ELSA Moot Court – 2016-2017

DRAFT BENCH MEMORANDUM 4/122016

1 GENERAL OVERVIEW OF THE ISSUES AND RELEVANT WTO LAW

1.1 The context

1. This dispute concerns the rights and obligations of WTO Members when they conclude regional trade agreements (RTAs) and shows the complex interlinkages between Article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT), the Enabling Clause and other fundamental provisions of the WTO covered Agreements.

2. The dispute arises between parties to a free-trade agreement (FTA) and follows the factual pattern of the recent *Peru – Agricultural Products,* where a signatory to the FTA (in *casu,* Guatemala) challenged a variable duty measure permitted under an FTA (in *casu,* between Guatemala and Peru) as being inconsistent with the Agreement on Agriculture (AoA). Peru claimed that Guatemala acted in bad faith in challenging the measure permitted by the FTA before the WTO dispute settlement system because Guatemala was prevented from contesting provisions of the FTA it signed, and certainly from doing so before a WTO panel. Peru argued that the FTA's provisions for variable duties were to be taken into account when interpreting Article 4.2 of the AoA, and therefore Peru's measure was not inconsistent with Article 4.2.

3. In *Peru – Agricultural Products*, the Appellate Body (AB) considered that the challenged variable duties were inconsistent with Article 4.2 of the AoA. In addition, it considered that the FTA provision authorizing these duties did not alter the parties' rights and obligations under the WTO Agreements. So it was considered that Guatemala was entitled to refuse that Peru uses the FTA variable duties flexibility because it was inconsistent with Article 4.2 of the AoA.

4. In respect of the inconsistency between the FTA and the WTO Agreement, the AB stated that Peru was not advocating for an interpretation of Article 4.2 of the AoA, but rather for an inter se modification of this provision between Peru and Guatemala. However, since the WTO contains specific provisions on amendment and modification of WTO obligations as well as provisions on RTAs, the AB considered that Article 41 of the Vienna Convention on the Law of Treaties (VCLT), which addresses the relationship between multilateral treaties, was not applicable, and the relevant provision for such an alleged modification was Article XXIV of the GATT. In the event, as the parties had not invoked Article XXIV of the GATT 1994, the AB did not rule on it. However, it hinted that a measure in an FTA, such as the variable duties at issues in that dispute, that rolled back existing WTO rights and obligations would probably not qualify for the exception provided for in Article XXIV of the GATT.

5. The AB also emphasized that WTO Members can only renounce their WTO rights and obligations *explicitly*, in particular in respect of their rights to initiate WTO dispute settlement proceedings. It referred to its prior statements in *EC – Bananas III (Article 21.5)* when it explained why Ecuador had not renounced to its rights under the Dispute Settlement Understanding (DSU) in the Lamy/Zoelick Agreement. In *Peru – Agricultural Products*, the AB decided that the FTA dispute settlement clause did not exclude access to the WTO dispute settlement system and Guatemala was entitled to initiate the dispute. The AB added that it is doubtful that WTO-consistent RTAs can roll back WTO rights:

> In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements.[1]

[1] AB Report, *Peru – Additional Duties*, para 5.116

6. With respect to a Member relinquishing its right to recourse to WTO dispute settlement, the AB noted:

> In this dispute, we are called upon to determine whether Guatemala acted contrary to good faith under Articles 3.7 and 3.10 of the DSU on account of the alleged relinquishment of its right to challenge the PRS before the WTO dispute settlement mechanism. In *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, the Appellate Body determined whether the Understandings on Bananas[2], which were notified to the DSB collectively as "a mutually agreed solution"[3], contained a waiver by the parties of their right to have recourse to compliance proceedings under Article 21.5 of the DSU.[4] The Appellate Body held that "the relinquishment of rights granted by the DSU cannot be lightly assumed", and that "the language in the Understandings must clearly reveal that the parties intended to relinquish their rights".[5] Further, the Appellate Body emphasized that "irrespective of the type of proceeding, if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it *cannot be regarded as failing to act in good faith* if it challenges that measure."[6] Thus, while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, any such relinquishment must be made clearly. In any event, in our view, a Member's compliance with its good faith obligations under Articles 3.7 and 3.10 of the DSU should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU. Thus, we proceed to examine in this dispute whether the participants clearly stipulated the relinquishment of their right to have recourse to WTO dispute settlement by means of a "solution mutually acceptable to the parties" that is consistent with the covered agreements.[7]
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> FN 106: While Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, *we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes*. In this respect, we recall that Article 23 of the DSU mandates that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

7. Clearly paragraph 5.25 states that only an very explicit relinquishing of rights could set aside access to the WTO dispute settlement system. But footnote 106 seems to go further in ruling out (in the WTO) any exclusive jurisdiction or fork in the road provision in FTAs. In other words it clarifies that such provisions cannot be the "legal impediments" referred to in *Mexico – Soft Drinks* ("legal impediments" could be other WTO rules or general principles of the law such as *res iudicata, litis pendens*).

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[2] Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1); and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

[3] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 8 (quoting *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Notification of Mutually Agreed Solution, WT/DS27/58, 2 July 2001).

[4] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217.

[5] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217. (fn omitted)

[6] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 228. (emphasis added)

[7] Article 3.5 of the DSU states that "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements." The third sentence of Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."

8. This present moot dispute deals with at least five different measures and legal claims. However, for each claim the teams will first have to consider whether the challenged measure is WTO-inconsistent and second, whether Article XXIV of the GATT or paragraph 2(c) of the Enabling Clause on RTAs can justify such inconsistency.

9. More specifically, for most of the claims, the respondent, Haito, will need to argue that, contrary to the claims of Chilo, the CHIMEHA FTA does not introduce any WTO-inconsistent measure (contrary to GATT Article I or XI or XVIII etc), and if it does, they can be justified under either Article XXIV GATT of the GATT or paragraph 2(c) of the Enabling Clause (further discussed below).

10. The FTA CHIMEHA has been notified under Article XXIV of the GATT by Chilo, and under the Enabling Clause by Haito and Meco. There is no perfect answer to the relationship between provisions of Article XXIV of the GATT and of the Enabling Clause and the consequences of dual notifications: an impasse prevails in the Committee on Regional Trade Agreements (CRTA) and the Committee on Trade and Development (CTD), as discussed below. The following section discusses the scope of these two provisions. Section 1.4 then discusses the implications of the fact that the FTA has been notified under both provisions.

1.2 Article XXIV of the GATT as a defence to justify otherwise WTO-inconsistent measures taken pursuant to an RTA

11. Article XXIV of the GATT is an exception to certain WTO obligations,[8] in particular the most-favoured nation (MFN) obligation in Article I of the GATT. However, this exception is subject to several important conditions.

12. In order to be justified under Article XXIV of the GATT, the FTA in question must satisfy the two-tier test established by the AB in *Turkey- Textiles.*

13. In relation to the *formation* of a customs union, there are two conditions that have to be fulfilled in order for Article XXIV to justify a measure, which is otherwise GATT-inconsistent. As the AB stated in *Turkey – Textiles*[9]:

> **First**, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, **second**, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.

14. There is no existing WTO jurisprudence that deals with the issue of formation of an FTA, as opposed to a customs union. But *Turkey – Textiles* should apply by analogy. Note that in *US – Line Pipe*, the panel did not agree with the line of *Turkey – Textiles* AB Report. So Haito could disagree with the *Turkey - Textile* line of reasoning and simply invoke *Line Pipe* but this would of course not be the best answer! The relevant portions of the report are as follows:

> 7.147 We note that the Appellate Body considered the availability of Article XXIV as a defence in Turkey – Textiles. The Appellate Body found that 58. (…) Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV.136

[8] AB Report, *Turkey – Textiles*, para 45, Para 45 in relevant part reads: "…Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency…"

[9] AB Report, *Turkey – Textiles*, para.58, AB Report, *Argentina- Footwear (EC),* para.109.

> 7.148 Thus, in addition to the conditions set forth above, the Appellate Body conditioned the availability of Article XXIV as a defence on a necessity test ("[a] party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue"). In our view, the Appellate Body's findings in Turkey – Textiles were conditioned by the facts of that case. In particular, Turkey – Textiles concerned the imposition by a member of a customs union of restrictive measures against imports from a third country, upon the formation of that customs union. Clearly, if members of a customs union seek to introduce restrictive measures against imports from third countries, contrary to GATT 1994, it is entirely appropriate that they should be required to 133 We would also note that Article XXIV:7 does not require the CRTA to approve regional trade arrangements, or issue formal decisions on their conformity with the WTO Agreement. That being said, we are not at all convinced that an identical approach should be taken in cases where the alleged violation of GATT 1994 arises from the elimination of "duties and other restrictive regulations of commerce" between parties to a free-trade area, which is the very raison d'être of any free-trade area. If the alleged violation of GATT 1994 forms part of the elimination of "duties and other restrictive regulations of commerce", there can be no question of whether it is necessary for the elimination of "duties and other restrictive regulations of commerce".

