

TEAM CODE: 148R

---

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

---



WT / DS / xxx

---

**BEFORE THE PANEL**

*Established by Dispute Settlement Body (DSB)*

*World Trade Organisation (WTO), Geneva*

---

---

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

---

*Respondent: Puerto Sombra*

---

**WRITTEN SUBMISSION FOR THE RESPONDENT**

---

## **TABLE OF CONTENTS**

<b>LIST OF ABBREVIATIONS</b> .....	<b>iv</b>
<b>INDEX OF AUTHORITIES</b> .....	<b>vi</b>
<b>[A] WTO Appellate Body Reports</b> .....	<b>vi</b>
<b>[B] WTO Panel Reports</b> .....	<b>vi</b>
<b>[C] Books</b> .....	<b>vii</b>
<b>[D] Articles</b> .....	<b>viii</b>
<b>[E] Agreements and Conventions</b> .....	<b>viii</b>
<b>[F] Other Authorities</b> .....	<b>ix</b>
<b>STATEMENT OF FACTS</b> .....	<b>x</b>
<b>MEASURES AT ISSUE</b> .....	<b>xii</b>
<b>SUMMARY OF LEGAL PLEADINGS</b> .....	<b>xiii</b>
<b>LEGAL PLEADINGS</b> .....	<b>1</b>
<b>I: PUERTO SOMBRA’S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:2, GATT AND ARTS. 12.3 AND 12.4, AoS</b> .....	<b>1</b>
<b>[I.A.] Compliance with Art.XIX: 2, GATT and Art. 12.3, AoS</b> .....	<b>1</b>
<b>[I.B.] Compliance With Art.12.4, AoS</b> .....	<b>2</b>
<b>II: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. 6, AoS</b> .....	<b>4</b>
<b>[II.A.] The NTC Established the Existence of Critical Circumstances</b> .....	<b>4</b>
<b>[II.A.1.] The fall in the value of profitability and other economic indicators of the domestic industry</b> .....	<b>5</b>
<b>[II.A.2.] Relationship between the declining indicators and increased imports</b> .....	<b>6</b>
<b>[II.B.] The NTC’s Preliminary Determination fulfills the requisite criterion under Art. 6</b> .....	<b>7</b>
<b>[II.B.1.] The NTC has based its Preliminary Determination of serious injury on clear evidence</b> .....	<b>7</b>

[II.B.2.] Increased imports have caused serious injury .....	7
<b>III: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARDS IS CONSISTENT WITH ART. XIX:1(A), GATT .....</b>	<b>8</b>
[III.A.] The NTC established the existence of Unforeseen Developments .....	9
[III.A.1.] Degree to which a circumstance affects prevailing competitive conditions..	9
[III.A.2.] Confluence of circumstances .....	10
[III.B.] The NTC established the existence of a link between the Increase in Imports and the GATT Obligation incurred.....	11
[III.B.1.] The existence of GATT obligation .....	11
[III.B.2.] The existence of a logical connection between GATT obligation and increased imports .....	12
<b>IV: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 2.1, 4.1(A), 4.2(A) AND 4.2(B), AoS.....</b>	<b>13</b>
[IV.A.] The NTC established the existence of ‘Such’ Increased Quantities of Imports .	13
[IV.B.] The NTC established the existence of Serious Injury .....	14
[IV.B.1.] The NTC analyzed all the relevant factors.....	15
[IV.B.2.] The NTC provided a reasoned and adequate explanation to support its conclusions.....	15
[IV.B.3.] The NTC established the existence of the requisite causal link.....	18
[IV.B.3.a.] The conditions of competition analyzed supported the NTC’s conclusion .....	18
[IV.B.3.b.] The coincidence analysis undertaken supported the NTC’s conclusion .....	19
[IV.B.3.c.] The non attribution analysis undertaken supported the NTC’s conclusions.....	20
[IV.C.] The Safeguard Measure was applied only for the Extent & Duration necessary	21
<b>V: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. I, GATT AND ART. 9.1, AoS .....</b>	<b>22</b>
[V.A.] Compliance with Art. 9.1, AoS .....	22
[V.B.] Compliance with Art. I, GATT.....	23
[V.C.] Puerto Santo’s Developing Status is affirmed by the Autonomous Operation of the Self- Designation Mechanism .....	23

[V.D.] Puerto Santo is a Part of the Economically Diverse ‘Developing’ Country Group .....25

**REQUEST FOR FINDINGS .....26**

## LIST OF ABBREVIATIONS

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

---

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

---

1. Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015)
2. Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS/121/AB/R (Dec. 14, 1999)
3. Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (Feb. 21, 1997)
4. Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000)
5. Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (June 5, 1998)
6. 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)
7. 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)
8. Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Jan. 19, 2001)
9. 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)

---

### **[B] WTO PANEL REPORTS**

---

1. Panel Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 22, 2014)

2. Panel Report, *Argentina – Safeguard Measure on Imports of Footwear*, WT/DS121/R (June 25, 1999)
3. Panel Report, *Brazil — Export Financing Programme for Aircraft*, WT/DS46/R (May 9, 2000)
4. 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 (Feb. 22, 2012)
5. Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, (Sept. 22, 1999)
6. Panel Report, *Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products*, WT/DS98/R (June 21, 1999)
7. Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R (July 20, 2015)
8. Panel Report, *United States - Definitive Safeguard Measures on Imports of Certain 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 (July 11, 2003)
9. Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2001)
10. Panel Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (July 31, 2000)

---

**[C] BOOKS**

---

1. *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012)
2. FERNANDO PIROLA, *THE CHALLENGE OF SAFEGUARDS IN THE WTO*, (1<sup>st</sup> ed., 2014)
3. GILBERT WINHAM, PATRICK F.J MACRORY, ARTHUR E. APPLETON & MICHAEL G. PLUMMER, *THE WORLD TRADE ORGANIZATION – LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, Vol. 1 (2005)
4. Tim Josling, *Special and Differential Treatment for Developing Countries*, in *AGRICULTURAL TRADE REFORM AND THE DOHA DEVELOPMENT*, World Economy, (Kym Anderson, and Will Martin, 2006)
5. WOLFRUM, STOLL & KOEBELE, *MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO TRADE REMEDIES*, Vol. 4 (2008)



6. YONG-SHIK LEE, SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS, (3<sup>rd</sup> ed., 2014)

---

**[D] ARTICLES**

---

1. Finger, J. M., L. Schuknecht, *Market Access Advances and Retreats: The Uruguay Round and Beyond*, World Bank Development Research Group, Policy Research Working Paper 2232 (November 1999)
2. H. Horn and Peter C Mavroidis, *Economic and Legal Aspects of the MFN Clause*, European Journal of Political Economy, Vol. 17 (2001)
3. Jan Bohanes, Fernanda Garza, *Going Beyond the Stereotype – Participation of Developing Countries in WTO Dispute Settlement*, Trade Law and Development, Vol IV, No.1 (2012)
4. Joe Mc Mahon, *A New Safeguards Code for the GATT*, 16 Victoria U. Wellington L. Rev. 197 (1986)
5. Jorge F. Perez-Lopez, *GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries*, 23 Case W. Res. J. Int'l L. 517 (1991)
6. Oscar Schachter, *The Evolving International Law of Development*, 15 Colum. J. Transnat'l L. 1 (1976)
7. Verdirame Guglielmo, *The Definition of Developing Countries under GATT and other International Law*, 39 German Yearbook of International Law 164 (1996)
8. Y.S. Lee, *Destabilization of the Discipline on Safeguards—Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement on Safeguards*, 25 Journal of World Trade (Dec. 2001)

---

**[E] AGREEMENTS AND CONVENTIONS**

---

1. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S 187
2. Agreement on Safeguards, Apr. 15, 1994, 1869 U. N. T. S. 154.
3. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1869 U.N.T.S

