

Report

ELSA Moot Court Competition

on WTO Law



2002 – 2003

elsa

The European Law Students' Association

Foreword

ELSA has been involved in the promotion of moot court competitions and particularly international moot courts for the past 15 years – an involvement that eventually developed into a wish to combine the experience and skills earned by the 250 local groups into our own international moot courts in order to better contribute to legal education both within Europe and across the World. This was the prime motivation of selecting WTO Law: as an innovative area of law that has not yet entered into the curriculum of many law students and yes is rapidly developing into a highly regulated international legal regime.

The first edition of the ELSA Moot Court Competition on WTO law was a success in that it met all the goals set as benchmarks in order to determine the quality of the event: The first case of the EMC2 was both very interesting and challenging – thanks to the skill of Professor Frank Emmert in drafting the case of the competition; and a stellar cast of academics and professionals in the field of WTO Law who devoted some of their time to supporting the competition and judging the teams. The competition also involved a truly international participation: with teams coming from 38 Universities spreading from the United States to the Russian Federation. Finally the final oral rounds themselves were excellent, with both the judges and the participants being highly motivated, enjoying themselves and living up to ELSA's ideal of creating a dialogue between foreign cultures – with an OC consisting of students from 11 different countries and participants sharing 21 different nationalities amongst themselves.

However this is not to say that the EMC2 cannot be improved further. This is the main aim of this report: to gather the main developments that took place during the competition enabling them to be examined in order to determine how things may have been accomplished better and constantly improve the organisation.

Finally we would like to thank the supporters of this competition

ELS (The ELSA Lawyers Society)
Red Bull
Westlaw International

And ELSA International's partners: Clifford Chance, CMS, LexisNexis, Microsoft, Thomson.

We would also like to thank the WTO for allowing us the use of their offices for the competition and all the invaluable support they provided.

Mark Refalo
Vice president Academic activities
ELSA International

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1. GENERAL BACKGROUND

Introduction

The European Law Students' Association, ELSA, is an international, independent, non-political, and non-profit-making organisation comprised and run by law students and young lawyers. Founded in 1981 ELSA is today the world's largest independent law students' association and is present in more than 200 law faculties in 38 countries across Europe with a membership in excess of 25 000 students and young lawyers.

ELSA has been involved in Moot Court Competitions for a number of years. However it was felt that it would be more beneficial to develop this experience into an international moot court competition aimed at contributing towards the development of law students worldwide.

ELSA has chosen WTO Law as the basis for its international moot court competition due to the importance of Trade Law as such and viability with which WTO Law is evolving. The World Trade Organisation was established in 1995 based on the old GATT agreements to create a system for efficiently regulating international trade. Although it has created controversies, the present structure looks set to promote and enhance international trade for years to come.

Structure of the Competition

The Case for the competition was issued in August with teams having to register for participation by the middle of December. Only one team per law faculty or law school was allowed to participate in the Competition.

The EMCC consists of 2 rounds: a Written Selection Round, in which all participating teams had to produce Memorials for both the claimant and the respondent to the case; and the Final Oral Rounds, which were held at the WTO Centre in Geneva between 23rd and 27th of April. Teams participating in the Final Oral Rounds were chosen either through their written memorials or by winning a National Moot Court Competition organized by an ELSA National Group. This year 5 teams were selected via a national round while another 7 through their memorials.

At the Final Oral Rounds 12 Teams pled against each other in the Preliminary Rounds – once as applicant and once as respondent. The best 4 Teams went on to the Semi-Finals, these were Elimination Rounds with the each team only pleading once. The two winners then contested each other for the title of winner of the EMC2.

2. LIST OF PARTICIPATING UNIVERSITIES:

	Belgium
006	Universite Catholique de Louvain
	Bulgaria
029	Sofia University "St. Kliment Ohridski"
	Finland
017	Helsinki University
	Germany
007	Martin-Luther University
	Hungary
026	Eötvös Loránd University
018	Pazmany Peter Catholic University
011	Central European University
	Ireland
009	University College, Cork
013	National University of Ireland, Galway
	Lithuania
015	Law University of Lithuania
021	Vilnius University
	Malta
31	University of Malta
	Norway
005	University of Oslo
	Portugal
038	Universidade do Porto
040	Universidade Nova de Lisboa
	Romania
033	Facultatea de Stiinte Juridice, Oradea
	Russian Federation
032	Kazan State University
004	Peoples' Friendship University of Russia (PFUR)
014	Moscow State University
030	Moscow State Institute for International Relations, MFA Russia

	Sweden
028	Uppsala University
	Switzerland
019	University of Neuchatel
016	University of St. Gallen
025	University of Geneva
	The Netherlands
010	Amsterdam Law School
012	Maastricht University
	Turkey
023	Ankara University
	United Kingdom
024	King's College London
037	ELSA ULU (University College London)
036	ELSA ULU (School of Oriental and African Studies)
027	University of Manchester
001	The University of Birmingham
002	Oxford Institute of Legal Practice
	Ukraine
020	Odessa National Law Academy
	USA
022	New York University - School of Law
003	George Washington University Law School

3. THE WRITTEN ROUNDS

In the Written Rounds participants were required to write memorials with arguments for both sides, Bohemia and Avalon. 28 teams participated in the EMCC, though 3 failed to present any memorials – out of which the top 7 made it to the Final Oral Rounds.

In general the quality of the memorials varied greatly, however the correction of the memorials tended to be consistent amongst the judges – probably as a result of using scoring sheets setting weights for the different aspects of the memorials.

From an administrative point of view one of the main issues that arose during the correction of the memorials was the time that the judges had to correct the memorials: Given that this was the first edition of the EMC2, we had underestimated the amount of interest the competition would generate along with the time required to correct each memorial. Also the time memorials spent in the post meant that the period to correct memorials was further shortened. The result was that the winning teams could only be determined a week after the deadline.

Internet proved to be a partial saviour in that email allowed the electronic version of memorials to be received on the same day as its mailing. At the same time many judges were ready to receive the memorials by email – allowing for an efficient and cheap administration in many cases. Of course did not solve the basic issue of a greater load than expected.

Although internet greatly improves efficiency, it cannot yet totally replace the printed memorials – especially since the formatting of a word document might change slightly when opened in different computers. For the sake of consistency, whether the formal rules are met or not should be established with reference to written memorials. At the same time if the electronic version is sent directly to the bench care must be taken to ensure that the substance of the printed and electronic copies is identical.

More definite solutions would be to both push back the deadline for the postage of memorials, and more importantly, by increasing the number of persons correcting the written memorials.

The rules on the written rounds should also be developed with clearer rules on the formal requirements and the manner in which penalties will be imposed.

