

TEAM CODE: 148C

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9<sup>th</sup> GNLU INTERNATIONAL MOOT COURT COMPETITION 2017

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WT / DS / xxx

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**BEFORE THE PANEL**

*Established by Dispute Settlement Body (DSB)*

*World Trade Organisation (WTO), Geneva*

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**PUERTO SOMBRA - SAFEGUARD MEASURES ON  
UNWROUGHT ALUMINUM**

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*Complainant: Pueblo Faro*

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**WRITTEN SUBMISSION FOR THE COMPLAINANT**

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## **LIST OF ABBREVIATIONS**

<b><u>ABBREVIATION</u></b>	<b><u>FULL FORM</u></b>
<b>%</b>	PERCENTAGE
<b>&amp;</b>	AND
<b>¶</b>	PARAGRAPH
<b>ANNEX.</b>	ANNEXURE
<b>AoS</b>	AGREEMENT ON SAFEGUARDS
<b>ART.</b>	ARTICLE
<b>CEO</b>	CHIEF EXECUTIVE OFFICER
<b>NTC</b>	NATIONAL TRADE COMMISSION
<b>DSU</b>	DISPUTE SETTLEMENT UNDERSTANDING
<b>DSB</b>	DISPUTE SETTLEMENT BODY
<b>EC</b>	EUROPEAN COMMUNITIES
<b>GATT</b>	GENERAL AGREEMENT ON TRADE AND TARIFFS, 1994
<b>GDP</b>	GROSS DOMESTIC PRODUCT

<b>GNP</b>	GROSS NATIONAL PRODUCT
<b>HDI</b>	HUMAN DEVELOPMENT INDEX
<b>LDC</b>	LEAST DEVELOPED COUNTRY
<b>MFN</b>	MOST FAVOURED NATION
<b>MT</b>	METRIC TONNES
<b>NO.</b>	NUMBER
<b>NTC</b>	NATIONAL TRADE COMMISSION
<b>p.</b>	PAGE NUMBER
<b>SCMA</b>	SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT
<b>UNDESA</b>	UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS
<b>USA</b>	UNITED STATES
<b>USD</b>	UNITED STATES DOLLAR
<b>VOL.</b>	VOLUME
<b>WTO</b>	WORLD TRADE ORGANIZATION

## **INDEX AUTHORITIES**

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### **[A] WTO APPELLATE BODY REPORTS**

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2. Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (Feb. 21, 1997)
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5. Appellate Body Report, *United States – Definitive Safeguard Measures on Certain Steel Products Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS/2558/R, WT/DS259/R (Nov. 10, 2003)
6. Appellate Body Report, *United States – Definitive Safeguard Measures on Import of Circular Welded Carbon Quality Line Pipe From Korea*, WT/DS202/AB/R (Feb. 15, 2002)
7. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Jan. 19, 2001)
8. 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 (May 1, 2001)

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8. Panel Report, *United States – Safeguard Measures on Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R (Dec. 21, 2000).
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10. Panel Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (July 31, 2000)

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## **STATEMENT OF FACTS**

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### **THE PARTIES**

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*Pueblo Faro is a developed country in the same continent as Puerto Sombra. Puerto Sombra is a developing country with a population of 100 million that is steadily growing every year. Both Pueblo Faro and Puerto Sombra are members of the WTO. Pueblo Faro is rich in natural resources and its main exports are iron and steel products, machinery and equipment, electronic equipment, among other products.*

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### **NEGOTIATIONS FOR A FREE TRADE AGREEMENT**

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*Puerto Sombra's government had been involved in active discussions with the government of Pueblo Faro to conclude a Free Trade Agreement as Puerto Sombra's government is actively entering into discussions with various countries to assist its domestic industry to expand to new markets that are growing. However, the negotiations between the two nations for the free trade agreement got stalled because of Puerto Sombra's unwillingness to reduce its tariffs on certain key base metals and articles.*

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### **APPLICATION FOR INITIATION OF INVESTIGATION**

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*Puerto Sombra's primary aluminum industry has allegedly been facing intense competition from imports. The major producers of unwrought aluminum, Kimp Aluminum Corporation, Puerto Sombra National Aluminum Corporation and Raven National Aluminum Corporation constituted the domestic industry in Puerto Sombra. In order to protect themselves, the domestic industry filed an application before the NTC for initiation of a safeguards investigation regarding imports of unwrought aluminum. Subsequently, the NTC initiated the investigation on 31<sup>st</sup> July, 2016.*

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### **PROVISIONAL SAFEGUARD MEASURES**

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*After an examination by the NTC, provisional safeguard measures on imports of unwrought aluminum were imposed by the NTC on 2<sup>nd</sup> August, 2016. Puerto Sombra keeping with its WTO obligations under Articles 12.1(a) and 12.4 of the AoS notified the WTO of the initiation of the safeguard investigation and the decision to impose the provisional safeguard measure on 15<sup>th</sup> August, 2016. The notification also invited member countries for consultations under Article 12.4 of the AoS.*

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## **EVENTS SUBSEQUENT TO THE IMPOSITION OF SAFEGUARDS**

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*A number of WTO members, including Pueblo Faro, posed questions to Puerto Sombra, through the Committee on Safeguards regarding the measure imposed and also raised objections stating that the measure imposed by Puerto Sombra was protectionist in nature and went against the intent of the WTO which was to promote international trade. Subsequent to the imposition of the provisional safeguard measure, a public hearing was held on 30<sup>th</sup> October 2016. The CEO of Kimp Aluminium Corporation was quoted in the article by a leading newspaper of Puerto Sombra as accepting that a major reason for the inability of the domestic industry to compete with the imports was the high prices of bauxite as the tenders were until now won by Baux Corporation or its subsidiaries, which are mining companies.*

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## **DEFINITIVE SAFEGUARD MEASURES**

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*Following the public hearing the NTC initiated a verification on the premises of the producers that constituted the domestic industry to examine the veracity of the data submitted. The NTC proceeded to issue the final determination imposing the definitive safeguard duty on 15<sup>th</sup> November, 2016. The measure was imposed on imports of all countries with the exception of certain developing countries. This decision was notified to the WTO by Puerto Sombra on 25<sup>th</sup> November, 2016. In particular, Puerto Santo has been recognized as a developing country by Puerto Sombra which was objected to by majority nations as nearly all the other WTO members consider Puerto Santo a developed country and its annual GDP per capita was USD 18,562.*

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## **REQUEST FOR ESTABLISHMENT OF PANEL**

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*Pueblo Faro requested for consultations with Puerto Sombra under the DSU in early December 2016. The consultations were unsuccessful. Pueblo Faro then requested for the establishment of a WTO Panel to which Puerto Sombra objected. Thereafter, Pueblo Faro sent a second request for establishment of a WTO Panel. The DSB established a panel in January 2017 and the Panel was composed in late January 2017.*

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**MEASURES AT ISSUE**

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**PUERTO SOMBRA'S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:2, GATT AND ARTS. 12.3 AND 12.4, AOS AS THE NOTIFICATION AND INVITATION FOR CONSULTATIONS WAS NOT DULY SENT.**

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**PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. 6, AOS AS THE EXISTENCE OF CRITICAL CIRCUMSTANCES HAS NOT BEEN ESTABLISHED BY THE NTC.**

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**PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:1(A), GATT AS THE EXISTENCE OF UNFORESEEN DEVELOPMENTS AND THE EFFECT OF GATT OBLIGATIONS HAS NOT BEEN ESTABLISHED BY THE NTC.**

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**PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 2.1, 4.1(A), 4.2(A) AND 4.2(B), AOS AS SUCH INCREASED IMPORTS WHICH LED TO SERIOUS INJURY TO THE DOMESTIC INDUSTRY HAS NOT BEEN ESTABLISHED BY THE NTC.**

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**PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART.I, GATT AND ART. 9.1, AOS AS PUERTO SANTO IS A DEVELOPED COUNTRY.**

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## **SUMMARY OF LEGAL PLEADINGS**

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### **ARGUMENT I: PUERTO SOMBRA'S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:2, GATT AND ARTS. 12.3 AND 12.4, AoS.**

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- Article XIX:2, GATT and Article 12.3, AoS mandates the country imposing safeguard measures to comply with the statutory requirement of prior consultations that should be precede the application of safeguard measure. Puerto Sombra acted in contravention of the said requisite by not consulting with the concerned exporting countries and not giving the adequate opportunity to take part in trade compensations before imposing the safeguard measure.
- Article 12.4, AoS provides for immediate notification of implementation of safeguard measures to WTO through its Committee on Safeguards. The notification on 15<sup>th</sup> August, 2016 was not sent immediately without delay. Hence, Puerto Sombra did not comply with its obligation under Article 12.4, AoS.

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### **ARGUMENT II: PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. 6, AoS.**

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- The NTC failed to establish the existence of critical circumstances. Critical circumstances are defined as those in which 'delay would cause damage which it would be difficult to repair'.
- By wrongly equating critical circumstances with a description of the alleged causal link between increased imports and serious injury being faced by the domestic industry, the NTC has failed to recognize and establish the additional standard necessarily required to prove critical circumstances.
- Further, the NTC failed to reasonably and adequately establish that the circumstances in existence met the requisite urgent threshold.
- The NTC failed to establish the existence of serious injury in its preliminary determination on the basis of clear evidence.
- The NTC's incomplete and annualized data, coupled with the existence of a discrepancy in its report, negated the existence of clear evidence.