---

**[F] OTHER AUTHORITIES**

---

1. Committee on Safeguards, *Minutes of the Regular Meeting Held on 28<sup>th</sup> April 2003*, Committee on Safeguards, *Minutes of the Regular Meeting Held on 20<sup>th</sup> April 2003*
2. Committee on Safeguards, *Note by Secretariat – Summary of Notifications in relation to Art. 9.1*, G/SG/W/204 (May 22, 2001)
3. *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT*, GATT/CP/106 (Oct. 22 1951)
4. *Tariff Download Facility*, World Trade Organisation, <http://tariffdata.wto.org/>
5. *Trade Policy Review Report by the Secretariat: Israel*, WT/TPS/S/272 (Sept.25, 2012)

---

## **STATEMENT OF FACTS**

---

---

### **THE PARTIES**

---

*Puerto Sombra is a developing country with a population of 100 million that is steadily growing every year. Over the last 5 years, there has been a major change in Puerto Sombra's economy owing to rapid urbanization primarily fuelled by the development of the services sector in the country. This sudden spurt in urbanization has also led to an increase in infrastructural activities in Puerto Sombra. It is a founding member of the WTO. Pueblo Faro is a developed country. It's GDP has been floundering in the aftermath of the 2009 global recession and its GDP growth has reduced to 5.4%, in 2015 while the projected GDP growth rate for 2016 is 5.9%. Recently, Pueblo Faro's local industries have started exporting a significant share of their production to numerous markets as demand for major commodities has been diminishing in Pueblo Faro.*

---

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

---

*Puerto Sombra's government had been involved in active discussions with the government of Pueblo Faro to conclude a free trade agreement. Pueblo Faro's government has imposed high taxes on exports of raw materials but provides incentives on exports of finished products. However, the negotiations between Puerto Sombra and Pueblo Faro for the free trade agreement got stalled as a result of Puerto Sombra's unwillingness to reduce its tariffs on certain key base metals and articles because Puerto Sombra has a competent local industry for these products that have the capability to cater to the domestic demand.*

---

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

---

*Puerto Sombra's primary aluminum industry has been facing intense competition from imports. There has been a sudden surge in the imports of unwrought aluminum which are primarily from Pueblo Faro. Kimp Aluminum Corporation, Puerto Sombra National Aluminum Corporation and Raven National Aluminum Corporation being the major producers of unwrought aluminum collectively constituted the domestic industry in Puerto Sombra. Therefore, an application for initiation of a safeguards investigation was filed by them to the NTC. The NTC initiated the investigation on 31<sup>st</sup> July, 2016.*

---

## **PROVISIONAL SAFEGUARD MEASURE**

---

*An examination by the NTC showed that, any delay in providing protection to the domestic industry would cause severe damage to it, particularly in light of the significant increase in imports of unwrought aluminum. Therefore, provisional safeguard measures on imports of unwrought aluminum were imposed by the NTC on 2<sup>nd</sup> August, 2016. Puerto Sombra in keeping with its WTO obligations under Arts. 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 Art. 12.4 of the AoS.*

---

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

---

*Subsequent to the imposition of the provisional safeguard measure, a public hearing was held on 30<sup>th</sup> October, 2016. A public hearing was conducted by the NTC which was attended by a record number of participants including a number of environmental and labour groups. They urged the NTC to impose the safeguard measure as it would be in public interest, since the manufacturers in Pueblo Faro were openly conducting their operations in contravention of international environmental and labour standards.*

---

## **DEFINITIVE SAFEGUARD MEASURE**

---

*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. As there were no discrepancies noted 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.*

---

## **REQUEST FOR ESTABLISHMENT OF PANEL**

---

*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.*

---

---

**MEASURES AT ISSUE**

---

---

---

**PUERTO SOMBRA’S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:2, GATT AND ARTS. 12.3 AND 12.4, AoS AS THE NOTIFICATION AND AN INVITATION FOR CONSULTATIONS WAS DULY SENT.**

---

---

**PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. 6, AoS AS THE EXISTENCE OF CRITICAL CIRCUMSTANCES HAS BEEN ESTABLISHED BY THE NTC.**

---

---

**PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:1(A), GATT AS THE EXISTENCE OF UNFORESEEN DEVELOPMENTS AND THE EFFECT OF GATT OBLIGATIONS HAS BEEN ESTABLISHED BY THE NTC.**

---

---

**PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 2.1, 4.1(A), 4.2(A) AND 4.2(B) OF THE AoS AS SUCH INCREASED IMPORTS WHICH LED TO SERIOUS INJURY TO THE DOMESTIC INDUSTRY OF PUERTO SOMBRA HAS BEEN ESTABLISHED BY THE NTC.**

---

---

**PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. I, GATT AND ART. 9.1, AoS AS PUERTO SANTO IS A DEVELOPING COUNTRY.**

---

## **SUMMARY OF LEGAL PLEADINGS**

---

### **ARGUMENT 1: PUERTO SOMBRA'S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 12.3 AND 12.4, AoS.**

---

- The safeguard measure imposed by Puerto Sombra is provisional in nature and consultations with exporting members prior to a provisional measure are not mandatory in nature.
- Furthermore, Puerto Sombra is open for prior consultations with the concerned countries before the beginning of period of definitive safeguard measure.
- Puerto Sombra notified the WTO through the Committee on Safeguards under Article 12.4, as soon as practically possible with a mere delay of only 13 days. The objective of imposition of provisional safeguard measure was to protect the domestic industry and the economy of the country from a sudden increase in imports.

---

### **ARGUMENT 2: PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART.6, AoS.**

---

- The existence of critical circumstances warranting the immediate application of a safeguard measure is confirmed by the fall in profitability of the domestic industry from 70% to -20, in the capacity utilization, market share and the productivity per day per employee. These amounted to an injury which was difficult to repair, caused by a sudden, sharp and significant increase in imports in a relatively short period.
- The NTC has reasonably and adequately determined the existence of serious injury based on clear evidence in its preliminary determination by analyzing the relevant factors and establishing a causal link between the increased imports and serious injury suffered. Further, the NTC also established the logical connection between increased imports and unforeseen developments and the effect of GATT obligation.

---

**ARGUMENT 3: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:1(A), GATT**

---

- The safeguard measures imposed by Puerto Sombra are consistent with Art. XIX: 1(a), GATT as the NTC reasonably and adequately established the existence of the pre requisites: unforeseen developments and the effect of GATT obligations.
- The recession in 2009 and its effects constituted unforeseen developments as the degree to which the circumstances affected the competitive conditions could not have been foreseen at the time of tariff reduction and hence, the confluence of circumstances amount to unforeseen developments.
- The NTC has adequately reasoned that Puerto Sombra has incurred obligations under GATT 1994, including tariff concessions, by clearly establishing that the bound rate of the product was 40%, and the applied rate was 5% in 2013. The application of the MFN principle itself in applying tariff concessions is a GATT obligation.
- Further, the reduction of tariffs below the bound rate had been taken in pursuance of the underlying obligation of WTO members to continue reducing their tariffs to encourage and promote global trade.
- By establishing the existence of unforeseen developments at the time of incurring a GATT obligation, the NTC reasonably and adequately demonstrated a logical connection between increased imports and the aforementioned conditions.

---

**ARGUMENT 4: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. XIX:1(A), GATT AND ARTS. 12.3 AND 12.4, AoS.**

---

- The NTC reasonably and adequately established the existence of conditions set forth for the application of a safeguard.
- The end to end point and trend analysis of the NTC were mutually reinforcing and established the existence of ‘such’ increased imports.
- The NTC established the existence of serious injury as it examined all the relevant factors, supported its conclusions with a reasoned and adequate explanation and established the existence of the requisite causal link between increased imports and the serious injury suffered.
- Further, the safeguard measure was applied to the appropriate extent and duration.

