



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 RESPONDENT

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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)

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<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>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , <u>WT/DS332/AB/R</u> , adopted 17 December 2007, DSR 2007:IV, p. 1527 Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , <u>WT/DS332/R</u> , adopted 17 December 2007, as modified by Appellate Body Report <u>WT/DS332/AB/R</u> , DSR 2007:V, p. 1649
<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>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by

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	Appellate Body Report <u>WT/DS207/AB/R</u> , DSR 2002:VIII, p. 3127
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , <u>WT/DS363/AB/R</u> , adopted 19 January 2010, DSR 2010:I, p. 3
<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
<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 – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , <u>WT/DS265/AB/R</u> , <u>WT/DS266/AB/R</u> , <u>WT/DS283/AB/R</u> , adopted 19 May 2005, DSR 2005:XIII, p. 6365
<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>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , <u>WT/DS246/AB/R</u> , adopted 20 April 2004, DSR 2004:III, p. 925
<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>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> , WT/DS457/AB/R and Add.1, adopted 31 July 2015 Panel Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , <u>WT/DS457/R</u> and Add.1, adopted 31 July 2015, as modified by Appellate Body Report <u>WT/DS457/AB/R</u>
<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 – Measures Affecting the Importation of Rice</i> , <u>WT/DS334/R</u> , adopted 22 October 2007, DSR 2007:VI, p. 2151
<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 – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <u>WT/DS285/AB/R</u> , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report <u>WT/DS381/AB/R</u> , DSR 2012:IV, p. 2013
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

3. WTO MATERIALS

1. GATT Contracting Parties, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, 28 November 1979, GATT, BISD 26S/203 (1980)
2. Ministerial Conference, *Decision on Implementation-Related Issues and Concerns*, adopted on 14 November 2001, WT/MIN(01)/17, dated 20 November 2001

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3. Understanding on the Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, WTO Agreement, Annex 2
4. Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994
5. WTO, General Council, Transparency Mechanism for Preferential Trade Arrangements - Decision of 14 December 2010, WTO Doc. WT/L/806, 16 December 2010
6. WTO, General Council, Transparency Mechanism for Regional Trade Agreements— Decision of 14 December 2006, WTO Doc. WT/L/671, 18 December 2006
7. 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
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
CHIMEHA FTA	Free Trade Agreement concluded between Chilo, Meco and Haito
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 and bananas. Most of these products are exported. Haito is a least developed country (“LDC”) that mainly produces bananas and coffee. In the category of industrial products Haito only produces parts and components for bicycles and roller-skates. The larger part of Haito’s industrial production is exported.
2. In 2015, Chilo, Meco and Haito concluded the CHIMEHA Free Trade Agreement (“FTA”) that entered into force on 1 January 2016. Chilo unilaterally notified the FTA on 1 January 2016 to the WTO under Article (“Art.”) XXIV:7(a) GATT. Meco and Haito jointly notified the FTA pursuant to the Enabling Clause on 1 March 2016.
3. The CHIMEHA FTA reduces barriers to trade between Chilo, Haito and Meco with the purpose of assisting in their development. The FTA reduces duties on both agricultural and industrial products (Chapter I and II). The FTA incorporates several rules of WTO law, among which the principle of national treatment. It further liberalizes trade by reciprocally exempting products of the FTA parties from the application of domestic anti-dumping law. The FTA contains an ambitious environmental policy chapter (Chapter V), which permits dispute settlement under the FTA if a listed multilateral environmental agreement (“MEA”) is not complied with. Chapter V also 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. Considering Haito’s status as an LDC, Chapter VI of the FTA contains Special and Differential Treatment (“S&DT”) provisions that eliminate tariffs on imports from Haito with the exception of tariffs on coffee. For disputes relating to the provisions of the agreement, the FTA establishes an FTA dispute settlement mechanism (“DSM”). Its relation to the WTO Dispute Settlement Body (“DSB”) is explicitly explained.
4. Haito introduced a system of import quota restrictions on 1 March 2016 due to serious balance-of-payments (“BOP”) problems. This system quantitatively limits imports of all products into Haito to the amount of the preceding year.
5. After 1 March 2016, Chilo decided to initiate WTO dispute settlement consultations against Haito in which it contests Haito’s BOP measure and the recently concluded FTA. After unsuccessful consultations, Chilo submitted a request for the establishment of a panel to the DSB.

Summary of Arguments**1. The Panel cannot validly establish jurisdiction**

- Art. 808 of the FTA contains clear waivers of the parties' rights to bring a dispute before the WTO. Chilo acted contrary to good faith under Art. 3.10 DSU by disregarding these waivers. Art. 3.10 DSU constitutes a legal impediment to validly establish jurisdiction.
- Since there is no validly established jurisdiction, the Panel must decline to exercise jurisdiction over the current dispute.

2. The BOP import quota restrictions are possibly inconsistent with Article XI GATT, but justified under Article XVIII:B GATT

- Haiti does not contest the possible inconsistency of its BOP measure with Art. XI GATT. This measure can be justified under Art. XVIII:B GATT because it is an effective measure imposed in response to a genuine BOP problem, it avoids causing unnecessary damage and it is temporary.
- There is no legal obligation to eliminate this BOP measure within the CHIMEHA free-trade area pursuant to Art. XXIV:8(b) GATT because this Article can only be invoked as a justification for measures that are inconsistent with other GATT rules. In subsidiary order, Haiti's BOP import quota restrictions fall under one of the listed exceptions in Art. XXIV:8(b) and are therefore allowed within the FTA. Moreover, the principle of parallelism requires Haiti to apply its BOP import quota restrictions to all Members.

3. Chapter I of the CHIMEHA FTA that reduces tariff rates on agricultural products is consistent with Article XIII GATT

- Chapter I of the FTA only provides a reduction of tariff rates and does not affect the access to, and participation in, the quota shares. FTA parties and other Members are therefore "similarly restricted" and thus, no violation of Art. XIII:1 GATT can be found.
- Chapter I of the FTA does not alter the allocation of quota shares and therefore does not affect the distribution of trade. Accordingly, Art. XIII:2 GATT has been complied with.