- The NTC failed to preliminarily establish the existence of serious injury as significant economic indicators like production; sales and capacity utilization of the domestic industry have shown substantial positive increase. The NTC has also failed to appropriately attribute injury to the deplorable financial condition of the domestic industry and monopoly of bauxite mines persistent in the domestic industry. Further, the NTC failed to establish the existence of unforeseen developments and the effect of GATT obligation incurred.

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**ARGUMENT III: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ARTICLE XIX:1(A), GATT.**

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- The safeguard measures imposed by Puerto Sombra violate Art. XIX: 1(a), GATT as the NTC failed to establish the existence of the pre requisites: unforeseen developments and the effect of GATT obligations.
- The circumstances the NTC has sought to establish as unforeseen, the recession and its effects, are not extraordinary in nature and were in existence at the time of reduction of tariffs. Hence, they do not meet the requisite standard of unforeseen developments as the negotiators of the country making the concession could and should have foreseen these developments at the time when the concession was made.
- Alternatively, assuming but not admitting that unforeseen developments existed, the NTC failed to reasonably or adequately establish a logical connection between the aforementioned developments and the increased imports.
- .The NTC failed to establish the existence of a GATT obligation as the reduction of tariffs below the bound rate, from the applied level of 15% to 5%, from the 31<sup>st</sup> December 2013, is not an obligation under GATT and gives rise to the negative effects of tariff overhang.
- Alternatively, assuming but not admitting that a GATT obligation existed, the NTC failed to establish that the logical connection between the aforementioned obligation and increased imports. The increased imports were a result of the demand – supply gap for the product concerned in Puerto Sombra.

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**ARGUMENT IV: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 2.1, 4.1(A), 4.2(A) AND 4.2(B), AoS.**

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- The NTC failed to establish the existence of the conditions for the application of a safeguard set forth in Article 2.1.
- The NTC failed to establish the existence of ‘such’ increased imports as the imports were a result of the demand – supply gap for the product concerned.
- The NTC failed to establish the existence of serious injury as it did not analyze all the relevant factors, did not provide a reasoned and adequate explanation to support its conclusions and did not demonstrate the existence of a causal link between increased imports and serious injury.
- Further, the safeguard measure was not applied to the appropriate extent and duration.

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**ARGUMENT V: PUERO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. I, GATT AND ART. 9.1, AoS AS PUERTO SANTO IS A DEVELOPED COUNTRY.**

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- Puerto Sombra’s exclusion of Puerto Santo under Art. 9.1, AoS and Art. I, GATT is invalid because Puerto Santo is a developed country.
- Puerto Santo’s developed status is established as the self designation mechanism is subject to the scrutiny of other members who classify it as developing and the objective measures of GDP per capita and HDI of Puerto Santo are indicative of its higher level of development. Further, the application of the principle of graduation supports the aforementioned contention.
- Additionally, Puerto Sombra has not complied with requirements of Art. 9.1, AoS.
- Alternatively, assuming but not admitting that Puerto Santo is a developing country, it would fall within the category of advanced developing countries and hence would receive treatment commensurate to its status.



## LEGAL PLEADINGS

### **I: PUERTO SOMBRA’S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:2, GATT AND ARTS. 12.3 AND 12.4, AoS.**

1. It is contended that the imposition of provisional and definitive safeguard measures are *[I.A.]* in violation of Art. XIX:2, GATT and Art. 12.3, AoS since no prior consultations were held before such imposition; further, *[I.B.]* the provision for immediate notification of implementation of safeguard measures to Committee on Safeguards under Art. 12.4 has not been complied with.

#### **[I.A.] VIOLATION OF ART. XIX:2, GATT AND ART. 12.3, AOS**

2. Art. XIX:2, GATT sets forth procedural requirements for the application of safeguards. On the lines of Art. XIX; Art. 12.3, AoS mandates the country imposing safeguard measures to comply with the statutory requirement of prior consultations with the exporting countries so as to achieve the object set in the Agreement. Art. 12.3 states that ‘*A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned...*’ The imperative and mandatory nature of the word ‘*shall*’<sup>1</sup> makes the provision a condition pre-requisite for taking measures.
3. Art. 12.3 states that an ‘*adequate opportunity*’ for consultations is to be provided ‘*with a view to*’ review the information furnished, exchange views on the measure and reach an understanding with exporting members on an equivalent level of concessions.<sup>2</sup> In view of these objectives, Art. 12.3 requires a member proposing to apply a safeguard measure to provide exporting members with sufficient information and time to allow for the possibility, through consultations, for meaningful exchange on the issues identified.<sup>3</sup>
4. The WTO Panel in its landmark precedent has rejected any inconsistencies with its obligations under Art. XIX:2 and Arts. 8.1 and 12.3 of the AoS, that is, countries failing to provide the complainants with an adequate opportunity to carry out prior consultations

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<sup>1</sup> *Black’s Law Dictionary*, 5<sup>th</sup> Ed., 1979, West Publishing Co.

<sup>2</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 8.202, WT/DS166/AB/R (Jan. 19, 2001) [hereinafter US – Wheat Gluten]

<sup>3</sup> Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, ¶ 7.440, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R (Feb. 22, 2012) [hereinafter Dominican Republic – Safeguard Measures]

and to obtain an adequate means of trade compensation.<sup>4</sup> It follows from the text of Art.12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure.<sup>5</sup>

5. In the present case, on the basis of internal initiation of investigation, the NTC of Puerto Sombra imposed provisional safeguard measures on imports of the product concerned on 2<sup>nd</sup> August, 2016. As these consultations are meant to be '*prior consultations*' on the proposed safeguard measure, they must precede the application of a safeguard measure.<sup>6</sup> Based on the initial investigation prior to making a determination through consultations with the exporting countries, Puerto Sombra imposed the provisional safeguard measures and further decided to impose definitive safeguard measures, contrary to its obligations under the AoS.
6. The contracting party taking action under Art.XIX must give notice in writing to the contracting parties before taking action. Also, it must give an opportunity to contracting parties substantially interested to consult with it.<sup>7</sup> The notification by Puerto Sombra to the WTO in regard to the imposition of the provisional safeguard measures under Art. 12.4, was made on 15<sup>th</sup> August, 2016. It also invited member countries for consultations. This notification and giving of opportunity for prior consultation with the exporting countries was made after a delay of 13 days.
7. The timing of the final notification in *Korea- Dairy*<sup>8</sup> was found inconsistent with Art.12.3 since it was made after the application of the safeguard measure and therefore did not provide the other affected members with sufficient time to prepare and enter into the consultations.
8. Members proposing to apply a safeguard measure should hold those consultations well before the implementation of a safeguard measure so that the results of those

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<sup>4</sup> Panel Report, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe*, ¶ 7.314, WT/DS202/R (Oct. 29, 2001) [hereinafter US – Wire Rod and Line Pipe]

<sup>5</sup> US – *Wheat Gluten*, *supra* note 2, ¶ 136.

<sup>6</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, ¶ 7.534, WT/DS468/R (July 20, 2015) [hereinafter Ukraine - Passenger Cars]

<sup>7</sup> *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Art. XIX of the GATT*, ¶ 42, GATT/CP/106 (Oct. 22 1951) [hereinafter Hatter's Fur]

<sup>8</sup> Panel Report, *Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products*, ¶ 7.120, WT/DS98/R (June 21, 1999) [hereinafter Korea - Dairy]

consultations can be incorporated in its implementation.<sup>9</sup> The period of 17 days between the announcement of the final USA safeguard measure and its implementation in *U.S.-Line Pipe*<sup>10</sup> was held to be insufficient for entering into new consultations and it was concluded that the adequate opportunity for consultations was not provided.

9. Puerto Sombra opened up for the consultations with other exporting members with regard to the safeguards measures 13 days after its imposition. However, Art. 12.3 gives affected members a right to an adequate opportunity for consultations before, not after, a safeguard measure is applied.<sup>11</sup> Hence, Puerto Sombra's imposition of safeguards is in clear violation of Art. XIX: 2, GATT and Art. 12.3, AoS.