A. Evaluation of Written Rounds

Following is the report on the EMC2 presented by the team from ELSA Helsinki:

1 Introduction

Finland was represented in the ELSA Moot Court Competition 2003 on world trade law by a team from the *University of Helsinki Faculty of Law*. The team consisted of three foreign postgraduate law students and one Finnish undergraduate law student and business school graduate: *Michael Mehling, Viktoria Kovalenko, Chad Eggerman* and *Ari Korpinen*. Ari Korpinen and Chad Eggerman prepared the brief for the claimant, the Empire of Avalon, whereas Michael Mehling and Viktoria Kovalenko prepared the brief for the respondent, the Bohemian Union. The Finnish team was coached by Mrs. *Tuula Mouhu-Young*, MBA, formerly a practitioner and currently pursuing advanced studies in international trade law. Despite a high level of motivation, the Finnish team did not qualify for participation in the final rounds of the moot court. Since the competition is by now over, it is time to provide some feedback on the practical arrangements of the competition.

2 On the practical arrangements of the competition

2.1 Support from ELSA Helsinki

Our team was supported by ELSA Helsinki, the local ELSA committee at the University of Helsinki. The support mostly consisted of facilitating contact with our coach, Mrs. Mouhu-Young, as well as securing financial support from the Dean of our faculty. The team is very pleased with the excellent job done by our local committee. We remain equally thankful to our coach for all the efforts she made to support our mission and especially her willingness to stand at our side during the strenuous last-minute preparations.

2.2 Practical arrangements from ELSA International

While our team was very pleased with the support from our local committee, we were not as pleased with the efforts raised by ELSA International, the international organizing committee (IOC) of the moot court. We hope that the remarks made in this report serve as support for future organizing committees when planning upcoming ELSA Moot Court competitions. The following passages shall illustrate our reasons for this assessment.

2.2.1 On the clarification requests for the case text

Our first note on the practical arrangements concerns the timeline of the competition. The deadline for requests for clarification was November 14th, 2002. Making an intelligent and comprehensive clarification request requires full immersion in the case as well as some degree of knowledge of the case-law and academic literature on the subject at hand. Achieving the necessary level of background knowledge and familiarity with the case takes more time than was allowed for this year in the competition. We think that the time between the release of the case text and the deadline for clarification requests was too short. It is the opinion of the Finnish team that this deadline should be set at a later date in the next moot court, e.g. two weeks later.

Our second note also concerns the clarification request. This year the IOC published a clarification text on the website of the moot court. The Finnish team also received an e-mail from the IOC with answers to the specific questions put forward by us. Not all points raised in the e-mail were published on the web site. Presumably such e-mails were also sent to our teams that had put forward a clarification request to the IOC. We think that this practice of the IOC, sending separate e-mails to each team, gives rise to questions of fairness and expedience. It allows for different teams obtaining different information, given that they have put forward different questions to the IOC. It is the opinion of the Finnish team that all relevant information and comments to all questions should be integrated into one clarification text published on the website. That way, the possibility that some private information received by certain teams might affect the outcome of the competition is safely ruled out.

2.2.2 On the results of the national semi-finals

The rules of the moot court allow the results of national oral semi-finals to be published at a time earlier than the results of the written phase of the competition. We think that this practice of the IOC provides a competitive edge to teams in countries who arrange national oral semi-finals instead of a written phase. Since the winning teams of national semi-finals know for sure that they will be allowed a seat in the final round, they can start preparing for that final round much earlier than those teams who compete for that seat by putting forward written memorials. Since preparation is everything in the moot court, the longer the time available for preparation, the better the chances for prevailing at the final rounds. It is therefore the opinion of the Finnish team that the results of all national oral semi-finals should be announced on the same date as the results from the written phase are announced. Such a practice could, for instance, be organised by requiring the judges of a national semi-final to send their results in a sealed envelope to the IOC. The IOC would then publish the results of all national semi-finals on the competition web site at the same date as it announces the results of the written phase of the competition.

2.2.3 On access to WESTLAW

ELSA International announced on their website that all registered teams would be provided with individual access to the WESTLAW database after December 15th, 2002. According to the information on the website, all teams would be provided with a password for that database after registration. Despite *several* requests made on behalf of our team to the IOC we never obtained the promised password. While we did eventually obtain access to Westlaw by other means, it would have helped our efforts greatly if the team members had been given access from their individual computers as promised by ELSA. The Finnish team regrets the failure of the IOC to provide access to the database as announced, and would at least have expected some timely notification to the effect that such access could not be arranged as promised earlier.

2.2.4 On the delay of the results of the written phase

The results of the written phase were not published for an entire week after the official deadline of January, 31st, 2003, had elapsed. It later came to our knowledge that this delay was a result of some mix-up with the judge's schedules. Clearly this delay shortened the time available for preparation for those teams that were ultimately awarded a seat in the final oral rounds. The delay also further enhanced the competitive edge enjoyed by the winning teams of the national semi-finals. Future organizing committees should keep strictly to the time schedules put forward in the representations to the teams.

2.2.5 On access to old memorials

According to information on the competition website the website would “*feature previous cases of the competition and some of the best written memorials*”. However, no previous memorials were ever published on the website by the IOC. The Finnish team regrets that the IOC did not publish earlier memorials which could have provided tips on the composition of a successful memorial. We are of the opinion that the IOC should in future competitions publish on the website the winning memorials of the previous competition. That should be done at the same time as the case text is published. The practice of publishing previous winning memorials is standard in some other moot court competitions.

3 Conclusion

Despite the foregoing difficulties in the practical arrangements, the Finnish team is of the opinion that participating in the ELSA Moot Court on world trade law was a rewarding experience (even though our mission ended in the written phase). We hope that future organizing committees take note of the aforementioned suggestions for improvement. The Finnish team has published an article on our ELSA Moot Court experience in “ELSA News”, the membership magazine of our local committee. In that article we inform the law student community in Helsinki about the existence of this competition and we encourage them to join future moot courts arranged by ELSA. We hope that the ELSA moot court could become a permanent part of the moot court culture at our law school.

