

**ELSA Moot Court Competition (EMC2)
on WTO Law
Case 2016-2017**

The CHIMEHA FTA between Chilo, Meco and Haito

by Gabrielle Marceau

Professor of Law at the University of Geneva and Counsellor to the Legal Affairs Division of
the World Trade Organization (WTO)

1 INTRODUCTION

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

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

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

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



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

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

2 THE CHIMEHA FTA

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

2.2. This CHIMEHA FTA includes the following Chapters:

2.1 Chapter I – Duties on agricultural products

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



2.2 Chapter II – Duties on industrial products

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

2.3 Chapter III– Basic rights and obligations

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

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

2.4 Chapter IV – Anti-dumping

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

"Reciprocal Exemption from the Application of Anti-dumping duty Law:

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



2.5 Chapter V - Environment

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

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

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

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

2.7 Chapter VII – Trade in services

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

2.8 Chapter VIII – Dispute settlement

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



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

"Relationship to Dispute Settlement under the WTO:

1. Subject to this Article, disputes regarding any matter arising under both this FTA and the WTO Agreement, may be settled in either forum at the discretion of the complaining Party only.

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

3. In any dispute concerning:

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

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

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



3 NOTIFICATION OF CHIMEHA FTA TO THE WTO

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

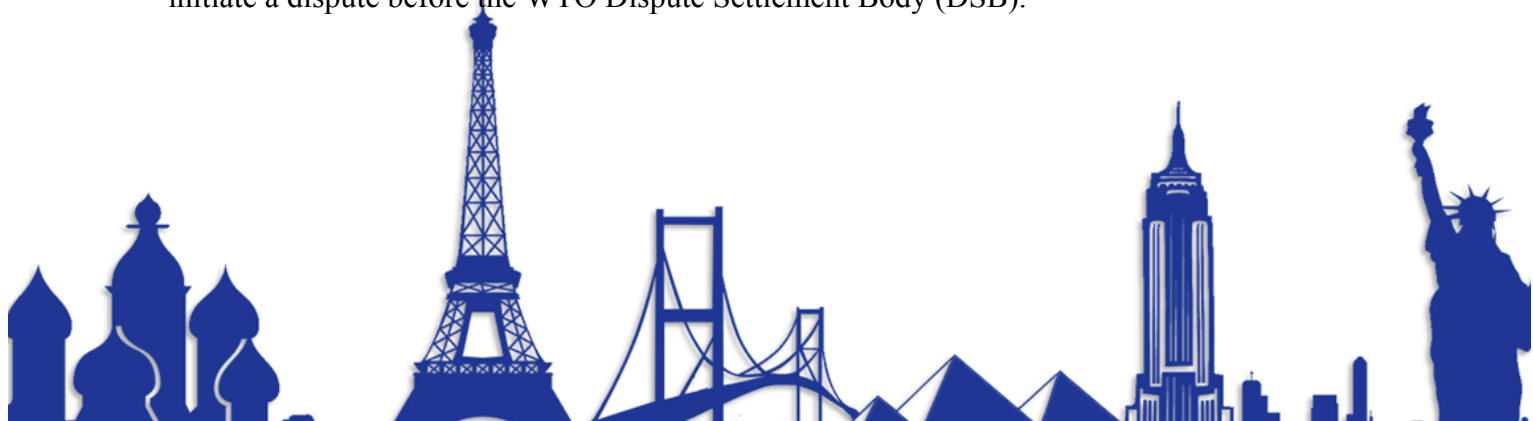
4 HAITO'S BALANCE-OF-PAYMENT (BOP) QUOTAS AND THE INCREASING TENSIONS BETWEEN THE PARTIES TO THE CHIMEHA FTA

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

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

4.3. Chilo and Meco considered that their exports to Haito should be exempted from such a BOP import restriction since they are entitled to preferential treatment pursuant to the FTA. Chilo argued that if Haito failed to remove its BOP import restrictions – at least with respect to imports from Chilo – it will have to initiate WTO dispute settlement proceedings. Haito asserted that only the FTA dispute settlement mechanism can be used for initiating a dispute concerning a BOP measure implemented within the FTA.