15. Therefore, in the current Moot case, the two-tier test to determine whether an otherwise GATT-inconsistent measure taken pursuant to the CHIMEHA FTA be justified under Article XXIV of the GATT involves an analysis as to whether (1) the CHIMEHA FTA complies with the requirements of the relevant paragraphs of GATT Article XXIV including paragraphs 4 (which was said to be only a principle that does not include enforceable obligations), 5 and 8; (2) whether the measure was introduced upon the formation of the CHIMEHA FTA; and (3) whether the measure was necessary for the formation of the FTA, i.e. whether the formation of the FTA would have been prevented if the introduction of the measure concerned had not been allowed.[10]

16. The assessment of Article XXIV of the GATT as a possible justification for maintaining measures which are otherwise WTO-inconsistent would begin with the assessment of the WTO-consistency of the CHIMEHA FTA. In doing so, the first question is whether this FTA is consistent with the chapeau of Article XXIV:5 of the GATT which stipulates in relevant parts:

> … the provisions of this Agreement shall not prevent, …, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

17. In examining this provision in *Turkey-Textiles*, the AB noted:

> We read this to mean that the provisions of the GATT 1994 shall not make impossible the formation of a customs union.[12] Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency. [11]

18. While assessing the WTO consistency of certain measures taken pursuant to the FTA at issue, it might also become relevant to assess the 'trade restrictiveness' of those measures. Article XXIV:5(a) and (b) of the GATT provides for an assessment of the 'trade restrictiveness' of a customs union and free trade area respectively in relation to third countries, i.e. non-FTA parties. On the issue of increase of barriers vis-à-vis third parties, the Panel in the *Turkey-Textiles* found that:

> What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade

[10] AB Report, *Turkey-Textiles*, para. 59-60.
[11] AB Report, Turkey-Textiles, para. 45.

restrictive, overall, than were the constituent countries' previous trade policies and that paragraph 5(a) provided for an '"economic" test' for assessing compatibility.[12]

19. The AB in *Turkey — Textiles* agreed with the Panel that the test for assessing trade-restrictiveness under paragraph 5(a) is an economic one:

> We agree with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the Understanding on Article XXIV, provide: ' … that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.' and we also agree that this is: 'an "economic" test for assessing whether a specific customs union is compatible with Article XXIV.'[13]

NOTE: It is however important to note that the participants are not expected to provide any economic assessment under Article XXIV:5(b) since they were not provided with any data. They should nonetheless know the legal test under such provision.

20. In *Canada- Autos*, Canada invoked Article XXIV exception with respect to a certain import duty exemption, which was inconsistent with Article I of the GATT. The Panel, in a finding not reviewed by the AB, rejected this defence, noting that the import duty exemption was not granted to all (but not only some) products imported from the United States and Mexico:

> We recall that in our analysis of the impact of the conditions under which the import duty exemption is accorded, we have found that these conditions entail a distinction between countries depending upon whether there are capital relationships of producers in those countries with eligible importers in Canada. Thus, the measure not only grants duty-free treatment in respect of products imported from the United States and Mexico by manufacturer-beneficiaries; it also grants duty-free treatment in respect of products imported from third countries not parties to a customs union or free-trade area with Canada. The notion that the import duty exemption involves the granting of duty-free treatment of imports from the United States and Mexico does not capture this aspect of the measure. *In our view, Article XXIV clearly cannot justify a measure, which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement*.[14]

21. By corollary, Article XXIV of the GATT justifies only those measures, which grant WTO-MFN inconsistent duty-free treatment to products originating in parties to a customs union or FTA.[15]

22. Finally, Article XXIV:4 of the GATT provides that the formation of a customs union or a free trade area should not raise barriers to the trade of other WTO Members which are not party to the FTA subsequent to which duty-free treatment has been provided to products originating in parties to an FTA. The AB in *Turkey-Textiles* noted:

> According to paragraph 4, the purpose of a customs union is 'to facilitate trade' between the constituent members and 'not to raise barriers to the trade' with third countries. This objective demands that the constituent members of a customs union strike a balance. A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries.[16]

23. After having demonstrated that the FTA is consistent with Article XXIV:5 and 8 (without any need to demonstrate that the FTA covers substantially all the trade or the economic impact of the FTA pursuant to article XXIV:5) the respondent must demonstrate that the specific WTO-inconsistent measure was introduced upon the formation of the FTA and that such measure was necessary for the formation of the FTA, i.e. the formation of the FTA would

[12] Panel Report, *Turkey – Textiles*, para. 9.121
[13] AB Report, *Turkey – Textiles*, para. 55
[14] Panel Report, *Canada — Autos*, paras. 10.55–10.56
[15] This will become very relevant to analysis of the Green Goods Program offered to the parties to CHIMEHA and to a few other WTO Members.
[16] AB Report, *Turkey — Textiles*, para. 57

be prevented (made impossible), if the measure concerned would not have been allowed. Jurisprudence is not very developed and does not seem to envisage the situation of WTO-inconsistent measures that would be introduced *during* the life of the FTA, i.e. after its initial formation. It is not clear, for instance, whether Article XXIV of the GATT can justify WTO-inconsistent discriminatory Balance-of-Payment (BOP) measures raised in our case.

1.3 Paragraph 2(c) of the Enabling Clause as a defence to justify otherwise WTO inconsistent measures taken pursuant to an RTA

24. The GATT Enabling Clause may also justify WTO-inconsistent measures, including the RTAs between less-developed WTO members (paragraph 2(c)). The conditions imposed by the text of the Enabling Clause in order to benefit from the exception are more flexible than the requirements of GATT Article XXIV.

25. In *EC — Tariff Preferences*, the AB held that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv). On that basis, the AB found that the Enabling Clause is "an integral part of the GATT.[17] In that report, the AB also addressed the relationship between Article I:1 of the GATT and the Enabling Clause and upheld the Panel's characterization of the Enabling Clause *as an exception* to Article I:1 based on the ordinary meaning of paragraph 1 of the Enabling Clause. It also stated that such a characterization does not affect the importance of the policy objectives of the Enabling Clause:

> By using the word 'notwithstanding', paragraph 1 of the Enabling Clause permits Members to provide 'differential and more favourable treatment' to developing countries 'in spite of' the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO 'immediately and unconditionally'.[] Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an 'exception' to Article I:1.[18]

26. Although that dispute dealt with GSP tariff preference under paragraph 2(a) of the Enabling Clause and this Moot dispute deals with paragraph 2(c), the exemption from the MFN principle contained in Article I of the GATT is also applicable to regional preferential arrangements under paragraph 2(c).

27. The Enabling Clause reads in relevant part:

> 1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries(1), without according such treatment to other contracting parties.
>
> 2. The provisions of paragraph 1 apply to the following:
>
> c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.

28. The wording of paragraph 2 (c) could suggest that there is no general obligation to "eliminate" all trade restrictions between the FTA parties (as provided in Article XXIV:8(b)), there is only an obligation to reduce tariffs. Moreover, the obligation to reduce mutual non-tariff measures is not required for "substantially all trade" between the parties to the FTA (as provided in Article XXIV:8(b) but on "... products imported from one another". Thus, the

[17] AB Report, *EC — Tariff Preferences*, para 90
[18] AB Report, *EC — Tariff Preferences,* para. 104

condition set out in paragraph 2(c) is less burdensome as compared to the one in Article XXIV:8(b) of the GATT.

In addition, paragraph 3 (a) of the Enabling Clause reads in relevant part

> 3. Any differential and more favourable treatment provided under this clause:
>
> a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties

29. Although the Enabling Clause offers more flexibility to the developing countries, paragraph 3 thereof also sets out additional requirements to ensure that the preferential treatment offered to developing countries does not unduly interfere with the trade of any other WTO Members. The AB stated in *EC — Tariff Preferences* (in the context of GSP schemes) that paragraph 3(a) requires that any positive response of a preference-giving country to the varying needs of developing countries not impose unjustifiable burdens on other Members.[19] It is not clear whether this AB statement could become relevant for RTA notified under the Enabling Clause.

1.4 Notification of RTAs

1.4.1 Basic provisions on notification

30. Although notification of RTA is not central to this Moot case and panelists should avopid useless questions in this regard; nontheless some basic information on this issue may be useful. Article XXIV:7 of the GATT sets out the notification requirement for a customs union or a free trade area. The article reads in relevant part:

> 7(a). Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

31. In this dispute, the notification requirement under the Enabling Clause is also important, given that the FTA is signed between developing countries and a least-developed country, Haito. Paragraph 4 of the Enabling Clause stipulates in relevant part:

> 4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:
>
> a) Notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

32. It is also important to note the General Council decisions on the "transparency mechanism" concerning the formation of regional trade agreements and preferential trade agreements. The transparency decision of 2006 provides in relevant part[20]:

> 1. Without prejudging the substance and the timing of the notification required under Article XXIV of the GATT 1994, Article V of the GATS or the Enabling Clause, nor affecting Members' rights and obligations under the WTO agreements in any way:
>
> (a) Members participating in new negotiations aimed at the conclusion of an RTA shall endeavour to so inform the WTO.

[19] AB Report, *EC — Tariff Preferences*, para. 167
[20] Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671.

(b) Members parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.

2. The information referred to in paragraph 1 above is to be forwarded to the WTO Secretariat, which will post it on the WTO website and will periodically provide Members with a synopsis of the communications received.

33. The transparency decision of 2010 reads in relevant part:[21]

The transparency mechanism shall apply to the following Preferential Trade Arrangements (PTAs): (a) PTAs falling under paragraph 2 of the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause"), with the exception of regional trade agreements under paragraph 2(c)1 as described in the General Council Decision of 14 December 2006 (Transparency Mechanism for Regional Trade Agreements). (b) PTAs taking the form of preferential treatment accorded by any Member to products of least-developed countries. (c) Any other nonreciprocal preferential treatment authorised under the WTO Agreement.