B. Judges of written memorials

Gratitude has to be shown towards the persons who devoted their time and energy in correcting the large number of memorials:

Dr. Arthur Appleton
Georg Berrisch
Prof. Jacques Bourgeois
Prof. Christine Breining Kaufmann
Prof. Frank Emmert
Prof. Robert Howse
Dr. Valerie Hughes
Dr. Gabrielle Marceau
Prof. Petros Mavroidis
Prof. Elisabetta Montaguti
Mr. Hunter Nottage
Dr. Audrius Perkauskas
Prof. Letizia Raschella-Sergi
Mr. Darius Saliunas
Mr. Hannes Schloemann
Prof. Christian Tietje

C. Scores of Preliminary Rounds:

Team Number	Respondent memos		Claimant Memos		Penalties		Average Score - Penalties		
	R1	R2	C1	C2	Resp	Claim	Respondent	Claimant	Total
7	16.25		16.5		0	0	16.25	16.5	32.75
24	17	19	14	19	2	2	17	15.5	32.5
22	15.5		17.5		1	1	15	17	32
25	16.75	13	17.25	19.25	1	2	14.375	17.25	31.625
10	16	17	16	17	3	2	15	15.5	30.5
37	15.25	15	15	14.5	2	2	14.125	13.75	27.875
12	14		13.75		0	0	14	13.75	27.75
1	11	17	14	15	1	2	13.5	13.5	27
16	12	13	14	13.25	1	0	12	13.625	25.625
3	15		15		3	6	13.5	12	25.5
6	13.5	16.25	13.5	15.75	4	4	12.875	12.625	25.5
13	14	12	12.75	13	1	1	12.5	12.375	24.875
9	14.75		11		1	1	14.25	10.5	24.75
30	15	12	13.5	7	0	1	13.5	9.75	23.25
36	14	12	15.25	14	5	5	10.5	12.125	22.625
29	9.25	11.5	11.5	11	1	0	9.875	11.25	21.125
27	7.25	15	6.5	13	2	0	10.125	9.75	19.875
28	10.25	12	9	7.5	2	1	10.125	7.75	17.875
19	9	13	9.5	15	10	1	6	11.75	17.75
21	7.25	12.25	8.75	12	2	3	8.75	8.875	17.625
2	6	11.5	6	11.7	0	1	8.75	8.35	17.1
23	8		7.25		1	1	7.5	6.75	14.25
17	7.25	7	9.25	6.5	3	0	5.625	7.875	13.5
32	3.5	10	4.25	10.5	2	1	5.75	6.875	12.625
15	6.75	9	4.25	6	1	1	7.375	4.625	12

4. NATIONAL ROUNDS

In order to ensure an international participation during the Final Oral Rounds, 5 ELSA Groups held National Rounds with the aim of selecting one team to represent them in Geneva.

The 5 National Rounds were:

Hungary
Malta
Norway
Portugal
Romania

In general the organisation of these national rounds was satisfactory, with the ELSA groups showing great inventiveness in the manner they organised the competition: in Romania the teams had to undertake the task of translating all applicable material into Romanian, simply because they couldn't find enough persons for a bench capable of judging the rounds in English. The fact that they found in total 4 teams ready to undertake this challenge only attests to their determination to break beyond their national boundaries. In Hungary however, the organising team insisted that the whole proceedings be kept in English and despite difficulties managed to find enough support and participants to make it possible. In Malta given limited resources, the organising committee managed to get the President of Malta and former President of the United Nations General Assembly to coach the teams. Norway organised the competition with their own case in Norwegian, the winning team then having to slave their days away to bring themselves to the top with WTO Law a task which they accomplished very successfully.

However in general it has been pointed out that the current rules used by the EMC2 are not very National Round friendly and therefore those groups trying to use them as is had to improvise rules which caused some issues to be ironed out. For this reason the OC will be drafting a skeleton set of rules for National Rounds to ensure that similar issues will not arise during the next EMCC.

Unfortunately the amount of effort put into the National Rounds was not always reflected by the academic performance of the teams. With the majority being ranked towards the bottom. This is partly due to a language problem: the 2 national teams that had a fluent grasp of English performing rather well indeed. While it is true that English is not yet a common language in many European countries, this fact only points to the importance that National Rounds be held in English and if anything teams are also coached to smarten up on their legal English. English is a necessity to anyone intending to work in the International field. National rounds should not only be aimed at ensuring an international presence in the competition but in preparing our members to be effective lawyers on an international field. It is not satisfactory to have teams chosen as the best in a national round only to then watch them struggle against more fluent teams.

Another problem faced by Organising Committees is that the EMCC is not an easy competition and a team dropping out at the last minute is an unfortunate reality. This can be an issue when there are only three or four teams participating in the competition, for this

reason we are currently looking at various possible solutions for national rounds in order to minimise the possibilities of teams from withdrawing, or that when it happens the competition is not overly disturbed.

A short summary on the National Rounds follows:

A. Hungary

Originally a team from the three Universities in Budapest was meant to participate, however one of the teams pulled out at the last minute leaving Pázmány Péter Catholic University and Central European University with the Oral Rounds (held on the 3rd March, 2003 at the Supreme Court of Hungary) being won by the former team.

The Bench was composed of:

Bánrévy Gábor (Director of the International Law Institute at the Pázmány Péter Catholic University Faculty of Law and Political Sciences, Budapest)

Hanák András (Attorney at Law, Hanák András Law Office, Budapest)

Martonyi János (Attorney at Law, Martonyi és Kajtár Baker & McKenzie Law Office, Budapest)

The competition was sponsored by:

The Ministry of Justice; Budapest Bar Association; Eötvös Loránd University of Sciences; Gloster telecom; Hunguest Hotels; ÍTÉLET; Pázmány Péter Catholic University

B. Norway

These National rounds were held on the 10 and 11 October 2002 in Oslo and were contested by one team from each of the three law faculties in Norway participated. The structure of this competition was a bit different from the rest in that the three teams were selected after fiercely competitive rounds held in the local faculties. With the winning teams from Bergen (Stian Tenfjord, Helge Røstum, Knut Erik Jakhelln), Oslo (Lars Marius Holm, Henrik Smiseth, Ingrid Sandvei) and Tromsø (Inge Dulin, Vidar Karlsen) meeting and competing at the University of Oslo in a battle of words which was ultimately won by the home team.

The bench was composed of real judges, both from the lower courts and the supreme court:

Preliminaries: Steingrim Bull, Jørgen Moen, Merete Smith

Finals: Steinar Tjomsland, Kirsti Coward, Jens Edvin Skoghøy

Although participation was not too high this year, it is felt that as it develops the moot court should attract larger audiences.

What made the competition different is that they used a different case prepared by: Dr.juris Per Kristiansen, Ammanuensis Petter Høiseith, Stipendiat Henriette Nazarian.

Different law firms, who also contributed towards the expenses of the competition, coached each team. These coaches were:

Oslo: Advokatfirmaet Lindh Stabell Horten ved Christian Stang Våland og Jon Andersen

Bergen: Kluge advokatfirma ans ved Grethe Gullhaug m.fl.

Tromsø: Advokatfirmaet Skjærgård ved Knut Skjærgård

The sponsors of the competition were: Advokatfirmaet Kluge, Advokatselskapet Skjærgård, Lindh Stabell Horten, Advokatfirmaet Harris, International Education Center (IEC)

C. Malta

Although there is only one University in Malta, after heavy marketing covering the university with posters and flyers three teams were gathered for the competition. Apart from marketing, the organising committee also managed to provide the winning team with satisfying rewards: finding a sponsorship for the flight tickets and also managing to get the winning team to be coached coached for the final oral rounds by H.E. the President of Malta Prof. Guido DeMarco, who was not only the top lawyer of Criminal Law in Malta, but also extremely experienced in other sectors of the law – having served both as an MP for many years and also as President of the United Nations General Assembly (45th Session).

