CLAUSE

59. The Enabling Clause allows for differential and more favourable treatment among developing countries in derogation from the MFN principle if several conditions are met.⁹⁶ Chilo does not contest that the CHIMEHA FTA may fall within the scope of para. 2(c) of the Enabling Clause. However, the cumulative requirements of para. 3 of the Enabling Clause have not been met. The burden of proof lies with Haito to show that these requirements are fulfilled.⁹⁷

60. Para. 3(a) of the Enabling Clause contains the obligation to not raise barriers to the trade of other Members.⁹⁸ Several FTA provisions, however, do raise barriers to trade with regard to non-FTA parties. Chapters I, IV, V and VI FTA reduce the competitive opportunities of certain non-FTA parties and thus raise “barriers to trade” between those countries and the FTA parties.⁹⁹ Para. 3(b) of the Enabling Clause requires the FTA provisions not to “constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis”. The CHIMEHA FTA liberalizes trade between three select countries. Several of these FTA provisions have a trade-restrictive effect towards non-FTA parties. Therefore, the FTA does in fact impede the reduction of restrictions to trade.

61. Accordingly, because the requirements of the Enabling Clause are not met, the WTO-inconsistent FTA provisions cannot be justified under the Enabling Clause.

⁹⁵ Panel Report, *Canada – Autos*, para. 10.55.

⁹⁶ See para. 37; AB Report, *EC – Tariff Preferences*, paras. 90 and 112.

⁹⁷ AB Report, *EC – Tariff Preferences*, para. 105.

⁹⁸ *Id.*, para. 179.

⁹⁹ See paras. 44 and 57.

Request for Findings

For the above stated reasons, Chilo respectfully requests the Panel to:

- i. Find that the Panel has validly established jurisdiction under the DSU;
- ii. Find that the BOP quota restrictions introduced by Haito are inconsistent with Articles XI, XII, XVIII and XXIV:8(b) GATT;
- iii. Find that the reduction of the TRQs on agricultural products provided for in Chapter I of the CHIMEHA FTA is inconsistent with Articles XIII:1 and XIII:2 GATT;
- iv. Find that the S&DT provisions of Chapter VI of the CHIMEHA FTA are inconsistent with Article I:1 GATT and cannot be justified under the Enabling Clause because (i) they are not covered by paragraph 2(d) and (ii) they do not meet the requirement under paragraph 3(a) of the Enabling Clause;
- v. Find that the provisions of Chapter V of the CHIMEHA FTA providing zero import tariffs to listed green goods are inconsistent with Article I:1 GATT;
- vi. Find that the provisions of Chapter IV of the CHIMEHA FTA on anti-dumping are inconsistent with Article 9.2 Anti-dumping Agreement;
- vii. Find that none of the contested measures can be justified under Article XXIV GATT;
- viii. Find that none of the contested measures can be justified under paragraph 2(c) of the Enabling Clause because the requirements of paragraphs 3(a)-(b) of the Enabling Clause have not been met.