TEAM CODE: 103C

9TH GNLU INTERNATIONAL MOOT COURT COMPETITION, 2017

IN THE WTO PANEL

Puerto Sombra- Safeguard Measures on Unwrought Aluminium

WT/DS/XXX

Pueblo Faro …………………………………………………………………….Complainant

Vs.

Puerto Sombra…………………..………………………………………………….Respondent

MEMORANDUM ON BEHALF OF THE COMPLAINANT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS 3

INDEX OF AUTHORITIES 5

STATEMENT OF FACTS 8

MEASURES AT ISSUE 10

SUMMARY 11

LEGAL PLEADINGS 13

ISSUE 1: Whether by facts of the case can it be shown that Puerto Sombra's imposition of safeguard measures are in contravention of its WTO commitments under Article XIX:2 of the GATT,1994, Article 12.3 and Article 12.4 of AoS? 13

ISSUE 2. Whether there exists a reasoned and adequate explanation in the provisional determination demonstrating critical circumstances warranting immediate application of safeguard measure under Article 6 of the AoS? 19

ISSUE 3. Whether the safeguard measure is based on a proper determination or explanation of any unforeseen developments and the effect of GATT obligations that led to increased imports that caused or threatened to cause serious injury to the domestic industry as per Article XIX:1(a) of the GATT, 1994? 23

ISSUE 4: Whether Article XIX:1(a) of the GATT, 1994 and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the AoS has been violated by Puerto Sombra in applying the safeguard measures? 30

ISSUE 5. Whether Puerto Sombra has violated Article I of the GATT and Article 9.1 of the AoS by granting immunity to Puerto Santo? 34

REQUEST FOR FINDINGS 37

LIST OF ABBREVIATIONS

%	Percentage
/	Or
AB/R	Appellate Body Report
AD	Anti-Dumping Duties
AoS	Agreement on Safeguards
BISD	Basic Instruments and Selected Document
CIF	Cost, Insurance and Freight
CNCE	Comisión Nacional de Comercio Exterior
CVD	Countervailing Duties
DSU	Dispute Settlement Understanding
EC	European Communities
ed.	Edition
EEC	European Economic Community
EU	European Union
FOB	Free on Board
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
i.e.	That is
MFN	Most Favoured Nation
MT	Metric Ton
NTC	National Trade Commission
para.	Paragraph
PF	Pueblo Faro
PS	Puerto Sombra
R	Report
U.S.	United States
UN	United Nations
USA	United States of America
USD	United States Dollar

Ver.	Version
Vol.	Volume
WT/DS	World Trade/ Dispute Settlement
WTO	World Trade Organisation

INDEX OF AUTHORITIES

WTO APPELLATE BODY REPORTS

Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear,WT/DS121/AB/R, adopted 12 January 2000 14

Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R 33

Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Page 22, (12 January 2000) 12

Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19 January 2001 16

Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997 32

Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, (16 May 2001) 23

Appellate Body Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001 23

Appellatte Body Report, United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear; WT/DS24/AB/R Page 19 (25 Feburary 1997) 18

WTO PANEL REPORT

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R 33

Panel Report on *Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the EEC*, adopted on 28 April 1994 20

Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, (12 January 2000) 14

Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, (22 February 2012) [hereafter referred to as *Dominican Republic- Safeguards Measures*] 12

Panel Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R 12

Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, Para 8.190 (19 January 2001) 16

Panel Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India WT/DS33/R (6 January 1997) 32

Panel Report, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R 18

United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R 34

AGREEMENT, TREATIES AND CONVENTIONS

Agreement on Safeguards, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A

United Nations Vienna Convention on the Law of Treaties, May 23, 1969

General Agreement on Tariffs and Trade, October 13, 1947

JOURNAL

The Law School, University of Chicago, The Safeguards Mess: A Critique of the WTO Jurisprudence, Alan O. Sykes 23

WEBSITES

http://www.lawleeko.com/pdf/Article_YJJ_13.pdf 15

http://www.law.uchicago.edu/Publications/Working/index.html 23

https://datahelpdesk.worldbank.org/knowledgebase/articles/906519#High_income 34

STATEMENT OF FACTS

Procedural timeline

- Puerto Sombra (PS) applied to National Trade Commission (NTC) for applying safeguard measures.
- Investigation was initiated on 31st July, 2016. Notification of this initiation was sent.
- NTC applied Provisional Safeguards Measure on 2nd August, 2016.
- Notification of the decision of the measure was provided on 15th August, 2016.
- Public hearing heard environment, labour groups; domestic industries; exporters; importers; user associations on 30th October 2016.
- The NTC verified to check the veracity and found no discrepancy. Definitive safeguards measure was imposed on 15th November 2016 for a period of 2 ½ years.
- WTO was notified of imposition of such a measure on 25th November 2016
- Pueblo Faro's (PF) request for consultation was unsuccessful.
- PS objected its request for establishment of Panel. Panel was established on the 2nd request for establishment of panel in January 2017. Its scope was limited by the terms of reference.

Background:

- Post the 2009 global recession, markets around the world saw a decline in global growth, PS's markets on the other hand had positive growth.
- PS's earlier agricultural economy now saw rapid urbanisation and development of services sector, infrastructural activities and consumerism. Changes were made to attract foreign investment.
- PS had an active export market as well. On the other hand, PF, a country in the same continent as PS, imposed high tax on the export of raw material and incentivised the manufacturing industry.
- PS in its attempt in protecting competent domestic industry of unwrought aluminium, from rising, cheap imports, has been reluctant in reducing tariffs and hence stalled their negotiations on a Free Trade Agreement.