Dates of Competition: 3 and 4 March, 2003

Location: Law Courts, Malta

With finals held in the Court of Criminal Appeal (the largest Court in Malta)

Bench:

Panels of judges were organised both to correct the written memorials and the oral rounds.

Written Memorials

Dr. Simone Borg

Dr. Jacques Zammit

Dr. Daniela Gauci

Dr. Stefan Berry

Oral Rounds

Dr. Andrew Borg Cardona

Dr. Chris Soler

Prof. Peter Xuereb

Dr. Daniela Gauci

Dr. David Fabri

Dr. Richard Galea Debono

The sponsors of the event where:

Air Malta; BOVclub; MFSA; Papillon; GABA gioielli

D. Portugal

What made these national rounds was interesting in that the teams came from the two main cities of Portugal: Lisbon and Porto. They were held at an Universidade Lusíada do Porto

The jury consisted of Professor Doutor Azeredo Lopes, Dr. Rui Marrana and Dr. Pedro Froufe.

Faculdade de Direito da Universidade Nova de Lisboa

Composed of André Filipe Oliveira de Miranda; Pedro de Almeida Frazão Caro de Sousa; Francisco Maria Gil Fernandes Pereira Coutinho; Gonçalo Veiga de Macedo

Faculdade de Direito da U. do Porto

Composed of: Cristiana Sílvia Bessa Ramos Ferreira; Andreia Patrícia Barbosa; Mariana Fontes da Costa; João Félix Nogueira

Although the Lisbon team was selected to represent ELSA Portugal was, the second team (Porto) did not leave empty handed with their team member being declared best orator (Andreia Patrícia Barbosa) and all the participants were given book prizes as a reward for their efforts.

Sponsors:

- Universidade Lusíada do Porto
- Universidade Católica Portuguesa

E. Romania

In Romania the team hunting was done, by obliging each local ELSA group (8, each in a different city) to find a team. However, although many were initially very successful in finding teams, since little information on WTO can be found in Romanian and teams had to translate their own material only four remained to participate in the oral rounds. Their task was made harder in that the universities provided little academic support. Teams came from ELSA Iasi, ELSA Constanta, ELSA Timisoara, and ELSA Oradea.

The Oral rounds of the Romanian National Moot Court took place between the 4-8 of December 2002 at Timis county Court of Appeal with a bench composed of university professors at the Timisoara Law School.

The main sponsor of the event was the West University of Timisoara, who are thanked for all their support.

4. THE FINAL ORAL ROUNDS

"Thanks to the efforts of ELSA and your enthusiasm, things are changing in Europe."

Prof. Claus Dieter Ehlermann

Chair of EC law, European University Institute

The First final oral rounds of the EMC2 opened in Geneva with a reception at the Beau Rivage hotel on the 23rd of April with the attendance of judges and participants of the competition – participants having a nationality much wider than that of the universities they represented. However it must be said that the reception ended quite soon as all the participants made off for an early bed to be able to face the preliminary rounds with fresh minds since the preliminary rounds started early in the morning after a hurried and tense breakfast.

The competition ran for three days like true swiss clockwork except for a couple of delays in the first preliminary rounds while the wheels still had to be oiled. The level of advocacy displayed throughout was of an outstanding standard, with the prize for best advocate going to Stephanie Motz from the Kings College London team. The culmination of the event was a hotly contested final held in Room W of the WTO offices won by ELSA ULU (University College London).

The EMC2 both fulfilled and exceeded our expectations. The EMC2 fulfilled our expectations by furthering one of our association's core commitments by enabling us to contribute to informed legal debate. Having identified "globalisation" as a one of the defining themes of our young century it was our goal to hold our first international moot court in a truly international environment, which addressed legal ideas related to this overarching theme.

The WTO provided us with the ideal forum as it not only promoted students' understanding of international trade law, a substantive legal specialisation, but also required them to consider broader global issues. EMC2 exceeded our expectations because after months of meticulous planning and organisation the quality of the participants, the enthusiasm of the judges, the beautiful city of Geneva and the famous "ELSA Spirit" added something, which we had not factored into the EMC² equation.

What follows is a breakdown of the rounds providing a more in-depth analysis.

A. Participating Teams

Selected through the Written rounds:

024 King's College London
007 Martin-Luther-University, Germany
025 Université de Genève
010 Amsterdam Law School
037 ELSA ULU (University College London)
022 New York University
012 Maastricht University

Passing through the national rounds, organized by ELSA groups:

018 Pázmány Péter Catholic University, Budapest, Hungary
031 University of Malta, Malta
005 University of Oslo, Norway
040 Universidade Nova de Lisboa, Portugal
033 University of Oradea, Romania

B. The Preliminary Rounds

The teams competed against each other in the following manner:

1st Session (9:30 - 11:00)		
Bench	Applicant	Respondent
Dr. Arthur Appleton Prof. Mary Footer Mr. Steve Porter	018	007
Mr. Lothar Ehring Prof. Petros Mavroidis Mr. Jan Bohanes	010	012
Dr. Gabrielle Marceau Mr. Hannes Schloemann Prof. Dr. Christian Tietje	040	005

2nd Session (11:30 - 13:30)		
Bench	Applicant	Respondent
Dr. Arthur Appleton Dr. Gabrielle Marceau Prof. Petros Mavroidis	024	031
Mr. Steve Porter Mr. Hannes Schloemann Prof. Dr. Christian Tietje	025	022
Mr. Jan Bohanes Mr. Hunter Nottage Prof. Letizia Raschella-Sergi	037	033

3rd Session (16:00 - 17:00)		
Bench	Applicant	Respondent
Prof. Christine Breining Kaufmann Prof. Petros Mavroidis Mr. Steve Porter	005	010
Mr. Lothar Ehring Prof. Mary Footer Mr. Hunter Nottage	007	040
Dr. Arthur Appleton Prof. Letizia Raschella-Sergi Mr. Hannes Schloemann	012	018

4th Session (18:00 - 19:00) Bench	Applicant	Respondent
Mr. Steve Porter Prof. Letizia Raschella-Sergi Prof. Dr. Christian Tietje	031	025
Dr. Arthur Appleton Mr. Hunter Nottage Ms. Gabrielle Marceau	022	037
Prof. Christine Breining Kaufmann Mr. Lothar Ehring Mr. Hannes Schloemann	033	024

The final results at the end of the day were the following

C. Ranking after Preliminary Rounds

Ranking	Team #	Scores		Total
		Claimant	Respondent	
1	37	35	52.5	87.5
2	22	48	38	86
3	24	31	48	79
4	7	43	30.5	73.5
5	5	34	35	69
6	12	28	36	64
7	10	33	30	63
8	31	21.5	37.5	59
9	25	31	27.5	58.5
10	40	21	33	54
11	33	23	21	44
12	18	18.1	21.5	39.6