---

**ARGUMENT 5: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. I, GATT AND ART. 9.1, AoS.**

---

- Puerto Sombra had complied with Article 9.1, AoS and Article I, GATT as Puerto Santo is a developing country.
- Under Article 9.1, Puerto Sombra has the authority to identify countries as developing for the purposes of the aforementioned Article. Further, the special and differential treatment reserved for developing countries under Article 9.1 serves as an exception to Article I.
- Additionally, the autonomous operation of the self – designation mechanism and the economically diverse group of developing WTO members, affirms the developing status of Puerto Santo.



## LEGAL PLEADINGS

### **I: PUERTO SOMBRA’S IMPOSITION OF PROVISIONAL AND DEFINITIVE SAFEGUARD MEASURES IS CONSISTENT 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.]* not in violation of Art. XIX: 2 of GATT and Art. 12.3 of AoS, since provisional safeguards can be imposed in critical circumstances without prior consultations; further *[I.B.]* Puerto Sombra complied with its obligations under Art. 12.4 by notifying the Committee on Safeguards and was also open for consultations with the concerned exporting countries.

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

2. Art. 12.3, AoS requires the members to hold prior consultations before proposing to apply or extend a safeguard measure. However, Art. XIX: 2, GATT decreases the liability of the country imposing the safeguard measures by incorporating the term of giving notice in writing to the contracting parties, *as far in advance as may be practicable*, having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.
3. The key parameter on the basis of which the NTC took the decision to impose the provisional safeguard measures was the sharp increase in imports over the period concerned, which had led to a significant decline in the profitability of the domestic industry. Notably, imports during the same period were coming in at prices that were forcing the domestic industry to sell at prices below their costs so as to compete with the imports and stay in the market. Such measures were imposed with the objective of eliminating trade deficits and increasing import substitution<sup>1</sup> by Puerto Sombra.
4. Art. XIX: 2, GATT itself states that in critical circumstances, where delay would cause damage, which would be difficult to repair, action under the AoS may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action. Owing to critical circumstances in Puerto

<sup>1</sup> Panel Report, *Argentina – Measures Affecting the Importation of Goods*, ¶ 6.228, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 22, 2014) [hereinafter ‘*Argentina – Import Measures*’]

Sombra, the consultations with the exporting countries were postponed till after the imposition of provisional safeguard measure.

5. Furthermore, Puerto Sombra only imposed provisional safeguards and the requirement of holding prior consultations with the exporting countries concerned can be done away with in the wake of critical circumstances. The NTC initiated the investigation on 31<sup>st</sup> July 2016, i.e. three days prior to imposition provisional safeguard. Such knowledge of initiation of investigation can be considered to be sufficient information for the purposes of immediate imposition of provisional measures during an emergency. Moreover, the notification relating to the imposition of the provisional safeguards measure under Art.12.4 of the AoS, sent on 15<sup>th</sup> August, 2016, invited member countries for consultations. The notification provided all pertinent details as required under the WTO notification requirements.
6. As a rule consultation should take place before the action is taken, but in critical circumstances consultation may take place immediately after the measure is taken provisionally.<sup>2</sup> Therefore, to achieve the objective of protecting domestic industry as soon as possible from the adverse affect of importation of the product concerned the consultations under Art. 12.3 of AoS were delayed.

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

7. Art. 12.4, AoS requires the country imposing the provisional safeguard measure to notify the WTO through its Committee on Safeguards regarding the same. Puerto Sombra complied with its obligations under Arts. 12.4 and 12.1 of the AoS with a little delay in time. In the light of the critical circumstances prevalent in the country and in order to protect country's economy, Puerto Sombra, a developing country member, imposed provisional safeguards measure with immediate effect on 2<sup>nd</sup> August, 2016 and notified the WTO on 15<sup>th</sup> August, 2016, fulfilling all its obligations under WTO duly.
8. The WTO Panel invoked the Preamble in its earlier precedent<sup>3</sup> in the context of recognizing the need to address the concerns of developing countries. The Preamble to the WTO Agreement recognizes both (i) the desirability of expanding international trade in goods and services and (ii) the need for positive efforts designed to ensure that

---

<sup>2</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*, ¶ 4, GATT/CP/106 (Oct. 22 1951) [hereinafter Hatter's Fur]

<sup>3</sup> Panel Report, *Brazil — Export Financing Programme for Aircraft*, ¶ 6.47, WT/DS46/R (May 9, 2000) [hereinafter Brazil – Aircraft]

developing countries secure a share in international trade commensurate with the needs of their economic development.

9. In implementing these goals, WTO rules promote trade liberalization, but recognize the need for specific exceptions from the general rules to address special concerns, including those of developing countries.<sup>4</sup> The purpose of Art. XVIII:B, GATT is to allow developing countries to deviate temporarily from the provisions of the GATT by adopting, under certain specified conditions, import restrictions to safeguard their external position and ensure a level of reserves adequate for the implementation of their program of economic development.<sup>5</sup>
10. The objective behind the provisions of the AoS were made in support of granting favorable treatment to developing countries, including a longer period for the application of safeguard measures and a lower injury standard.<sup>6</sup> This overarching concern of the WTO finds ample reflection in the protection of developing countries.
11. Puerto Sombra complied with its obligations under Art. 12.4 by notifying the Committee on Safeguards on 15<sup>th</sup> August, 2016. The procedural requisites of the AoS were accomplished by Puerto Sombra only with a little delay of 13 days contrary to the general rule of sending the notification before imposition of safeguards measure. A panel need not always apply the criteria for the evaluation of challenges against rules or norms of general and prospective application. Rather, the elements a panel needs to review depend on the specific measure challenged and how it is characterized by a complainant.<sup>7</sup>
12. In the instant matter, Puerto Sombra, which is a developing country, was only trying to protect its domestic industry from serious injury by a sudden increase in imports of the product concerned should be brought under the exception to the rule of Art. 12.4.
13. Moreover, Art. 9.2, AoS allows developing country members to apply a safeguard measure for up to ten years, instead of eight. Developing-country members may also apply a new safeguard measures on the same product sooner. Since, the provisions for developing country members are relaxed in comparison to that of the developed country

---

<sup>4</sup> Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 7.2 WT/DS90/R, (Sept. 22, 1999) [hereinafter *India – Quantitative Restrictions*]

<sup>5</sup> *India – Quantitative Restrictions*, *supra* note 4, ¶ 5.102

<sup>6</sup> Y.S. Lee, *Destabilization of the Discipline on Safeguards—Inherent Problems with the Continuing Application of Art. XIX after the Settlement of the Agreement on Safeguards*, 25 *Journal of World Trade*, p. 1242–1245 (Dec. 2001)

<sup>7</sup> Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, ¶ 5.110, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015) [hereinafter *Argentina – Import Measures*]

members, therefore, a mere delay of 13 days by Puerto Sombra, a developing country, in notifying the Committee on Safeguards and opening the forum for consultations with the exporting countries, is merely an irregularity which can be cured.

---

## **II: PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. 6, AOS**

---

14. Art. 6, AoS authorizes the imposition of provisional safeguards on the fulfillment of certain requirements. It is contended that there is a reasoned and 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.
15. The additional precautionary measures in Art. 6 such as the expiration of these measures in 200 days, satisfaction of the conditions under Arts. 2 to 7 and 12 and the prompt refund of tariff measures if the competent authorities do not finally determine that increased imports have caused or threatened to cause serious injury, are indicative of the relatively lower standard to be met in order to justify the imposition of provisional measures.