Facts in Brief:

- The initiation notification set forth the procedure for investigation. In its analysis it brought up the difference in bound and applied customs duty, injury being caused and threatened to be caused by increased imports, production, sales, consumption, productivity. Decline in capacity utilisation and losses led to the commission discerning a prima facie case of injury and thereby decide to initiate the investigation to further investigate the matter.
- The NTC examined in the provisional determination if increased imports affected economic parameters. It scrutinized whether increase in production led to the increase in sales and whether these sales were profitable. Sales although shown to have increased, wasn't seen to be profitable. It was provisionally determined that imports captured significant portion of the consumption and hence domestic industry lost market share. Furthermore, it was determined that an increase in consumption didn't ensure utilisation of newer capacity and in spite of increase in capacity utilisation in 2016, industry still faced losses when seen with respect to 2014. Productivity and employment and profitability were in indexed figures and the real figures were kept confidential. Causal link was drawn between the sudden, sharp, significant and recent increase in imports and the domestic industry's sharp fall in profitability. These critical circumstances warranted immediate intervention as any delay would worsen conditions. Unforeseen developments were – 2009 global recession, anti-dumping and countervailing duties by 5 major economies on imports from PF, surplus capacities with PF manufacturers, export incentive of 5% FOB value and high demand in PS. The commission thereby approved the levy of 20% provisional safeguard duty for 200 days, commencing 2nd August 2016
- PF then questioned the NTC regarding the measures, the existence of critical circumstances, evidence proposing the injury causing imports under Article 6, their protectionist nature and violations under WTO. A leading newspaper wrote about the corruption in bauxite mine (raw material) tenders. CEO of Kimp Aluminium Corporation (applicant) also spoke of Baux Cooperation's monopoly. Public hearing was conducted, and the commission levied definitive safeguard duty in terms of section 5(1), 7(1) and 7(4).

MEASURES AT ISSUE

ISSUE 1. Whether by uncontroverted facts of the case it can be shown that Puerto Sombra's imposition of provisional and definitive safeguard measures are in contravention of its WTO commitments under Article XIX:2 of the GATT,1994 and Article 12.3 of AoS?

ISSUE 2. Whether there exists a reasoned and adequate explanation in the provisional determination demonstrating critical circumstances warranting immediate application of safeguard measure under Article 6 of the AoS?

ISSUE 3. Whether the safeguard measure is based on a proper determination or explanation of any unforeseen developments and the effect of GATT obligations that led to increased imports that caused or threatened to cause serious injury to the domestic industry as per Article XIX:1(a) of the GATT, 1994?

ISSUE 4: Whether Article XIX:1(a) of the GATT, 1994 and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the AoS has been violated by Puerto Sombra in applying the safeguard measures?

ISSUE 5. Whether Puerto Sombra has violated Article I of the GATT and Article 9.1 of the AoS by granting immunity to Puerto Santo?

<u>ISSUE 1.</u> Whether by facts of the case can it be shown that Puerto Sombra's imposition of safeguard measures are in contravention of its WTO commitments under Article XIX:2 of the GATT,1994, Article 12.3 and Article 12.4 of AoS?

- PS is in clear violation of Article XIX:2 of the GATT because no critical circumstances existed that necessitated the imposition of provisional safeguards measures.
- PS failed to provide for consultations under Article 12.3 and a notification pursuant to Article 12.4 of the Agreement on Safeguards.

<u>ISSUE 2</u>. Whether there exists a reasoned and adequate explanation in the provisional determination demonstrating critical circumstances warranting immediate application of safeguard measure under Article 6 of the AoS?

- PS has failed to analyse Article 6 of AoS which requires damages or threat of damages that are beyond repair for imposing provisional measures.
- There existed no critical circumstances and there has been no adequate and reasoned explanation.

<u>ISSUE 3</u>. Whether the safeguard measure is based on a proper determination or explanation of any unforeseen developments and the effect of GATT obligations that led to increased imports that caused or threatened to cause serious injury to the domestic industry as per Article XIX:1(a) of the GATT, 1994?

- In PS, the increase in imports is not a result of unforeseen developments and GATT obligations.
- PS fails to give reasoned or adequate explanation of the above.
- PS has failed under Article XIX:1 (a) of GATT, 1994 which requires establishment of casual link between increase in imports and injury caused or threatening to be caused.

<u>ISSUE 4</u>: Whether Article XIX:1(a) of the GATT, 1994 and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the AoS has been violated by Puerto Sombra in applying the safeguard measures?

- PS has failed to give any reasonable or adequate explanation under the provisions of Article XIX:1 (a) and Article 2.1 of the AoS which requires that the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury which is not the same in the instant case.
- PS has failed to realise that the impairment of the domestic industry is not that which can be termed sharp and significant as per Article 4.1 (a) of AoS.
- PS has failed to analyse that under Article 4.2 (a) and (b) the factors enumerated are not exhaustive and other relevant factors should have been evaluated.

ISSUE 5. Whether Puerto Sombra has violated Article I of the GATT and Article 9.1 of the AoS by granting immunity to Puerto Santo?

- Puerto Sombra's exclusion of Puerto Santo from the safeguard measure is unilateral, unsupported by merits and in contravention of the special and differential treatment provisions within the WTO.
- The determination of "developing countries" under Article 9 of AoS is subject multi-lateral control pursuant to the provisions mentioned in the preamble of the Agreement on Safeguards.

ISSUE 1: Whether by facts of the case can it be shown that Puerto Sombra's imposition of safeguard measures are in contravention of its WTO commitments under Article XIX:2 of the GATT,1994, Article 12.3 and Article 12.4 of AoS?

The Agreement on Safeguards and Article XIX of GATT deal with the application of Safeguard measures and before any such measure is imposed, the conditions under both the provisions must be satisfied[1].

The complainant argues that PS didn't provide opportunity to hold consultations prior to imposition of the provisional safeguards measure and information relating to these matters was released only after actual imposition of measure. To prove the case, the complainant should prove that there have been firstly, contravention of Article XIX:2 of GATT, secondly, Article 12.3 of AoS and thirdly, Article 12.4 of AoS.