D. Semifinals

The four highest ranked teams in the preliminary rounds entered the knockouts, with the teams competing in the following manner:

Applicant	Martin-Luther-University, Germany
Respondent	New York University

Applicant	King's College London
Respondent	ELSA ULU (University College London)

The pleadings were held in Room B of the WTO offices in front of:

Prof. Robert Howse
 Prof. Thomas Cottier
 Dr. Gabrielle Marceau

E. Finals

The hotly contested Championship round was held in Room W of the WTO offices, with New York University pleading as applicants against ELSA ULU (University College London) with the title being won by the latter. The final panel was composed of:

Dr. Valerie Hughes,
 Director of the WTO Appellate Body Secretariat

Prof. Jacques Bourgeois
 Akin Gump Strauss Hauer & Feld, Belgium
 Professor at the College of Europe
 Chairman of a WTO dispute Settlement panel.

Prof. Elisabetta Montaguti
 Part-time professor of Law (V.U.B), Administrator at the European Commission, Legal Service.

Prof. Claus-Dieter Ehlermann
 Wilmer, Cutler & Pickering, Belgium
 Chair of EC Law at the European University Institute.
 Chairman of the WTO Appellate Body in 2001.
 He has served as both Director-General of the DG for Competition, and Director-General of the Legal Service of the European Commission

Prof. Frank Emmert
 Benjamin N. Cardozo School of Law, Yeshiva University, New York
 Author of the EMCC Case 2002/03 as well as a number of issues for the ELMC.

Prof. Thomas Cottier
 Baker & McKenzie
 University of Berne, Switzerland
 Chairman WTO dispute settlement panel

5. APPRECIATION

Finally our gratitude must be expressed to a number of persons for all the help they provided in the organization of the competition.

Academic Advisors and Supporters

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Mr. Jan Bohanes
Mr Martin Bohnstedt
Prof. Jacques Bourgeois
Prof. Christine Breining Kaufmann
Prof. Thomas Cottier
Prof Claus Dieter Ehlermann
Mr. Lothar Ehring
Prof. Frank Emmert
Prof. Mary Footer
Prof Heinz Hauser
Dr. Valerie Hughes
Prof. Robert Howse
Dr. Gabrielle Marceau
Prof. Petros Mavroidis
Dr. Philip Marsden
Prof. Elisabetta Montaguti
Mr. Hunter Nottage
Mr. Steve Porter
Dr. Audrius Perkauskas
Prof. Letizia Raschella-Sergi
Mr. Darius Saliunas
Mr. Hannes Schloemann
Prof. Christian Tietje
Prof. Peter Van den Bossche

Partners of the Competition

ELS (The ELSA Lawyers Society)
Red Bull
Westlaw International

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Members of the Organising Committee:

Last of all a word of thanks should be given to all those ELSA Members who helped organise the event and turn the EMC2 a point of pride for the whole network:

Irena Bojadzievska (*Macedonian*)
Isabelle Ginet-Kauders (*French*)
Bettina Kuperman (*Danish*)
Jenny Piipponen (*Swedish*)
Mark Refalo (*Maltese*)
Andrius Vitkevicius (*Lithuanian*)
Ieva Zebryte (*Lithuanian*)
Fatma Zühre Akıncı (*Turkish*)

Irène Bernhard (*Swiss*)
Cécile Jeanneret (*Swiss*)
Anja Haller (*Swiss*)
Ana Krisafi (*Albanian*)
Claudius Krucker (*Swiss*)
Umut Kurman (*Turkish*)
Hans Lederer (*Austrian*)
Aino Rudebeck (*Danish*)
Tina Rutz (*Swiss*)
Gian Carlí Staübli Fioroni (*Swiss*)
Barbara Schmid (*Swiss*)
Charlotte Tvede Andersen (*Danish*)

6. THE CASE OF THE EMCC 2002 – 2003

The case centred around a conflict of interests between “Avalon”, who sought to assert their right to free trade, and the “Bohemian Union” who were concerned about the environmental implications of Avalon’s actions.

Teams were essentially being invited to attempt to “legalise” broad policy arguments and formulate arguments in a manner, which brought them within the framework set out by WTO precedent and dispute settlement rules. The issue of the tension between free trade and environmental protection was selected due to its relevance in today’s international political and legal arenas’.

The Case

(1) The Empire of Avalon is a constitutional monarchy in East Asia. It is characterized by a unique combination of very traditional cultural and social structures and a very efficient and modern economy. Even though the domestic market is important, more than 50% of GDP is earned by exports. The Bohemian Union is a customs union of 24 Western democratic States. It is characterized by great diversity of its members internally and the political requirement to speak with one voice in trade matters externally. Next to the USA, the EU, China, and Japan, Avalon and Bohemia are the major players in international trade with the biggest domestic markets and the largest shares in imports and exports of goods and services. All of them are also very active members of the WTO.

(2) Due to the fact that the majority of its population lives close to the coast and that agricultural land has always been scarce, the people of Avalon have traditionally relied heavily on fish in their diet. Nowadays, Avalon has one of the most efficient fishing fleets in the world and is not only supplying its own people but is also exporting large quantities of fish (fresh, frozen, and tinned) to other markets, including Bohemia.

(3) Whale meat is among the traditional food appreciated on special occasions in Avalon to this very day. Consequently, Avalon has been very reluctant to participate in international efforts for the protection of whales from the earliest beginnings in 1902 to the present day. Avalon did, however, sign and ratify the 1946 International Convention on the Regulation of Whaling. After the moratorium on commercial whaling came into force in 1982, Avalon began to issue special permits in limited numbers to its fishing industry, allowing the killing of whales for scientific research. This was done in full knowledge of the fact that the whale meat would end up on dinner tables of wealthy Avalon families and irrespective of stock status and schedules or quotas adopted by the International Whaling Commission.

(4) During the 1990s, Avalon issued around 500 special permits per year, mainly for the killing of minke whales in Antarctic waters. However, among the special permits were also some for humpback and blue whales. Japan, Russia, and Norway had also permitted limited whaling during the same period. All this became known to an international public in the year 2000, when updated estimates were published showing that conservation efforts with respect to these species of large whales had still not produced the desired effects and that their estimated global populations continued to be very low, with a real risk of extinction, in particular in the case of blue whales.

(5) In response to the new data, several international NGOs joined forces to examine the practice of Avalon and to step up the pressure on this country to discontinue issuing licenses for whaling under the guise of scientific research. The NGOs found evidence that Avalon had not only applied a rather generous interpretation of the exemption for scientific research. It was also found that occasionally, whale meat had been exported by Avalon companies to other Asian countries in violation of international restrictions on trade in whale products included in the Convention on International Trade in Endangered Species (CITES), to which Avalon is a party. Finally, the NGOs discovered that whaling was not very profitable for the fishing companies in Avalon, in spite of very high prices for whale meat. However, all of the companies engaged in whaling were making substantial profits with other fish, including tuna, the bulk of which was exported to Western markets.