#### **[I.B.] NON-COMPLIANCE WITH ART. 12.4, AOS**

10. Art. 12.4, AoS states that '*A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Art. 6, consultations shall be initiated immediately after the measure is taken.*' Art. 12.4 makes it mandatory for the members to notify the Committee on Safeguards immediately regarding the proposal of imposition of safeguard measure, i.e. before its imposition.<sup>12</sup> This allows any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure and/or compensation.<sup>13</sup>
11. The ordinary meaning of the term '*immediately*' introduces a certain notion of urgency.<sup>14</sup> The defence of notifying the Committee '*as soon as practically possible*' was not equivalent to '*immediately*,' and found certain delays in notifications unacceptable.<sup>15</sup> Hence, no exigency or critical circumstances can justify the failure of notifying the Committee on Safeguards of the imposition of safeguard measures.
12. Puerto Sombra notified the WTO of the initiation of the safeguard investigation and the imposition of the provisional safeguard measure on 15<sup>th</sup> August, 2016 under Arts. 12.1(a) and 12.4, AoS, respectively. A delay of 13 days was witnessed in such a notification. In the present case, since Puerto Sombra did not comply with the provision of notifying the

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<sup>9</sup> Panel Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 8.206, WT/DS166/R (July 31, 2000) [hereinafter US - Wheat Gluten]

<sup>10</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 7.308, WT/DS202/R (Oct. 29, 2001) [hereinafter US – Line Pipe]

<sup>11</sup> *Ukraine – Passenger Cars*, *supra* note 6, ¶ 7.521

<sup>12</sup> *Korea—Dairy*, *supra* note 8, ¶ 7.128

<sup>13</sup> *US – Wheat Gluten*, *supra* note 9, ¶ 8.204

<sup>14</sup> *US – Wheat Gluten*, *supra* note 9, ¶ 8.193

<sup>15</sup> *Korea – Dairy*, *supra* note 8, ¶ 7.134

WTO through the Committee on Safeguards of imposing provisional safeguards before such imposition, therefore, Puerto Sombra is in violation of Art. 12.4, AoS.

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## **II: PUERTO SOMBRA'S IMPOSITION OF PROVISIONAL SAFEGUARD MEASURE IS INCONSISTENT WITH ART. 6, AoS**

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**13.** Art. 6, AoS authorizes the imposition of provisional safeguards on the fulfillment of certain requirements. It is contended that there is no reasoned or adequate explanation in the provisional determination demonstrating the existence of the aforementioned requirements, namely: *[II.A.]* critical circumstances and *[II.B.]* a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.

### **[II.A.] THE NTC FAILED TO ESTABLISH THE EXISTENCE OF CRITICAL CIRCUMSTANCES**

**14.** It is contended that the NTC has failed to *[II.A.1.]* identify critical circumstances as an additional standard and *[II.A.2.]* ALTERNATIVELY, *assuming but not admitting* that a description of the alleged causal link can be equated with that of critical circumstances, the NTC has failed to reasonably or adequately explain that the circumstances in existence meet the threshold required.

**15.** Critical circumstances are defined in the AoS as those in which ‘*delay would cause damage which it would be difficult to repair*’. The key terms in the statement, namely, critical and damage, mean, having the potential to become disastrous at a point of crisis<sup>16</sup> and physical harm that impairs the value, usefulness, or normal function of something,<sup>17</sup> respectively. Such circumstances include those in which a significant increase in imports leads to significant loss of employment and closure of domestic producers.<sup>18</sup>

**16.** Art. 20.6 of the SCMA defines critical circumstances as injury which is difficult to repair, caused by massive imports in a relatively short period. As the WTO law is a single undertaking developed in various intertwined and integrated agreements,<sup>19</sup> the provisions of the SCMA is relevant to the AoS. Hence, in the present case emphasis is laid the data of the recent period, i.e., from January to June, 2016.

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<sup>16</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 232-233

<sup>17</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 248

<sup>18</sup> WOLFRUM, STOLL & KOEBELE, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO TRADE REMEDIES, p. 337, Vol. 4 (2008)

<sup>19</sup> Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, ¶ 12, WT/DS22/AB/R (Feb. 21, 1997) [hereinafter Brazil – Desiccated Coconut]

***[II.A.1.] Failure of the NTC to establish critical circumstances as an additional standard***

17. Critical circumstances do not fall within the ambit of ‘serious injury’ or ‘threat to serious injury’, if it did; the inclusion of the aforementioned terms in Art. 6 would be redundant. The suggested format for the notification of provisional safeguards<sup>20</sup> also requires the member imposing the safeguard to specify the basis for the preliminary determination of serious injury and determination of critical circumstances separately, supplementing the fact that they are distinct in nature. Hence, critical circumstances serve as an additional standard to be established by the competent authority before imposing provisional safeguards.
18. The NTC equates critical circumstances with a description of the alleged causal link between increased imports and serious injury being faced by the domestic industry.<sup>21</sup> The existence of a causal link is a necessary element of the preliminary determination of serious injury which is distinct from critical circumstances. Hence, by terming the description of a causal link and critical circumstances as identical, it fails to recognize and establish the additional standard necessarily required to prove critical circumstances.

***[II.A.2.] ALTERNATIVELY, NTC’s primary contentions stand invalidated***

19. ALTERNATIVELY, *assuming but not admitting*, that a description of the alleged causal link can be equated with that of critical circumstances, the NTC has failed to reasonably or adequately explain that the circumstances in existence meet the threshold illustrated above. The primary contentions of the NTC establishing critical circumstances will be invalidated by analyzing: *[II.A.2.a.]* the fall in the value of profitability and other economic indicators of the domestic industry and *[II.A.2.b.]* the relationship of the same with the increased imports.

***[II.A.2.a.] The fall in the value of profitability and other economic indicators of the domestic industry is as follows:***

20. A) *Profitability*: In first six months of 2016, the landed value of the imports was 80, the cost of production and selling price of the domestic industry was 110 and 91 respectively. Hence, the claim that the domestic industry experienced a fall in profitability to -20 as it was forced to lower its selling price to match the landed value is invalidated as follows.

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<sup>20</sup> Committee on Safeguards, *Suggested Formats for Notifications under the AoS*, G/SG/W/1, Annexure Part VII (Feb. 23, 2003)

<sup>21</sup> ¶ 35, Exhibit 2, p. 21, Moot Proposition

- 21.** In 2014 the landed value, cost of production and selling price were all equal to 100. Any increase in the cost of production since then is a result of the increase in fixed costs and depreciation costs due to the huge debt incurred by the domestic industry to increase its capacities in 2015. Thus, any fall in profitability because of the difference between the selling price and the increased cost of production, is a consequence of the financial conditions of the domestic industry. This is established when the landed value in 2016, i.e. 80, is compared with the cost of production before the debt was incurred, i.e. 100; if the domestic industry's selling price matched the landed value, the fall in profitability would have been drastically less.
- 22.** The substantial difference in the fall in profitability when the debt was incurred and the hypothetical situation when it was not, is indicative of the independence of the same from a fall in the landed value. Additionally, in the provisional determination, the NTC failed to acknowledge that the domestic industry had incurred a debt, it was recorded in the final determination.

**23. B) *Fall in other economic indicators***

- i. *Market share***- The market share of the domestic industry has decreased from 26% to 24% in the first six months of 2016. The decrease of 2% has not been explained to be significant enough to 'capture' the market share of the domestic industry; to meet the threshold described above.
- ii. *Productivity per day per employee***- The productivity per day per employee has decreased from 113 to 111 in 2016. This marginal decrease has not been explained to be significant enough to establish the urgent situation as described above. Further, this value is not the lowest one illustrated in the period of investigation.
- iii.** Significant economic indicators like production, sales and capacity utilization of the domestic industry have shown substantial positive increases from 133 to 147, 125 to 133 and 67% to 73% in 2016. Hence, this supplements the contention that the circumstances described are not of 'critical' nature.

**[II.A.2.b.] *Relationship between increase in imports and critical circumstances***

- 24.** The NTC has attributed the fall in profitability, capacity utilization, market share and productivity per day per employee to an increase in imports. It has failed to reasonably or adequately establish that the fall in the aforementioned indicators is significant enough to establish critical circumstances as described above. Hence, the following attribution of the same to an increase in imports is of no consequence.

25. A competent authority's explanation is reasoned when the explanation fully addresses the nature and complexities of the data, and responds to other plausible interpretations of that data.<sup>22</sup> It does not fulfill the requisite parameters when such an explanation is insufficient in the light of a plausible alternative explanation of the facts.<sup>23</sup> Additionally, it is insufficient to present data and state conclusions as there is a need for a reasoned explanation linking the data to the conclusion.<sup>24</sup> Further, neither a mere assertion<sup>25</sup> nor the simple repetition of facts and legal provisions amounts to the required reasoned or adequate explanation.<sup>26</sup> It must also be noted that an ex post explanation cannot remedy the deficiencies in the competent authority's determination.<sup>27</sup>
26. By failing to identify critical circumstances as an additional standard the NTC has failed to fully address the nature and complexities of data. From the analysis of the fall in profitability, it is clear that the data responds to at least one other plausible interpretation, in light of which, its explanation is not adequate. In respect of the economic indicators the NTC's statements amount to mere assertions as it has not illustrated the urgency of the circumstances. Hence, the final conclusion of critical circumstances amounts to the juxtaposition of legal provisions with facts, which does not meet the standard of the requisite explanation that requires a link between the data and the conclusions drawn.

**[II.B.] NTC'S PRELIMINARY DETERMINATION DOES NOT FULFILL THE REQUISITE CRITERION UNDER ART. 6, AoS**

27. The NTC's claim in the preliminary determination illustrated that there is *[II.B.1.]* clear evidence that *[II.B.2]* increased imports have caused serious injury, does not fulfil the requisite criterion established under Art. 6, AoS.