### **[II.A.] THE NTC ESTABLISHED THE EXISTENCE OF CRITICAL CIRCUMSTANCES**

16. The existence of critical circumstances warranting the immediate application of a safeguard measure is established through the NTC's reasoned and adequate explanation of: *[II.A.1.]* the fall in the value of profitability and other economic indicators of the domestic industry and *[II.A.2.]* the relationship of the same with the increased imports.
17. Art. 6, AoS defines critical circumstances 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>8</sup> and physical harm that impairs the value, usefulness, or normal function of something,<sup>9</sup> respectively.
18. 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

---

<sup>8</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 232-233

<sup>9</sup> *Compact Oxford English Dictionary*, 3<sup>rd</sup> ed., (Oxford University Press, 2012) p. 248

undertaking developed in various intertwined and integrated agreements,<sup>10</sup> the provisions of the SCMA is relevant to the AoS. Hence, in the present case emphasis is laid on the data of the recent period, i.e., from January to June, 2016.

***[II.A.1.] The fall in the value of profitability and other economic indicators of the domestic industry***

**19. A)** Fall in profitability: In the first six months of 2016, the landed value of the imports sharply fell from 101 to 80 and the cost of production of the domestic industry, which had expanded its capacity in 2015, had been tamed from 130 to 110.<sup>11</sup> However, as a direct consequence of the drop in the landed value, the domestic industry was forced to sell at a price below its cost of production, at a value of 91. The recorded emails by buyers threatening to abandon the domestic industry's goods, if they do not match the prices of the imports, indicate that the domestic industry was forced to lower its selling price in an attempt to remain competitive. As a consequence of under selling, the domestic industry's profitability fell by 70% to -20.

**20. B)** Fall in other economic indicators:

- i)** *Capacity utilization*- The capacity utilization of the domestic industry increased from 67% to 73% in 2016. However this must be viewed in light of the fact that despite a substantial increase in consumption of the product, it is still below its value of 75% in 2014.
- ii)** *Market share*- The market share of the domestic industry decreased from 26% to 24% in the first six months of 2016, after being stable for two years. The share of imports in consumption increased significantly from the already high level of 53% to 56% in the same time period. The 60,000 MT gap between production and sales, despite an increase in domestic consumption, confirms that the domestic industry lost its market share to the increasing imports. Hence, this justifies the conclusion drawn that the imports have captured the market share of the domestic industry.
- iii)** *Productivity per day per employee*- The productivity per day per employee significantly decreased from 113 to 111 in 2016.<sup>12</sup>

---

<sup>10</sup> Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, ¶ 12, WT/DS22/AB/R (Feb. 21, 1997) [hereinafter *Brazil – Desiccated Coconut*]

<sup>11</sup> ¶ 24, Exhibit 2, p. 17, Moot Proposition

<sup>12</sup> ¶ vii, Exhibit 2, p. 16, Moot Proposition

21. The overarching concern of the WTO for developing countries as described in *[I.B.]* requires that the aforementioned circumstances described in (A) and (B) are evaluated in light of the particular vulnerabilities of a developing country.

*[II.A.2.] Relationship between the declining indicators and increased imports*

22. In the first six months of 2016, the absolute and relative increase in imports was 11% and 9% respectively. The fact that in the most recent quarter imports have increased significantly is especially relevant when examining the coincidence of the same with the drastic fall in profitability and the above mentioned economic indicators. The sharp, significant, sudden and recent increase in imports is discussed in detail in *[IV.A.]*.

23. Despite an increase in significant economic indicators like production and sales, the domestic industry is not profitable and has experienced a decline in capacity utilization, market share and productivity per day per employee. These critical circumstances coincide with the aforementioned increased imports. This coincidence is indicative of the link between the critical circumstances and the increased imports.

24. The competent authority's explanation is reasoned or adequate if all the relevant factors have been examined, if the nature and complexities of the data have been fully addressed and if the explanation responds to other plausible interpretations of that data.<sup>13</sup> An explanation does not meet the requisite standard, if it does not seem sufficient in the light of a plausible alternative explanation of the facts.<sup>14</sup> Additionally, the competent authority must provide a reasoned explanation linking the presented data to the stated conclusion.<sup>15</sup>

25. By providing explanations for the circumstances being critical even though increases in production and sales were recorded, the NTC has ensured that its explanation responds to other plausible interpretations of data. Its analysis also reflects that it has examined the nature and complexities of the relevant factors. Hence, a reasoned and adequate explanation as required to support its conclusion that the circumstances above are critical has been provided in the report.

---

<sup>13</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>14</sup> US – Steel Safeguards, *supra* note 13, ¶ 10.23

<sup>15</sup> Panel Report, *Argentina – Safeguard Measure on Imports of Footwear*, ¶ 8.225, WT/DS121/R (June 25, 1999) [hereinafter Argentina – Footwear (EC)]

## **[II.B.] THE NTC'S PRELIMINARY DETERMINATION FULFILLS THE REQUISITE CRITERION**

### **UNDER ART. 6**

26. The claim that the preliminary determination illustrated that there is *[II.B.1.]* clear evidence that *[II.B.2.]* increased imports have caused serious injury, is established as follows. While examining the NTC's conclusion the nature of a preliminary determination as permitting the competent authority to impose provisional safeguards upon consideration and gathering of a lesser extent of facts than those required to make a final determination must be noted.<sup>16</sup>

#### ***[II.B.1.] The NTC has based its Preliminary Determination of serious injury on clear evidence***

27. The AoS leaves a certain amount of discretion as to the manner in which the competent authority may evaluate a given factor.<sup>17</sup> The most recent information has certainly been considered to be the most relevant.<sup>18</sup> However, since the continuous updating of data is unnecessarily burdensome and difficult to administer, the competent authority must fully take into consideration the available data.<sup>19</sup> In fact, since the discretion lies with the member, in case the relevant data cannot be precisely recorded, the use of approximations that are not wholly accurate is preferable to the exclusion of that data.<sup>20</sup>

28. The NTC has unambiguously laid out all the procedures it has followed and the sources of information it has used, illustrating the clearness of evidence. The NTC also verified the data collected at the premises of the domestic industry. Moreover, considering the relevance of data in the recent period, especially in the application of provisional measures, the use of annualized figures for the year 2016 is indicative of the effort of the NTC to clarify the data in the most recent period. Further, the limited resources available for continuous updating of data in a developing country like Puerto Sombra must also be taken into consideration.

#### ***[II.B.2.] Increased imports have caused serious injury***

29. Art. 4.1(a) of the AoS defines serious injury as significant overall impairment in the position of a domestic industry. (A) In order to make such a determination, at least the

---

<sup>16</sup> YONG-SHIK LEE, *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS*, p. 170 (3<sup>rd</sup> ed., 2014)

<sup>17</sup> Panel Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 8.69, WT/DS166/R (July 31, 2000) [hereinafter US - Wheat Gluten]

<sup>18</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.213

<sup>19</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.213

<sup>20</sup> Panel Report, *Korea—Definitive Safeguard Measure on the Imports of Certain Dairy Products*, ¶ 7.82, WT/DS98/R (June 21, 1999) [hereinafter Korea - Dairy]

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>21</sup> (B) the establishment of a causal link under Art. 4.2 (b) denoting a relationship of cause and effect such that increased imports contribute to ‘bringing about’ or ‘inducing’ the serious injury,<sup>22</sup> is a necessary pre requisite. Further, the NTC established the logical connection between the increased imports and unforeseen developments and the effect of GATT obligation incurred.

**30. A)** The relative and absolute increase in imports over the period of investigation, 2014 to 2016, was 6% and 52% respectively.<sup>23</sup> This amounts to a sharp, significant, sudden increase in imports. Despite an increase in significant economic indicators such as production, sales, productivity of the industry and employment, the market share of the domestic industry, productivity per day per employee and capacity utilization declined, indicative of the injury suffered by the domestic industry. This injury was reflected in the drastic fall in profitability of the domestic industry.