(6) The NGOs used these facts to launch a powerful lobbying effort in the USA, the EU, and the Bohemian Union, for sanctions against Avalon. *Inter alia*, they promoted import restrictions on tuna in order to force the fishing companies in Avalon to give up whaling. A number of Bohemian fishing companies, who had been struggling against the competition from Avalon, supported these efforts and under strong pressure from the public, the Council of Ministers of the Bohemian Union, in late 2000, adopted an import ban on tuna from fishing companies in Avalon who were also engaged in the killing of whales of any kind. This import ban entered into force on 1 January 2002.

(7) Already in mid-2001, Avalon had addressed a formal request for consultations to Bohemia and had copied this to the Dispute Settlement Body (DSB) of the WTO and to the WTO Council for Trade in Goods. The consultations were sought under Article 4 of the Dispute Settlement Understanding (DSU) and reference was made to Article XXIII of the GATT. Avalon claimed that the import ban on its tuna was in violation of Articles I, II, XI, and XIII of the GATT. Bohemia had entered into consultations with Avalon as required by Article 4 DSU but the parties had been unable to settle the dispute bilaterally.

(8) After additional negotiations, Avalon formally requested the DSB to establish a panel. The panelists were nominated by the Secretariat and accepted by the parties, who also agreed to apply the standard terms of reference. The panel informed the parties of its intention to apply the Rules for the ELSA Moot Court Competition in addition to, and, where necessary, with priority over the Working Procedures in Annex 3 of the DSU.

(9) The panel invited the parties to submit their final written memorials by 31st of January 2003. Finally, the panel requested the parties to include in their memorials a reasoned opinion whether or not the panel should hear representatives of the NGOs, who had compiled the fact sheets on Avalon's whaling practices, pursuant to Article 13 DSU.

Applicable Law:

- General Agreement on Tariffs and Trade, as amended
- all relevant WTO agreements
- 1946 International Convention on the Regulation of Whaling
- 1973 Convention on International Trade in Endangered Species (CITES)
- other rules of international law binding upon States regardless

Further notes on the case given to the teams:

In general a moot court, like most interesting real life cases revolves around ambiguity. For this reason the case should be taken as it is, and the ambiguities are to be argued in the moot.

The only laws to be taken into account are the ones listed as applicable law in the case. These laws apply to both parties of the case. No other presumptions as to specific reservations or ratifications are to be made.

Teams are allowed to argue basing their position on any of the agreements concluded in scope of the WTO.

The Bohemian Union does have a fishing fleet that fishes in the high seas. It is possible that whales and tuna reach Bohemia's shores.

The NGOs have submitted unsolicited fact sheets on Avalon's whaling practices to the governments of the EU, the USA, and the Bohemian Union.

No presumption should be made that the tuna fishing process of Avalon caused any harm to the whales.

Prior to the prohibition on tuna imports the percentage share of the tuna market held by tuna from Avalon was not insignificant and the reduction was noticeable. And probably both domestic and other foreign producers have benefited to some extent. However the import ban applies only to tuna from companies who are "engaged in the killing of whales of any kind", these are the companies making particularly attractive profits in tuna.

7. BENCH MEMORANDUM

The clash of free trade interests on the one side and environmental conservation interests on the other is one of the defining issues of international relations and politics today. Behind the immediate interests of industry and environmentalists, there is a host of burning issues, including the scope of national sovereignty in the 21st century, and the question whether and how international (trade) relations should become more rule based. The challenge for the participants in this competition was to “legalize” broader policy arguments and to present them in the framework prescribed by substantive WTO law and by the rules on dispute settlement. Case briefs and oral presentations that get lost in what would seem fair in international relations or the “emerging right to life” of whales, would not seem to reach this target.

Arguments on behalf of the applicant Avalon and on behalf of the respondent Bohemia

1) Violation of Article XI GATT

A will argue first and foremost that the import ban on tuna is a violation of Art. XI (1). An import ban is a classic quantitative restriction, notably an import quota of zero. A will also argue that the violation is not justified under Art. XI (2), of which only sub c) may merit brief discussion.

B should probably concede the violation of Art. XI and focus on justifications.

2) Violation of Article XIII GATT

A will argue that the application of the import ban only against tuna from Avalon is also a violation of Art. XIII (1). Under this article, if a country does apply a quantitative restriction on imports, for example claiming a justification under Art. XI (2), it is obliged to apply the same rules for all of its trading partners, i.e. to spread the burden out to all suppliers.

In the present case, A will claim that B is not applying an import ban against all of its tuna suppliers and not even against other nations also engaged in whaling (Japan, Russia, Norway).

B will argue that the provisions of Art. XIII are not suitable for the case at hand since they essentially address market problems in the importing country. If a country imposes trade restrictions in order to protect its domestic industry from import competition, it may be fair to impose a rule that the restrictions must be applied evenly against all import competition, regardless where it comes from. However, in the present case there is no threat to the survival of whales originating from other tuna producing companies and countries (with the possible exception of Japan, Russia, and Norway). With regard to the latter three countries, B would have a difficult stand under Art. XIII. An argument that there is no tuna imported from companies in Japan and the other two countries that are also engaged in whaling should be rejected since the facts are deliberately open in this regard.

3) Violation of Article I GATT

With pretty much the same arguments as under 2), A will also claim a violation of the Most Favoured Nation Clause. Under Art. I, the contracting parties to the GATT = Members of the

WTO have to treat all the other members equally. Concretely, every single member is entitled to the most favourable treatment afforded to any other member. In the present case, A will claim that B is allowing importation of tuna from certain other member states and that this more favourable treatment should be extended to the tuna from A.

B might argue that tuna from companies that are engaged in whaling is not a like product to tuna from companies that are not engaged in whaling. However, this is not a strong argument since the concept of like product in the GATT essentially asks whether the two products are competing for the same customers. That would clearly be the case, since there is no argument being made that the tuna from Avalon as such is bad tuna or even different from other tuna. The arguments are solely directed at *other* commercial activities of the tuna producing companies.

Ultimately, B should rather concede the violation and focus on the justifications.

4) Violation of Article II GATT

The case for a violation of Art. II is much more difficult to make. The article makes reference to the concession schedules which are country specific and attached to the main agreement. In the concession schedules, the different member states primarily determine the rate of import duties that will be applied to a given product to all beneficiaries of MFN status. A typical violation of Art. II would be the charging of an import duty in excess of the rate fixed in the relevant schedule. In the present case, however, B is not charging a higher duty for tuna but is simply not allowing any importation of such tuna from A. Counsel on behalf of A could only argue that the total ban violates the spirit of Article II - an interest safeguarded by Art. XI, however - or that it distorts the balance of concessions made by the parties to the dispute - an interest which is probably better safeguarded by Art. XXIII. Reference to Art. II was included in the fact sheet in order to see whether the teams could make some sense of it and/or come up with a creative argument.