A. **Whether there is a blatant contravention of its WTO commitments under Article XIX:2 of the GATT,1994 by Puerto Sombra?**

   Article XIX:2 of the GATT requires the members imposing a safeguard measure (under clause 1), to provide "…a notice in writing to the contracting parties as far in advance…". It further places an obligation on the member imposing safeguards measure to afford the "…parties having a substantial interest as exporters of the product concerned, an opportunity to consult with it in respect of the proposed action".

i. Under the 1st half of XIX:2 of GATT, there are two obligations, one of granting a notice in writing before taking action pursuant to Article XIX:1(a) and the second obligation, is the opportunity to hold consultations in respect of proposed action. The terms "before taking action" as in the 1st obligation, suggest the requirement to notify

[1] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Page 22, (12 January 2000) [hereafter referred to as Korea Dairy Case]

Panel Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R

about the application of the safeguard measure.[2] On the other hand the requirement to provide opportunity to hold consultations is a stage when the action is merely "proposed" and not yet adopted. Hence contrary to the sequence of their mention in Article XIX:2 the ordinary meaning[3] of the terms "proposed action" and "taking action" suggest a sequence of events, i.e. opportunity to hold consultations must be granted when the action is proposed, when adopted, must be notified before its application (jurisprudence of "taking action" as discussed in Dominican Republic bags and fabric case). In providing this opportunity to hold consultations, Article 12.3 of the Agreement on Safeguards, states it to be provided "… with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8." Breaking it down, we have that the opportunity to hold consultations must be provided, in order to review information provided under paragraph 2, which discusses for the purpose of this clause, pertinent information included in making the notification of the finding of serious injury or threat thereof caused by increased imports. Remaining objects of the consultations, have prima facie interpretations. Article 12.3 doesn't provide for the obligation to notify the taking of decision to apply or extend the safeguard measure. But the obligation provided under Article XIX:2 of GATT finds mention under Article 12(1)(c) of the Agreement on Safeguards.

ii. PS, on the basis of the safeguard investigation done by the National Trade Commission (NTC) imposed provisional safeguard measures on the imports of unwrought aluminum on the 2nd of August, 2016 and did not provide any notice in writing or any opportunity for consultations prior to the application of safeguards measures. Such an act is in direct procedural contravention of its WTO commitments accruing from the GATT

iii. Therefore, in failing to provide opportunity to hold consultation prior to safeguard measures, PS contravenes obligation under Article XIX:2 of GATT and Article 12.3.

iv. The last line of Article XIX:2 provides for a condition where a contracting party imposing a safeguard measure, could forgo the procedure mentioned above and

[2] Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, (22 February 2012) [hereafter referred to as *Dominican Republic- Safeguards Measures*]

[3] Article 31(1), United Nations, *Vienna Convention on the Law of Treaties*, (23 May 1969)

impose the safeguard if "critical circumstances" exist and delay in taking a measure would cause damage which would be "difficult to repair". This provision bares resemblance to Article 6 of the Agreement on Safeguards and places a similar threshold on the parties to prove that there existed "critical circumstances" which would cause, or would threaten to cause "serious injury". Since Article 6, provides no means to examine if the injury caused by imports is serious or not, the determination of the injury would have to be according to the provisions of Article 4. Under the Article, it hence becomes imperative to establish that, firstly, in determination of injury, all relevant factors of objective and quantifiable nature were evaluated; and secondly, the causal link that attributes injury to increase in imports also needs to be proved.

v. The *Argentina Footwear Case*[4], laid down a few preliminary indicators for determining critical circumstances causing serious injury. These included, but weren't limited to high unemployment, the precarious financial situation of the companies, fall in production, decline in capacity utilization reflected in the decreasing share of that industry in the GDP due to increase in imports. All these circumstances were non-existent in PS. Moreover, the profit figures disclosed were not complete and a part of these figures were not disclosed citing confidentiality reasons.

vi. Since in the case at hand the exempting clause of Article XIX:2 is not applicable, the general provisions hold ground. Moreover, the provisions of GATT XIX:2 are not specific in nature, hence it is broad enough to cover both provisional and definitive safeguard measures.

B. Whether Puerto Sombra contravened its obligations under Article 12.4 of the Agreement on Safeguards?

It is the complainant's case that the respondent, though claims provisional imposition of Safeguard measures, has not acted in compliance with Article 12.3 of the Agreement on Safeguards which deal with consultation prior to imposition of a safeguards measures.

[4] Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, (12 January 2000) [hereafter referred to as *Argentina- Footwear Case*]; Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000

Further the respondent also fails to discharge the burden placed on it by Article 12.4 of notifying the NTC before imposing the provisional safeguard measures. Article 12 serves to provide transparency and information concerning the safeguard-related actions taken by Members.

vii. We note in this context that notification under Article 12 is just the first step in a process of transparency that can include, *inter alia*, review by the Committee as part of its surveillance functions (Article 13.1(f)), requests for additional information by the Council for Trade in Goods or the Committee on Safeguards (Article 12.2), and/or eventual bilateral consultations with affected Members if application of a measure is proposed (Article 12.3)[5]. Safeguards are probably at risk of further proliferation under the current framework.[6] Thus, a need for them to be reviewed by Committee on Safeguards becomes important.

viii. The Panel agreed with the contention of EU in the case of *Korea-Dairy* that: "besides the lapse of time (17 days) between the entry into force of the safeguard measure (7 March) and the date of the notification to the Safeguards Committee, the required content and the purpose of this notification warrant the same conclusion. In fact, this constitutes the final document on the basis of which consultations can take place under Article 12.3 of the Agreement on Safeguards, and therefore offers the last opportunity for informed bilateral consultations before possibly starting dispute settlement consultations. Seen from this perspective, failure to meet the notification standards has the specific consequence of impairing a Member's provision of "adequate opportunity for prior consultations" within the meaning of Article 12.3 of the Agreement on Safeguards. As regards the required contents of the notification, the European Communities observe that in view of the length of the investigatory process and the previous notification requirements, much of the information should have been available even in English for long time, all the more so if already on 21 January Korea was able to announce "a decision to apply" a safeguard measure. This consideration further reinforces the conclusion that Korea failed to notify in time and thus violated Article 12.1(c) of the Agreement on Safeguards."

---

[5] Para 8.298, *Argentina- Footwear Case*

[6] Retrieved from, http://www.lawleeko.com/pdf/Article_YJJ_13.pdf , last accessed on 4:17 pm, 13th January, 2017

ix. The purpose of Article 12.3 logically requires that such consultations must be held on the basis of all the information required at a date prior to the application of the measure, so as to have a possibility to avoid it or ensure that the balance of concessions is preserved.

x. The panel in US-Wheat Glutten case held: "We consider that Article 12 Agreement on Safeguards refers to two different points in time which determine the timeliness of the notification of any decision or finding by a Member. First, Article 12.1 AoS refers to the actual decision or finding. The notification is to be made *immediately following* this decision or finding. Second, we consider that Articles 12.2 and 12.3 Aos provide that the notifications of Article 12.1 are to be made *in any case before* the implementation of the measure in order to allow for prior consultations on the proposed measure. In sum, we find that the notifications of Article 12.1 are situated in time between the moment of making the decision or finding to be notified and the final application of the measure concerned."[7]

xi. The Panel in Wheat Gluten Case stated: "We found above that the United States did not provide a timely notification under Article 12.1 (c) Agreement on Safeguards of its proposed final measure since the United States notified its decision to apply a measure three days after the measure had been implemented. **For the same reason, we find that the United States violated the obligation of Article 12.3 Agreement on Safeguards to provide adequate opportunity for prior consultations on the measure**. **Hence, we find that the United States also violated its obligation under Article 8.1 AoS to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3 AoS."**[8]

xii. Unlike the case of Article XIX:2 of GATT read with Article 12.3 of AoS wherein the lack of consultations results in contravention, the last sentence of / exemption under, Article XIX:2 when read with Article 12.4, failure to make notification before imposing provisional safeguard measure, leads to its contravention in imposing safeguard measure under it.