***[II.B.1.] Non-existence of clear evidence***

28. The hasty imposition of safeguards in a very short period of time without any basis in 'clear evidence' has been recognized as a systemic concern regarding the application of

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<sup>22</sup> Panel Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 10.23, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS/2558/R, WT/DS259/R (July 11, 2003) [hereinafter US – Steel Safeguards]

<sup>23</sup> *US – Steel Safeguards*, *supra* note 22, ¶ 10.23

<sup>24</sup> Panel Report, *Argentina – Safeguard Measure on Imports of Footwear*, ¶ 8.225, WT/DS121/R (June 25, 1999) [hereinafter Argentina – Footwear (EC)]

<sup>25</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Import of Circular Welded Carbon Quality Line Pipe From Korea*, ¶ 220, WT/DS202/AB/R (Feb. 15, 2002) [hereinafter US – Line Pipe]

<sup>26</sup> Panel Report, *Argentina – Definitive Safeguard Measures on Imports of Preserved Peaches*, ¶ 7.61, WT/DS238/R (Feb. 14, 2003) [hereinafter Argentina – Preserved Peaches]

<sup>27</sup> *Ukraine – Passenger Cars*, *supra* note 6, ¶ 7.27

safeguards.<sup>28</sup> The terms clear and evidence mean, unambiguous, manifest,<sup>29</sup> and the available body of facts or information indicating whether a proposition is valid<sup>30</sup> respectively.

- 29. A) Annualized data-** From the definition above it can be inferred that evidence is primarily based on facts. Facts are things that are known or proved to be true.<sup>31</sup> Annualized means recalculated as an annual rate.<sup>32</sup> Therefore, it is a projection of a future value based on the past. Since the NTC has made a determination of serious injury as opposed to the threat of the same, such a projection cannot be held to be a fact, let alone a 'clear' fact, on which the NTC may rely on to justify the imposition of safeguard measures. The invalidity of annualized data especially affects the determination of critical circumstances as the NTC has made extensive use of annualization to compute recent data.
- 30. B) Discrepancy in the report-** The initial trend analysis recorded a 32% increase in imports between 2015-16, while a later analysis recorded a 27% increase in the same time period. On a mathematical calculation using the import volumes recorded, it is found that the value of 27% is accurate. Hence, the discrepancy in the provisional determination is indicative of the fact that the data of the NTC is not even reliable, let alone 'clear' in nature.
- 31. C) Incomplete data-** The data was incomplete because although the AoS is silent as to the selection of the period of investigation<sup>33</sup> and the discretion as to the method of evaluation of data<sup>34</sup> lies with the member, the member must choose the most appropriate tool<sup>35</sup> to evaluate data. Further, the sensitivity of the outcome of the comparison to a one year shift of its start or end year analysis to the particular end points of the investigation period must be considered.<sup>36</sup> As Puerto Sombra reduced its tariffs from 5% to 15% on the 31<sup>st</sup> of December, 2013 and the effects of the same were reflected in 2014, the NTC's choice of investigation period from 2014 to 2016, does not allow for a comparison between the data presented and the data before the tariff reduction. The data prior to the tariff reduction is

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<sup>28</sup> Committee on Safeguards, *Systemic Concerns with Certain Safeguard Proceedings*, G/SG/W/226, p. 1 (Oct. 5, 2012)

<sup>29</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 177

<sup>30</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 343

<sup>31</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 356

<sup>32</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 34

<sup>33</sup> *US - Line Pipe*, *supra* note 10, ¶ 7.196

<sup>34</sup> *US - Wheat Gluten*, *supra* note 9, ¶ 8.69

<sup>35</sup> *US - Steel Safeguards*, *supra* note 22, ¶ 10.294

<sup>36</sup> *Argentina - Footwear (EC)*, *supra* note 24, ¶ 8.162



significant in light of the claim that the increased imports and serious injury to the domestic industry was a consequence of the aforementioned tariff reduction. Hence, the absence of the aforementioned statistics renders the data incomplete and the method of evaluation inappropriate, as a result of which it is established that the determination of the NTC is not based on 'clear' evidence.

- 32.** The aforementioned factors vitiating the clearness of the data used, undermines the validity of the conclusions drawn by the NTC on the basis of the same.

***[II.B.2.] Increased imports have not caused serious injury***

- 33.** It is contended that in the preliminary determination the increased imports have not caused serious injury. Art. 4.1(a) defines serious injury as significant overall impairment in the position of a domestic industry. In order to make such a determination, **(A)** at least the indicators mentioned under Art.4.2 (a) must be examined, along with an adequate explanation of how the facts as a whole supported the determination made.<sup>37</sup> The establishment of a **(B)** causal link under Art.4.2 (b) denoting a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury,<sup>38</sup> is a necessary prerequisite. Further, the NTC failed to establish the existence of unforeseen developments and the effect of GATT obligation incurred.
- 34. A)** The relative and absolute increase in imports over the period of investigation was 6% and 52% respectively. The market share, productivity per day per employee and capacity utilization of the domestic industry marginally decreased. However, significant indicators such as production, sales, productivity of the industry and employment have shown a positive growth. The NTC has failed to adequately and reasonably establish that there exists overall impairment to the domestic industry when the aforementioned indicators depict a positive increase, while the indicators that have declined, have only decreased marginally.
- 35. B)** Since the indicators do not illustrate the requirements of serious injury, the possibility of a causal link between the same and an increase in imports is negated. Further, the NTC has failed to adequately attribute injury to the deplorable financial condition of the domestic industry and monopoly of bauxite mines which have contributed to the serious injury.

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<sup>37</sup> *Korea - Dairy*, supra note 8, ¶ 7.55

<sup>38</sup> *US - Wheat Gluten*, supra note 2, ¶ 67

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### III: PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. XIX:1(A), GATT

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36. As prescribed by Art. XIX, the increased imports that caused or threaten to cause serious injury have not been a result of *[III.A.]* unforeseen developments and *[III.B.]* the effect of GATT obligations.

#### **[III.A.] THE NTC FAILED TO ESTABLISH THE EXISTENCE OF UNFORESEEN DEVELOPMENTS**

37. It is contended that the developments characterized by the NTC as being unforeseen are *[III.A.1.]* not extraordinary in nature and *[III.A.2.]* were in existence at the time of reduction of tariffs. 'Unforeseen developments' must be interpreted as unexpected developments<sup>39</sup> occurring after the negotiation of the relevant tariff concession, which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.<sup>40</sup> While making a distinction between unforeseen and unforeseeable<sup>41</sup> it has been impliedly confirm that the question of unforeseen developments is a question of 'absence of foresight'.<sup>42</sup> With modern statistical, forecasting techniques, only very particular changed circumstances will satisfy this requirement.<sup>43</sup>

#### ***[III.A.1.] Developments characterized by the NTC are not unforeseen***

38. Import restrictions imposed when a safeguard action is taken are extraordinary in nature and when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.<sup>44</sup> The wording of Art. XIX:1(a), GATT is clearly not the language of ordinary events in routine commerce<sup>45</sup> and hence a recession triggered by the long-lasting global financial crisis with its economical distorting consequences can never constitute an unforeseen development.<sup>46</sup> Therefore, the NTC's explanation that the recession and its effects constitute unforeseen developments is not valid as it does not

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<sup>39</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶ 92, WT/DS/121/AB/R (Dec. 14, 1999) [hereinafter *Argentina – Footwear (EC)*]

<sup>40</sup> *Hatter's Fur*, *supra* note 7, ¶ 9; *Argentina - Footwear (EC)*, *supra* note 39, ¶ 96

<sup>41</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Certain Steel Products Steel Products*, ¶ 330, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS/2558/R, WT/DS259/R (Nov. 10, 2003) [hereinafter *US – Steel Safeguards*]

<sup>42</sup> FERNANDO PIROLA, *THE CHALLENGE OF SAFEGUARDS IN THE WTO*, p. 143 (1<sup>st</sup> ed., 2014)

<sup>43</sup> Hanna Mykolska, *Recession, Technological Changes and Other Factors as Unforeseen Developments*, Mile 11 Thesis, World Trade Institute, p. 18 (Sept. 2011)

<sup>44</sup> *Argentina – Footwear (EC)*, *supra* note 39, ¶ 94

<sup>45</sup> Appellate Body Report, *Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products*, ¶ 86, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea – Dairy*]; *Argentina – Footwear (EC)*, *supra* note 39, ¶ 93

<sup>46</sup> Committee on Safeguards, *Minutes of The Regular Meeting Held On 30 April 2001*, ¶ 4, G/SG/M/17, (April 30, 2001)

fulfill the requirement of being ‘extraordinary’ in nature, by virtue of the substantial gap of four years between the period of recession and tariff reduction.