4. The allegedly inconsistent S&DT provisions of Chapter VI of the CHIMEHA FTA are justified under the Enabling Clause

- The S&DT provisions are justified under the Enabling Clause. Firstly, the FTA has been validly notified under paragraph ("para.") 4(a) of the Enabling Clause. Secondly, the S&DT provisions fall within the scope of para. 2(d) of the Enabling Clause. Thirdly, the S&DT provisions are consistent with para. 3 of the Enabling Clause because they grant preferential treatment to Haiti, an LDC, and do not adversely affect other Members.

5. The environmental provisions of Chapter V of the CHIMEHA FTA providing zero import tariffs to listed green goods are consistent with Article I:1 GATT

- Haito does not contest that the provisions granting zero import tariffs to listed green goods originating in FTA parties and Green accredited parties constitute an advantage. However, this advantage is granted immediately and unconditionally to all other WTO Members willing to participate. Furthermore, the FTA's regulatory distinctions do not have a detrimental impact on the competitive opportunities of like imported products from other Members. Therefore, Art. I:1 GATT has been complied with.

6. Chapter IV of the CHIMEHA FTA is consistent with Article 9.2 Anti-Dumping Agreement

- Chilo's claim falls outside the scope of Art. 9.2 Anti-Dumping Agreement ("ADA") because this Article only applies *within* the context of anti-dumping proceedings.
- If the claim does fall in the scope of Art. 9.2 ADA, Chapter IV FTA is consistent with Art. 9.2 ADA because this Article does not prohibit a waiver of the right to apply anti-dumping law. Also, the producers and exporters under investigation remain unaffected by the waiver in Chapter IV FTA. Therefore, Art. 9.2 ADA has been complied with.

7. The contested provisions of the CHIMEHA FTA are justified under the Enabling Clause

- Chilo did not identify which obligations of the Enabling Clause the S&DT provisions are alleged to have contravened. Its claim should therefore be dismissed.
- The contested FTA provisions can, in subsidiary order, be justified under the Enabling Clause. Firstly, the FTA has been validly notified under para. 4(a) of the Enabling Clause. Secondly, the FTA provisions fall under para. 2(c) and meet the requirements of para. 3 of the Enabling Clause because they do not raise barriers to the trade of other Members.

8. The contested provisions of the CHIMEHA FTA are justified under Article XXIV GATT

- The contested FTA provisions can, in subsidiary order, be justified under Art. XXIV GATT. Firstly, the FTA provisions do not increase duties or regulations of commerce and are therefore consistent with Art. XXIV:5(b) GATT. Secondly, the FTA significantly reduces duties on both agricultural products and industrial products and therefore meets the requirement of Art. XXIV:8(b) GATT. Thirdly, the FTA provisions facilitate trade between the FTA parties and do not raise barriers to trade with third countries. Accordingly, the FTA provisions were necessary for the formation of the free-trade area.

Identification of the Measures at Issue

- Haito introduced BOP quota restrictions applicable to all imported products. This system limits the amount of imports of all products to the amount exported to Haito 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 Haito. Import tariffs on all imports from Haito 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. When jurisdiction has been validly established, the Panel cannot decline to exercise its jurisdiction.¹ For a Panel to validly establish jurisdiction, the complainant must act in good faith according to Art. 3.7 and 3.10 DSU.² A Member may be acting in bad faith if it challenges a measure before the WTO DSB for which it had previously clearly stated that it would not take legal action before the WTO DSB.³ Chilo has acted inconsistently with Art. 3.10 DSU because it acted contrary to good faith by bringing this dispute before the WTO DSB after it agreed to Art. 808 FTA, which clearly provides that the FTA DSM is the only available forum in the current circumstances.⁴

2. Art. 808 FTA sets out the relationship of the FTA DSM to the WTO DSM. Art. 808:1 FTA establishes as a general rule that the complainant may choose the forum.⁵ Art. 808:3 FTA deviates from this general rule. Art. 808:3 FTA provides that “in any dispute concerning” a BOP measure or an environmental measure where the responding party

¹ AB Report, *Mexico – Soft Drinks*, para. 53.

² AB Report, *EC – Export Subsidies on Sugar*, para. 312; 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.

³ AB Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, paras. 217 and 228; AB Report, *Peru – Agricultural Products*, para. 5.25.

⁴ EMC2 Case, para. 26.

⁵ *Id.*, para. 17.

requests in writing that “the matter” be considered under this FTA, the complaining party must, “in respect of that matter”, have recourse to dispute settlement procedures solely under this FTA.⁶ In this dispute, Chilo contests Haiti’s BOP measure as well as an environmental measure under Chapter V of the FTA. This dispute thus concerns measures that fall within the categories of Art. 808:3. The use of the wording “the matter” suggests that the respondent is not limited as to the type of measure for which he can request consideration under the FTA DSM because it refers to the whole dispute. “the matter” does not exclusively refer to the measures mentioned in Art. 808:3 FTA, therefore the respondent has the right to refer the entire dispute to the FTA DSM. This reading of Art. 808:3 FTA assists in avoiding conflicting findings by different dispute settlement bodies.

3. Haiti asks the Panel to regard these written submissions as its request in writing that the dispute be considered under the FTA. The FTA does not prescribe a time limit for this request in writing. Since Art. 808:3 FTA clearly states that in the abovementioned situation, the complainant must have recourse “solely” under the FTA, this provision constitutes a clear waiver of the right to initiate WTO proceedings. Chilo is acting in bad faith because it is contesting Haiti’s BOP measure and an environmental measure taken under the FTA before the WTO DSB, despite this clear waiver. Therefore, the Panel is kindly asked to decline to exercise jurisdiction for all of Chilo’s claims.

4. If the Panel were to find that Art. 808:3 FTA does not constitute a clear waiver with regard to the entire dispute, then the Panel is asked to find that at least with regard to BOP measures and environmental measures, Art. 808:3 FTA constitutes a clear waiver. Therefore, in subsidiary order, the Panel is kindly asked to decline to exercise jurisdiction at least with regard to those specific measures.

2. THE BOP IMPORT RESTRICTIONS ARE INCONSISTENT WITH ARTICLE XI GATT, BUT JUSTIFIED UNDER ARTICLES XII AND XVIII GATT

5. In order to remedy a serious BOP problem, Haiti introduced import quota restrictions. Haiti does not contest that its BOP measure could be a quantitative restriction that is inconsistent with Art. XI GATT. However, such alleged inconsistency with Art. XI GATT can be justified under Art. XII and XVIII GATT.