…

3. The required notification of a PTA shall take place as early as possible; it will occur when practicable before the application of preferential treatment by the notifying Member and, at the latest, three months after the PTA is in force.

34. It might also be useful to read the 'Legal note on regional trade arrangements under the Enabling Clause' by the WTO Secretariat.[22] In particular, the note addresses "where" and "when" notification of RTAs between developing countries is to be made, as well as "where" and "when" consultations on, and reviews of, the notified RTAs are to take place. The note discusses the mandates of the CTD and the CRTA, the WTO bodies with apparent responsibilities for ensuring compliance with these procedural requirements, and how these bodies have dealt with RTAs among developing countries. The note then examines the substantive legal requirements of the Enabling Clause for RTAs among developing countries.

35. In the current Moot case, the CHIMEHA FTA was notified under both GATT Article XXIV and the paragraph 2(c) of the Enabling Clause, so we can assume that parties can invoke either provision to justify WTO-inconsistencies.

1.4.2 Status of dual notification of an RTA

36. In WTO law, the status of dual notification is unclear. WTO Members seem to be divided on whether an RTA can be notified under more than one of those WTO provisions, the relevant provision is Article XXIV or the Enabling Clause, whether the same RTA can be notified under both provisions, and if so, the consequences when requirements under each concerned provision differ.

37. In practice, several agreements such as the ASEAN Korea FTA were notified under the Enabling Clause by the ASEAN members (developing) and under Article XXIV of the GATT by the Republic of Korea (developed) and it is usually seen as the prerogative of the notifying developing-country member to make a choice between the Enabling Clause or Article XXIV of the GATT. In another instance, on 3 October 2006, the GCC Customs Union (developing members) had been notified to the CRTA under Article XXIV of the GATT by Saudi Arabia[23] and the Understanding thereon. The notification was circulated in document WT/REG222/N/1. The GCC Agreement was subsequently notified to the CTD under paragraph 4(a) of the

[21] Transparency Mechanism for Preferential Trade Arrangements, Decision of 16 December 2010, WT/L/806.

[22] Note by the Secretariat, WT/COMTD/W/114, 13 May 2003

[23] Pursuant to a specific commitment to do so during its WTO accession negotiations.

Enabling Clause. This notification, of 19 November 2007, was circulated in document WT/COMTD/N/25. In the discussions of the Committee on Trade and Development, the following views were expressed by some of the delegations:

> The representative of India said that his delegation had been following discussions on this matter [dual notification] very closely in the CTD, as well as in the CRTA. In India's view, it was the prerogative of the GCC countries, which were all developing countries, to determine whether to notify their Agreement under GATT Article XXIV or under the Enabling Clause. His delegation welcomed the fact that the concerned Members had been able to resolve the matter concerning the notification of the Agreement. He indicated, however, that this should not prejudice the rights of other developing country Members to notify their RTAs under the Enabling Clause, if they so choose.[24]
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> The representative of China said that his delegation saw the compromise reached on the GCC notification as an exceptional case, which should not undermine the rights and obligations of developing country Members – including the GCC countries – under the Enabling Clause. In addition, it should not constitute a precedent for any other notifications by developing country Members. China shared the systemic concerns raised by India and Egypt on the dual notification of the GCC Customs Union, and encouraged the Chairman to hold informal consultations on this issue.[25]
>
> The representative of the United States said that her delegation was slightly confused about what had been said under this agenda item at the present meeting. She was not sure whether it was the systemic issue of an Enabling Clause notification, as opposed to a notification under GATT Article XXIV, that would remain on the CTD's agenda. In any case, it appeared to her that a submission by one or more delegations would have to be made for the purpose of placing a matter on the agenda of a Committee. In this light, she did not see how the present item could continuously appear on the CTD's agenda.[26]

38. The issue for the participants in the current moot case arising from this dual notification is the applicable law for the RTA justification. If notified under the Article XXIV of the GATT then Article XXIV would be the applicable law and not the Enabling Clause. In this current moot the FTA CHIMEHA was notified under both provisions, and there is no perfect answer to dual notifications. It will be for each team to decide how they will handle their claims and defences. On occasions, Haito may want to invoke both paragraph 2(c) of the Enabling Clause and Article XXIV cumulatively or in the alternative.

39. Panelists should avoid asking overly detailed questions on notification because most discussion would necessitate a very good understanding of the practice.

1.5 Allegation of bad faith by Haito against Chilo for initiating a WTO dispute instead of using the dispute settlement mechanism under the CHIMEHA FTA (in support of claims)

40. Haito may argue generally and together with other claims that Chilo has acted in bad faith because it challenges measures that it had agreed could be maintained in accordance with the FTA. Additionally, Haito may argue that initiating a WTO dispute in which the WTO-consistency of certain components of the CHIMEHA FTA is challenged constitutes an act of bad faith since the CHIMEHA FTA dispute settlement mechanism has exclusive jurisdiction.

41. In *Peru-Agricultural Products,* similar arguments were made by Peru challenging Guatemala's action as the one contrary to good faith in violation of Article 3.7 of the DSU. In response to Peru's arguments, the AB noted:

> In this dispute, we are called upon to determine whether Guatemala acted contrary to good faith under Articles 3.7 and 3.10 of the DSU on account of the alleged relinquishment of its right to challenge the PRS [the measure] before the WTO dispute

[24] Minutes WT/COMTD/M/76, para 11
[25] Minutes WT/COMTD/M/76, para 14.
[26] Minutes WT/COMTD/M/76, para 19.

settlement mechanism. In *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, the Appellate Body determined whether the Understandings on Bananas[27], which were notified to the DSB collectively as "a mutually agreed solution"[28], contained a waiver by the parties of their right to have recourse to compliance proceedings under Article 21.5 of the DSU.[29] The Appellate Body held that "the relinquishment of rights granted by the DSU cannot be lightly assumed", and that "the language in the Understandings must clearly reveal that the parties intended to relinquish their rights".[30] Further, the Appellate Body emphasized that "irrespective of the type of proceeding, if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it *cannot be regarded as failing to act in good faith* if it challenges that measure."[31] Thus, while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, any such relinquishment must be made clearly. In any event, in our view, a Member's compliance with its good faith obligations under Articles 3.7 and 3.10 of the DSU should be ascertained on the basis of actions taken in relation to, or within the context of, the rules and procedures of the DSU. Thus, we proceed to examine in this dispute whether the participants clearly stipulated the relinquishment of their right to have recourse to WTO dispute settlement by means of a "solution mutually acceptable to the parties" that is consistent with the covered agreements.[32][33]

2 THE LEGAL CLAIMS

2.1 Claim [1]: The BOP quota restrictions imposed by Haito are inconsistent with Articles XI, XII, XVIII and XXIV of the GATT (25 points)

2.1.1 Chilo's legal claim

42. Haito has imposed its BOP import restrictions on an MFN basis pursuant to Article XVIII:B of the GATT, including against imports from Chilo and Meco. Chilo challenges the application of such restrictions on imports from the CHIMEHA FTA parties. Chilo claims that the BOP quota restrictions applicable to all imported products imposed by Haito are inconsistent with Articles XI, XII, and XVIII of the GATT.

43. Chilo should also claim that such application on an MFN basis is inconsistent with the requirements of Article XXIV of the GATT since, pursuant to Article XXIV:8(b) of the GATT, BOP quota restrictions constitute internal restrictive regulation that must be eliminated inter se the FTA parties. **NOTE:** students have been informed of this additional aspect of the claim

44. In order to make this claim, **Chilo** must show that:

- even if BOP restrictions should generally be on an MFN basis, the situation is different between Parties to an FTA because each Party has to eliminate restrictive regulations

[27] Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1); and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

[28] AB Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 8 (quoting *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Notification of Mutually Agreed Solution, WT/DS27/58, 2 July 2001).

[29] AB Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217.

[30] AB Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217. (fn omitted)

[31] AB Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 228. (emphasis added)

[32] Article 3.5 of the DSU states that "[a]ll solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements." The third sentence of Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."

[33] AB Report, *Peru-Additional Duties*, para 5.25

of commerce (internal restrictions) on substantially all the trade between the FTA Parties, in accordance with Article XXIV:8(b) of the GATT;

- BOP quota restrictions are internal restrictions which must be eliminated as they are not included among the permitted measures listed in paragraph 8(b) of Article XXIV of the GATT.

45. In defence, **Haito** must show that:

- Article XVIII of the GATT requires the MFN application of BOP measures and also states that Article XII is not relevant since it applies to BOP measures maintained by developed countries and Article XVIII:B is an exception to Article XI of the GATT available to developing countries akin to Article XII of GATT. (Article XVIII:B offers a procedure for BOP when requested by developing countries, while Article XII deals with regular BOP. In this Moot dispute the BOP at issue is presumed consistent with XVIII:B differ vastly;

- the MFN application of BOP restrictions does not contravene the conditions stipulated in Article XXIV:8 (b) of the GATT;

- Excluding FTA parties would be contradiction with the principle of "parallelism".

2.1.2 Consistency of BOP restrictions between the FTA parties with Articles XI and XII of the GATT

46. Article XII of the GATT is an exception to Article XI of the GATT available to BOP measures applied by developed countries. On the lines of Article XII of GATT, Article XVIII:B was added to the GATT text in 1957 to provide special and differential treatment for developing countries in respect of their BOP measures.[34] The provisions of Article XVIII:B embody a presumption that developing country Members would face BOP difficulties on account of economic development.