5) Article XXIII Nullification or Impairment

Art. XXIII is not only the traditional key opening the door to dispute settlement procedures. It also safeguards the balance of trading concessions which is supposedly the result of the negotiations of the concession schedules and their subsequent amendment in the various trade rounds. Concretely, the provision is based on the notion that each member of the WTO makes a variety of promises (fixing its tariffs at certain levels, which are usually lower than those applied before, and giving up the possibility of increasing these tariffs except in certain specific cases, such as against dumped imports) that can be translated into a monetary value of trading concessions (for example, if a A imports 10.000 bicycles from B per year at a price of 100\$ each and reduces the tariff on these bicycles from 10% to 5%, that concession has a value of 50.000\$) and that these promises are made in order to receive an equivalent amount/value of trade concessions from the other side. If one member subsequently “nullifies or impairs” the trading opportunities promised to another member, the essential balance becomes distorted, since trade flows from A to B will decrease, while trade flows from B to A will continue at the same level. Therefore, Art. XXIII provides a right to the member who claims to be the victim of a nullification or impairment to demand an “adjustment” of the mutual concessions. In principle, such an adjustment can take one of several forms: a) the trade restriction which is claimed by A to cause the nullification or impairment is terminated by B, the country that introduced it before - trade continues at the previous high level and with the same goods; b) B continues to apply the trade restriction on the goods in question but provides additional

trading opportunities with respect to other goods from the complaining member A that have an equivalent value (additional concessions on motorcycles make up for impairment of bicycle imports) - trade continues at the previous high level but in part with different goods; c) B continues to apply the trade restriction and A suspends, by way of retaliation, some of its own trading concessions on goods from B, of approximately equal value - trade continues at a lower level but one that is also in balance again.

Part of the attraction of Art. XXIII lies in the fact that it allows the members to raise a nullification or impairment complaint not only if the measure by the other side is in violation of the rules but even if it is a lawful measure (so-called non-violation complaint). The rationale is that there are not only the trading rules to be followed but there is also a balance of trading opportunities to be maintained.

In the present case, A would argue that the import ban falls under Art. XXIII (1) a) because it is a failure to carry out obligations such as the ones under Art. XI. In the alternative, however, A can argue that the ban in any case distorts the balance of trading concessions even if it should be justifiable.

Again, B has not much to reply, in particular to a non-violation complaint, and should focus on justifying the measures even if they are held to be in breach of certain obligations protected by the GATT.

6) Justifications Under GATT

Since the GATT itself foresees a number of exceptions, i.e. situations in which the rules can be set aside for a certain product for a time, A would also have to address certain possible justifications B could conceivably rely on.

a) Article XII Safeguarding the Balance of Payments

This exception is so obviously not applicable that it must be held against a team if even a brief reference is made to Art. XII.

b) Article XIX Emergency Action

Again, this exception is obviously not applicable. Art. XIX allows temporary measures against a so-called "surge of imports" that give domestic competitors time to adjust to the sharply increased competition from abroad.

c) Article XXI Security Exceptions

This is another article with a very specific scope - national security in the military sense - that is obviously not relevant to the case at hand.

d) Article XX General Exceptions

Art. XX, by contrast, contains two passages of relevance to the present case. First of all, sub b) allows "measures ... necessary to protect human, animal or plant life or health". Secondly, sub g) allows "measures ... relating to the conservation of exhaustible natural resources".

After the establishment of the articles which may be violated by the import ban, the discussion whether or not the ban can be justified under Art. XX is the other main task for the teams.

i) Life or Health

Before entering into a discussion of Art. XX b), the teams might raise the question whether the SPS Agreement should be applied as *lex specialis* with priority over the more general provisions of Art. XX.

However, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) is not applicable in this context. On its face, this agreement provides rules for the application of measure designed to “human, animal or plant life or health”. Nevertheless, it is clear from the definition of a sanitary or phytosanitary measure in Annex A of the SPS that measures are covered only if they are designed to protect these values “within the territory of the Member” who is applying the measures. The SPS Agreement would apply, for example, if B would restrict the importation of the tuna because a certain small number of the cans of tuna had been found to contain dangerous contaminants. However, since the whaling does not constitute a risk for “human, animal or plant life or health” in B, the SPS Agreement is not applicable.

The next question will be whether Art. XX itself should be interpreted in the same way, i.e. allowing only measures taken by a member for the protection of life or health of humans, animals or plants *within its own jurisdiction*. Arguably, this is an open question. What would seem clear is the right of a member to protect these interests if they are endangered within its own jurisdiction, i.e. of the life and health of humans, animals and plants that come under its jurisdiction under the territoriality and under the personality principle. At the same time, it would seem clear that a member is not entitled to adopt trade restrictive measure in violation of other articles of the GATT for the protection of the life and health of humans, animals and plants that are entirely within the jurisdiction of one or more other members. The open question would be whether such measures may be adopted for the protection of animals or plants that are part of the common heritage of mankind, for example whales on the high seas, dolphins, etc. B could argue that Art. XX does indeed permit such measures, however, this would be somewhat *de lege ferenda*, i.e. an expansion of the existing body of case law on the issue.

ii) Exhaustible Natural Resources

In light of the Shrimp-Turtle Case (WT/DS58/AB/R, Report of the Appellate Body adopted on 6 November 1998), it seems clear that whales can be considered exhaustible natural resources. B could argue that it is entitled to adopt trade restrictive measures to protect the whales, at least if they are sometimes found in the territorial waters of the member taking the measures, here B. The Appellate Body specifically noted the migratory life style of the sea turtles, which would also apply to whales. What we do not know is whether all whale species in question travel at least sometimes to the territorial waters of B. If not, the case for B is weakened, since the Appellate Body, in the Shrimp Turtle Case, specifically left it open whether or not a “jurisdictional limitation” should be applied for Art. XX g), i.e. whether a member could be prevented from adopting measures for the protection of exhaustible natural resources that were never found within its own jurisdiction. This will have to be argued - controversially - by the teams.

iii) Proportionality Test

On the basis of case-law of the DSB it seems clear that a measure, which is in violation of provisions of the GATT, can only be justified under Art. XX if it not only fits *prima facie* under one of the clauses in that article. It also has to pass a proportionality test. This test can be broken down into three elements: a) the measure has to be *suitable* to pursue the interest it is supposedly pursuing, i.e. it has to be at the very least a step in the right direction; b) the measure must be *necessary*, i.e. there is no less restrictive measure readily available that would promote the protected interest in a similar way; and c) the measure has to be *proportionate* in the strict sense, i.e. there must be a reasonable relationship between the risk to the protected interest and the trade restriction. As a rule of thumb it can be said that a serious trade restriction like an import ban will only be permitted if there is a significant risk. For example, a food containing a certain additive can be banned if either the risk to those consuming it is grave (serious illness or death), even if the probability is small (only few people having a certain allergy), or if the probability is very high (many will get ill), even though the risk as such is small (a minor stomach ache).