⁶ Ibid.

2.1 The alleged inconsistency with Article XI GATT is justified under Article XVIII:B GATT

2.1.1 On the relationship between Articles XII and XVIII:B GATT

6. Both Art. XII and XVIII:B GATT allow the exceptional use of quantitative restrictions for BOP purposes and therefore constitute an exception to Art. XI GATT.⁷ The conditions that need to be met for a justification pursuant to Art. XVIII:B GATT are similar to those of Art. XII GATT with the difference that recourse to Art. XVIII:B GATT should be less onerous and is reserved for developing countries.⁸ Since Haiti is an LDC, it can invoke Art. XXIV:B GATT instead of having to rely on the stricter Art. XII GATT.

2.1.2 Haiti's BOP measure is justified pursuant to Article XVIII:B GATT

7. Restrictive measures taken for BOP purposes are justified pursuant to Art. XVIII:B GATT when the following conditions are met. Firstly, the BOP measure must fall within the scope of Art. XVIII:B GATT. Secondly, the measure may not exceed what is necessary to address the BOP problem at hand.⁹ Thirdly, the measure must avoid unnecessary damage to the commercial and economic interests of other Members.¹⁰ Finally, the measure must be temporary.¹¹ The import quota restrictions have been imposed in response to a genuine BOP problem and these restrictions are effective. Additionally, Haiti notified its BOP measure in a WTO-consistent manner. Therefore, the first and second requirement have been met. This measure also avoids causing unnecessary damage and is temporary.

2.1.2.1 Haiti's BOP measure avoids causing unnecessary damage

8. Art. XVIII:B GATT requires the BOP measure to avoid unnecessary damage to the commercial and economic interests of other Members.¹² Haiti has shaped its BOP measure in such a way that such unnecessary damage is avoided. Firstly, the BOP measure is applicable to all products from all Members alike. Therefore, it does not discriminate between like products or countries. Secondly, imports have been limited to the amounts imported in the preceding year, thereby leaving unaffected the existing distribution of trade. By taking these precautions, Haiti avoids causing serious prejudice to exports of a particular commodity on

⁷ AB Report, *Argentina – Textiles and Apparel*, para. 73.

⁸ Art. XXIV:4(a) GATT; Panel Report, *India – Quantitative Restrictions*, para. 5.155; Ministerial Conference, *Ministerial Decision on Implementation-Related Issues and Concerns*, adopted on 14 November 2001, WT/MIN(01)/17, dated 20 November 2001, para. 1.1.

⁹ Art. XVIII:9 GATT.

¹⁰ Art. XVIII:10 GATT.

¹¹ Art. XVIII:11 GATT; BOP Understanding, para. 1.

¹² Art. XVIII:10 GATT.

which the economy of a contracting party is largely dependent.¹³ Therefore, Haiti has introduced its import quota restrictions in such a way as to avoid any unnecessary damage.

2.1.2.2 Haito's measure is taken on a temporary basis

9. Art. XVIII:B GATT only provides a justification for the implementation of a BOP measure if this measure is temporary.¹⁴ After being in place for only one year (since March 2016), Haiti's BOP measure cannot be regarded as permanent, considering the fact that Haiti can withdraw it as soon as the BOP problems have been relieved. Time-schedules for the removal of restrictive import measures must be announced publicly as soon as possible.¹⁵ When a time-schedule is not announced, a justification must be given.¹⁶ Haiti cannot yet estimate how long the BOP measure will have to be in place in order to remedy the BOP problem. For this reason, no time-schedules have been drafted yet. Therefore, even though Haiti has not announced time schedules, this does not imply that the measure is not temporary and this does not lead to an inconsistency with Art. XVIII:B GATT.

2.1.3 **Conclusion**

10. Haiti does not contest the possible inconsistency of its BOP measures with Art. XI GATT. However, since all conditions of Art. XVIII:B GATT are met, this inconsistency is justified pursuant to this Article.

2.2 Haiti's BOP measure must not be eliminated within the free-trade area

11. Art. XXIV:8(b) GATT can only be invoked when justifying an inconsistency with a GATT provision and thus, as a "defence". In subsidiary order, if this Article does grant actionable rights, then Haiti's BOP measure is still allowed under Art. XXIV:8(b) GATT.

2.2.1 **Article XXIV:8(b) GATT does not grant actionable rights**

12. A measure that is otherwise inconsistent with certain GATT provisions can be justified under Art. XXIV GATT as part of a free-trade area, if certain conditions are met.¹⁷ Case law on Art. XXIV GATT is concerned with this Article's role as a justification to measures that are inconsistent with other GATT rules.¹⁸ In *Turkey – Textiles*, the AB concluded that Art. XXIV GATT may, under certain conditions, be invoked as a "defence" to a finding of inconsistency.¹⁹ There is no case law that states that Art. XXIV GATT grants additional rights, which may be used as an "offence", to the constituent territories of a free-trade area.

¹³ Ad note Art. XII:3(c)(i) GATT; Art. XVIII:10 GATT.

¹⁴ Art. XVIII:11 GATT; BOP Understanding, para. 1.

¹⁵ BOP Understanding, para. 1.

¹⁶ *Ibid.*

¹⁷ AB Report, *Peru – Agricultural Products*, paras. 5.112-5.113.

¹⁸ *Id.*, paras. 5.114-5.117; AB Report, *Turkey – Textiles*, para. 45; AB Report, *Argentina - Footwear (EC)*, para. 110.

¹⁹ AB Report, *Turkey – Textiles*, para. 45.

Two Panel Reports that brought up the existence of such additional rights have later been reversed or modified by the AB.²⁰ Since Art. XXIV GATT does not grant actionable rights, Chilo cannot allege a breach of this Article.