---

[7] Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, Para 8.190 (19 January 2001) [hereafter referred as *US- Wheat Gluten Case*]; Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19 January 2001;

[8] Para 8.219, *US- Wheat Gluten Case*

Thus, *a fortiori* in this case Puerto Sombra should be found to have failed to comply with its obligation arising under Article 12.3 and under 12.4 of the Agreement on Safeguards.

Hence, it is concluded, that the provisional safeguards measure in improperly imposed and Puerto Sombra contravened Article XIX:2 of GATT, Article 12.3 and 12.4 of AoS in doing so.

<u>ISSUE 2</u>. Whether there exists a reasoned and adequate explanation in the provisional determination demonstrating critical circumstances warranting immediate application of safeguard measure under Article 6 of the AoS?

Article 6 of the AoS, suggests that critical circumstances mean a situation where delay would cause damage which would be difficult to repair. The 'critical circumstances' do not bear an illustrative mention under GATT or the AoS. The discussions in various panel reports can be relied upon in order to determine what situations constitute 'critical circumstances'.

xiii. In determining critical circumstances, the CNCE[9] spoke of various indicators for determining critical circumstance in its preliminary determination. These were: high unemployment, the precarious financial situation of the companies, falls in production, decline in capacity utilisation (in spite of decrease in installed capacity during the period under examination) reflected in the decreasing share of that industry in the GDP due to increase in imports. None of the above stated circumstances exist in Puerto Sombra. Even the financial losses do not indicate any precarious situation as the profitability is calculated for six months and there is disclosure of non-confidential figures only.

xiv. "The appreciation of when such [critical] circumstances may reasonably be regarded as having arisen, can only be done in concrete cases and on a case-to-case basis."[10] Under Para 25 and 26 of the Provisional Determination, the factors that were relied upon to establish critical circumstances (para 35 of Provisional Determination) were: fall in landed value and a consequent decline in selling price of domestic industry, domestic industry's capacity utilisation, market share and productivity per day per employee.

A. Whether decline was sharp, significant and sudden

It is the complainants case that the reports show that the decline was not sharp, significant and sudden.

[9] *Argentina- Footwear Case*

[10] Appellatte Body Report, United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear; WT/DS24/AB/R Page 19 (25 Feburary 1997) [hereafter referred as US- Underwear Case]; Panel Report, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, <u>WT/DS24/R</u>, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R

Capacity Utilisation

xv. The capacity utilisation for three years (2014-1016) shows that in the year 2014 the capacity utilisation was 75%, in the year 2015 was 67% and in the year 2016 was 73%. There was an increase in capacity utilisation between 2015 and 2016. This explains that there was no pattern that helps in inferring that a gradual reduction has occurred.

Market Share

xvi. The analysis of market share of the applicants' in the consumption of domestic industry is given for the years 2014-2016. The pattern shows the market share to be 26% in the year 2014 and 2015 but 24% in 2016. This is doesn't, however, makes it evident that there was a sharp decline as there was a fall of only 2% in the market share of the domestic industry of the total consumption.

Productivity per day per employee

xvii. The indexed values of productivity per day per employee have been claimed confidential and do not reveal actual figures. Yet, relying on them for the sake of argument, makes it apparent that it was 100 in the year 2014, 113 in the year 2015 and 111 in the year 2016. This pattern shows that productivity was lowest in the year 2014 and highest in the year 2015. Clearly, the sudden and sharp fall cannot be seen in the report. Also, the fall cannot be termed as significant.

Selling Price

xviii. The selling price of the domestic industry has declined but there has been no analysis of the selling price of domestic industry as against that of the foreign imports. As pointed out by the European Communities in the *Argentina Footwear Case,*[11] given the absence of analysis of the prices of imports, there is no basis to even examine whether import prices might have "exerted pressure" on the domestic industry.

Article 6 of the AoS requires 'clear evidence' to show that imports have caused or are threatening to cause injury. There is no denial of fact that there has been an increase in

[11] Page 192, *Argentina- Footwear Case*

imports, but a mere coincidence of increase in import and a decline in relevant injury factors *cannot itself prove causation*.[12] The statement of the Panel in *Brazil – Milk Powder* that it was not sufficient for an authority to refer to the evidence it considered and then state its conclusion, but rather that "it was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding"[13].

B. The delay wouldn't cause the damage difficult to repair

xix. The provisional determination doesn't consist reasoned and adequate explanation to prove that the delay in providing subsidies would cause irreparable damage. It is the complainants case, that there is insufficient analysis on whether injury to the industry is capable of instant repair and whether qualitative restrictions on imports wouldn't remedy the industry or prevent the irreparable damage. In absence of such analysis, the urgency and need for the provisional safeguard measures become questionable, and therefore unnecessary and unwarranted.

xx. There is insufficient data to prove that increase in duties, would increase the landed value of imports and thereby decrease its market share, since, there is little information on the profits and losses, and the economies for scale on which the exporting country is coming in at, presently.

xxi. Since the exporting country has much larger capacities, given the amount of countries it used to cater to before the decline of global demand and anti-dumping measures by the countries, it is definite that the importing industry given the theory of economies of scale, would produce at much cheaper value per unit. The hit in profitability by provisional measures, may not ensure increase in its landed value, as exporting country's large margin is not a wild assumption, but a rather logical deduction. The reduction in **market share of imports**, is hence, not a result of such measures.

xxii. When the market shares of imports, fail to reduce, the provisional duties wouldn't guarantee the domestic industry any rise in market share. If the **domestic industry's market share**, stays at the current level, its **capacities** are not going to be fully utilised. Moreover, capacities can't be reduced in the middle of the year, and abruptly, and hence, if the market share stays constant, the utilisation is also going to stay static, and so is the cost of production. And hence there would be no reduction in the **selling price**, that could incentivise the increase in the domestic industry's market share.