2.1.3 Is the maintenance of BOP quota restrictions between the FTA parties inconsistent with the requirements of Article XXIV of the GATT ?

47. If generally Article XXIV of the GATT requires the elimination of 'restrictive regulations of commerce' between FTA parties, are BOP measures exempted from this rule? Are BOP restrictions imposed on an MFN basis pursuant to Article XVIII:B of the GATT inconsistent with the requirements of Article XXIV:8(b) of the GATT?

2.1.3.1 "...other restrictive regulations of commerce..."

48. In *Turkey - Textiles*, the Panel had found that the quantitative restrictions imposed by Turkey on imports of a number of textile and clothing items from India were inconsistent with Articles XI and XIII of GATT (and consequently with Article 2.4 of the Agreement on Textiles and Clothing). The Panel rejected Turkey's defence that Article XXIV:5(a) of GATT authorizes Members forming a customs union to deviate from the rules of Article XII or XVIII of the GATT, which allow for BOP measures on an MFN basis.

49. The AB said that "Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions … which were found inconsistent with Articles XI and XIII of the *GATT 1994* and Article 2.4 of the ATC".[35] However, the AB stressed that it was only finding that Turkey's quantitative restrictions at issue were not justified by Article XXIV of the GATT but that it was not making a "finding on the issue of whether quantitative restrictions will *ever* be justified by Article XXIV".[36]

[34] BISD18S/48-53 and BISD 20S/47-49
[35] AB Report, *Turkey — Textiles*, para. 64.
[36] AB Report, *Turkey — Textiles*, para. 65

50. In this dispute, the BOP measure is based on an invocation by Haito of Article XVIII:B of the GATT. *A priori* the BOP should be applied on an MFN basis, i.e. also against imports from the FTA parties. The question in this dispute is different. The question is whether a BOP measure is a "restrictive regulation[s] of commerce" (internal FTA restriction) that should be eliminated within the meaning of article XXIV:8(b).

51. Article XXIV:8(b) of the GATT reads:

> (*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

52. If the BOP quota restrictions has been mentioned within the parentheses of Article XXIV:8(b) of the GATT – as an internal restriction permitted to be maintained, they could be argued to be permitted under the GATT. However, whereas Articles XI and XII (general provision for BoP) of the GATT are expressly mentioned in the parentheses Article XVIII of the GATT is not, and thus would not appear to be permitted.

53. Article XXIV has been present since the inception of the GATT[37] and it could be argued that the absence of Article XVIII in the parentheses of Article XXIV:8(b) merely constitutes a drafting omission. However, the presence of Article XII in the parenthesis, which was redrafted in 1957, suggests that it might not be a drafting omission. Nevertheless, if allowance has been made for Article XII of the GATT for the benefit of the rich countries as is listed between parentheses of Article XXIV:8 (b) of GATT then omitting Article XVIII from the parenthesis would arguably not be fair for developing countries. Both sides of the argument will have to be argued by Chilo and Haito. On balance, the exclusion of Article XVIII suggests it is not a permitted other restrictive regulation of commerce, per Article XXIV:8(c).

2.1.3.2 Is a BOP measure a 'restrictive regulations of commerce' within the meaning of GATT Article XXIV:8(b)?

54. Teams could debate whether FTA parties should be expected to impose any BOP measure on an MFN-basis, including against imports from the FTA parties, or whether such BOP measure should not be imposed on imports from the FTA parties. First, participants should determine that generally BOP measures should be applied on an MFN basis. Then parties should discuss the specific situation of BOP and RTAs and the hierarchy between the 2 provisions. If BOP should a priori be applied on an MFN basis, this means that such BOP quotas will imposed against imports from RTA parties. If BOP measures are considered restrictive regulation of commerce, i.e. "restrictions", then one can assume that as with all restrictions, such BOP restrictions should be eliminated within the RTA. Article XXIV:8(b) obliges FTA parties to eliminate internal restrictions.

55. There is a form of "clash" or contradiction between the prescriptions of Article XVIII:B that requires the MFN application of a BOP restrictions and Article XXIV:8(b) that requires the elimination of any internal restrictions within an RTA. In this current Moot, GATT Article XXIV is not invoked to justify the non-MFN based application of BOP restrictions, because Article XXIV mandates the elimination of internal RTA quotas and other restrictions. In this current dispute Haito is not interested in excluding CHIMEHA parties from the application of its BOP measures, on the contrary. In this dispute it is Chilo who is of the view that paragraph 8(b) of Article XXIV *requires* the elimination of BOP measures between FTA parties. So Chilo will claim that the Haito's BOP measures are contrary to Article XXIV of the GATT, while Haito will argue that the BOP must be applied MFN even on imports from the FTA parties, i.e. internal restrictions.

56. In *Brazil – Tyres* the AB found that Brazil had acted inconsistently with its obligations by accepting "like" imports from Paraguay, although it had invoked Article XX of the GATT to justify its import ban. Brazil invoked GATT Article XXIV to justify a better treatment of imports

[37] Kerry Chase, Multilateralism compromised : The mysterious origins of GATT Article XXIV, World Trade Review (2006), 5: 1, 1–30, available at http://people.brandeis.edu/~chase/research/wtr06.pdf.

from the RTA parties (Paraguay). The AB recognized that Brazil could be entitled to invoke GATT Article XX to justify its import quotas of retreated tyres from the EU, but the chapeau of Article XX required that Brazil be coherent and thus also banned such "like" imports from the RTA parties. This was probably in part because Article XX provides for "general exceptions". In other words, the coherence requirements under Article XX of GATT were considered so important that the invocation of Brazil's practices in favour of imports from MERCOSUR were such as to invalidate Brazil's invocation of Article XX of the GATT. For the current dispute, Article XXIV:8 of the GATT requires the elimination of internal regulations restricting trade while Article XVIII of the GATT requires the imposition of BOP import quotas on an MFN basis. So, in principle BOP quotas (restrictions) should be applied on an MFN basis, including against imports from RTA parties. If BOP quotas are considered as 'other regulations restricting trade', they should be eliminated within the CHIMEHA FTA, pursuant to Article XXIV:8(b). But Haito could argue that BOP restrictions are considered not to be regulation restricting trade, but rather "justified restrictions" under XVIII:B and they could therefore be maintained within an RTA – even if they are not listed in the parenthesis. A counter-argument is that BOP quota adopted under Article XII are justified BOP and article XII is listed in the parenthesis of Article XXIV:8(b) as a type of restriction that can be maintained within an RTA.

2.1.3.3 Principle of parallelism

57. The principle of "parallelism" – originally developed for emergency safeguard measures – could offer analogous arguments to the parties, since a BOP measure is a type of safeguard measure (even if the parallelism principle is based on the wording of Art 2.2 of the Agreement on Safeguards).

58. Under the principle of parallelism, when a RTA party decides to exempt the other RTA parties from the imposition of safeguard measures, that RTA party cannot take into account the increased imports from the RTA parties that will ultimately be exempted from the application of the safeguard measure. There must be parallelism between countries from where increased imports are taken into account and countries against which the safeguard measures are imposed. If imports from FTA parties are taken into account, then safeguard measures must also be imposed against imports from FTA parties, or somewhat adjusted so as to ensure that parties outside the FTA do not "pay the price" of increased imports coming from the FTA Parties otherwise exempted from any safeguard action.

59. In a number of disputes, the question has arisen whether a Member can exclude products from Members that are its partners in a free trade area or a customs union from the application of a safeguard measure. In *Argentina – Footwear (EC),* the AB ruled that, if a WTO Member has imposed a measure after conducting an investigation on imports from all sources, it is also required under Article 2.2 of the Agreement on Safeguards to apply such a measure to all sources, including partners in a free trade area.[38] In *US – Wheat Gluten* it reaffirmed that, in 'the usual course', the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2. This has been referred to as the principle of 'parallelism'.[39] In *US – Line Pipe* and in *US – Steel Safeguards*, the AB explained that the principle of 'parallelism' is derived from the parallel language used in the first and second paragraphs of Article 2 of the Agreement on Safeguards.[40] This principle can find application while dealing with TRQs specifically for determining whether the FTA Parties should be exempted from the application of such BOP restrictions or such exclusion will increase the burden on those WTO Members who are not a party to the FTA.

60. It is also possible that Haito raises a defence under the Enabling Clause (as opposed to GATT Article XXIV) to support its non-exclusion of the CHIMEHA FTA Parties from the application of BOP restrictions because if Article XXIV of the GATT mandates elimination of internal restrictions, the Enabling Clause does not require the elimination of internal restrictions but only refers to the reduction of internal restrictions. In this Case Chilo is raising a claim of inconsistency with Article XXIV of the GATT, so it is not clear whether Haito can raise the defence under the Enabling Clause. But here the goal of Haito in invoking the

[38] AB Report, *Argentina – Footwear (EC),* para. 112
[39] AB Report, *US – Wheat Gluten*, para. 96.
[40] AB Report, *US – Line Pipe*, para. 181; and AB Report, *US – Steel*, para. 441.

Enabling Clause would be to maintain an MFN application of the BOP measures (consistently with Article XVIII:B) and not to eliminate them within the CHIMEHA FTA.