2.2.2 **Haito's BOP measure is allowed under Article XXIV:8(b) GATT**

13. In subsidiary order, if the Panel were to find that Art. XXIV GATT does grant actionable rights, then the import quota restrictions permitted under Art. XVIII:B GATT would still be allowed within the CHIMEHA free-trade area. Art. XXIV:8(b) GATT requires that duties and other restrictive regulations of commerce be eliminated on substantially all trade between the territories constituting a free-trade area. However, Art. XXIV:8(b) GATT also allows exceptions to the required elimination of duties and restrictive regulations by allowing certain restrictive measures that are permitted under specific GATT Articles. Even though Art. XVIII:B GATT is not included within the listed Articles, measures taken under Art. XVIII:B GATT should still be allowed within a free-trade area because Art. XII GATT *is* explicitly included as a listed exception. The fact that Art. XII GATT is included as a listed exception should be interpreted in the sense that measures taken for BOP purposes are permitted in a free-trade area, regardless of whether they are taken under Art. XII or XVIII:B GATT. It is difficult to conceive that restrictions for BOP difficulties taken by developed countries pursuant to Art. XII GATT would be allowed within a free-trade area, while those taken by developing countries under Art. XVIII:B GATT would not be allowed.

14. Art. XXIV:8(b) GATT states that, “where necessary”, the restrictive measures permitted under one of the listed exceptions must not be eliminated. The assessment of “necessity” involves “weighing and balancing” of factors related to both the measure at issue and reasonably available alternatives.²¹ Factors taken into account in most cases include: (i) the importance of the interests or values at stake; (ii) the contribution of the measure to the realisation of the ends pursued by it; and (iii) the restrictive effect of the measure on international commerce.²² The BOP measure is necessary to address Haito's BOP problem for the following reasons. Firstly, the interest at stake is the stability of Haito's balance of payments. The importance of safeguarding these interests is acknowledged by the fact that two GATT Articles (Art. XII and XVIII:B) cover this issue and permit restrictive measures taken for this purpose. Secondly, Haito's import quota restrictions are an effective measure to

²⁰ Panel Report, *Argentina - Footwear (EC)*, para. 8.97; AB Report, *Argentina - Footwear (EC)*, para. 110; Panel Report, *Turkey - Textiles*, para. 9.163; AB Report, *Turkey - Textiles*, para. 45.

²¹ AB Report, *China - Publications and Audiovisual Products*, para. 239.

²² *Id.*, paras. 240-242; AB Report, *US - Gambling*, paras. 306-308.

relieve the BOP issues.²³ The measure thus effectively contributes to the realisation of the ends pursued by it. Thirdly, Haiti's BOP measure is designed to have the least possible restrictive effect on trade by limiting imports of a certain product to the amounts imported of this product in the preceding year.²⁴ As long as the total amount of imports into Haiti does not exceed the preceding year's level of imports, access to Haiti's market remains unchanged. If Haiti had taken a price-based measure, the levying of additional duties on each imported product would have restricted each instance of importation. Furthermore, since imports are not likely to differ by a large margin from imports of the preceding year, exporting countries do not face much disruption as a result of this measure. It is necessary that the measure covers products from all Members because any discrimination between like products or countries would be prohibited under Art. XIII:1 GATT. For the same reasons, it is also necessary for the BOP measure to apply within the free-trade area.

15. Pursuant to Art. XXIV:8(b) GATT, Haiti's BOP measure must not be eliminated within the CHIMEHA free-trade area. Firstly, it has been demonstrated that the BOP measure is necessary within the free-trade area.²⁵ Secondly, it has been demonstrated that the BOP measure is permitted under Art. XVIII:B GATT.²⁶

2.2.3 The principle of "parallelism" prohibits excluding FTA parties from the application of the BOP measure

16. The principle of parallelism is originally derived from the parallel language used in paras. 1 and 2 of Art. 2 of the Agreement on Safeguards.²⁷ In the context of safeguards, this principle requires that the imports included in the determination on whether imports are causing injury to a domestic industry correspond to the imports included in the application of the safeguard measure.²⁸ Phrased more generally, this principle requires that when a Member takes into account the imports from all sources in determining the necessity of a certain measure, then it is also required to apply this measure to imports from all sources. The same logic applies to BOP measures because both types of measures require a prior assessment of the effect of imports on a domestic situation.

17. Haiti faces real BOP problems that threaten its external financial position.²⁹ The determination of whether a country is suffering BOP problems is made by assessing the

²³ EMC2 Case, case author note.

²⁴ Id., para. 19.

²⁵ See para. 14.

²⁶ See para. 10.

²⁷ AB Report, *US – Line Pipe*, para. 179.

²⁸ AB Report, *US – Wheat Gluten*, para. 96, AB Report, *US – Line Pipe*, para. 181.

²⁹ EMC2 Case, case author note.

overall level of imports and exports, thereby not excluding imports from FTA parties. Since imports from *all* Members were included in this determination, the principle of parallelism requires Haiti to also apply its BOP quotas on imports from all Members, including partners in a free-trade area.³⁰ For those reasons, Haiti is not allowed to grant preferential treatment to the FTA parties and thus Chilo and Meco must also be subject to the BOP measure.

2.2.4 Conclusion

18. Art. XXIV:8(b) GATT does not require Haiti to grant preferential treatment to the FTA parties with regard to its BOP measure. Moreover, requiring such preferential treatment would be inconsistent with the principle of parallelism.

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

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

19. In 2015, the FTA parties subjected certain products to either MFN or country-specific TRQs.³¹ For TRQs on agricultural products, Chapter I FTA requires that in-quota tariffs be reduced by 50% and out-of-quota tariffs to 60% between the FTA parties by 2025.

20. TRQs must comply with the requirements of Art. I:1 and Art. XIII GATT.³² Each Article applies to a different element of the TRQ.³³ “If a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota, Art. I:1 would be implicated”.³⁴ Art. XIII GATT concerns the access to or allocation of tariff quota shares.³⁵ Chapter I FTA only concerns tariff differentiation, which is subject to Art. I:1 GATT, and therefore, Art. XIII GATT is not applicable.