**31. B)** Further, the sudden, sharp and significant increase in imports coincide with both: (i) the fall in landed value and corresponding decline in selling prices of the domestic industry leading to a sharp fall in profitability of the domestic industry and (ii) the deteriorating values of the economic indicators discussed above. The NTC also adequately attributed injury to the other relevant factor. This preliminarily establishes a causal link between the serious injury being faced by the domestic industry and the increased imports.

**32.** Hence, the NTC has provided a reasoned and adequate explanation categorizing the aforementioned circumstances as a preliminary determination of serious injury.

---

### **III: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARDS IS CONSISTENT WITH ART. XIX:1(A), GATT**

---

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

---

<sup>21</sup> *Korea - Dairy*, *supra* note 20, ¶ 7.55

<sup>22</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 290, WT/DS166/AB/R (Jan. 19, 2001) [hereinafter US – Wheat Gluten]

<sup>23</sup> ¶ 3, Exhibit 2, p. 12, Moot Proposition



### **[III.A.] THE NTC ESTABLISHED THE EXISTENCE OF UNFORESEEN DEVELOPMENTS**

**34.** It is contended that the NTC properly determined and reasonably and adequately established the existence of unforeseen developments as the *[III.A.1.]* degree to which a circumstance affected the competitive conditions and *[III.A.2.]* a confluence of events, constitute unforeseen developments. The term ‘unforeseen developments’ must be interpreted as unexpected developments<sup>24</sup> occurring after the negotiation of the relevant tariff concession, which 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>25</sup>

#### ***[III.A.1.] Degree to which a circumstance affects prevailing competitive conditions***

**35.** The interpretation of the unforeseen developments clause by the Working Party in *Hatters Fur*<sup>26</sup> was that although the change in fashion of hat styles did not constitute an unforeseen development,<sup>27</sup> the degree to which this change affected the competitive situation as a result of the lower price of imports, could not reasonably be expected to have been foreseen and hence the aforementioned requirement was held to be fulfilled.<sup>28</sup> Additionally, the Working Party opined that any view on such matters was a matter of economic judgment and governments could be greatly influenced by social factors.<sup>29</sup> Further, an unforeseen development may evolve from well-known prior facts.<sup>30</sup>

**36.** The NTC has contended that the 2009 global recession led to a decline in infrastructure investments in several countries. Pueblo Faro, a country accounting for 60% of global production of the product concerned, was experiencing saturation of domestic demand as a result of the recession and had been unable to export the same to major economies for the same reason.<sup>31</sup> Additionally, five major economies have imposed anti-dumping or countervailing duties on the product concerned from Pueblo Faro in the past two years. Hence, Pueblo Faro began importing the product concerned into Puerto Sombra at low prices, since the international market was experiencing a surplus of the same, and in

---

<sup>24</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>25</sup> *Argentina - Footwear* (EC), *supra* note 24, ¶ 96

<sup>26</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*, GATT/CP/106 (Oct. 22 1951) [hereinafter *Hatter’s Fur*]

<sup>27</sup> *Hatters Fur*, *supra* note 2, ¶ 11

<sup>28</sup> *Hatters Fur*, *supra* note 2, ¶ 12

<sup>29</sup> *Hatters Fur*, *supra* note 2, ¶ 48

<sup>30</sup> *US - Steel Safeguards*, *supra* note 13, ¶ 10.84

<sup>31</sup> ¶ 27, Exhibit 2, p. 18, Moot Proposition

increased quantities, as the demand for the product concerned in Puerto Sombra was high because of its rapidly growing economy and consequent rise in infrastructure projects. The share of imports from Pueblo Faro in the total imports of Puerto Sombra had been steadily increasing from 60% to 75% and 82% in 2014, 2015 and 2016 respectively. Pueblo Faro had also given a 5% export incentive to the manufacturers of the product concerned in 2015.<sup>32</sup>

**37.** From the NTC's explanation, it is established that the degree to which the recession altered the conditions of competition in Puerto Sombra is unforeseen in nature. The prolonged existence of recession, for four years at the time of reduction of tariffs, is unforeseen in itself. Further, in light of the increased quantities of imports at prices significantly lower than the selling price of the domestic product, the NTC establishes that the recession has significantly modified the conditions of competition in Puerto Sombra. The degree to which it has been modified could not have been reasonably foreseen because the anti - dumping and countervailing duties imposed on and export incentive given by Pueblo Faro were not in existence at the time of reduction of tariffs on 31<sup>st</sup> December, 2013.

**38.** The developing nature and consequent vulnerabilities existent in Puerto Sombra lends the government additional leeway to base its economic judgments on social considerations like the problems arising from the injury suffered by the domestic industry.

#### ***[III.A.2.] Confluence of circumstances***

**39.** A confluence of a number of developments can constitute the requisite unforeseen developments.<sup>33</sup> The Panel has accepted that unforeseen financial crises along with the strong economy and appreciating currency of the importing member can be termed as unforeseen developments.<sup>34</sup>

**40.** As established in *[III.A.1.]* the degree to which recession affected the conditions of competition was unforeseen in nature. Further, the rapidly growing economy of Puerto Sombra witnessing an increase in infrastructure projects and consequently, the consumption of the product concerned has led to a favorable market for the product. Hence, the confluence of the aforementioned events constitutes the requisite unforeseen developments.

---

<sup>32</sup> ¶ 30, Exhibit 2, p. 19, Moot Proposition

<sup>33</sup> *US - Steel Safeguards*, *supra* note 13, ¶ 10.99

<sup>34</sup> *US - Steel Safeguards*, *supra* note 13, ¶ 10.98

41. To meet the requisite standard of review, the competent authority must provide a reasoned or adequate explanation demonstrating the existence of the aforementioned requirements.<sup>35</sup> Hence, by linking the data, the nature and complexities of which have been fully examined, to the conclusions made, the NTC has provided a reasonable and adequate explanation justifying the existence of unforeseen developments.

**[III.B.] THE NTC ESTABLISHED THE EXISTENCE OF A LINK BETWEEN THE INCREASE IN IMPORTS AND THE GATT OBLIGATION INCURRED**

42. It is contended that the NTC demonstrated the effect of GATT obligation as prescribed by Art. XIX:1(a) as it has illustrated *[III.B.1.]* the existence of such an obligation and *[III.B.2.]* a logical connection between the same and increased imports.

***[III.B.1.] The existence of GATT obligation***

43. The Appellate Body is of the view that to comply with this condition it must simply be demonstrated that the increase in imports is the result of GATT obligations, including tariff concessions.<sup>36</sup> GATT obligation has been interpreted broadly as encompassing any action taken under the rules of GATT.<sup>37</sup> The application of the MFN principle itself amounts to an obligation for the purposes of Art. XIX:1(a).<sup>38</sup> This Art. explicitly provides for the inclusion of tariff concessions as a GATT obligation. Hence, by illustrating that the bound rate of the product was 40% and the uniform applied rate 5%, the NTC has established that Puerto Sombra had incurred tariff concessions under GATT 1994.<sup>39</sup>

44. Further, Puerto Sombra reduced its tariff rates in pursuance of an overarching obligation to do the same, as a result of most WTO members reducing their tariff below their bound rate to promote international trade and better integrate into the market.