---

[12] Page 192, para 8.238, *Argentina- Footwear Case*

[13] Panel Report on *Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the EEC*, adopted on 28 April 1994, BISD 41S/467, 550, para. 286

xxiii. The factors of production would also not benefit unless the capacities utilisation improve. Only if capacity utilisation improves, the productivity and employment would increase and thereby the **productivity per employee**.

xxiv. The delay wouldn't hence be the cause of any damage. The Committee on safeguards had to discharge its burden of determining the probabilities of the increase in landed value and thereby the reduction in market share. In its failure to evaluate this, it can't be said that the immediate and expedited measures, would remedy or repair the damage. The delay thereby, wouldn't render any damage difficult to repair. The provisional measures weren't based on reasonable and adequate grounds, as if the immediate measure cannot repair the injury, the delay couldn't be a factor in rendering the injury irreparable.

It is submitted that there is no reasoned or adequate explanation in the provisional determination demonstrating that critical circumstances existed warranting immediate application of safeguard measures under Article 6 of AoS.

<u>ISSUE 3</u>. Whether the safeguard measure is based on a proper determination or explanation of any unforeseen developments and the effect of GATT obligations that led to increased imports that caused or threatened to cause serious injury to the domestic industry as per Article XIX:1(a) of the GATT, 1994?

xxv. Puerto Sombra's imposition of definitive safeguards measure is an exercise of this freedom under Article XIX:1 (a). Imposition of these safeguards would require the fulfilment of the conditions under the Article. Article XIX:1(a) of GATT and specifically Article 3.1 of Agreement on safeguards, suggest the obligations to properly determine and set forth measures on the basis of findings and reasoned conclusions.

xxvi. Article XIX 1(a) enables the contracting party in respect of "such product" (as discussed to in the select provision), and to the extent and for such time as may be necessary, to prevent or remedy "such injury" (i.e. as described under the provision as, a result of unforeseen developments and effect of GATT obligation), suspend the obligation in whole or in part or withdraw or modify the concession. This freedom is enjoyed by the injured contracting party only "if" the import of the product in such increased quantities and under such conditions causing or threatening serious injury, is a result of unforeseen developments and effect of GATT obligations.

xxvii. It is the complainant's (Pueblo Faro) case, that the imposition of safeguards is not based on proper determination or reasoned and adequate explanation of any unforeseen developments and GATT obligations resulting in and giving effect to increased imports causing or threatening serious injury to domestic industry. The safeguards were imposed on the basis, of injury faced by the industry due to increase in imports owing to unforeseen developments and GATT obligations. But the complainant argues, that the injury to the domestic injury in 2015 was caused merely due to the wrongly estimated increase in capacity. The estimated demand for the year, was well within the earlier capacity. In spite of the domestic industry's need for an inventory, it still largely overestimated the demand, it hence produced far lesser, and hence, had large production cost, owing to low capacity utilisation. Lowering of the selling price, is hence, due to the rise in domestic production cost, which was a result of a completely foreseeable event (estimated market share).

xxviii. In order to prove the increased import caused the injury, it would be necessary to base it on the true figures of the landed value, domestic industry's cost of production and domestic industry's selling price. In the respondent's case it is imperative to prove the increase in selling price as an attempt to compete against low imports. But as the facts suggest, the imports increased only marginally in 2015, and the selling price is seen more as an attempt to net the high selling costs, than to compete with the imports. Further in 2016, the domestic industry had lowered market share, but still didn't sell enough to meet its demand of 81,600 MT, as it sold only 80,000. If there was a need for an inventory, and it correctly assessed the excess required by the industry while keeping in mind the estimated demand, it could've raised the units produced and hence better utilised the capacity, thereby reducing costs. If domestic industry assessed the foreseeable events well, it could've gotten lower costs of production and wouldn't have to sell at low selling price.

xxix. All the injury faced by the industry, bore no attribution to the imports and weren't a result of it.

xxx. The provision places the burden to establish a causal link between "conditions" in the latter part of Article XIX:1(a) and "circumstances" described in the initial parts of the same provision. The NTC is obligated to analyse and conclude when imposing safeguard measures, that the result of unforeseen developments and effect of GATT obligations ("circumstances") causes increase in imports and the injury causing or threatening "conditions".[14] The Article hence obligates the determination of the causal link between them, and not merely the foreseeability of the development and effect of GATT obligations.

xxxi. Alan O. Skyes in his analysis of causation analysis, between increased imports and injury, suggested the liberal approach towards the word "cause", since, he suggested that in real world economics, demand, supply, world price, all are a result of exogenous factors and hence, imports can never really be the distinct cause of the injury. [15]

[14] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, (16 May 2001) [hereafter called as US- Lamb Case]; Appellate Body Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001

[15] The Law School, University of Chicago, The Safeguards Mess: A Critique of the WTO Jurisprudence, Alan O. Sykes; http://www.law.uchicago.edu/Publications/Working/index.html

xxxii. But in order to interpret GATT Article XIX, the U.S. Lamb Case[16] suggested the **"correlation approach"** to prove causation. The correlation between the import increase and the injury, with no external hindering factors is sufficient. The injury may be a result of other exogenous factors, but the injuriousness of the event must be attributed to the increase in imports.

xxxiii. Further in the case of the unwrought copper, commission reports suggested the application of the **"hypothetical quota approach"** to determine the true cause of the injury.[17]

xxxiv. Additionally, jurisprudence has also taken note of the **"import supply curve"** theory that divided the potential causes of the injury into three groups: forces that cause shifts in domestic supply schedule, forces that cause shifts in the domestic demand schedule and the forces that cause shifts in the import supply schedule. The harm attributed to the shifts in import supply curve alone was to be deemed as the result of increased imports.[18]

A. Unforeseen developments

xxxv. The provisional determination reports of the National Trade Commission pointed out the following unforeseen developments which resulted in the increase in imports causing or threatening serious injury to the domestic industry:

<u>2009 global recession leading to global decline in the infrastructure investment causing global decline in demand for the product concerned</u>

xxxvi. In reviewing the results of unforeseen developments and effects of GATT obligations incurred leading to increase in imports and injury causing and threatening conditions, the global recession cannot be said to fall under the review period (which begins from 2014), and the effects of such a recession in the 2014 cannot be interpreted to be unforeseen. Since jurisprudentially, courts have interpreted "unforeseen" as "unexpected" and "unforeseeable" to mean "unpredictable" or "incapable of being foreseen, foretold or anticipated". [19]The decline in demand is hence an expected outcome from the 2009 recession.