**[III.A.2.] Developments characterized by the NTC existed during reduction of tariffs**

- 39.** It is contended that the circumstances alleged as being unexpected were in existence at the time of the reduction of tariffs by Puerto Sombra. Puerto Sombra reduced its tariffs for the product concerned, which were below its bound rate, from 15% to 5%, from the 31<sup>st</sup> December, 2013. Hence, at the time of this reduction the global recession, which began in 2009, had been in existence for four years as a consequence of which, the degree to which this would affect conditions of competition could and should have been foreseen. Further, the high demand for the product concerned in Puerto Sombra, evident from the increase in infrastructural activity as a result of the major changes in its developing economy beginning in 2011<sup>47</sup> and the uniformly increasing domestic demand of about 100,000 million MT each year, was also indisputably in existence. Therefore, as these circumstances were already in existence, they cannot be termed as ‘unforeseen’ developments.
- 40.** To meet the standard of review, the competent authority must provide a reasoned or adequate explanation illustrating the existence of the requirements.<sup>48</sup> The standards of the requisite explanation mentioned in Issue [III] are applicable here.<sup>49</sup> The examination of the NTC amounts to mere assertions as it failed to link the data examined to the conclusions made. Hence, it is established that the NTC did not make a proper determination or provide a reasoned or adequate explanation in its report justifying the existence of unforeseen developments. Therefore, since the NTC failed to make the requisite determination of unforeseen developments, the alleged link of the same with an increase in imports is of no consequence. Mere increased imports, as such, do not constitute the unforeseen developments.<sup>50</sup>
- 41.** ALTERNATIVELY, *assuming but not admitting*, that the NTC has established the existence of unforeseen developments, it has failed to provide a reasoned or adequate explanation to establish the requisite logical connection<sup>51</sup> between the increase in imports and the

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<sup>47</sup> ¶ 1, p.1, Moot Proposition

<sup>48</sup> *US – Steel Safeguards*, *supra* note 41, ¶ 289-291

<sup>49</sup> *US – Steel Safeguards*, *supra* note 41, ¶ 276

<sup>50</sup> Panel Report, *United States – Safeguard Measures on Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 7.16, WT/DS177/R, WT/DS178/R (Dec. 21, 2000) [hereinafter *US – Lamb*]; *Argentina – Preserved Peaches*, *supra* note 26, ¶ 7.17-7.18

<sup>51</sup> *US - Steel Safeguards*, *supra* note 22, ¶ 10.104

aforementioned developments. The NTC has stated that there was coincidence between the increase in imports and the developments. Coincidence<sup>52</sup> means a ‘remarkable concurrence of events or circumstances without apparent causal connection’. Hence, simply coincidence does not reflect the requisite logical connection between unforeseen developments and the increase in imports.

**[III.B.] THE NTC FAILED TO ESTABLISH THE EXISTENCE OF THE EFFECT OF GATT OBLIGATIONS INCURRED**

- 42.** It is contended that the NTC did not demonstrate the existence of a GATT obligation as there is no obligation on WTO members to continually reduce tariffs below the bound rate. The effect of obligations incurred means that it is for the member imposing the safeguard to identify in its report the existence of the specific obligations under the GATT 1994 and the link of the same with the increase in imports causing serious injury to its domestic industry.<sup>53</sup> This condition is not satisfied if the injury would have occurred in the absence of some action by the member concerned, which would permit the better flow of imports.<sup>54</sup>
- 43.** The NTC has contended that in pursuance of the apparent obligation to reduce tariffs below the bound rate, Puerto Sombra had lowered its tariffs, bound at 40%, from the original applied level of 15% to 5%, from the 31<sup>st</sup> December, 2013. It records that the increase in imports as compared to the previous year in each case was 20%, 108%, 20% and 27% in 2013, 2014, 2015 and 2016 respectively.<sup>55</sup> It highlights that the increase in imports between 2013 and 2014 is a result of the reduction of the applied tariff on the product concerned.
- 44.** The WTO Agreement sets up tariff bindings for each country and sector, which require that the applied MFN tariff be less than or equal to the bound tariff. Tariff overhang is the gap between bound and the current MFN tariff.<sup>56</sup> If the MFN tariff is less than the bound tariff, then the government has the flexibility to increase the MFN tariff to protect the import market without paying costs; this is known as weak binding. The existence of

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<sup>52</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 167

<sup>53</sup> *Dominican Republic – Safeguard Measures*, *supra* note 3, ¶ 7.146, *Ukraine – Passenger Cars*, *supra* note 6, ¶ 7.196

<sup>54</sup> Jorge F. Perez-Lopez, *GATT Safeguards: A Critical Review of Art. XIX and its Implementation in Selected Countries*, 23 Case W. Res. J. Int'l L. 517, p. 521 (1991)

<sup>55</sup> ¶ 32, Exhibit 2, Page 20, Moot Proposition

<sup>56</sup> Youngwoo Rho, *Tariff Overhang and Temporary Trade Barrier: Substitutes or Complements?*, *Journal of Economic Literature*, p. 1 (2001)

tariff overhang is especially prevalent in developing countries.<sup>57</sup> It contributes to unpredictability in the multilateral trading system<sup>58</sup> and hampers trade liberalization as negotiations take place at bound levels and an agreement to liberalize will not amount to an increase in market access unless the negotiated reductions in tariffs are below the applied rate.<sup>59</sup>

45. In light of the negatives of a tariff overhang, it is clearly established that WTO members should not resort to the aforementioned weak binding. The NTC's assumption that there is the apparent obligation to continually reduce tariffs below the bound rate to promote global trade, effectively increasing the tariff overhang and the consequent negative effects that stem from the same, is false. Hence, since the NTC failed to determine the existence of a GATT obligation, the alleged and necessary link of the same with an increase in imports is of no consequence.
46. ALTERNATIVELY, *assuming but not admitting*, that the NTC demonstrated the existence of a GATT obligation, the sustained increase in imports was not the result of the GATT obligation. The GATT obligation of reducing the tariffs to 5% was incurred on the 31<sup>st</sup> December, 2013. The subsequent 108 % increase in imports recorded in 2014 was a result of the aforementioned reduction. However, in 2015 and 2016, the increase in imports fell substantially and was 20% and 27% respectively, which is roughly proportionate to the increase in domestic consumption which was 21% and 24% respectively. Even if the domestic industry fully utilized its capacities and thereafter sold all its produce, there would still be a demand supply gap of 380,000 MT, which is also the value of the import volume in 2016.<sup>60</sup> In light of the proportionality between the increase in imports and consumption, this demand supply gap implies that the increase in imports was a result of the increase in domestic consumption that the domestic industry did not have the capacity to cater to.

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<sup>57</sup> Mohamed Hedi Bchir, Sébastien Jean and David Laborde, *Binding Overhang and Tariff-Cutting Formulas*, Review of World Economics, Vol. 142, No. 2, p. 210 (Jul., 2006)

<sup>58</sup> Krzysztof J. Pelc, *Why Do Some Countries Get Better WTO Accession Terms Than Others?*, International Organization, Vol. 65, No. 4, p. 643 (2011)

<sup>59</sup> WILLIAM ALEXANDER KERR, JAMES D. GAISFORD, HANDBOOK ON INTERNATIONAL TRADE POLICY, p. 218 (2007)

<sup>60</sup> ¶ 32, Exhibit 2, Page 20, Moot Proposition

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#### **IV: PUERTO SOMBRA IS INCONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 2.1, 4.1(A), 4.2(A) AND 4.2(B), AoS**

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47. As the AoS clarifies and reinforces Art. XIX of the GATT,<sup>61</sup> the corresponding provision in the Agreement with regard to the requirements enumerated under Art.XIX:1(a), namely, of the product being imported in such increased quantities and under such conditions so as to cause or threaten to cause serious injury is Art. 2.1. Art. 2.1 sets forth the legal requirements, i.e. the conditions, for application of a safeguard measure, while Art. 4.2 develops the operational aspects of these requirements.<sup>62</sup> The conditions set forth in Art. 2.1 are: *[IV.A.]* such increased quantities of the product being imported, under such conditions as to cause or threaten to cause *[IV.B.]* serious injury to the domestic industry that produces like or competitive products. Further, *[IV.C.]* the extent and duration of the safeguard measure is not appropriate.

##### **[IV.A.] THE NTC FAILED TO ESTABLISH THE EXISTENCE OF ‘SUCH’ INCREASED QUANTITIES OF IMPORTS**

48. The non- existence of unforeseen developments and GATT obligations as established in Issue *[III.]* renders the increase in imports of no consequence. The NTC’s explanation is not adequate in light of other plausible interpretations of data, hence it has failed to properly determine, with a reasoned or adequate explanation, the existence of ‘*such*’ increased imports. Further, the discrepancy identified in *[II.B.1.]* indicates its failure to accurately examine the nature and complexities of the data.

##### **[IV.B.] THE NTC FAILED TO ESTABLISH THE EXISTENCE OF SERIOUS INJURY**

49. Under Art.4.1(a), serious injury is defined as significant overall impairment in the position of a domestic industry. The caution given to Panels to be mindful of the very high standard implied by these terms<sup>63</sup> is indicative of the lofty threshold to be met while making a determination of the same. It is contended that the NTC has failed to make a proper determination of serious injury because *[IV.B.1.]* it did not analyse all the relevant factors, *[IV.B.2.]* did not support its conclusions with adequate reasoning and *[IV.B.3.]* did not establish a causal link between the increased imports and serious injury suffered.