61. **In sum, Chilo would argue** that:

a. Haito's BOP measures applied on an MFN basis do not meet the requirements of Article XXIV of the GATT.

   i. From the plain reading of Article XXIV:8(b) it is evident that internal restrictions as those provided for under Article XVIII of the GATT cannot be maintained between the parties to a free trade area.

   ii. Chilo should explain what a "restrictive regulation" is and why a BOP measure should be considered a restrictive measure which should be eliminated between FTA parties pursuant to Article XXIV:8(b). In that context Chilo should develop on the relationship between the general obligation to imposed BOP measure on an MFN basis and other the obligation to eliminate restrictive regulation of commerce.

b. Since Chilo notified the CHIMEHA under Article XXIV of the GATT, Chilo may also argue that only article XXIV is relevant,

   i. The flexibilities of paragraph 2(c) of the Enabling Clause (to only "reduce" restrictions, not "eliminate" them) are not available to Haito.

   ii. Even if paragraph 2(c) of the Enabling Clause was applicable, maintaining internal restrictions against FTA parties would go against the spirit of paragraph 3(b) of the Enabling Clause.

62. **Haito would argue** that:

a. As noted in the Moot case, Haito meets the conditions of Article XVIII:4(a) of the GATT and the BOP measures maintained by Haito are eligible to benefit from Article XVIII:8 B of the GATT which is an exception to Article XI of the GATT. Moreover, the BOP measures meet the conditions provided for under Article XIII:B of the GATT and are not susceptible to scrutiny under Article XII of the GATT which applies to the BOP measures maintained by developed countries.

b. The absence of a reference to Article XVIII in the parentheses of Article XXIV:8(b) could merely be a drafting omission since the corresponding provision benefiting developed countries i.e. Article XII of the GATT is present within these parentheses.

c. BOP restrictions are in principle applied on an MFN-basis, and that exempting the FTA parties from such BOP restrictions, risks of imposing all the burden of BOP restrictions on non-FTA parties and thus can be contrary to the WTO principle of 'parallelism' as is applicable in case of safeguard measures an.

d. In addition, there may be scope for arguing that Haito can benefit from the flexibilities provided in para 2(c) of the Enabling Clause (which only requires the "reduction" and not the "elimination" of internal restrictions). Haito would be invoking the Enabling Clause in order to maintain an MFN application of the BOP measure (consistently with GATT Article XVIII:B) and not to eliminate or even only reduce the BOP measures within the CHIMEHA FTA.

e. Also, paragraph 2(d) and paragraphs 6 and 8 of the Enabling Clause make special allowance for the difficult economic situation of LDCs. This could be invoked to justify the MFN application of BOP restrictions, even to parties to the CHIMEHA.

f. Haito could also argue that Chilo has acted in bad faith by initiating a dispute in the WTO instead of raising the matter in the FTA dispute system

2.2 Claim [2]: The reduction of the Tariff Rate Quotas (TRQs) on agricultural products provided for in Chapter I of the CHIMEHA FTA are inconsistent with Article XIII of the GATT (25 points)

2.2.1 Chilo's legal claim:

63. Chilo claims that the reduction of the in-quota tariff rates of such TRQs on agricultural products only for the parties to the FTA are inconsistent with the obligations set out in Article XIII of the GATT that TRQ must be applied on an MFN basis. Article XIII of the GATT provides for the non-discriminatory administration of quantitative restrictions whereas pursuant to CHIMEHA FTA imports from the parties to the FTA shall receive more favourable treatment in comparison to other WTO Members. In addition, Chilo claims that Haito cannot invoke either Article XXIV of the GATT or the Enabling Clause as a defence because several provisions of the CHIMEHA such as the reduction of TRQs are inconsistent with the basic rules of the WTO, including the conditions set out in Article XXIV of the GATT.

64. In order to make out this claim, Chilo must show that:

- TRQs on agricultural products must be maintained on an MFN basis
- TRQs on certain agricultural products cannot be more favourably removed only for the FTA parties as the restriction has to be used in the 'least trade-distorting manner possible'
- Article XXIV of the GATT or the Enabling Clause cannot justify 'raising barriers to trade' for other contracting parties i.e. other WTO Members

65. In order to defend this claim, Haito must show that:

- favourable treatment extended to the FTA parties pursuant to an FTA cannot be equated with the treatment extended to other WTO Members
- the MFN requirement of GATT for TRQs cannot be impeded by the formation of an FTA
- GATT inconsistency, if any, can be justified through the Enabling Clause.

2.2.2 Maintenance of TRQs on agricultural products must be on an MFN basis and importation of like products from all Members' must be similarly restricted

66. The Panel Report on *EC — Bananas III (21.5 — Ecuador II)* addressed the application of Article XIII to tariff quotas:

> The words 'any' (both before the terms 'tariff quota' and 'contracting party') and 'shall' in Article XIII:5 underscore the absolute and categorical nature of the application of 'the provisions of … Article [XIII]' to tariff quotas. The Panel notes also that Article XIII:5 uses the term 'any tariff quota instituted or maintained by any [Member]' in the singular. The Panel reads this to mean that Article XIII of the GATT 1994 is also applicable to one single tariff quota, and that this is so irrespective of whether that single tariff quota is part of an import regime with more tariff quotas or is part of an import regime that comprises only one tariff quota.[41]

67. On appeal, the AB also addressed this issue:

> In contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I. Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions. Accordingly, in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff quota must not fall

[41] Panel Report, *EC — Bananas III* (Article 21.5 — Ecuador), para. 6.20.

short of the scheduled amount. In addition, tariff quotas are, under the terms of Article XIII:5, made subject to the disciplines of Article XIII.[42]

68. On the non-discrimination principles under Article XIII: 1, in *EC- Bananas III*, Panel noted:

> … Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted. Thus, a Member may not limit the quantity of imports from some Members but not from others. But as indicated by the terms of Article XIII (and even its title, 'Non-discriminatory Administration of Quantitative Restrictions'), the non-discrimination obligation extends further. The imported products at issue must be 'similarly' restricted. A Member may not restrict imports from some Members using one means and restrict them from another Member using another means. …[43]

69. In *EC — Bananas III*, the AB reviewed the Panel's finding that the EC import regime for bananas was inconsistent with Article XIII because the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. Upholding this finding, the AB applied Article XIII to the whole import regime as follows:

> The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or *by applying different tariff rates*, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member. (emphasis added)[44]

70. **So Chilo would argue** that:

a. the non-discrimination discipline of Article XIII apply to TRQs.

   i. The reduction of TRQs on certain agricultural products only for the FTA parties would be a violation of the non-discriminatory principle set out in Article XIII:1 as different tariff rates are being applied only to the parties to the CHIMEHA FTA.

   ii. The non-discrimination principle embodied in Article XIII:1 of the GATT extends further and provides that these restrictions must be 'similarly applied' to importation of products from all WTO Members whereas in the present scenario the TRQ rate being applied to the FTA parties is more favourable than the one applicable to all other WTO Members.

b. Discriminatory TRQs would not be justified under Article XXIV of the GATT or the Enabling Clause, because the CHIMEHA FTA is not consistent with the conditions set out in Article XXIV of the GATT.

c. In arguendo, the Enabling Clause cannot be used to justify such discriminatory TRQs.

71. **Haito would argue** that:

a. the FTA Parties to the CHIMEHA FTA and the rest of the WTO Members do not fall into the same category. The same regime cannot be extended to all WTO Members alike, the

[42] AB Report, *EC — Bananas III* (Article 21.5 — Ecuador), para. 335
[43] Panel Report, *EC — Bananas III*, paras. 7.68–7.69.
[44] AB Report, *EC — Bananas III*, para. 190.

non-discrimination obligation set out in Article XIII:1 of the GATT should apply within each of these categories.

b. Moreover, Article XXIV(8)(b) of the GATT requires the elimination of duties and other respective regulations of commerce on substantially all trade between the constituent territories. The TRQ in this dispute is such a restrictive regulation of commerce and should therefore be eliminated between the RTA parties.

c. However Haito could also argue (in the alternative) that CHIMEHA is covered by the Enabling Clause and stands to generally benefit from the flexibilities provided for under the Enabling Clause and paragraph 2 of the Enabling Clause in particular. For Haito the Enabling Clause would arguably allow for the application of a discriminatory TRQ, as it would justify or excuse any inconsistencies with Article XIII of the GATT. It is not clear whether the Enabling Clause can be invoked to justify an inconsistency with the MFN dimension of Article XIII of the GATT. If reduction of TRQs amounted to an addition of an unjustifiable burden on other WTO Members, then it may not be possible to take advantage of the flexibilities provided for in paragraph 2 of the Enabling Clause, since it would impose unjustifiable burdens on other Members.