[16] *US- Lamb Case*

[17] U.S. International Trade Commission, Certain Motor Vehicles, Inv. No. TA-201-44, Pub. No. 1110, 2 I.T.R.D. 5241 (1980).

[18] Wood Shakes and Shingles, U.S. International Trade Commission, Inv. No. TA-201-56, Pub. No. 1826 (1986)

[19] *Korea – Dairy Case*

xxxvii. Furthermore, there is no proper determination of this global demand. Absence of determining factors disable the analysis under the Article, as there is no method to deduce that the quantities of and conditions in which products are imported are a result of such a decrease in demand.

xxxviii. Pertinently, decrease in global demand would cause all like/competitive product exporting countries to increase exports into PS, but the reduction in share of imports of other countries, goes against such an analogy.

xxxix. Moreover, there is no decline or saturation in production and sales of domestic producers. Hence firstly the argued saturation in demand in 2014-15 is subject to the increase total consumption, is not really a saturation in demand. The share in demand is also as dynamic as the growth in the consumption/demand. Additionally, the drop of 2% in the share of applicants in total consumption, doesn't end up in a decline in production or sales, hence it can be interpreted as the consumers' act of hoarding in inventories. And hence the resultant being no real loss to the domestic industry.

xl. The decline in applicants' share in consumption doesn't lead to a proper injury analysis, because the inventory or surplus (consumption versus sale) existed in 2014, but faced a deficit in 2015 and took off on surplus sale in 2016. Injury is not consistent. When seen with decline of share in demand/consumption, the share percentage may be saturated, but the domestic industry faces no real injury.

Anti-dumping and countervailing duties by five major economies on imports of the product concerned from Pueblo Faro in the past two years (since 2014) leading to export push to Puerto Sombra.

xli. This cannot be said to be a GATT obligation for the purposes of Article XIX:1(a) because such an obligation for the purposes of the provision must be incurred by "contracting parties", such parties are specific to the dispute. Antidumping and countervailing measures are taken by other parties, and hence an effect of such a dispute wouldn't be the subject matter the Article.

xlii. Mere coincidence of events (increase in imports and AD, CVD by the 5 economies) cannot establish the former as a result of the latter. Inadequate explanation, renders a fairly speculative approach to this allegation, since increase in imports has been a

feature since 2013 in PS[20], and is not peculiar post the imposition of such duties i.e. 2014. There is no nexus binding that increase in imports to the AD, CVD imposed on products from PF. Hence it is not a compelling or reasoned explanation for the increase in imports.

Surplus capacities of the product concerned with manufacturers in pueblo Faro and their urge to channel their goods in overseas markets such as PS

xliii. If it is argued that surplus for concerned product in the PF market, have caused PF to export the products under an inability to command high prices. It is pertinent to note that there is a constant and consistent growth in imports and PF's contribution to the imports since 2014, but in 2015 the landed value of the product was higher than that commanded in 2014, hence there is a lax in the theory that the surplus has caused an increase in imports under a prevalent inability to command high prices. The drop in landed value is limited to the landed value in 2016. There have been no extraordinary or irregular fluctuations in imports from PF with the fluctuations in landed value of the product.

xliv. Arguendo, if the condition of the drop in landed value arising out of a surplus (2016) has resulted in the increase in imports, no similar reasoning can be supplied to the similar increase when landed value commanded was high. The inaccuracy in according the surplus to the increase in such injury causing/threatening imports substantiates an improper application of Article XIX:1(a)

Export incentive of 5% on FOB value of the product concerned by government of PF

xlv. For the discussion underneath, we argue Article XIX:1(a) to have 2 distinct events essential for the applicability of the provision. The first being the unforeseen development or GATT obligation, after a sound determination of such an event, an effect such an event, needs to be assessed. The 2nd stage is hence, when the product "is being imported" as a result of the above event, in such increased quantities and injury causing and threatening conditions. The link connecting the events must also be established.

xlvi. The incentive given by PF in January 2015 caused no drop in CIF value of that year for the product, i.e. some balance had been struck to immediately neutralise the

[20] Provisional determination, Paragraph 32, pp 20

incentive granted of the import. And the landed value has instead risen in spite of incentive issued. Hence, 5% on FOB value rendered no real incentive.

xlvii. Moreover, the subsequent 21 units drop in landed value in 2016 has no triggering event, given this line of reasoning. There is inadequate explanation of the relation of this incentive with hike in insurance and freight costs of imported product or importing policies. The absence of such a relation, weakens the "unforeseeable" aspect of the incentive. The 5% incentive if seen as an unforeseen development, there is nothing to prove that the result of such a development i.e. the decrease in landed value, itself causes the increase in imports and injury/threat to it.

xlviii. Similarly, even if the 5% rise is seen as a GATT obligation, the drop in landed value isn't properly determined as the result of such an obligation, and thereby, hence for our determination, cannot be the event resulting in increase in imports and injury/threat of it.

High demand for the product concerned in PS since 2014

xlix. The pre-condition under Article XIX:1(a) is not merely imports resulting from unforeseen developments and of the effect of GATT obligation, but the specific language of the provision requires the product being imported "in such increased quantities" and "under such conditions" as to cause or threaten serious injury, to be a result of the unforeseen developments and GATT obligation. Hence while referring to the result of the unforeseen developments and effect of GATT obligations, mere increased quantities and diverse conditions aren't in issue, rather, such increase in quantities and such conditions causing or threatening the injury, are relevant.

l. The conditions of consumption/demand of imported products are not in issue in isolation, but its injury to the domestic industry, is the subject matter for the applicability of the Article. Hence rise in total consumption/demand of the product, or increase in import's share in the consumption is not in issue until there is a drop in the demand for domestically produced products. Till 2015 although the consumption of imported products increased, the consumption of domestically produced products increased proportionally. The ratio of increase has been constant, in spite of the spike in demand. The only divergence arose in 2016, when the consumption of imports increased and the corresponding consumption of domestically produced unwrought aluminium decreased. Hence the trigger for increase of imports under such conditions was 2016. Rise in demand since 2014 as an unforeseen development, is hence an

improperly determined explanation for the increase in 'injury causing or threatening' imports.