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



5 CHILO'S COMPLAINTS TO THE WTO DISPUTE SETTLEMENT SYSTEM

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

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

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

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

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



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

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

1. The BOP quota restrictions applicable to all imported products are inconsistent with Articles XI, XII and XVIII of the GATT 1994;
2. The reduction of the TRQs on agricultural products provided for in Chapter I of the CHIMEHA FTA (i.e. the reduction by 50% of the in-quota tariff level, as well as the reduction by 60% of the tariff level applicable for the out-of-quota), are inconsistent with Article XIII of the GATT 1994;
3. The S&DT provisions of Chapter VI of the CHIMEHA FTA in favour of Haito are inconsistent with Article I:1 of the GATT 1994 and the Enabling Clause;
4. The provisions of Chapter V of the CHIMEHA FTA providing zero import tariffs to listed green goods from parties of the CHIMEHA FTA and a few other WTO Members are inconsistent with Article I:1 of the GATT 1994;
5. The provisions of Chapter IV of the CHIMEHA FTA on anti-dumping are inconsistent with Article 9.2 of the WTO Anti-dumping Agreement.

7 NOTE FROM THE CASE-AUTHOR

For strategic reasons, claims, defences and arguments relating to the "substantially all the trade" references in Article XXIV:8(b), are not to be raised or developed by the participants in their written or oral submissions. Moreover, claims, defences and arguments relating to Article XX of the GATT 1994 to justify any of the potential inconsistencies invoked in this dispute, are not to be raised or developed by the participants in their written submissions. Finally, the participants should assume that the CHIMEHA FTA does cover substantially all the trade. The participants should also assume that Haito does face real balance-of-payment (BOP) problems and has imposed effective BOP import restrictions.



8 ILLUSTRATIVE JURISPRUDENCE

- Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products, (Russia – Tariff Treatment)*, [WT/DS485/R](#) and Add.1, circulated to WTO Members 12 August 2016;
- Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, WT/DS457/AB/R and Add.1, adopted 31 July 2015.
- Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products, (Turkey – Textiles)* WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, p. 2345.
- Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products, (US – Steel Safeguards)* WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117;
- Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products, (EC – Poultry)*, [WT/DS69/AB/R](#), adopted 23 July 1998, DSR 1998:V, p. 2031
- Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador (EC – Bananas III (Article 21.5–Ecuador II) / EC – Bananas III (Article 21.5 – US))*, [WT/DS27/AB/RW2/ECU](#), adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, [WT/DS27/AB/RW/USA](#) and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165;
- Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, (EC – Bananas III)*, [WT/DS27/AB/R](#), adopted 25 September 1997, DSR 1997:II, p. 591;
- Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products, (EC – Poultry)*, WT/DS 69/AB/R, adopted on 23 July 1998, DSR 1998:V, p. 2031;



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

9 RELEVANT MINUTES OF THE WTO COMTD AND WTO CRTA AND OTHER COMMUNICATIONS ON THE ISSUE OF DUAL NOTIFICATIONS

- Minutes: WT/COMTD/M80, WT/COMTD/M76, WT/COMTD/77, WT/COMTD/78, WT/COMTD/79

- Systemic and Specific Issues arising out of the dual notification of the Gulf Cooperation Council Customs Union, Communication from China, Egypt and India, WT/COMTD/W/175

- Gulf Cooperation Council Customs Union - Saudi Arabia's Notification (WT/COMTD/N/25), Communication from the United States, Addendum, WT/COMTD/W66A1

- Gulf Cooperation Council Customs Union - Saudi Arabia's Notification (WT/COMTD/N/25), Communication from the European Communities, Addendum, WT/COMTD/W66A2

10 SOME OTHER RELEVANT WTO DECISIONS

- TRANSPARENCY MECHANISM FOR REGIONAL TRADE AGREEMENTS Decision of 14 December 2006 WT/L/671

- TRANSPARENCY MECHANISM FOR PREFERENTIAL TRADE AGREEMENT, Decision of 14 December 2010, WT/L/806