2.2.3 Maintenance of TRQs on agricultural products must be done in the least trade distorting manner (Article XIII:2 of the GATT)

72. Article XIII:2 of the GATT deals with the distribution of import quotas or tariff quotas among Members. The chapeau of Article XIII:2 stipulates a general rule regarding the allocation of import quotas in the least trade-distorting manner. The general rule laid down in Article XIII:2 aims to minimize the impact of quantitative restrictions on the distribution of trade by attempting to approximate under such measures the trade shares that various Members might be expected to have in the absence of such quantitative restrictions. Moreover, allocation of quotas in this manner ensures that under such a quota regime, Members producing like products are afforded market access as well as competitive opportunities that mimic their comparative advantage vis-à-vis other Members.[1]

73. The AB in EC-Bananas III (Article 21.5 — Ecuador II) noted that chapeau of Article XIII:2 requires:

> .... that the tariff quota be distributed so as to serve the aim of 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. In this way, all Members producing the like product are afforded access to, and competitive opportunities under, the tariff quota in a manner that mimics their comparative advantage vis-à-vis other Members who would participate under the quota.45

74. **Object and Purpose of Article XIII:2 of the GATT:** In *EC — Bananas III*, the Panel, (in a finding not reviewed by the AB) held that the object and purpose of Article XIII:2 is to minimize the impact of quantitative restrictions on trade flows, and set out how the provisions of Article XIII work together:

> The working of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on their use in Article XI), they are to be used in the least trade-distorting manner possible. … In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime. In interpreting the terms of Article XIII, it is important to keep their context in mind...[46]

75. **Chapeau of Article XIII:2 of the GATT:** In *US — Line Pipe*, the Panel held: "the chapeau of Article XIII:2 contains a general rule aimed at 'distribution of trade', and not

[45] AB Report, EC — Bananas III (Article 21.5 — Ecuador II) / EC — Bananas III (Article 21.5 — US), (WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, WT/DS27/AB/RW2/ECU/Corr.1, WT/DS27/AB/RW/USA/Corr.1), para. 338

[46] Panel Report, *EC — Bananas III*, paras. 7.68–7.69

merely a statement of principle. This is confirmed by the Note Ad Article XIII:2, which refers to "the general rule laid down in the opening sentence of paragraph 2".[47] In *US — Line Pipe*, the Panel examined a US safeguard measure which provided that, for three years and one day, a higher tariff (declining each year) would be imposed on all imports from each country in excess of 9,000 short tons. Mexico and Canada were excluded from the remedy. The Panel found that this measure was inconsistent with the "general rule" in the chapeau of Article XIII:2 because it was not based on historical trade patterns, and did not aim at tracking the distribution of trade that would be expected in its absence:

> [I]n our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.[48]

76. In *EC — Bananas III*, the AB found a violation of Article XIII:2 in respect of the European Communities' import regime for bananas and, more specifically, in respect of the treatment granted to countries which had concluded with the European Communities the so-called Banana Framework Agreement (BFA). A quota share not utilized by one of the BFA countries could, at the joint request of all BFA countries, be transferred to another BFA country. No equivalent regulation existed with respect to banana exporting countries that were not part of the BFA. The Panel found that this aspect of the measure was inconsistent with the requirement to approximate, in the administration of a quantitative restriction, the relative trade flows which would exist in the absence of the measure at issue.[49]

77. In *EC — Poultry*, Brazil challenged the European Communities' calculation of the tariff quota shares because imports from China — at that time not a Member of the WTO — had been included in this allocation of tariff quota shares. The Panel, in a finding expressly endorsed by the AB[50] found that nothing in Article XIII required the calculation of tariff quota shares only on the basis of imports from WTO Members:

> We note that Article XIII carefully distinguishes between Members ('contracting parties' in the original text of GATT 1947) and 'supplying countries' or 'source'. There is nothing in Article XIII that obligates Members to calculate tariff quota shares on the basis of imports from Members only.[51] If the purpose of using past trade performance is to approximate the shares in the absence of the restrictions as required under the chapeau of Article XIII:2, exclusion of a non-Member, particularly if it is an efficient supplier, would not serve that purpose. This interpretation is also confirmed by the use in Article XIII:2(d) of the term 'of the total quantity or value of imports of the product' without limiting the total quantity to imports from Members.[52]

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[47] Panel Report, *US — Line Pipe*, fn. 64

[48] Panel Report, *US — Pipe Line*, paras. 7.53–7.55.

[49] AB Report, *EC — Bananas III*, para. 163.

[50] AB Report, *EC — Poultry*, para. 106.

[51] (*footnote original*) 'We note in this regard that in the *Bananas III* case, the panel made the following observation (which was not affected by the subsequent appeal): "The consequence of the foregoing analysis is that Members may be effectively required to use a general 'others' category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned". See Panel Reports on *EC — Bananas III*, para. 7.75. The quoted passage, particularly the use of the phrase "*all suppliers* other than Members with a substantial interest in supplying the product" (emphasis added), indicates that the *Bananas III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted.

[52] Panel Report, *EC — Poultry*, paras. 230–232. back to text

2.2.4 Can non-MFN TRQs on agricultural products or TRQs that are otherwise inconsistent with Article XIII:2 be justified under Article XXIV of the GATT

78. Here if Haito wants to justify TRQs inconsistent with GATT Article XIII, it will invoke Article XXIV or the Enabling Clause.

79. Haito could argue that discriminatory TRQs in favour of the CHIMEHA parties are consistent with GATT Article XXIV. For this purpose, Haito will need to demonstrate that CHIMEHA passes the two-tier test in relation to the successful invocation of the defence available under Article XXIV of the GATT has been discussed above under sections 1.1.2 and 1.1.3 of the general section. Haito will also argue that the discriminatory TRQ are essential for the formation of the CHIMEHA.

80. In the alternative Haito may invoke the Enabling Clause to justify the reduction fi restrictions between FTA parties, suggesting that discriminatory TRQs are leading the CHIMEHA towards further liberalisation in line with the principle of the Enabling clause paragraph 3(a) (which is parallel to paragraph XXIV:4 of GATT).

81. **So Chilo would argue that**

a. the reduction of TRQs on certain agricultural products of the FTA parties would not be compatible with the 'general rule' of 'distribution of trade' set out in the chapeau of Article XIII of the GATT. The TRQs as applied by the FTA Parties to WTO Members prior to the conclusion of the FTA took into account the import from all WTO Members and the reduction of TRQs only for the FTA Parties subsequent to the CHIMEHA FTA will shift the entire burden on the other WTO Members. This shall interfere with the 'least trade distorting' element of the TRQs which were maintained by Chilo with respect to certain agricultural imports from all WTO Members since the trade with the FTA Parties was taken into consideration while those TRQs were put in place.

b. violating Article XIII:2 of the GATT and exempting FTA Parties from the restrictions of such a TRQ cannot be justified by Article XXIV:8 because CHIMEHA is not consistent with Article XXIV and such discriminatory TRQ was not necessary for the formation of CHIMEHA.

c. The reduction of TRQs on certain agricultural products for the FTA parties increases the barrier on non-FTA parties with respect to the import of such agricultural products into Chilo and does not meet the requirements of Article XXIV:4 of the GATT which stipulates that the formation of a free trade area should not increase trade barriers to the trade of other contracting parties with such territories.

d. The reduction of TRQs pursuant to the CHIMEHA FTA also contravenes the principle of not increasing the burden of duties or regulations on WTO Members not party to the free trade area as set out in Article XXIV:5 of the GATT. The TRQs maintained by Chilo prior to the formation of CHIMEHA took into account the imports from Haito as well as Meco and maintaining the same level of TRQs for other WTO Members without discounting the reduction in TRQs offered to the FTA parties will add to the burden of other WTO Members.

e. Furthermore, assuming the Enabling Clause is applicable in the present situation, Haito cannot benefit from the flexibilities under the Enabling Clause as the CHIMEHA FTA does not meet the requirements of Paragraph 3 (a) of the Enabling Clause which provides that preferential treatment to developing countries will not impose unjustifiable burden on other WTO Members.

82. **Haito would argue** that:

a. the reduction of TRQs on certain agricultural products of the FTA parties does not violate the obligation provided for under Article XIII:2 of the GATT as the two different TRQs being administered by Chilo belong to two separate regimes i.e. one comprising the FTA parties and the second the other WTO Members.

b. assuming that the reduction of TRQs on certain products for the FTA parties is inconsistent with Article XIII of the GATT, the defense provided for under Article XXIV of the GATT could be invoked to justify such inconsistent measure. Haito could argue that the CHIMEHA is consistent with the test developed in *Turkey – Textiles*.

c. The formation of CHIMEHA meets the principle and requirements as laid down under paragraphs 4 and 5 of Article XXIV of the GATT since the formation has not increased any barriers with respect to other WTO Members or increased the general incidence of duties on other WTO Members.

d. Alternatively, it would argue that the CHIMEHA FTA has been concluded between developing parties and it has been notified as such by Haito, thus, the Enabling Clause can be invoked in order for Haito and Parties to the FTA to benefit from the flexibilities of the Enabling Clause which provide an exemption from the observation of the MFN principle in Article I:1 of the GATT, subject to less strict conditions than those of Article XXIV: 5 and 8.

2.3 Claim [3]: The S&DT provisions of Chapter VI of the CHIMEHA FTA in favour of Haito are inconsistent with Article I:1 of the GATT and do not meet the requirements of the Enabling Clause (15 points)

2.3.1 Chilo's legal claim

83. Chilo claims that the special and differential treatment provisions in Chapter VI of the CHIMEHA FTA which provides for elimination of import tariffs on all imports only from one FTA-party namely Haito within the first 3 years after the entry into force of the CHIMEHA FTA is inconsistent with the non-discrimination obligation in Article I:1 of the GATT. In addition, Chilo also claims that the S&DT provision does not meet the requirements of the Enabling Clause and cannot benefit from the flexibilities of the Enabling Clause.

84. In order to make this claim, Chilo must show that:

- the tariff concessions provided only to Haito are in violation of the obligation provided in Article I:1 of the GATT;
- the Enabling Clause does not provide for S&DT being offered only to one developing party and not to other parties to the FTA.

85. In order to defend this claim, Haito must show that:

- deviations from the obligation contained in Article I:1 of the GATT can be made in order to accommodate the special needs of an LDC party to an FTA;
- the Enabling Clause envisages that S&DT is offered only to one developing party and not to other parties to the FTA.