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<sup>61</sup> Appellate Body Report, *United States – Safeguard Measures On Imports Of Fresh, Chilled Or Frozen Lamb Meat From New Zealand And Australia*, ¶ 70, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001) [hereinafter, US – Lamb]

<sup>62</sup> *Argentina - Footwear (EC)*, *supra* note 24, ¶ 8.249

<sup>63</sup> *US - Lamb*, *supra* note 61, ¶ 124, 126

***[IV.B.1.] The NTC did not analyse all the relevant factors***

**50.** The competent authority must analyse all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry,<sup>64</sup> the factors in Art. 4.2(a) serve as the minimum standard to be evaluated.<sup>65</sup> Besides the factors mentioned in Art. 4.2 (a), the NTC analyzed only one other factor, the Total Consumption in Puerto Sombra. Hence, it failed to fulfill its obligation of evaluating all relevant factors as it has not considered the: (a) financial condition of the domestic industry, and (b) monopoly over bauxite mines, both of which have a bearing on the situation and are discussed in *[IV.B.3.]*

***[IV.B.2.] The NTC did not provide a reasoned or adequate explanation to support its conclusions***

**51.** To support a proper determination of serious injury, the relevant factors must be examined along with an adequate explanation of how the facts as a whole supported the determination made.<sup>66</sup> It is contended that the NTC has not provided a sufficient analysis of the factors it has considered to support its conclusion of serious injury.

**52. A) Share of the domestic market taken by the increased imports** - The share of imports in total consumption was stable at 53% during 2014 and 2015. In 2016 it increased by 3% to 56%.<sup>67</sup> The NTC does not provide a reasoned or adequate explanation for how an increase of merely 3% amounts to the imports having ‘captured’ a ‘significant’ portion of the market share of the domestic industry.

**53. B) Changes in the level of capacity utilization** - The capacity utilization of the domestic industry has decreased from 75% in 2014 to 67% in 2015 and subsequently increased to 73% in 2016.<sup>68</sup> The NTC further states that the domestic industry has stabilized its capacities to ‘a great extent’, but the capacity utilization was still below the original level in 2014. The words to ‘a great extent’ imply that the capacities have not been fully stabilized yet. Hence, the 6% increase in 2015-16, reflects the aforementioned stabilization of capacities. Till the capacities are fully stabilized the domestic industry cannot expect the capacity utilization to reach or surpass its level during the base year.

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<sup>64</sup> *US - Wheat Gluten*, *supra* note 2, ¶ 51-53

<sup>65</sup> *Argentina-Footwear (EC)*, *supra* note 39, ¶ 136

<sup>66</sup> *Korea-Dairy*, *supra* note 8, ¶ 7.55

<sup>67</sup> ¶ 16, Exhibit 2, Page 15, Moot Proposition

<sup>68</sup> ¶ 19, Exhibit 2, Page 15, Moot Proposition

Additionally, in light of the requirement that a determination of serious injury must pertain to the recent past,<sup>69</sup> the increase in capacity utilization is especially significant.

- 54. C) *Changes in the levels of productivity and employment*** - The productivity per day of the industry as a whole and the level of employment in the domestic industry has significantly increased from 428.57 MT to 628.57 MT and 100 to 130 between 2014 and 2016, respectively.<sup>70</sup> The NTC's non consideration of productivity and employment while making its conclusion of serious injury, in the absence of an explanation for the same, is indicative of the inadequacies in the NTC's analysis.
- 55.** The productivity per day per employee has increased from 100 in 2014 to 113 in 2015 and marginally decreased to 111 in 2016. The NTC has termed this factor as decreasing as it failed to consider the intervening increase in 2015 and the 11% increase between 2014 and 2016. Hence, it has failed in its obligation to consider the performance of this factor in relation to the whole investigation period. Further, since an examination of 'productivity' normally means the overall productivity of the industry<sup>71</sup>, the importance of criteria of productivity per day per employee as a determining factor has decreased.
- 56. D) *Changes in the level of sales, production and profits and losses*** - The sales and production of the domestic industry have significantly increased by 40,000 MT and 70,000 MT, respectively, in the period of investigation. The profitability has decreased from 100 in 2014 to 50 in 2015 and finally to -20 in 2016. The NTC has analyzed profitability instead of the mandated requirement of profits and losses. It has not provided indexed figures for the same and therefore has failed to appropriately examine this factor.
- 57.** It will be established in *[IV.B.3.c.]* that the requisite causal link between imports and fall in profitability was absent. Hence, the relationship between sales, production and profitability is of no consequence.
- 58.** In light of the increase in production, sales, demand, capacity utilization, productivity and employment; and the exclusion of productivity and employment in its final conclusion, it is contended that the facts as a whole did not support the determination of serious injury made. The exclusion of productivity and employment in the final conclusion of the NTC and the non consideration of the factors mentioned in *[IV.B.1.]* indicate its failure in examining the nature and complexities of the data.

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<sup>69</sup> *US – Wheat Gluten*, *supra* note 9, ¶ 8.81

<sup>70</sup> ¶ 20, Exhibit 2, Page 16, Moot Proposition

<sup>71</sup> *US – Wheat Gluten*, *supra* note 9, ¶ 8.44-8.45



59. Further, as demonstrated above, the data responds to other plausible interpretations and in light of the same, the explanation of the NTC is not adequate. Hence, the NTC has failed to provide a reasoned or adequate explanation to support a proper determination of serious injury.

***[IV.B.3.] The NTC failed to establish the existence of the requisite causal link***

60. The term causal link, in Art. 4.2 (b), denotes a relationship of cause and effect such that increased imports contribute to ‘bringing about’, ‘producing’ or ‘inducing’ the serious injury.<sup>72</sup> The demonstration of a causal link must be on the basis of ‘objective’ evidence or data.<sup>73</sup> The non reliability of the data as established in *[II.B.1.]* negates the existence of the requisite kind of evidence.

61. The establishment of a causal link incorporates<sup>74</sup>: *[IV.B.3.a.]* a coincidence analysis, *[IV.B.3.b.]* an analysis of the conditions of competition and *[IV.B.3.c.]* a non-attribution analysis. It is contended that the NTC has failed to properly determine or provide a reasoned or adequate explanation to establish the existence of the same.

***[IV.B.3.a.] The NTC failed to undertake the requisite coincidence analysis***

62. A coincidence analysis refers to the temporal relationship between movements in imports, both import volumes and import market shares, and movements in the injury factors.<sup>75</sup> Since a coincidence analysis is central to a causation analysis,<sup>76</sup> the absence of the same would create serious doubts as to the existence of a causal link and would require a very compelling analysis of why a causal link still is present.<sup>77</sup> It is necessary that such an analysis illustrates an ‘overall coincidence’ between the factors and imports.<sup>78</sup>

63. A) The NTC arrived at the conclusion that the increase in imports was sudden, sharp, significant and recent only on the basis of import volumes. A coincidence analysis requires import market shares to be compared with the injury factors as well. The unexplained absence of the same caused the NTC to reach an inaccurate conclusion. This is because the value of import market shares was stable throughout the period of investigation, till January to June 2016, where it marginally increased by 3%; and hence

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<sup>72</sup> *US - Wheat Gluten*, *supra* note 2, ¶ 209

<sup>73</sup> *US - Steel Safeguards*, *supra* note 41, ¶ 486

<sup>74</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 8.131

<sup>75</sup> *Argentina - Footwear (EC)*, *supra* note 24, ¶ 8.238

<sup>76</sup> *US - Steel Safeguards*, *supra* note 22, ¶ 10.299 – 10.300

<sup>77</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 8.237 – 8.238

<sup>78</sup> *US - Wheat Gluten*, *supra* note 9, ¶ 8.101

the movements between the injury factors and import market shares would not illustrate coincidence to the extent asserted by the NTC.

- 64. B)** The exclusion of productivity of the industry and employment by the NTC in its coincidence analysis, without providing the required explanation for the same, has prevented the NTC from accurately establishing the ‘overall’ coincidence required. Further, both these factors illustrate a simultaneous increase along with imports.
- 65.** Hence, the exclusion of the above factors establishes the NTC’s failure to fully examine the nature and complexities of the data.

**[IV.B.3.b.]** The conditions of competition did not support the NTC’s conclusions

- 66.** The determination under Art.2.1 that the increased imports are occurring ‘under such conditions’ has been interpreted to be a reference to the factors under Art.4.2(a) as well as other factors having a bearing on the overall situation of the domestic industry,<sup>79</sup> some examples of which are physical characteristics, quality, service, and a price analysis.<sup>80</sup> As aforementioned in [IV.B.], the NTC has failed to provide a reasoned or adequate explanation to support its analysis of injury factors. The NTC has primarily relied on an analysis between the landed value of imports and the cost of production, selling price and profitability of the domestic industry in its causation analysis. It has contended that a fall in profitability from 100 to -20 is a result of the fall in landed value and consequent decline in selling prices of the domestic industry.<sup>81</sup> This contention has been invalidated in [II.A.2.a]. It will be established in [IV.B.3.c.] that the competent authority has failed to establish a genuine link between the injury arising from the decline in profitability and the increase in imports.

**[IV.B.3.c.]** The NTC failed to undertake the requisite non attribution analysis

- 67.** It is established that the NTC failed to establish a genuine link between the injury due to a fall in profitability and the increase in imports as [IV.B.3.c.i.] it did not consider all the relevant factors that contributed to the injury suffered and [IV.B.3.c.ii.] failed to establish that the injury caused by those other factors was not attributed to imports.