21. In subsidiary order, if the Panel were to find that Art. XIII GATT is applicable, then Chapter I FTA is consistent with this Article. In order to establish an inconsistency with Art. XIII:1 GATT, evidence of the following must be provided: (i) the products concerned are like products, (ii) the existence of a TRQ on the importation of any product of the territory of another Member, (iii) the fact that imports of like products from all other countries are not similarly made subject to the tariff quota.³⁶ If a Member is excluded from access to and participation in the TRQ, then imports of like products from this Member are not “similarly

³⁰ AB Report, *Argentina – Footwear (EC)*, para. 112, AB Report, *US – Wheat Gluten*, para. 441, AB Report, *US – Line Pipe*, para. 181.

³¹ EMC2 Case, para. 4.

³² Art. XIII:5 GATT; AB Report, *EC - Bananas III (Article 21.5 - Ecuador II / US)*, para. 343.

³³ *Id.*, para. 343.

³⁴ AB Report, *EC - Bananas III (Article 21.5 - Ecuador II / US)*, para. 343.

³⁵ *Id.*, paras. 337-338.

³⁶ *Id.*, para. 337 ; Panel Report, *EC – Bananas III (Art. 21.5 – Ecuador II / US)*, para. 7.673.

made subject to the tariff quota”.³⁷ Haiti does not contest that the products concerned are “like”, nor does it contest that all FTA parties had several TRQs in place prior to the conclusion of the FTA. However, Chapter I FTA does not alter the allocation of shares. Therefore, Chapter I FTA leaves the access of non-FTA parties to TRQs unchanged and thus, non-FTA parties are similarly restricted by the TRQ. Accordingly, Chapter I FTA is consistent with Art. XIII:1 GATT.

3.2 Chapter I of the CHIMEHA FTA is consistent with Article XIII:2 GATT

22. 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. As demonstrated earlier, the measure at issue does not alter the distribution of quota shares.³⁸ Since the measure only adapts the level of quota tariffs, the distribution of trade remains the same. Therefore, Chapter I FTA is consistent with Art. XIII:2 GATT.

4. THE S&DT PROVISIONS ARE POSSIBLY INCONSISTENT WITH ARTICLE I:1 GATT BUT JUSTIFIED UNDER THE ENABLING CLAUSE

23. Article I:1 GATT requires that with respect to custom duties, any advantages granted to any product originating in any Member shall be accorded immediately and unconditionally to the like products originating in all other Members.³⁹ The Enabling Clause allows for preferential treatment among developing countries in derogation from the MFN principle of Art. I:1 GATT. However, in its request for the establishment of a Panel, Chilo did not identify the provisions of the Enabling Clause with which the S&DT provisions would allegedly be inconsistent.⁴⁰ Therefore, Chilo’s claims of inconsistency under the Enabling Clause should be disregarded. In subsidiary order, Haiti does not contest that the S&DT provisions are possibly inconsistent with Art. I:1 GATT. However, the S&DT provisions are justified under the Enabling Clause. The burden of proof lies with Chilo to show the inconsistency of the S&DT provisions with Art. I:1 GATT.⁴¹

4.1 Chilo failed to identify the applicable provisions of the Enabling Clause

24. The AB has held that the complaining party has the responsibility to identify those provisions of the Enabling Clause with which the challenged provisions are allegedly

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

³⁸ See paras. 19 and 20.

³⁹ AB Report, *Canada – Autos*, para. 79-81; AB Report, *EC – Seal Products*, para. 5.86.

⁴⁰ EMC2 Case, para. 28.

⁴¹ AB Report, *EC – Tariff Preferences*, para. 87.

inconsistent.⁴² In its request for the establishment of a Panel, Chilo failed to identify *any* specific provisions under the Enabling Clause with which the S&DT provisions would be inconsistent.⁴³ This is a due process consideration,⁴⁴ which Chilo did not respect. Its claims of inconsistency under the Enabling Clause should therefore be dismissed because they are not a matter before the Panel in the sense of Art. 11 DSU.⁴⁵

4.2 The Enabling Clause is applicable

25. Para. 4(a) of the Enabling Clause stipulates that WTO Members who take action to introduce a differential and more favourable treatment arrangement must notify the contracting parties. The Transparency Mechanism for Preferential Trade Arrangements sets out when notification under para. 2(d) of the Enabling Clause should be done.⁴⁶ The CHIMEHA FTA was notified by one of the parties “taking action to introduce an arrangement”, within the ultimate deadline of three months after it entered into force.⁴⁷ Chilo cannot rely on its own failure to notify in order to deny valid notification of the CHIMEHA FTA. Chilo only notified the FTA under Art. XXIV GATT; not under the Enabling Clause.⁴⁸ Furthermore, even if the Panel were to find an issue of compliance with these formal requirements, the purpose of the notification was met. Both Meco and Haito notified the FTA under the Enabling Clause and have thus transparently provided information on the S&DT provisions.⁴⁹ Accordingly, the Enabling Clause is applicable.

4.3 The requirements of the Enabling Clause are fulfilled

26. The Enabling Clause allows for preferential treatment among developing countries in derogation from the MFN principle of Art. I:1 GATT if several conditions are met.⁵⁰ First, these measures must fall within the scope of para. 2 of the Enabling Clause.⁵¹ Second, they must be consistent with the requirements under para. 3 of the Enabling Clause.⁵²

⁴² Id., para. 113.

⁴³ EMC2 Case, para. 28.

⁴⁴ AB Report, EC – Tariff Preferences, para. 113.

⁴⁵ AB Report, Chile – Price Band System, paras. 164 and 174-177.

⁴⁶ WTO, General Council, Transparency Mechanism for Preferential Trade Arrangements - Decision of 14 December 2010, WTO Doc. WT/L/806, 16 December 2010, paras. 1(a) and 3.

⁴⁷ EMC2 Case, para. 18; WTO, General Council, Transparency Mechanism for Preferential Trade Arrangements - Decision of 14 December 2010, WTO Doc. WT/L/806, 16 December 2010, para. 3.

⁴⁸ EMC2 Case, para. 18.

⁴⁹ WTO, General Council, Transparency Mechanism for Preferential Trade Arrangements - Decision of 14 December 2010, WTO Doc. WT/L/806, 16 December 2010, para. 2.

⁵⁰ AB Report, EC – Tariff Preferences, paras. 90 and 112.

⁵¹ Id., para. 112.

⁵² Ibid.