2.3.2 Elimination of import tariffs on imports originating only in Haito is inconsistent with Article I:1 of the GATT and does not meet the requirements of the Enabling Clause

86. The AB, in support of its interpretation of Article I:1 of the GATT, explained in *Canada-Autos* that the object and purpose of Article I "is to prohibit discrimination among like products originating in or destined for different countries".[53] The AB in *EC-Seal Products* summarized the elements that must be demonstrated to establish violation of Article I:1 of the GATT, which are as follows[54]:

a. the measure at issue falls within the scope of application of Article I:1 of the GATT;

b. the imported products at issue are "like" within the meaning of Article I:1 of the GATT;

[53] AB Report, *Canada — Autos*, para. 84
[54] AB Report, *EC - Seal Products*, para. 5.86

c. the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country;

d. that advantage is not accorded "immediately" and "unconditionally" to "like" products originating in the territory of all WTO Members.

87. The AB emphasized that Article I:1 of the GATT protects expectations of equal competitive opportunities for like imported products from all WTO Members. The S&DT provisions of the CHIMEHA FTA stand in violation of Article I:1 of the GATT as the concessions extended to imports originating in Haito upon the entry into force of the CHIMEHA FTA have a detrimental impact on the competitive opportunities for the import of like products from other FTA parties since the concessions are not being extended to imports of such products from other WTO Members parties.

88. It needs to be noted that Article XXIV of the GATT is a justification available to FTA parties for deviating from MFN obligations only when duties are eliminated on 'substantially all trade' among all FTA parties. Chilo may argue that within an FTA, pursuant to Article XXIV:8(b) of the GATT, all duties and restrictions should be eliminated and that zero rate tariffs should be applicable not only to imports from Haito but to imports from all the FTA parties with respect to other FTA parties. At the same time, since the CHIMEHA FTA has been concluded between developing countries, it needs to be examined whether offering such special concessions to only one FTA party, which is an LDC while keeping some tariff duties amongst the other FTA parties can be covered by the flexibilities of the Enabling Clause. The flexibilities of the Enabling Clause can be invoked to justify measures otherwise inconsistent with GATT provisions.

89. For discussion on the possible invocation of the Enabling Clause as a defence against the WTO–inconsistency of a measure taken pursuant to an FTA, reference must be made to general section.

90. **Chilo would argue** that:

a. the S&DT provisions in Chapter VI of the CHIMEHA FTA in favour of Haito are inconsistent with the provisions of Article XXIV of the GATT that does not envisage different treatments to different RTA parties.

b. Under sub-paragraph 8(b) of Article XXIV of the GATT all duties *need to be eliminated* on substantially all trade between all the constituent parties. Here with the exception of Haito, duties are not generally reduced to zero and this can be legally problematic and S&DT provisions cannot be justified under Article XXIV of the GATT.

c. the Enabling Clause shall not apply in the given case as the CHIMEHA FTA was notified under Article XXIV of the GATT.

d. Further, assuming the Enabling Clause is applicable in the present situation, Haito cannot benefit from the flexibilities under the Enabling Clause, as the Enabling Clause does not seem to envisage an RTA where the parties are treated different from each other.

91. **Haito would argue** that:

a. the S&DT provisions in Chapter IV of the CHIMEHA FTA in favour of Haito stand to benefit from the fact that the concessions have been extended pursuant to the CHIMEHA FTA and the core of Article XXIV and the Enabling Clause is that a deviation can be made from the MFN principle within a FTA.

b. Assuming, arguendo, that the S&DT provisions in Chapter VI of the CHIMEHA FTA are in contravention of the non-discrimination obligation articulated in Article I:1 of the GATT, the contravention can separately be justified pursued to the Enabling Clause as the FTA was notified under the Enabling Clause and the concessions being extended by Chilo and Meco are being extended to imports from an LDC. Haito would also argue that the

CHIMEHA FTA fits into the situation anticipated by paragraph 2(c) and (d) of the Enabling Clause as the FTA has been concluded between developing countries and concessions have only been extended to Haito given its status as an LDC and respects its special economic needs.

c. In addition, internal tariff duties need not be eliminated between the CHIMEHA parties since the Enabling Clause only requires the reduction (and not necessarily the elimination) of tariffs. Arguably, paragraph 2(d) of the Enabling Clause allows for better treatment to imports into one of the LDC FTA party.

2.4 Claim [4]: The provisions of Chapter V of the CHIMEHA FTA eliminating tariff on listed green goods imported only from the parties to the CHIMEHA FTA and a few other WTO Members are inconsistent with Article I:1 of the GATT (15 points)

2.4.1 Chilo's legal claim

92. Chilo claims that even if the elimination of tariff on listed goods for such imports from the CHIMEHA FTA parties could be justified under Article XXIV of the GATT, the extension of such concessions in favour of a few other WTO Members regarded as 'Green Accredited Party' inconsistent with Article I:1 of the GATT.

93. In order to make this claim, Chilo must show that:

- the elimination of tariffs on listed green goods imports from only some WTO Members is in violation of the MFN treatment obligation under Article I:1 of the GATT;
- Article XXIV of the GATT cannot be invoked to justify such a derogation from Article I:1 of the GATT.
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94. In order to defend this claim, Haito must show that:

- the concessions have been extended to the parties to the CHIMEHA FTA;
- it furthers the goal of the sustainable development principle mentioned in the preamble of the Marrakech Agreement.

2.4.2 Elimination of import tariffs on listed green goods originating in the parties to the CHIMEHA FTA and a few other WTO Members is inconsistent with Article I:1 of the GATT and cannot be justified under Article XXIV of the GATT

95. In *Indonesia — Autos*, the Panel explained how to carry out the examination of a measure under Article I:1:

> The AB, in Bananas III, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members. Following this analysis, we shall first examine whether the tax and customs duty benefits are advantages of the types covered by Article I. Second, we shall decide whether the advantages are offered (i) to all like products and (ii) unconditionally.[55]

96. While examining the meaning of 'any advantage, favour, privilege or immunity granted by any Member' as postulated in Article I:1 of the GATT, in *Canada — Autos*, the AB found that Canada's import duty exemption accorded to motor vehicles originating in some countries in which affiliates of certain designated manufacturers were present, was inconsistent with Article I:1. The AB noted:

[55] Panel Report, *Indonesia — Autos*, para. 14.138. In *EC — Bananas III*, the AB stated as follows: " … Also, a broad definition has been given to the term "advantage" in Article I:1 of the GATT 1994 by the panel in United States — Non-Rubber Footwear. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members." See AB Report, *EC — Bananas III*, para. 206.

> Article I:1 requires that 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members' The words of Article I:1 refer not to some advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to some products, but to 'any product'; and not to like products from some other Members, but to like products originating in or destined for 'all other' Members.[56]

97. In order to assess the consistency of the measure at issue, it also becomes important to examine whether the advantage to other WTO Members who are not parties to the CHIMEHA FTA has been granted conditionally or unconditionally. With respect to the term 'unconditionally', in applying Article I:1 of the GATT, in *Canada – Autos*, the AB referred to the undisputed finding of the panel that the "term 'unconditionally' refers to advantages conditioned on the 'situation or conduct' of exporting countries".[57] The panel had found that:

> The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord 'unconditionally' to third countries which are WTO Members an advantage which has been granted to any country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.[58]

98. Chapter V of the CHIMEHA FTA is potentially inconsistent with Article I:1 of the GATT as the concessions extended to listed green goods imports are limited to those goods originating in only some WTO Members and are not being extended to imports of such products from other WTO Members. Moreover, the benefit of concession on listed green good exports is being conditioned upon a WTO Member being considered by the FTA Parties a 'Green accredited party' and there is not an objective criteria for determining which WTO Members qualify as a 'Green accredited party'.

99. In *Canada- Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption, which was found inconsistent with Article I of the GATT. The Panel, in a finding not reviewed by the AB, rejected this defence, noting that the import duty exemption was not granted to all products imported from the United States and Mexico [only] and that it was also granted to products from countries other than the United States and Mexico:

> We recall that in our analysis of the impact of the conditions under which the import duty exemption is accorded, we have found that these conditions entail a distinction between countries depending upon whether there are capital relationships of producers in those countries with eligible importers in Canada. Thus, the measure not only grants duty-free treatment in respect of products imported from the United States and Mexico by manufacturer-beneficiaries; it also grants duty-free treatment in respect of products imported from third countries not parties to a customs union or free-trade area with Canada. The notion that the import duty exemption involves the granting of duty-free treatment of imports from the United States and Mexico does not capture this aspect of the measure. In our view, Article XXIV clearly cannot justify a measure, which grants WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade agreement.[59]

100. By corollary of the Panel's observation, Article XXIV of the GATT justifies only those measures, which grant WTO-inconsistent duty-free treatment to products originating in *parties* to a customs union or FTA.

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[56] AB Report, *Canada — Autos*, para. 79
[57] AB Report, *Canada – Autos*, para. 76.
[58] Panel Report, *Canada – Autos*, para. 10.23
[59] Panel Report on *Canada — Autos*, paras. 10.55–10.56

101. Moreover, in relation to the customs union, the AB made it clear that Article XXIV can be used to justify the derogation from the MFN obligation under Article I of the GATT as far as the *formation* of the custom union is concerned. If the same logic were extended to free trade areas only such derogations are justified under Article XXIV of the GATT which meet the requirements of sub-paragraph 5(a) and 8(b) of Article XXIV and if the formation of a free trade area would be prevented in the absence of the same.