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<sup>79</sup> *US - Wheat Gluten*, supra note 2, ¶ 78

<sup>80</sup> *Argentina - Footwear (EC)*, supra note 24, ¶ 8.251-8.252

<sup>81</sup> ¶ 25, Exhibit 2, Page 17, Moot Proposition

**[IV.B.3.c.i.]** *The NTC failed to consider certain relevant factors*

- 68.** It is mandated that the competent authority establish explicitly, on the basis of a reasoned and adequate explanation, that injury caused by those other factors was not attributed to imports.<sup>82</sup> This mandate cannot be fulfilled unless the aforementioned other factors are considered by the competent authority. It is contended that the NTC has not fulfilled this mandate because it failed to consider the following factor in its entirety:
- 69.** *Monopoly over bauxite mines:* An article in a Puerto Sombra newspaper highlighted the corruption prevalent in the tenders for bauxite mines, a key raw material for the production of the product concerned. This article quoted the CEO of Kimp Aluminum Corporation, one of the producers that comprised of the domestic industry, as accepting that the high price of bauxite on account of a monopoly held by Baux Corporation is a major reason for the inability of the domestic industry to compete with imports.<sup>83</sup>

**[IV.B.3.c.ii.]** *The NTC failed to attribute injury to the other factors*

- 70.** Even though the AoS does not prescribe any legal test to be followed in complying with this objective,<sup>84</sup> the injury caused by increased imports must be distinguished from that caused by other factors and be accordingly attributed. Moreover, the competent authority must determine whether there exists a causal link, involving a genuine substantial relationship, between increased imports and serious injury.<sup>85</sup>
- 71.** Several interested parties raised the contention that the domestic industry is stressed under a huge amount of debt incurred on account of borrowings to expand its capacity, high interest rates and consequent increases in fixed costs and high depreciation costs.<sup>86</sup> It is contended that the NTC has not fulfilled the aforementioned obligation with respect to the financial health of the domestic industry. The inadequate treatment of this factor by the NTC in the *(A)* provisional determination and *(B)* final determination is as follows.
- 72. A)** In the provisional determination, the NTC did not disclose the vital fact that the domestic industry had borrowed to increase its capacities, diluting any other explanation put forth in relation to this factor. Further, the statements made by it with relation to the capacity utilization and cost of production of the domestic industry, indicate that any injury suffered due to an increase in capacities has been largely mitigated. Hence, the NTC has failed to appropriately attribute injury to these factors.

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<sup>82</sup> *US - Line Pipe*, *supra* note 25, ¶ 216

<sup>83</sup> ¶ 11, Page 3, Moot Proposition

<sup>84</sup> *US - Steel Safeguards*, *supra* note 22, ¶ 10.328

<sup>85</sup> *US - Steel Safeguards*, *supra* note 22, ¶ 10.326

<sup>86</sup> ¶ 7 i(d), ii(b), Exhibit 3, Pages 24 – 25, Moot Proposition

- 73. B)** In the final determination, the NTC's single sentence mention of this factor was nothing more than a mere assertion. This statement does not provide any indication as to the nature and extent of injury that can be attributed to this factor and fails to explicitly establish that the injury caused by factors other than increased imports is not attributed to the same.
- 74.** Conclusively, the failure of the NTC to fully address the complexities and nature of the relevant data and the inadequacy of their explanation in light of the plausible interpretations of the data, illustrated in the coincidence and non attribution analyses respectively, it is demonstrated that the NTC has failed to explicitly establish the existence of a genuine and substantial causal link between increased imports and serious injury suffered.

**[IV.C.] PUERTO SOMBRA IS IN VIOLATION OF ARTS. 5.1 AND 7.1, AoS.**

- 75.** Art. XIX:1 (a) requires the member applying the safeguard to do so only to the extent and for such time as may be necessary to prevent or remedy the injury being suffered. The provisions that deal with the extent and duration of the application of a safeguard measure are Arts. 5.1 and 7.1 respectively. The Appellate Body upheld that the inconsistency with Arts. 2 and 4 had deprived the measure at issue of its legal basis, and hence it was not necessary to complete an analysis of Art. XIX:1(a).<sup>87</sup> Hence, it is contended that the inconsistencies with Arts. 2 and 4 also indicate an inconsistency with Arts. 5.1 and 7.1.

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**V: PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS INCONSISTENT WITH ART. I, GATT AND ART.9.1, AoS**

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- 76.** The object and purpose of the MFN Clause embodied in Art. I of the GATT, is to prohibit discrimination among like products originating in or destined for different countries.<sup>88</sup> It is a fundamental non-discrimination clause on which the WTO system rests and is of central importance.<sup>89</sup> This principle finds expression in Art. 2.2 of the AoS.<sup>90</sup> Art. 9.1, AoS is a manifestation of the special and differential treatment given exclusively to

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<sup>87</sup> *Argentina – Footwear (EC)*, *supra* note 39, ¶ 98

<sup>88</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 84, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada – Autos*]

<sup>89</sup> H. Horn and Peter C Mavroidis, *Economic and Legal Aspects of the MFN Clause*, *European Journal of Political Economy*, Vol. 17, p. 234 (2001)

<sup>90</sup> *US - Line Pipe*, *supra* note 10, ¶ 4.24

developing countries.<sup>91</sup> Thus, it serves as an exception to the MFN Policy<sup>92</sup> expounded above.

77. Puerto Sombra has violated Art. I and Art. 9.1 by granting Puerto Santo immunity from the safeguard duty, as [V.A.] Puerto Santo is not a developing country and [V.B.] Puerto Sombra did not comply with the requirements under Art. 9.1. [V.C.] ALTERNATIVELY, assuming but not admitting that Puerto Santo is a developing country, the differentiation within the category of developing countries is also discussed.

#### **[V.A.] PUERTO SANTO IS NOT A ‘DEVELOPING’ COUNTRY**

78. This is proved by an [V.A.1.] analysis of the self-designation mechanism, [V.A.2.] the need for an objective method of classification and the [V.A.3.] application of the principle of graduation.

##### ***[V.A.1.] Self - designation is subject to scrutiny by other members***

79. Art. XVIII:I of the GATT provides a rough definition of a ‘developing’ country as one whose economy ‘can only support low standards of living’ and is in the ‘early stages of development.’ However, given that no specific criteria for determining whether a country qualified as developing emerged from the definition provided, in practice, countries self - designate themselves, subject to scrutiny by other members.<sup>93</sup> Hence, notwithstanding its self recognition as a developing country,<sup>94</sup> the recognition of Puerto Santo’s status as a developed country by a majority of the WTO members is clear evidence in support of the contention that it is not a developing country.<sup>95</sup>

##### ***[V.A.2.] The use of objective measures in classifying countries***

80. Art. XVIII has been characterized as being so indeterminate that it can hardly be called a definition.<sup>96</sup> This situation allows for the possibility of hampering the proper application of Art.9.1, undermining the general objective to grant special and differential treatment to developing countries.<sup>97</sup> The silence of Art.9.1 itself on, *inter alia*, the method of identifying developing countries may lead to unpredictable, arbitrary decisions to the

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<sup>91</sup> GILBERT WINHAM, PATRICK F.J MACRORY, ARTHUR E. APPLETON & MICHAEL G. PLUMMER, THE WORLD TRADE ORGANIZATION – LEGAL, ECONOMIC AND POLITICAL ANALYSIS, p. 1552, Vol. 1 (2005)

<sup>92</sup> *Dominican Republic – Safeguard Measures*, *supra* note 3, ¶ 7.70

<sup>93</sup> SONIA E. ROLLANDE, DEVELOPMENT AT THE WTO, p. 80 (Feb. 2012)

<sup>94</sup> Clarification No. 11, Clarification to the Moot Proposition

<sup>95</sup> ¶ 14, p.4 and ¶ (i), p. 24, Exhibit 3, Moot Proposition

<sup>96</sup> ROLLANDE, *supra* note 93, p. 81

<sup>97</sup> WOLFRUM, STOLL & KOEBELE, *supra* note 18, p. 364-365

disadvantage of developing members.<sup>98</sup> Such arbitrary decisions would impair the object of the second recital of the preamble to the agreement which elucidates the need to re-establish multilateral control over safeguards and eliminate measures that escape such control. Several members have requested clarifications and submitted proposals in pursuance of the clarification of Art. 9.1.<sup>99</sup>

- 81.** Hence, the need for an objective method of classification is clearly necessary. In practice the aforementioned inadequacy of a definition has been resolved by the use of an economic indicator, GNP per capita, to measure the level of development in a country.<sup>100</sup> The unbiased parameters used in the SCMA can serve a priori as a benchmark for classification purposes under Art. 9.1.<sup>101</sup>
- 82.** Therefore, comparisons made by the use of indicators like (A) GDP per capita and (B) HDI to assess the level of development in a country are necessary to establish that Puerto Santo is not a developing country.
- 83.** A) *GDP* - is the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output. GDP per capita is GDP divided by mid-year population.<sup>102</sup> The growth in GDP per capita indicates the pace of income growth per head of the population.<sup>103</sup> As a single composite indicator it, is a powerful summary indicator of economic development.<sup>104</sup> It is also one of the parameters used by the ACWL to classify a country as developing.<sup>105</sup>
- 84.** Countries as varied as Chile, Brazil, and India; with GDP per capita's of USD 13,416.2, 8,538.6 and 1,598.3 respectively,<sup>106</sup> have been classified as 'developing' under the auspices of the WTO, and in an attempt to regularise this classification, it has been subsequently inferred that a member country with a GDP lower than these countries