45. The average of the applied MFN *ad valorem* duties for the product concerned of a majority of the WTO members is between 0-5%.<sup>40</sup> Inferentially, it can be stated that in practice, WTO members are reliant on each other in the reduction of tariffs. The obligation of all WTO members to contribute to the objective of expansion of trade in goods and services, by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade, is explicitly

---

<sup>35</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Certain Steel Products Steel Products*, ¶ 289, 291, 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>36</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 91

<sup>37</sup> Joe Mc Mahon, *A New Safeguards Code for the GATT*, 16 Victoria U. Wellington L. Rev. 197, p. 199 (1986)

<sup>38</sup> FERNANDO PIROLA, *THE CHALLENGE OF SAFEGUARDS IN THE WTO*, p. 161 (1<sup>st</sup> ed., 2014)

<sup>39</sup> ¶32, Exhibit 2, p. 20, Moot Proposition

<sup>40</sup> *Tariff Download Facility*, World Trade Organisation, <http://tariffdata.wto.org/>, (Jan 12, 2017)

elucidated in the third recital of the WTO Agreement and has been recognized as an object and purpose of the same, generally, as well as of the GATT 1994.<sup>41</sup> Further, the binding and lowering of tariffs, was at the cynosure of the multilateral trade negotiation ‘rounds’ establishing the importance of the same.<sup>42</sup>

**46.** Hence, it is established that Puerto Sombra had an obligation to reduce tariffs, below bound rates, in consonance with the other WTO members.

***[III.B.2.] The existence of a logical connection between GATT obligation and increased imports***

**47.** The existence of a logical connection is established if the injury would not have occurred in the absence of some action by the member which would permit the better flow of imports.<sup>43</sup> Puerto Sombra reduced its already low tariff rate of 15% to 5% from the end of 2013. Between 2013 and 2014, the rate of increase in imports of the product concerned increased significantly from 20% to 108%. Further increases of 20% and 27% in 2015 and 2016 respectively, have been recorded from the significantly increased amount of imports in 2014. There was a 280% increase in imports between 2012 and 2014.<sup>44</sup> By observing the trend of increase in imports, it is established that the significant 108% increase would not have materialized in the absence of the aforementioned tariff concession. Hence, the requisite link has been established.

**48.** Hence, the NTC has provided a reasoned and adequate explanation to establish the existence of developments that could not have been reasonably foreseen at the time of incurring GATT obligation, has led to the aforementioned increase in imports. The overarching concern of the WTO for developing countries as described in *[I.B.]* requires that the effects of the aforementioned circumstances described above are evaluated in light of the particular vulnerabilities of a developing country.

---

<sup>41</sup> Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 82, WT/DS62/AB/R (June 5, 1998) [hereinafter EC – Computer Equipment]

<sup>42</sup> Finger, J. M., L. Schuknecht, *Market Access Advances and Retreats: The Uruguay Round and Beyond*, World Bank Development Research Group, Policy Research Working Paper 2232, p.1 (November 1999)

<sup>43</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>44</sup> ¶ 33, Exhibit 2, p. 20, Moot Proposition

---

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

---

49. As the AoS clarifies and reinforces Art. XIX of the GATT,<sup>45</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 fundamental legal requirements, i.e. the conditions, for application of a safeguard measure, while Art. 4.2 further develops the operational aspects of these requirements.<sup>46</sup> It is contended that the NTC complied with the conditions in Art. 2.1 of [IV.A.] such increased quantities of the product being imported, under such conditions as to [IV.B.] cause or threaten to cause serious injury to the domestic industry that produces like or competitive products. Further, [IV.C.] the extent and duration of the safeguard measure is appropriate.

**[IV.A.] THE NTC ESTABLISHED THE EXISTENCE OF ‘SUCH’ INCREASED QUANTITIES OF IMPORTS**

50. As to the satisfaction of the condition of ‘such’ increased quantities of imports, the Agreement provides no numerical guidance as to how this is to be judged.<sup>47</sup> This qualification is interpreted to mean that the increase in imports must be judged in its full context, in particular with regard to its ‘rate and amount’ as required by Art. 4.2(a);<sup>48</sup> and the aforementioned increase in imports must be recent, sudden, sharp and significant enough, both quantitatively and qualitatively.<sup>49</sup> It has been considered necessary, but not sufficient to carry out a comparison between the end points of the data.<sup>50</sup> The competent authority is also required to evaluate the intervening trends in imports over the period of investigation.<sup>51</sup> The result of the aforementioned analyses should be mutually

---

<sup>45</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>46</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.249

<sup>47</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.161

<sup>48</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 8.161

<sup>49</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 131

<sup>50</sup> Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, ¶ 7.132, WT/DS468/R (July 20, 2015) [hereinafter Ukraine - Passenger Cars]

<sup>51</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 131

reinforcing.<sup>52</sup> Additionally, there is also a requirement to focus on the increase in imports in the recent time period.<sup>53</sup>

- 51.** The NTC has evaluated the absolute increase in imports over the period of investigation by conducting both, an end to end point analysis and a trend analysis. The end to end point analysis reflected a significant increase of 52% from 250,000 MT in 2014 to 380,000 MT in 2016. The trend analysis reflects a 20% increase between 2014 and 2015 and a 27% increase between 2015 and 2016. Focusing on the increase in imports in the recent time period, a sharp 11% increase from 90,000 MT to 100,000 MT in the first 6 months of 2016 is illustrated.
- 52.** In light of the mutually reinforcing nature of the aforementioned analyses, the NTC has consequently determined that there was a sudden, sharp, significant and recent increase in imports of the product concerned. The 108% increase in imports from 120,000 MT to 250,000 MT from 2013 to 2014 and the 280% increase in imports calculated in an end to end point analysis between 2012 and 2016; further support the NTC's aforementioned conclusion. The consideration of data outside the period of investigation has been accepted to support a conclusion<sup>54</sup> and is indicative of the NTC's examination of the nature and complexities of the data presented.
- 53.** The NTC's explanation is adequate in light of any other plausible interpretations of the data and as mentioned above examines the nature and complexities of the relevant data. As either absolute or relative increase in imports is required to be analyzed under Art. 2.1<sup>55</sup> it is proven that the NTC has properly determined with a reasoned and adequate explanation, the existence of 'such' increased quantities of imports. Further, the NTC's analysis of the relative increase in imports discussed under *[IV.B.]*, fortifies the conclusion above.

#### **[IV.B.] THE NTC ESTABLISHED THE EXISTENCE OF SERIOUS INJURY**

- 54.** Under Art. 4.1(a), serious injury is defined as significant overall impairment in the position of a domestic industry. It is contended that the NTC made a proper determination

---

<sup>52</sup>Argentina – Footwear (EC), *supra* note 15, ¶ 8.157

<sup>53</sup>Argentina – Footwear (EC), *supra* note 24, ¶ 130

<sup>54</sup> Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, ¶ 7.234, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R (Feb. 22, 2012) [hereinafter *Dominican Republic – Safeguard Measures*]

<sup>55</sup> *Ukraine – Passenger Cars*, *supra* note 50, ¶ 7.119

of the same by: *[IV.B.1.]* analysing all the requisite factors, *[IV.B.2.]* supporting its conclusions with adequate reasoning and *[IV.B.3.]* establishing a causal link between the increased imports and serious injury suffered.

***[IV.B.1.] The NTC analyzed all the relevant factors***

**55.** The competent authority must analyze all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry.<sup>56</sup> The factors listed in Art. 4.2(a) only serve as the minimum standard to be evaluated.<sup>57</sup> Besides the factors mentioned in Art. 4.2 (a), the NTC analyzed two other factors, the Total Consumption in Puerto Sombra and Profitability of the domestic industry, which have been dealt with under *[IV.B.2.]*. Hence, it is established that the NTC has examined the nature and complexities of all the relevant data.