27. The S&DT provisions of the CHIMEHA FTA grant special treatment to Haiti, an LDC.⁵³ These provisions fall within the scope of para. 2(d) because special treatment is granted to one of the “least developed among the developing countries”.⁵⁴ Para. 3(a) of the Enabling Clause contains the obligation to not raise barriers to the trade of other Members. The AB does not find that a benefit reserved for some Members, by its very nature, is a disadvantage and therefore represents a “barrier to trade” for other Members.⁵⁵ The S&DT provisions grant preferential treatment to Haiti and leave other Members unaffected. Accordingly, para. 3(a) is complied with. For the same reason, the S&DT provisions do not in any way “constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis”. Furthermore, the S&DT provisions are in line with the Preamble to the WTO Agreement, which recognizes that “there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade”.⁵⁶ Therefore, para. 3(b) of the Enabling Clause is complied with. The requirement of para. 3(c) is irrelevant because the contested preferential treatment is not granted by developed countries.

28. All conditions in para. 2 and 3 of the Enabling Clause are met. Therefore, the allegedly WTO-inconsistent S&DT provisions are justified pursuant to the Enabling Clause.

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

29. Article I:1 GATT requires that with respect to custom duties, any advantages granted to any product originating in any one Member shall be accorded immediately and unconditionally to the like products originating in all other Members.⁵⁷ “Immediately” means that the measure at issue must be granted without delay.⁵⁸ Haiti does not contest that the provisions granting zero import tariffs to listed green goods from FTA parties and Green accredited parties constitute an advantage with respect to customs duties that is granted to like products. However, since this advantage is granted immediately and unconditionally to all other WTO Members willing to participate, the measure is consistent with Art. I:1 GATT.

30. An advantage granted to products of any country must immediately and unconditionally be accorded to like products of all WTO Members.⁵⁹ “Unconditionally” means that the advantage granted to the product of any country must be accorded to the like products of all

⁵³ EMC2 Case, para. 14.

⁵⁴ Enabling Clause, para. 2(d); AB Report, *EC — Tariff Preferences*, para. 172.

⁵⁵ AB Report, *EC — Bananas III (Article 21.5 — US/Ecuador II)*, para. 346.

⁵⁶ Preamble GATT, para. 2; AB Report, *EC — Tariff Preferences*, para. 92.

⁵⁷ AB Report, *Canada — Autos*, para. 79; AB Report, *EC — Seal Products*, para. 5.86.

⁵⁸ Panel Report, *US — Tuna II (Mexico)*, para. 7.412.

⁵⁹ Art. I:1 GATT.

WTO Members without discrimination as to origin.⁶⁰ Art. I:1 GATT does not prohibit a Member from attaching any conditions to the granting of an advantage within the meaning of Article I:1 GATT.⁶¹ Regulatory distinctions between like imported products are allowed, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.⁶²

31. Chapter V FTA creates a system of reciprocal import duty exemptions on 51 green goods. At the entry into force of the FTA, any Member exporting like products would be granted the advantage of 0% import tariffs when reciprocally exempting the 51 green goods from import tariffs. These Members are considered by the FTA parties to be Green accredited parties. This system is thus open to any country willing to participate under the same condition. Accordingly, the conditions do not discriminate with respect to the origin of products and are therefore consistent with Art. I:1 GATT.

32. Furthermore, only conditions with a detrimental impact on the competitive opportunities for like imported products from other Members are inconsistent with Art. I:1 GATT.⁶³ The contested provision corresponds to the GATT's preambulatory objective of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".⁶⁴ The provision's purpose is thus to liberalize trade and increase the trade flow of the 51 green products. When satisfying the condition of reciprocal exemption, like products of that country will enjoy *enhanced* competitive opportunities by adhering to a group of countries with an increased trade flow at 0% import tariffs. Accordingly, no detrimental impact exists and the measure remains consistent with Art. I:1 GATT.

33. For all these reasons, the advantage is granted immediately and unconditionally to all other WTO Members and the measure is therefore consistent with Art. I:1 GATT.

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

6.1 The claim falls outside the scope of Article 9.2 ADA

34. Art. 9.2 ADA sets out that when an anti-dumping duty is imposed, this duty must be collected in the appropriate amounts in each case and on a non-discriminatory basis from all

⁶⁰ Panel Report, Canada – Autos, para. 10.23.

⁶¹ AB Report, EC – Seal Products, para. 5.88.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Preamble GATT, para. 3.

sources found to be dumped and causing injury.⁶⁵ These requirements relate to the general obligation to provide individual treatment to producers and exporters under investigation.⁶⁶

35. Art.9.2 ADA only applies “When an anti-dumping duty is imposed [...]”. When *no* anti-dumping duty is imposed (or is imposable), Art. 9.2 ADA does not apply. The AB agrees with this interpretation as it clearly stated that Art. 9.2 ADA relates to the obligation to provide individual treatment “in the context of anti-dumping proceedings”.⁶⁷ Thus, it is only *within the context* of anti-dumping proceedings that the provisions of Art. 9.2 ADA apply.

36. The current dispute does not concern a specific instance of anti-dumping duty collection. Instead, Chilo challenges the consistency of Art. 404 FTA in which the FTA parties have waived their use of domestic anti-dumping law. Art. 404 FTA thus *eliminates* the use of anti-dumping proceedings. Since Art. 9.2 ADA only applies “in the context” of those proceedings, it does not apply to Art. 404 FTA, which rules out the use of anti-dumping proceedings within the free-trade area. Therefore, Chilo’s claim falls outside the scope of Art. 9.2 ADA.

6.2 In subsidiary order: Chapter IV of the CHIMEHA FTA is consistent with Article 9.2 ADA

37. If the Panel finds that the claim at hand falls within the scope of Art. 9.2 ADA, then Chapter IV of the FTA is consistent with this Article because the FTA parties have clearly waived their right to apply anti-dumping law. Art. 9.2 ADA does not prohibit such a waiver.