B. Effect of GATT obligations

li. The analysis of whether products being imported in injury causing increased amount and conditions, is an effect of GATT obligations, is a requirement subsequent to the unforeseen developments requirement and not a condition parallel to it. The usage of "and" between the two requirements suggest that, only the fulfilment of the former would require the establishment of the latter. Measure was improperly imposed, as it is based on inadequately analysed requirement, as it is only a requirement in question on the fulfilment of the condition precedent.

lii. Arguendo, the rise in imports as a result of GATT obligations of 108% can only be analysed if 2013 is reviewed, but the analysis and every other report is restricted to analysis from 2014 onwards, hence the injury causing impact of such increase is improperly determined.

<u>ISSUE 4</u>: Whether Article XIX:1(a) of the GATT, 1994 and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the AoS has been violated by Puerto Sombra in applying the safeguard measures?

It becomes important to analyse whether conditions under all the Articles under AoS are met.

A. Conditions necessary to be fulfilled before imposing a safeguard measure under Article 2.1 are:

1. Increased imports, in relative or absolute terms of domestic production
2. importing of products that produce like or directly competitive products
3. such imports must cause or threaten to cause serious injury.

liii. Article XIX:1(a) of the GATT 1994 and Article 2.1 of AoS do not speak only of an "increase" in imports. Rather, they contain specific requirements with respect to the quantitative and qualitative nature of the "increase" in imports of the product concerned. Both Article XIX:1(a) of the GATT 1994 and Article 2.1 AoS require that a product is being imported into the territory of the Member concerned *in such increased quantities* (absolute or relative to domestic production) as to cause or threaten serious injury. Thus, not just *any* increase in imports will suffice. Rather, the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury. The Appellate Body in *Argentina-Footwear Safeguard* stated: "And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1 (a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."[21]

liv. The increase in imports was merely by 27% in 2016 as compared to 2015. Also, many parameters in the economy show improvement, for example, production, sales, employment, etc.(It must not be forgotten that the increase in production is a result of the increase in imports which was aiding the production). It is contended that the productivity has dropped and so has the capacity utilization. These can be said to attribute to the reason for fall in the market share. NCT has failed to consider these

[21] Appellate Body Report, *Argentina-Footwear Case*, para. 131.

parameters in the correct light. It is quite evident that by over-looking this aspect, NCT was purposefully trying to draw a relation between imports and failing market share of domestic industry.

lv. Article 4.1 (a) defines 'serious injury" to include significant overall impairment in the position of the domestic industry. The impairment of the domestic industry is not that which can be termed sharp and significant as the capacity utilization has been low. Consequently, the cost of production is high and the selling price has to be reduced suiting the market price, which reduces the profitability.

B. Conditions for determining whether there exists a threat of serious injury under Article 4.2 (a) and (b):

1. the investigating authority shall evaluate all relevant factors which have to be objective as well as quantifiable in nature
2. the above shall be done by taking into consideration, particularly, increase in imports (in relative and absolute terms), the share of the domestic industry, changes in level of sales, production, productivity, capacity utilization, profits and losses, and employment.
3. The objective evidence of the investigation must show existence of causal link between increased imports and the injury caused or threatened to be caused.
4. In case the injury is being caused by any other factor other than increased imports, at the same time, the injury shall not be attributed to increased imports.

lvi. The question arises as to whether the list of factors given is exhaustive or not, and for the same it becomes imperative to analyse the paragraph from the *US Wheat Gluten Case*:

"….. the language in this provision is mandatory ("shall…"). Furthermore, this list is preceded by the term "in particular…". On the basis of the text of the provision, [it must therefore be concurred that]…… all of the factors listed in Article 4.2(a) must be evaluated. We find support for our view in the Appellate Body Report in *Argentina – Footwear Case*. There, the Appellate Body stated: "We agree with the Panel's interpretation that Article 4.2(a) of the *Agreement on Safeguards* requires a demonstration that the competent authorities evaluated, at a minimum, each of the

factors listed in Article 4.2(a) …".[22] Of course, an examination of any one of those factors in a given case may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Likewise, factors not enumerated in Article 4.2(a) that are "relevant" must be examined, although examination may lead the investigating authority to conclude that a particular factor is not probative in a particular case. "[23]

lvii. Thus an evaluation of all other relevant factors must be done, making the list inclusive. The purpose of accessing any factor is that they must lead to an affirmative determination of serious injury. It is contended that NCT has failed to acknowledge the fact that domestic industry in Puerto Sombra is under heavy debt. The debt was taken to increase the capacity during 2014-2015. Interest rates are also high in Puerto Sombra. The domestic industry committed a further blunder of expanding its capacity in 2015, which led to huge fixed costs. At the same time, new installed capacities caused high depreciation cost for the domestic industry. Consequently, the domestic industry could not recover its cost of production by selling its products at a higher price when the international market is saturated and prices are at an all-time low.

lviii. Also, in the Korea Dairy Case, it was held in para 4.51: "In assessing serious injury under Article 4.2(a), the competent authority is not required to give any specific weight or significance to any particular criterion. Under Article 4.2(a) of the Agreement, no criterion gives conclusive guidance as to whether serious injury occurred. The Agreement also does not require that each criterion be considered in isolation. Moreover, the Agreement on Safeguards contemplates that the competent authority may use other factors that are more relevant to a particular domestic industry in assessing serious injury."[24] No other factors were analysed and all the factors that were analysed were done in isolation. In an economy which is fast growing, it becomes important to take a wholesome view rather than blaming the imports. The causal link has not been established, which requires not just mere incidence of increase in imports and an adverse effect on the domestic industry, a clear and substantial evidence must exist with no other factor being existing causing those adverse effects.