***[IV.B.2.] The NTC provided a reasoned and adequate explanation to support its conclusions***

**56.** To support a proper determination of serious injury, the relevant factors must be examined along with a reasoned or adequate explanation of how the facts as a whole supported the determination made.<sup>58</sup> The findings of the NTC with regard to the factors it analysed and the adequate and reasoned supporting explanation provided are as follows:

**57. A) *Rate and amount of increase in the imports in both absolute and relative terms-***

- i) Absolute terms-** The rate and amount of the increase in imports in absolute terms has been discussed in *[IV.A.1.]*.
- ii) Relative terms-** In relative terms, which mean the imports are expressed as a percentage of the total domestic production<sup>59</sup>: (i) an end to end point analysis indicated an increase from 100% to 106% between 2014 and 2016 (ii) a year on year trend analysis illustrates a marginal 3% decline between 2014 and 2015, from 100% to 97%, which rose sharply to 106% in the first six months of 2016. The importance of this 9% increase in 2016 is amplified by the aforementioned focus on data from the past. Hence, it is established that the marginal decline is a

---

<sup>56</sup> *US - Wheat Gluten*, *supra* note 22, ¶ 51-53

<sup>57</sup> *Argentina - Footwear (EC)*, *supra* note 24, ¶ 136

<sup>58</sup> *Korea - Dairy*, *supra* note 20, ¶ 7.55

<sup>59</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.141

temporary reversal which will not affect the conclusions<sup>60</sup> drawn by the NTC that the imports have captured the market share of the domestic industry.

**58. B) *Share of the domestic market taken by the increased imports-*** During 2014 and 2015, the market share of the imports and the domestic industry was stable at the values of 53% and 26%. In 2016 the share of imports increased substantially by 3% to 56%, leading to a sharp fall in market share of the domestic industry to 24%. It is established that the increased imports have captured the market share of the domestic industry because despite an increase in domestic consumption, the difference between the production and sales of the domestic industry has increased by 30,000 MT, 50,000 MT and 60,000 MT in 2014, 2015 and 2016 respectively.

**59.** In the provisional determination, the NTC also stated that this trend of imports capturing the market share will be further examined in the course of the investigation. The affirmation of this finding in the final determination is evidence of the fact that the imports have captured the market share of the domestic industry in a significant manner.

**60. C) *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. The NTC acknowledged that the decline in this factor in 2015 was a result of the time taken to stabilize the increased capacities of the domestic industry.<sup>61</sup> It further states that, even though the domestic industry had stabilized its capacities to a great extent and there was a significant increase in consumption as explained under (F), the capacity utilization was still significantly below its level in 2014.

**61. D) *Changes in the levels of productivity and employment-*** The productivity per day of the industry as a whole has increased from 428.57 MT in 2014 to 628.57 MT in 2016. The productivity per day per employee has increased from 100 in 2014 to 113 in 2015 and decreased to 111 in 2016.<sup>62</sup> In light of the requirement that a determination of serious injury must pertain to the recent past,<sup>63</sup> the NTC identified this as a decreasing factor. Additionally, the Panel held that data and statements pertaining to worker productivity, in conjunction with the statements on capital investments indicated that this factor was

---

<sup>60</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.159

<sup>61</sup> ¶ 20, Exhibit 2, p. 15, Moot Proposition

<sup>62</sup> ¶ vii, Exhibit 2, p. 16, Moot Proposition

<sup>63</sup> *US – Wheat Gluten*, *supra* note 17, ¶ 8.81



adequately analysed.<sup>64</sup> Hence, in view of the analysis by the NTC of capacity utilisation in (C) and productivity per day per employee, it is established that this factor was examined to be declining in a reasoned and adequate manner.

- 62.** The level of employment has increased from 100 in 2014 to 120 in 2015 and finally 130 in 2016. The NTC has provided a reasoned and adequate explanation for the increase in the same as being commensurate to the increase in capacities.
- 63. E) *Changes in the level of sales, production and profits and losses*** - The sales and production of the domestic industry has increased by 40,000 MT and 70,000 MT, respectively in the period of investigation. The profitability has significantly decreased from 100 in 2014 to 50 in 2015 and finally to -20 in 2016.<sup>65</sup>
- 64. F) *Total consumption/demand in Puerto Sombra***- The consumption of the product has increased from 470,000 MT in 2014 to 570,000 MT in 2015 and to 680,000 MT in 2016. The NTC recognized the demand supply gap and established that while imports were necessary, the domestic industry could not compete with ‘such increased’ imports and temporary protection measures in the form of safeguards was necessary.
- 65.** The competent authority is free to determine an appropriate method of assessing the circumstances of the domestic industry, inclusive of deciding which factors to give more importance to while making the determination of serious injury<sup>66</sup> and it is not necessary for it to identify a negative trend in every factor examined. It must consider the totality of trends and interaction between the factors and provide an adequate or reasoned explanation of how the facts support the determination of significant overall impairment of the industry.<sup>67</sup>
- 66.** The NTC has considered the increase in sales and production, in totality with the sharply falling profitability of the domestic industry and concludes that despite an increase in production and sales; the domestic industry is not profitable. Similarly, it has examined the increase in total consumption with the decrease in the domestic industry’s market share and capacity utilization. Both these situations illustrate circumstances in which the increase in factors as a result of positive trends in related factors has not materialized, and

---

<sup>64</sup> *US – Wheat Gluten*, *supra* note 17, ¶ 8.45

<sup>65</sup> Exhibit 2, p. 13 – 16, Moot Proposition

<sup>66</sup> *Korea – Dairy*, *supra* note 20, ¶ 7.96

<sup>67</sup> *US – Wheat Gluten*, *supra* note 17, ¶ 8.80 and 8.85

negative trends are observed instead. This is indicative of the serious injury suffered by the domestic industry.

67. In *[IV.B.1.]* it has been established that the NTC examined the nature and complexities of all relevant factors. The explanations for the existence of serious injury despite increases in production and sales ensure that its explanation responds to other plausible interpretations of data. It is established that it made a proper determination of serious injury by providing a reasoned and adequate explanation to link the data presented to the conclusions made. The concern of the WTO for developing countries, described in *[I.B.]*, requires the determination of serious injury to be evaluated in light of the vulnerabilities of a developing country.

*[IV.B.3.] The NTC established the existence of the requisite causal link*

68. The existence of a causal link rests on three basic elements<sup>68</sup>: *[IV.B.3.a.]* an analysis of the conditions of competition, *[IV.B.3.b.]* a coincidence analysis and *[IV.B.3.c.]* a non attribution analysis.

69. Causal link can be described as a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury.<sup>69</sup> The demonstration of a causal link must be on the basis of 'objective' evidence or data.<sup>70</sup> The analysis in *[II.B.1.]* establishes that the NTC has used the requisite data. The AoS does not prescribe any method to be followed while determining the existence of a causal link. It is not imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities. Further, there is no mandated order in which the competent authority's analysis is to take place.<sup>71</sup> The method used must determine whether or not a genuine and substantial relationship of cause and effect exists between the increased imports and the serious injury suffered by the domestic industry.<sup>72</sup>

*[IV.B.3.a.] The conditions of competition analyzed supported the NTC's conclusion*

70. The determination under Art. 2.1 that the increased imports are occurring 'under such conditions' as to cause or threaten to cause serious injury 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

---

<sup>68</sup> *Argentina – Footwear (EC)*, *supra* note 15, ¶ 8.131

<sup>69</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Import of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 209, WT/DS202/AB/R (Feb. 15, 2002) [hereinafter US – Line Pipe]

<sup>70</sup> *US – Steel Safeguards*, *supra* note 35, ¶ 486

<sup>71</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 10.328

<sup>72</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 10.294

overall situation of the domestic industry;<sup>73</sup> some examples of which are physical characteristics, quality, service and a price analysis.<sup>74</sup> There have been instances where the competent authority has considered the low prices of imports and their asserted effects on the domestic industry as the only condition of competition on which the causation analysis was based.<sup>75</sup> In the present dispute the NTC's analysis of the landed value of imports with the cost of production, selling price and profitability of the domestic industry forms an integral part of its causation analysis.