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<sup>98</sup> WOLFRUM, STOLL & KOEBELE, *supra* note 18, p. 371

<sup>99</sup> Committee on Safeguards, *Minutes of the Regular Meeting held on 28<sup>th</sup> April 2003*, ¶125-134, G/SG/M/22 (April 28, 2003); Committee on Safeguards, *Report to The General Council Concerning The Review By The Safeguards Committee Of The African Group's S&D Proposal On Art. 9 Of The Safeguards Agreement*, G/SG/64, (July 28, 2003)

<sup>100</sup> Verdirame Guglielmo, *The Definition of Developing Countries under GATT and other International Law*, 39 German Yearbook of International Law 164, p. 176 (1996)

<sup>101</sup> WOLFRUM, STOLL & KOEBELE, *supra* note 18, p. 356

<sup>102</sup> Economic Indicators, Definition of Economic Indicators, [https://www.unicef.org/infobycountry/stats\\_popup7.html](https://www.unicef.org/infobycountry/stats_popup7.html) (Jan. 14, 2017)

<sup>103</sup> *Indicators of Sustainable Development: Guidelines and Methodologies*, UNDESA, p. 212 (3<sup>rd</sup> ed. Oct. 2007)

<sup>104</sup> *Indicators of Sustainable Development: Guidelines and Methodologies*, UNDESA, p. 212 (3<sup>rd</sup> ed. Oct. 2007)

<sup>105</sup> Jan Bohanes, Fernanda Garza, *Going Beyond the Stereotype – Participation of Developing Countries in WTO Dispute Settlement*, Trade Law and Development, Vol IV, No. 1, p. 55 (2012)

<sup>106</sup> World Bank Accounts Data, *GDP per capita*, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?view=map> (Jan 14, 2017)

would also qualify as ‘developing’.<sup>107</sup> GDP per capita is a close derivative of GDP and hence it follows that a simple comparison between the aforementioned countries and Puerto Santo, with a GDP per capita of 18,562<sup>108</sup> establishes that the latter falls far beyond the range affirmed by precedent.

**85. B) HDI** - is a measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and having a decent standard of living.<sup>109</sup> The inclusion of all three parameters provides for an accurate representation of the level of development in a country, it is hence used by the UNDP to classify countries on the basis of relative thresholds.<sup>110</sup> According to their HDI value countries are divided into four quartiles: developed countries are in the top quartile while developing countries form the other three quartiles.<sup>111</sup> Puerto Santo has a high HDI value comparable to any developed country,<sup>112</sup> hence it can be inferred that it would fall within the top quartile and consequently would not be classified as a ‘developing’ country.

***[V.A.3.] Puerto Santo has graduated from its ‘developing’ status***

**86.** The principle of graduation is that advanced developing countries should begin to move back towards a parity of obligations and privileges.<sup>113</sup> It gains credibility from its identification as a common element between different international organizations in their country classifications.<sup>114</sup> It is embodied in the Enabling Clause<sup>115</sup> which demands reciprocity from more advanced developing countries once it has achieved a sufficient level of development in the agricultural or industrial sectors that enjoy preferential treatment.<sup>116</sup>

**87.** While the Enabling Clause provides for a soft graduation mechanism, devoid of specific economic benchmarks,<sup>117</sup> the SCMA explicitly provides for a unique tiered graduation scheme<sup>118</sup> which exempts not only LDC’s, but also developing countries, until their GNP

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<sup>107</sup> Verdirame, *supra* note 100, p. 186

<sup>108</sup> ¶ 14, Page 4, Moot Proposition

<sup>109</sup> Lyngé Nielson, *Classification Of Countries And How it Could Be Done*, WP/11/31, p. 8 (February 2011)

<sup>110</sup> José Antonio Alonso, Ana Luiza Cortez and Stephan Klasen, *LDC And Other Country Groupings: How Useful Are Current Approaches To Classify Countries In A More Heterogeneous Developing World?*, UNDESA, ST/ESA/2014/CDP/21, p. 23 (Sept. 2014)

<sup>111</sup> José Antonio Alonso, Ana Luiza Cortez and Stephan Klasen, *supra* note 110, p. 24

<sup>112</sup> Clarification No.11, Clarification to the Moot Proposition

<sup>113</sup> ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT/WTO LEGAL SYSTEM*, p. 17 ( 2<sup>nd</sup> ed., 2011)

<sup>114</sup> Verdirame, *supra* note 100, p. 194

<sup>115</sup> *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD 26S/203 (adopted by GATT Contracting Parties in 1979)

<sup>116</sup> Verdirame, *supra* note 100, p. 194

<sup>117</sup> SONIA E. ROLLANDE, *supra* note 93, p. 83

<sup>118</sup> Annex VII, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1869 U.N.T.S 14

per capita of a country crosses USD 1000 per annum; other developing countries who have crossed this mark are expected to phase out their benefits within eight years.

- 88.** It is crucial to mention that Puerto Santo achieved a GNP per capita higher than USD 1000 per annum in 2005.<sup>119</sup> It must be noted that eleven years, a significant period of time, has passed since Puerto Santo ‘graduated’ from the benefit provided in the above mechanism. In addition, as explained in [V.A.2.], important economic indicators clearly establish that Puerto Santo does not fall within the ‘developing’ country category. In light of the above mentioned factors, it is established that Puerto Santo has graduated from its original developing member status. The application of the graduation principle to Puerto Santo greatly reduces the significance of its self recognition as a developing country.

**[V.B.] NON COMPLIANCE WITH THE REQUIREMENTS UNDER ART. 9.1**

- 89.** Members applying safeguard measures have the obligation to take all reasonable steps necessary to exclude developing countries exporting less than the *de minimis* levels in Art. 9.1 from the application of the safeguard measure.<sup>120</sup> Correspondingly, the aforementioned steps that the member is obliged to take must prevent the exclusion of countries which are, above all, not developing in nature. It has been established that Puerto Santo is not a developing country, and hence Puerto Sombra’s exclusion of it from the application of the safeguard measure is in clear contravention with the requirements under Art. 9.1.
- 90.** ALTERNATIVELY, *assuming but not admitting*, that Puerto Santo is a developing country, there must be a differentiation created between the broad categories of developing countries. The WTO only recognizes three categories of developed, developing and least developed countries.<sup>121</sup> This has concealed the existence of different levels of development within the two blocs, developed and developing, themselves to a point where a coalition of all developing countries does not exist<sup>122</sup> contributing to the creation of international instruments that do not give adequate recognition to these differences.<sup>123</sup>
- 91.** The current arrangement is manifestly unfair to the weaker developing countries, not classified as LDC’s, as they have commitments and obligations similar to advanced

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<sup>119</sup>Clarification No.11, Clarification to the Moot Proposition

<sup>120</sup> *US - Line Pipe*, *supra* note 25, ¶ 132

<sup>121</sup> GILBERT WINHAM, PATRICK F.J MACRORY, ARTHUR E. APPLETON & MICHAEL G. PLUMMER, *supra* note 91, p. 1526

<sup>122</sup> John Whaley, *Non Discriminatory Discrimination: Special And Differential Treatment Under The GATT For Developing Countries*, *The Economic Journal*, Vol. 100, No. 403, p. 1318 (Dec 1990)

<sup>123</sup> Verdirame, *supra* note 107, p. 180



developing countries.<sup>124</sup> Certain provisions of the SCMA allow for differentiation between developing countries. This differentiation has been interpreted as meaning that this tendency would progressively gain momentum in the GATT.<sup>125</sup>

**92.** The SCMA provides for five different categories: developed countries that are subject to the ordinary provisions of the agreement, and four categories of developing countries. As previously mentioned, the applicability of the SCMA to the AoS is established under *[V.A.2.]*. Hence, assuming not admitting that Puerto Santo is a developing country, it would be an ‘advanced’ developing country mentioned above and would be appropriately differentiated as per the SCMA provisions.

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<sup>124</sup> Jonas Kasteng, Arne Karlsson, Carina Lindberg, *Differentiation Between Developing Countries*, Swedish Board of Agriculture International Affairs Division, p.10 (June 2004)

<sup>125</sup> Verdirame, *supra* note 100, p. 180

## REQUEST FOR FINDINGS

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

1. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are inconsistent with Art. XIX:2, GATT and Art. 12.3, AoS.
2. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are inconsistent with Art. 6, AoS.
3. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are inconsistent with Art. XIX:1(a), GATT.
4. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are inconsistent with Art. XIX:1(a), GATT and Arts. 2.1, 4.1(a), 4.2(a) and 4.2(b) of the AoS.
5. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are inconsistent with Art. I, GATT and Art. 9.1, AoS.

All of which is respectfully affirmed and submitted,  
Counsel for the Complainant,

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