[22] Appellate Body Report, *Argentina-Footwear Case*, Para. 8.123.
[23] Page 17, *Wheat Gluten Case*
[24] Page 13, *Korea Dairy Case*

lix. To determine serious injury, Article 4.1 (a) has to be given great emphasis for it is the sole requirement for determining whether there exists an injury or a threat to injury. A determination as to the existence of such "significant overall impairment" can be made only on the basis of an evaluation of the overall position of the domestic industry, in light of all the relevant factors having a bearing on the situation of that industry.[25]

lx. In *US - Shirts and Blouses* and *US -Underwear*[26] it was held that: the investigating authority has to seek out and consider "all relevant facts" (and not rely on what is "before it"); and it is necessary, at a minimum, for a serious injury determination under the Agreement on Safeguards to demonstrate that the relevance or otherwise of each of the injury factors listed in Article 4.2(a) of the Agreement on Safeguards was properly analysed unless it is explained for what reason the injury factor may be disregarded. It is true that no injury factor "in isolation" can establish serious injury but that does not excuse a failure to examine them all.

lxi. It is contended that NCT has overlooked many factors which should have been analysed before taking safeguard measures.

[25] Appellate Body Report, *Argentina – Footwear Case,* paras. 138-139.

[26] Panel Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/R (6 January 1997) [hereafter referred to as US - Shirts and Blouses], Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997

<u>ISSUE 5</u>. Whether Puerto Sombra has violated Article I of the GATT and Article 9.1 of the AoS by granting immunity to Puerto Santo?

<u>There is a blatant contravention of its WTO commitments by Puerto Sombra under Article 1 of the GATT</u>

lxii. It is the Complainants case, that the imposition of safeguards measures by Puerto Sombra are inconsistent with Article I:1 of the GATT, which requires the Members to accord unconditional most favoured nation (MFN) treatment to products originating in the territories of all Members. The MFN principle is a fundamental norm of the rules-based multilateral trading system of the WTO. This principle has "long been a cornerstone of the GATT and is one of the pillars of the WTO trading system"[27]. Embodying this principle, Article I:1 of GATT 1994 provides, in relevant part: "..., any advantage ... granted by any [Member] to any product originating in ... any other country shall be accorded ... immediately and unconditionally to the like product originating in ... the territories of all other [Members]." (emphasis supplied)

lxiii. In applying Article I:1 of the GATT, in *Canada – Autos*, the Appellate Body referred to the undisputed finding of the panel that the "term 'unconditionally' refers to advantages conditioned on the 'situation or conduct' of exporting countries"[28]. It follows from the above 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.

lxiv. Thus, Article I:1 of GATT, which sets out the general MFN principle, is also applicable within the sphere of the Agreement on Safeguards. Any deviation from this principle must have a legal basis. The Respondents have argued that the safeguard measures have not been imposed on Puerto Santo because it is a 'developing country' and hence the action is justified on claims of "special and differential treatment"

lxv. It is contended by the complainant that the Respondent had wrongly classified Puerto Santo as a developing country because Santo has a very high per capita Gross

[27] First written submission of India, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, Page 7 (20 April 2004)

[28] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, Para 76, (19 June 2000)

Domestic Product (GDP) of USD 18,562[29]. Though not a sole-indicator, a high GDP is one of the paramount deciding factor to establish whether a country is developed or not. More importantly, Puerto Santo crosses the USD 12,475[30] threshold used by the World Bank to classify countries as a "high-income economy", a term that is interchangeably used with "developed county". Puerto Santo is a highly industrialised economy with a high human development index comparable to any developed country[31]. Additionally, the fact that almost all the other WTO Member consider Puerto Santo as a developed country and Puerto Sombra's lack of justification for its decision, lend support to the Complainant's case.

There is a blatant contravention of its WTO commitments by Puerto Sombra under Article 9.1 of the Agreement on Safeguards

lxvi. It is contended by the Complainant that there is no established procedure or criteria on the basis of which it can be decided that a country is a developing or a developed country neither for the purposes of WTO or the Agreement on Safeguards. Further in favour of the Complainant's view, it is argued that it's not possible that a single Member be considered a developing country by, say, the United States and not the European Communities and others in respect of the same dispute or the same provision. To proceed otherwise would deprive WTO developing country Members from all legal certainty as far as their rights and obligations under WTO Agreements are concerned[32]. Any approach adopted contrary to this would also be in contradiction with the need for a multilateral approach of the "special and differential treatment" provisions within the WTO.

lxvii. It is humbly submitted that Article 2 of the Agreement on Safeguards determines the conditions for a WTO Member country to apply safeguard measures. While paragraph 1 of this provision stipulates the general conditions for a member to apply a safeguard

[29] Moot Proposition, Para 14

[30] World Bank Country and Lending Groups, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519#High_income; last accessed at 10:47 am, 13th January, 2017

[31] Clarifications to the Moot Proposition, Point 11

[32] Argument by the Parties, Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, Para 1863 (10 December 2003)

measure, paragraph 2 of this provision determines that the measure to be taken shall be applied to all products being imported to the territory of that country irrespective of their source.

lxviii. Article 2.2 sets forth an important obligation that a safeguard measure be imposed on the imported product "irrespective of its source". In other words, safeguard measures are in principle imposed on a most favoured nation (MFN) basis. In this regard, safeguard measures have to be taken in reaction to an increase in imports, from whatever source and not imports from a particular country.

lxix. On the other hand, Article 9.1 of the Agreement on Safeguards offers special and differential treatment to developing countries. Under this a Safeguard measure shall not be applied against a developing country if the its share in the imports does not exceed 3% individually, and the percentage of imports from these developing countries *in toto* does not exceed 9%.

lxx. The contention that the Agreement on Safeguards does not indicate how a Member must comply with Article 9.1 and that it is for the importing member to decide how to apply the safeguard measure must be flatly rejected. All obligations under the covered agreements are the subject of multilateral control. This is the very purpose of the Agreement on Safeguards, as stated explicitly in the preamble

REQUEST FOR FINDINGS

Wherefore in light of the Issues Raised, Arguments Advanced, the Complainant requests this Panel to:

a) Find that the imposition of Safeguard measures was inconsistent with GATT Articles I, XIX:1(a) and XIX:2

b) Find that the imposition of Safeguard measures was inconsistent with Articles 2.1, 4.2 (a), 4.2 (b), 6, 9.1, and Articles 12.3 and 12.4 of the Agreement on Safeguards

All of which is respectfully affirmed and submitted,

Counsel for the Complainant,

103C.