<**However** In Korea - Beef (in the context of XX(d)) the AB introduced the new TWO necessity test where 3 variables have to be balanced when a necessity test is called for. Those are (1) the value of stake, (2) the choice of the measure and (3) the restrictive impact (par. 164). The balancing of these three variables is what is called for under XX(b) - as stated by the AB in Asbestos (para. 172). >

A will argue that the import ban may be suitable to force the companies to give up whaling but is not necessary. Alternative measures could be certain labelling requirements (such as a seal of “whale-friendly tuna” for other tuna), which would allow the consumers to make an informed choice. A would further argue that the ban is not proportionate since there is no proof that the whaling activities will in fact lead to the extinction of certain species of whales.

B will argue that the import ban is suitable and necessary. Alternative measures are either not readily available or not comparably effective. With regard to proportionality, the question is really about who bears the burden of scientific uncertainty. In this respect, B will make a claim to its national sovereignty, i.e. it will claim that in the face of scientific uncertainty, it must be for each country to determine whether it considers a certain risk - such as global warming or the extinction of whales - to be sufficiently proven or not.

iv) Chapeau

Last but not least, Art. XX requires that measures adopted under its exceptions are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination”. Such an accusation could be made by A if, for example, Japan was doing much more whaling than A but there were no measures by B against Japan, or if B itself was contributing to the decline of the whale populations in other ways (e.g. by oil exploration in essential breeding waters). However, the fact sheet does not contain indications to that effect.

7) Justifications Outside of GATT/WTO Law

At some point, either as part of the discussion under Art. XX or as a separate item, the teams have to address the rights and obligations of the parties under the CITES Convention and under the 1946 Whaling Convention, and their relationship to the provisions of the GATT and WTO.

Under the Whaling Convention, schedules with permitted catches are established and administered by the International Whaling Commission. The Commission has the power to amend the schedules, i.e. fix the number of permitted catches for different species of whales, and to fix protected and unprotected species, open and closes seasons, open and closed waters, size limits, etc. The limits set by the Commission have been zero for blue whales for quite some time and have more recently become zero for humpback whales and are increasingly low for minke whales. It is pretty clear that 500 permits per year for minke whales would exceed the limits and that A could not grant regular permits for blue and humpback whales at all.

Art. VIII of the Whaling Convention, however, permits any “Contracting Government” to designate a certain number of permitted kills for “purposes of scientific research”. The number of whales so designated and the conditions for the fishermen are to be determined “as the Contracting Government sees fit”. From the side of the international community, the only conditions imposed on the respective governments are to report the number and conditions of catches permitted for scientific purposes and to share the scientific discoveries. Art. VIII is an obvious loophole in the protection system of the Whaling Convention.

In the present case, A will argue that the permits have been granted under Art. VIII and do not violate the obligations placed upon A by the Whaling Convention. B will respond that A is violating at least the spirit, if not the letter of the Convention, since there is no scientific reason for the large number of permits given per year.

Under the CITES Convention, trade in endangered species is restricted. Trade is defined as “export, re-export, import, and introduction from the sea”. The latter is defined as the importation of a specimen obtained from the sea from outside the jurisdiction of the state. For species included in Appendix I of the CITES Convention, i.e. species threatened by extinction, including most species of whales, export and/or introduction from the sea shall only be permitted on a case by case basis after a Scientific Authority of the state in question has confirmed that the specimen was obtained in a lawful manner and that its trade “will not be detrimental to the survival of the species” (Art. III).

In the present case, B will argue that the landing of whales caught on the high seas and the exportation of whale meat to other Asian countries were both violations of the CITES Convention. However, the facts are unclear, whether or not permits had been granted by a Scientific Authority in Avalon. Essentially, the CITES Convention is another example of an international environmental convention that works only in those countries that apply strict standards for its application and enforcement. There is no mechanism for ensuring that the procedure for obtaining a permit from a national Scientific Authority is handled properly and is not too generous, let alone corrupt.

As far as the relationship between these Conventions and WTO law is concerned, the question is essentially one of sequencing. According to Art. 30 of the Vienna Convention on the Law of Treaties, which can be applied to the present case on the basis of its expression of customary international law, i.e. without knowing whether or not A and B are parties to it, the more recent convention prevails over older conventions between the same parties on the same subject matter. The WTO Agreements of 1994 would be the most recent in time but the question is whether they cover “the same subject matter”. This might be argued for the CITES Convention but certainly not for the Whaling Convention.

In any case, neither the Whaling nor the CITES Convention provide for a right to free trade on the one side, or for a right of a country on the other, to restrict access to its markets for the

protection of animal life or health or protection of the environment more generally. Thus, it would seem that the law governing the case is primarily the law of the WTO and that the other Conventions could only be used by way of supplementary considerations.

8) Amicus Curiae Briefs from NGOs

According to Art. 13 of the Dispute Settlement Understanding (DSU), panels can “seek information and technical advice” from any source they deem appropriate, including non-governmental organizations. Only unsolicited amicus briefs from sources other than WTO member states are not foreseen in the DSU. Nevertheless, the Appellate Body, in the Shrimp-Turtle Case, ruled that it had the power to accept non-requested submissions from non-parties such as NGOs (WT/DS58/AB/R, paras. 99-110, adopted on 6 November 1998). This decision reversed a panel report that had held that the panels could only seek information but could not accept information that had not been sought. Subsequently, in the Asbestos Case, the Appellate Body drew up procedures for its own decisions whether or not to accept unsolicited briefs (WT/DS135/9, adopted on 8 November 2000).

Even though the decision by the Appellate Body to accept - under certain circumstances - even unsolicited briefs, was criticised by many member states, the question is not about unsolicited briefs in the present case. Art. 13 is quite clear about the power of the panels to request a brief from any source that is deemed appropriate. Therefore, the discussion has to focus on the question, whether it would be “appropriate” to request an opinion from those NGOs that had already been previously involved in the case.

A will argue that it has reason to fear that the opinions of the NGOs in question will be biased against it and, therefore, that they should not be heard. B will reply that the panel would be informed about facts and that A would have an opportunity to respond to any factual allegations made by the NGOs.

ANNEX: BEST MEMORIALS 2002/03

For the memorials of the team from Martin-Luther University, Halle, Germany please see the “WTO Moot Court” section of the website of ELSA International (www.elsa.org).