38. Art. VI:2 GATT states that Members “may” levy anti-dumping duties. With regard to the imposition and collection of anti-dumping duties, Art. 9.1 ADA states “the decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled [...] are decisions to be made by the authorities of the importing Member”. This provision makes it clear that a Member may decide not to impose anti-dumping duties, even when a product is found to be dumped. If a Member may decide not to impose anti-dumping duties even after an investigation has found a product to be dumped, then it is hard to conceive that a Member may not choose whether or not to initiate anti-dumping investigations. This view appears to be confirmed by the AB, which qualifies taking anti-dumping measures as a “right”.⁶⁸ Instead, both the decision to initiate anti-dumping investigations and the decision to impose anti-dumping duties are within a Member’s discretion. Since Art. 404 FTA is nothing more than, on the one hand a decision not to initiate anti-dumping investigations with respect to goods from FTA parties and, on the other hand, a

⁶⁵ Art. 9.2 ADA.

⁶⁶ AB Report, *EC – Fasteners (China)*, para. 330.

⁶⁷ *Ibid.*

⁶⁸ AB Report, *EC – Biodiesel*, para. 6.25.

decision not to impose anti-dumping duties on such goods, this measure is consistent with Art. 9.2 ADA.

39. In those cases in which an anti-dumping duty is imposed on products from non-FTA parties, Art. 9.2 ADA must still be complied with. The requirements of Art. 9.2 ADA relate to the general obligation to provide individual treatment to producers and exporters under investigation.⁶⁹ Due to the waiver contained in Art. 404 FTA, no producers and exporters from FTA parties can be investigated. Art. 404 FTA does not take away the individual treatment of the non-FTA producers and exporters under investigation because it does not affect the procedure for these producers and exporters.

40. Producers and exporters under investigation still receive individual treatment under Art. 404 FTA and the FTA parties have waived the right to apply anti-dumping duties, which is not prohibited under Art. 9.2 ADA. Art. 404 of the CHIMEHA FTA is therefore consistent with Art. 9.2 ADA.

7. ALL CHAPTERS OF THE CHIMEHA FTA ARE JUSTIFIED UNDER THE ENABLING CLAUSE

41. In its request for the establishment of a Panel Chilo only referred to the Enabling Clause under its third claim without identifying the specific obligations of the Enabling Clause that the FTA has allegedly contravened.⁷⁰ Chilo's claims of inconsistency under the Enabling Clause should therefore be dismissed.⁷¹ In subsidiary order, the FTA provisions are justified under the Enabling Clause.

42. The Enabling Clause allows for differential and more favourable treatment among developing countries in derogation from the MFN principle if several conditions are met.⁷² It has been demonstrated earlier that the FTA has been properly notified under para. 4(a) of the Enabling Clause.⁷³ Para. 3 of the Transparency Mechanism states that the required notification shall take place as early as possible.⁷⁴ On 1 March 2016, Meco and Haito jointly submitted a notification of the CHIMEHA FTA to the WTO Committee on Trade and Development. The purpose of the notification was met because Meco and Haito notified the FTA under the Enabling Clause and have thus transparently provided information on the

⁶⁹ AB Report, *EC – Fasteners (China)*, para. 330.

⁷⁰ EMC2 Case, para. 28.

⁷¹ See para. 24; AB Report, *EC – Tariff Preferences*, para. 113; AB Report, *Chile – Price Band System*, paras. 164 and 174-177.

⁷² AB Report, *EC – Tariff Preferences*, paras. 90 and 112.

⁷³ See para. 25.

⁷⁴ WTO, General Council, Transparency Mechanism for Regional Trade Agreements - Decision of 14 December 2006, WTO Doc. WT/L/671, 18 December 2010, para. 3.

FTA.⁷⁵ Accordingly, the Enabling Clause is applicable. In what follows, it will be demonstrated that the FTA meets the conditions of paras. 2 and 3 of the Enabling Clause.

43. The FTA is an arrangement entered into amongst less-developed countries for the mutual reduction and elimination of tariffs and non-tariffs measures and therefore falls within the scope of para. 2(c) of the Enabling Clause. Para. 3(a) of the Enabling Clause contains the obligation to not raise barriers to the trade of other Members. None of the Chapters of the FTA increase duties or regulations of commerce between FTA parties or between FTA and non-FTA parties. Further, the AB does not find that a benefit reserved for some Members, by its very nature, represents a disadvantage and therefore a “barrier to trade” for other Members.⁷⁶ 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 FTA reduces tariffs and other restrictions in line with the Preamble to the WTO Agreement, without raising barriers to trade of other Members.⁷⁷ For these reasons, it does not impede the reduction or elimination of tariffs and other restrictions to trade on an MFN basis. The requirement of para. 3(c) is irrelevant because the contested preferential treatment is not granted by developed countries.

44. Accordingly, the requirements of the Enabling clause are fulfilled and the allegedly WTO-inconsistent FTA provisions can be justified under the Enabling Clause.

8. ALL CHAPTERS OF THE CHIMEHA FTA ARE JUSTIFIED UNDER ARTICLE XXIV GATT

45. If the Panel were to find that the FTA cannot be justified under the Enabling Clause, the contested provisions are justified pursuant to Art. XXIV GATT. Art. XXIV GATT justifies the adoption of a measure that is inconsistent with certain other GATT provisions if certain conditions are met.⁷⁸ The AB set out a two-part test for allowing such a justification in the context of a customs union and confirmed that it also applies in the context of free-trade areas.⁷⁹ Firstly, the measure must be introduced upon the formation of a free-trade area that fully meets the requirements of Art. XXIV:5(b) and 8(b) GATT.⁸⁰ Secondly, the formation of that free-trade area would be prevented if it were not allowed to introduce this measure.⁸¹

⁷⁵ Id., para. 2.

⁷⁶ AB Report, *EC – Bananas III (Article 21.5 – US/Ecuador II)*, para. 346.

⁷⁷ See para. 27.

⁷⁸ AB Report, *Turkey – Textiles*, para. 45.

⁷⁹ Id., paras. 45-46 and 58; AB Report, *Peru – Agricultural Products*, para. 5.115.

⁸⁰ AB Report, *Turkey – Textiles*, para. 58; AB Report, *Argentina – Footwear (EC)*, para. 109.

⁸¹ Ibid.