102. **Chilo would argue** that:

a. the concessions in Chapter V of the CHIMEHA FTA in favour of certain WTO Members other than the parties to the CHIMEHA FTA are inconsistent with Article I:1. The concessions of the GATT. and do not comply with the non-discrimination obligation as they only extend to products originating in certain WTO Members and such an advantage is not extended to the "like" imports from other WTO Members.

b. In case Haito argues that the tariff concessions are extended to 'Green accredited party', Chilo would rebut by stating that the extension of such concessions cannot be based on the fact that those certain WTO Members are regarded as 'Green accredited party' by the parties to the CHIMEHA FTA since Article I:1 provides that a Member granting any advantage to any product originating in any other country has the obligation to accord that advantage to like products of all other Members regardless of their situation or conduct.

c. Moreover, the defence of Article XXIV of the GATT cannot be used to justify extending preferential treatment on listed green goods to certain WTO Members and not to other WTO Members since Article XXIV of the GATT can only be invoked to defend preferential treatment granted to the parties to an FTA and not to other WTO Members who are not party to that FTA.

103. **Haito would argue** that:

a. the provisions of Chapter V of the CHIMEHA FTA in favour of the FTA parties and certain WTO Members stand to benefit from the fact that the concessions have been extended pursuant to the CHIMEHA FTA, and further, the sustainable development principle enumerated in the preamble of the Marrakesh Agreement supports helping as many as possible but sometimes not all WTO Members.

b. the provisions of Chapter V meet the requirements of sub-paragraph 5(b) and 8(b) of Article XXIV of the GATT and the objective of the provision i.e. to promote sustainable development, would be not be achieved if it was not extended to other WTO Members who can be considered a 'Green accredited party'.

2.5 Claim [5]: The provisions of Chapter IV of the CHIMEHA FTA on anti-dumping are inconsistent with Article 9.2 of the WTO Anti-dumping Agreement (15 points)

2.5.1 Chilo's legal claim:

104. Chilo claims that the mandatory reciprocal exemption from the application of the anti-dumping duty law among the parties to the CHIMEHA FTA is inconsistent with WTO Members' right to use antidumping measures as provided in Article VI of the GATT and the Antidumping Agreement. Moreover, Chilo claims that if antidumping duties are imposed, they should be applied on an MFN basis for similar situations.

105. In order to make this claim, Chilo must show that:

- trade between parties to an FTA cannot be exempted from the application of the anti-dumping law, as the rights of WTO Members to use Antidumping duties is a WTO fundamental right;

- the general MFN principle of the WTO stands violated if anti-dumping duties can be imposed against dumped imported products from some Members and not from other Members.

106. In order to defend this claim, Haito must show that:

- removal of anti-dumping duties between the parties to an FTA foster closer trade integration of economies;
- anti-dumping duties in effect are non-tariff measures;
- in any event no anti-dumping duties have been applied under this Chapter of the FTA.

2.5.2 The reciprocal exemption from the application of the anti-dumping law among the parties to the CHIMEHA FTA are justifies by GATT Article XXIV as FTAs cannot roll back WTO Members' rights and obligations, including the right to use AD duties.

107. FTAs are a means of obtaining *closer* integration between the economies of the parties to such agreements as per paragraph 4 of Article XXIV of the GATT 1994.[60] In *Peru-Agricultural Products,* the AB, while discussing the nature of Article XXIV of the GATT 1994 and with respect to rights and obligations of WTO Members under the WTO covered agreements noted:

> In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements.[61]

108. Thus, although Article XXIV of the GATT 1994 can be used to defend measures in FTAs that somehow discriminate but it does not allow WTO Members to go back on the rights and obligations undertaken by them pursuant to the WTO covered agreements.

109. Recall that in *Peru –Agricultural Products*, the AB stated that:

> In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements.[62]

110. The idea is that XXIV provides an exemption for FTAs that further liberalize trade between the parties and thus do not roll back WTO provisions. Such WTO includes for instance the right to initiate a WTO DS process. Now what about the right to impose anti-dumping duties? If Chilo needs to argue that somehow, the right to impose anti-dumping duties is such a right that cannot be dispensed with easily and the FTA provisions to this effect must be clear, it seems more plausible that antidumping measures be considered forms of restriction. Giving up the right to impose anti-dumping duties within the CHIMEHA FTA does not 'roll back' a WTO right, but rather it goes forward in the direction required by Article XXIV of the GATT to grant the exception.

111. In support of Chilo's line of argument, please recall that with respect to a Member relinquishing its right to recourse to WTO dispute settlement, the AB noted:

> In *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, the Appellate Body held that "the relinquishment of rights granted by the DSU cannot be lightly assumed", and that "the language in the Understandings must clearly reveal that the parties intended to relinquish their rights".[63] Further, the Appellate Body emphasized that "irrespective of the type of proceeding, if a WTO Member has not clearly stated

[60] AB Report, *Peru-Additional Duties*, para 5.116
[61] AB Report, *Peru-Additional Duties*, para 5.116
[62] AB Report, *Peru-Additional Duties*, para 5.116
[63] AB Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 217. (fn omitted)

> that it would not take legal action with respect to a certain measure, it *cannot be regarded as failing to act in good faith* if it challenges that measure."[64] Thus, while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, any such relinquishment must be made clearly…[65]

2.5.3 Anti-dumping duties are forms of restrictions that should be eliminated between the FTA parties

112. In this Case Haito would argue that antidumping duties are restrictions and pursuant to Article XXIV:8(b) they should be eliminated in the trade between the FTA parties. Moreover Article VI is not listed in the parenthesis of Article XXIV:8(b) as exempted from this obligations.

113. One counter argument to explain why AD duties need not be eliminated is that AD duties are "not restrictive regulation of commerce" but rather trade measures that restore fairness, thus not restrictions at all! Therefore AD duties need not to be phased out. To this some respond that antidumping duties are not restrictions to trade but to the contrary restore fairness.

114. Note that the AD Agreement does not require the initiation of AD investigation when products are dumped and even if an AD investigation is initiated and dumping and injury are found to exist, a Member may still choose not to apply AD duties.

115. Note that the Chile-Canada free trade agreement contains a provision akin to Chapter IV of the CHIMEHA FTA and the parties to the Chile-Canada FTA premised it on the assumption that anti-dumping duties hamper free trade and such a finding has been supported by many scholars.[66] There are other similar FTAs.

2.5.4 Exempting the use of antidumping duties only between FTA parties is inconsistent with Article 9.2 of the WTO Anti-dumping Agreement

116. As noted above, the Anti-dumping Agreement does not require the initiation of AD investigation when products are dumped and even if an AD investigation is initiated and dumping and injury are found to exist, a Member may still chose not to apply AD duties. But Article 9.2 of the Antidumping Agreement is clear that when an investigation is undertaken and AD duties are imposed, they must be imposed similarly in similar situation (a form of MFN application of AD duties).

> When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, *on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury*, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

117. So, in practice, if Chilo is exempted from any AD duties, otherwise imposed by Haito or Meco against imports from outside CHIMEHA FTA, it would have no economic interest to complain about not being subject to such AD duties. However, from a systemic perspective

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[64] AB Reports, *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, para. 228. (emphasis added)

[65] AB Report, *Peru-Additional Duties*, para 5.25

[66] K.D. Raju, World Trade Organization Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence, 1998, Kluwer Law International, p. 3 quoting Roessler F (1975), GATT and Access to Supplies, Journal of World Trade Law, 9 (1): 25-40. [not sure we need this. Plus it's pretty ancient].

(and in order to avoid being victim of such situation in the context of other FTA where Chilo is an outsider), Chilo could argue that exempting the use of antidumping duties only between FTA parties is inconsistent with Article 9.2 of the WTO Anti-dumping Agreement.

118. If such exemption of AD duties for the FTA parties is argued to be inconsistent with Article 9.2 then one line of argumentation by Haito can include the fact that such discriminatory application is justified by Article XXIV. In such case Haito would need to demonstrate that the CHIMEHA FTA respects the WTO-consistency test developed in the *Turkey – Textiles*, i.e. that the FTA is consistent with Article XXIV:5 and Article XXIV:8 and that the challenge inconsistent measure exists since the formation of the FTA and that without such measure the formation of the RTA would have been prevented. This means that for Haito the elimination of internal AD duties would be essential to the formation of this RTA.

119. **Chilo would argue** that:

a. FTAs cannot roll back WTO Members' rights and obligations, including the right to use AD duties.

b. the exemption of parties from the application of anti-dumping is inconsistent with Article 9.2 of the WTO Agreement on Anti-Dumping as the provision requires the application of duties on all sources of imports found to be dumped.

c. would argue that application of anti-dumping duty is a fundamental right under the WTO covered agreements and an FTA cannot be used to roll back on that fundamental right of WTO Members.

120. **Haito would argue** that:

a. anti-dumping duties are in fact a form of barrier to trade and it has been long established that anti-dumping duties have an adverse impact on trade liberalization. Thus, anti-dumping duties oppose the aim of closer integration of economies of territories signatory to a FTA as provided for in paragraph 4 of Article XXIV of the GATT.

b. Antidumping duties are duties and other regulation restricting trade which must be eliminated within a FTA pursuant to Article XXIV:8(b).

c. Anti-dumping duties should in fact be eliminated on 'substantially all trade' pursuant to Article XXIV:8(b) of the GATT.