8.1 The requirements of Article XXIV:5(b) and XXIV:8(b) GATT are fulfilled

46. Art. XXIV:5(b) GATT states that duties and other regulations of commerce maintained in each of the constituent territories shall not be higher or more restrictive than those existing prior to the formation of the FTA. This assessment constitutes an economic test that is clarified in the Understanding on Article XXIV for customs unions.⁸² This test should also be considered applicable to para. 5(b) due to the almost identical wording of paras. 5(a) and (b). An overall assessment of weighted average tariff rates and of customs duties collected is required.⁸³ None of the Chapters of the FTA increase duties or regulations of commerce between FTA parties or between FTA and non-FTA parties. Chapter V FTA is the only provision in the FTA that concerns the relation between FTA and non-FTA parties, but this Chapter allows for the lowering of tariffs.⁸⁴ Accordingly, the Chapters of the FTA do not raise barriers to trade and therefore, the requirement of Art. XXIV:5(b) GATT is met.

47. Art. XXIV:8(b) GATT stipulates that duties and other restrictive regulations of commerce must be eliminated on substantially all trade between the constituent territories of a free-trade area. While it is unclear where the threshold for the elimination of duties and regulations of commerce lays, it is certain that Art. XXIV:8(b) GATT does not require that *all* duties and regulations of commerce be eliminated.⁸⁵ The FTA covers substantially all trade between Chilo, Meco and Haito.⁸⁶ It significantly reduces duties on both agricultural products and industrial products.⁸⁷ With regard to regulations of commerce, it abolishes the use of anti-dumping law, liberalizes trade in services and applies national treatment and other market access rules.⁸⁸ The FTA thus significantly reduces tariffs and restrictive regulations of commerce within the free-trade area. As some flexibilities are allowed under Art. XXIV:8(b) GATT, the considerable tariff reductions in the CHIMEHA FTA suffice to meet the requirement under Article XXIV:8(b) GATT.⁸⁹ This analysis is not affected by the 0% duty on listed green goods also being granted to countries outside the free-trade area.⁹⁰ Para. 8 does not prohibit duties from also being eliminated with regard to third countries.

⁸² AB Report, *Turkey – Textiles*, para. 55; Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para. 2.

⁸³ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, para. 2.

⁸⁴ EMC2 Case, para. 13.

⁸⁵ AB Report, *Turkey – Textiles*, para. 48.

⁸⁶ EMC2 Case, para. 7.

⁸⁷ *Id.*, paras. 9 and 10.

⁸⁸ *Id.*, paras. 11, 12 and 15.

⁸⁹ AB Report, *Turkey – Textiles*, para. 48; Panel Report, *Brazil – Retreaded Tyres*, para. 7.284.

⁹⁰ EMC2 Case, para. 13.

8.2 The contested measures are necessary for the formation of the free-trade area

48. The second requirement of the two-part test can be read in the chapeau of Art. XXIV:5 GATT.⁹¹ A measure that is inconsistent with certain GATT provisions is justified under Art. XXIV GATT if it is necessary for the formation of a free-trade area.⁹² The AB has stated that para. 4 of Art. XXIV GATT is an important element of the context of the chapeau of para. 5.⁹³ 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.⁹⁴

49. Firstly, Chapter I FTA facilitates trade by reducing TRQs on agricultural products. Given that TRQs for non-FTA parties remain unchanged, no barriers to trade are raised. Secondly, Chapter IV FTA recognizes the need to promote the development of developing countries and therefore introduces S&DT provisions directed at Haiti. Within the FTA, trade between Haiti and the other FTA parties is thereby facilitated. Thirdly, Chapter V FTA introduces a system of reciprocal import duty exemptions to facilitate trade in green goods. This system is mandatory within the FTA, but can be extended to non-FTA parties willing to participate. This open system leaves the rates of non-participating countries unaffected, and therefore does not raise barriers to trade. Finally, in Chapter IV FTA, the FTA parties have agreed to abolish the use of anti-dumping duties within the FTA. The Panel in *Argentina – Footwear* found that the "letter and spirit of Art. XXIV:8 GATT" permit the elimination of the use of safeguard measures within a customs union.⁹⁵ While leaving non-FTA parties unaffected, the elimination of potentially trade-restrictive anti-dumping duties within the free-trade area is therefore necessary to facilitate trade and ensure the formation of the free-trade area. Furthermore, the AB has held that it cannot be considered that "by its very nature, a benefit reserved for some Members generally represents a disadvantage for other Members".⁹⁶ The fact that trade is facilitated within the FTA can therefore not be interpreted to mean that "barriers to trade" are raised with regard to non-FTA parties.

50. For those reasons, the contested measures were necessary for the formation of the CHIMEHA free-trade area. They therefore satisfy the second requirement of the two-tier test under Art. XXIV GATT. Accordingly, any alleged WTO-inconsistent FTA provision can be justified pursuant to Art. XXIV GATT.

⁹¹ AB Report, *Turkey – Textiles*, para. 45.

⁹² *Id.*, para. 46.

⁹³ *Id.*, para. 56.

⁹⁴ *Id.*, para. 57.

⁹⁵ Panel Report, *Argentina – Footwear*, para. 8.99.

⁹⁶ AB Report, *EC - Bananas III (Article 21.5 - Ecuador II / US)*, para. 346.

Request for Findings

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

- i. Find that the Panel has not validly established jurisdiction under Article 3.10 DSU;
- ii. Find that, although the BOP import quota restrictions introduced by Haito are possibly inconsistent with Article XI GATT, these restrictions are justified under Articles XII and XVIII:B GATT and do not have to be eliminated within the CHIMEHA free-trade area pursuant to Article 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 consistent with Articles XIII:1 and XIII:2 GATT;
- iv. Find that, although the S&DT provisions of Chapter VI of the CHIMEHA FTA Haito are possibly inconsistent with Article I:1 GATT, these provisions are justified under paragraph 2(d) 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 consistent with Article I:1 GATT;
- vi. Find that the provisions of Chapter IV the CHIMEHA FTA on anti-dumping are consistent with Article 9.2 Anti-dumping Agreement.
- vii. Find in subsidiary order that, if any of the contested measures are found to be inconsistent with WTO law, these measures are justified as part of the CHIMEHA free-trade area under paragraph 2(c) of the Enabling Clause;
- viii. Find in subsidiary order that, if any of the contested measures are found to be inconsistent with WTO law, these measures are justified as part of the CHIMEHA free-trade area under Article XXIV GATT.