**71.** The injury caused by the factors analyzed under Art. 4.2 (a) has been established in *[IV.B.2.]* Further, it has been established in *[III.A.I.]* that the price analysis conducted illustrates that the sharp fall in profitability, and hence the injury caused to the domestic industry, is a result of the fall in landed value of the imports. Since pricing trends must always be considered in context to establish a causal link,<sup>76</sup> the NTC provided for the interactions of the same with increased imports and other economic indicators.

**[IV.B.3.b.] The coincidence analysis undertaken supported the NTC's conclusion**

**72.** A coincidence analysis is central to a causation analysis<sup>77</sup> and refers to the temporal relationship between movements in imports, both import volumes and import market shares, and movements in the injury factors.<sup>78</sup> It is necessary for such an analysis to illustrate an 'overall coincidence' between the factors and imports, in light of which, the existence of slight absences of coincidence in the movement of individual injury factors in relation to imports would not preclude a finding of a causal link between increased imports and serious injury.<sup>79</sup>

**73.** Since the absence of coincidence in certain individual factors such as production and sales does not disturb the overall coincidence, the NTC has established the same over the period of investigation by illustrating that the sudden, sharp, significant and recent increase in imports of the product concerned coincided with the fall in profitability, capacity utilization, market share, and productivity per day per employee of the domestic

---

<sup>73</sup> *US – Wheat Gluten*, *supra* note 22, ¶ 78

<sup>74</sup> *Argentina - Footwear (EC)*, *supra* note 15, ¶ 8.251-8.252

<sup>75</sup> *Argentina - Footwear (EC)*, *supra* note 15, ¶ 8.254

<sup>76</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 10.322

<sup>77</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 10.299 – 10.300

<sup>78</sup> *Argentina - Footwear (EC)*, *supra* note 15, ¶ 8.238

<sup>79</sup> *US - Wheat Gluten*, *supra* note 17, ¶ 8.101

industry.<sup>80</sup> Further, by comparing the declining market share of the domestic industry, which is equivalent to the increasing market share of the imports, with the movements of the other factors, the NTC has carried out a complete analysis.

**74.** The trend of coincidence established between increased imports and the aforementioned injury suffered is especially important because while the domestic industry acknowledges that imports were necessary to address the demand supply gap, it is the sudden, sharp, significant and recent increase in imports that has caused serious injury to the domestic industry. In the period from January to June 2016 in which the domestic industry made no profitable sales,<sup>81</sup> the volume of imports was 190,000 MT and there was an 11% absolute and 9% relative increase in imports in that time period.

**[IV.B.3.c.]** *The non attribution analysis undertaken supported the NTC's conclusions*

**75.** The scope of the non attribution analysis that the competent authority is mandated to carry out is as follows<sup>82</sup>: the injury caused by increased imports must be distinguished from that caused by other factors and accordingly attributed. Finally, the competent authority must determine whether there exists a causal link, involving a genuine substantial relationship, between increased imports and serious injury. Members are free to carry out the process by any method as long as the obligations in Art. 4.2 are respected.<sup>83</sup> It is contended that the NTC satisfied its obligation to carry out the requisite non attribution analysis. The treatment of this in the **(A)** provisional determination and **(B)** final determination is as follows:

**76. A)** In the provisional determination, the NTC has attributed injury caused by the investment by explaining the decrease in capacity utilization and increase in cost of production in 2015 as being a result of the same. In fact, the aforementioned analysis enables the apportionment in a rough manner of the injury attributable to a factor other than increased imports<sup>84</sup> as it attributes the fall in capacity utilization from 75% to 67% and increase in cost of production from 100 to 130, in 2015, to the endeavor of the domestic industry to increase its capacities.<sup>85</sup>

**77. B)** In the final determination the NTC explicitly acknowledged that the increase in imports is not the sole factor causing serious injury. Further, by asserting that the

---

<sup>80</sup> ¶ 26, Exhibit 2, p. 18, Moot Proposition

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

<sup>82</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 10.326

<sup>83</sup> *US – Lamb*, *supra* note 45, ¶ 178, 181

<sup>84</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 10.342

<sup>85</sup> ¶ 25, Exhibit 2, p. 17, Moot Proposition

domestic industry is not suffering injury solely due to huge debt, high interest rate, high fixed cost and high depreciation cost; the NTC has established the nature and extent of the injury caused by the aforementioned factors as being contributing factors to the serious injury being suffered.<sup>86</sup>

- 78.** The concern of the WTO for developing countries as described in *[I.A]* requires that the circumstances described in (A) and (B) are evaluated in light of the particular vulnerabilities of the domestic industry a developing country, as being unable to increase its capacities without incurring a debt.
- 79.** In light of the NTC's full analysis of the complexities and nature of the relevant data and the adequacy 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 explicitly established the existence of a genuine and substantial causal link between increased imports and serious injury suffered due to the decline in profitability.

**[IV.C.] THE SAFEGUARD MEASURE WAS APPLIED ONLY FOR THE EXTENT & DURATION NECESSARY**

- 80.** 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 of the AoS, respectively. It is contended that the safeguard applied is consistent with the aforementioned Arts. Additionally, the examination of an adjustment plan by the NTC is strong evidence to support that the substantive obligation imposed by Art. 5.1 is complied with.<sup>87</sup>
- 81.** Art. 5.1 imposes the substantive obligation that the measure is applied commensurate to the goals of preventing or remedying serious injury and facilitating adjustment of the domestic industry.<sup>88</sup> Though the consideration of adjustment plans is not mandated,<sup>89</sup> the examination of the same by the competent authority is strong evidence to support that this obligation was complied with. The NTC has examined the structural adjustment plan of the domestic industry to be based on its capability and track record and hence deemed it as acceptable. The domestic industry will also be required to report to it, as to the

---

<sup>86</sup> ¶ 8 (c), Exhibit 3, p. 30, Moot Proposition

<sup>87</sup> *Korea – Dairy*, *supra* note 20, ¶ 7.108

<sup>88</sup> *Argentina – Footwear (EC)*, *supra* note 24, ¶ 73-75

<sup>89</sup> *Korea – Dairy*, *supra* note 20, ¶ 7.108

progress toward the milestones enumerated in the plan on an annual basis. Hence, it is established that in applying the safeguard measure the NTC complied with the requirements of Art. 5.1.

---

**V: PUERTO SOMBRA’S IMPOSITION OF SAFEGUARD MEASURES IS CONSISTENT WITH ART. I, GATT AND ART. 9.1, AOS**

---

**82.** Puerto Sombra has not violated *[V.A.]* Art. 9.1 of the AoS and *[V.B.]* Art. I of the GATT by granting Puerto Santo immunity from the safeguard duty. ALTERNATIVELY, Assuming but not admitting that Puerto Sombra did not have the authority to identify countries as developing for the purposes of Art. 9.1; *[V.C.]* the independent operation of the self designation mechanism of classification between countries and *[V.D.]* the economic diversity of developing members in the WTO, affirm the developing status of Puerto Santo.

**[V.A.] COMPLIANCE WITH ART. 9.1, AOS**

**83.** Art. 9.1 expounds that safeguard measures should not be applied against a product originating in a developing country, subject to certain *de minimis* qualifications. The wording of this Art. imposes an obligation as opposed to a discretionary faculty, on the Member enforcing the measure, to exclude developing country Members that satisfy the aforementioned requirements, from the application of the same.<sup>90</sup> As Puerto Santo satisfied the *de minimis* qualifications, to establish that Puerto Sombra complied with Art. 9.1, it is contended that the country applying the safeguard has the authority to identify countries as being ‘developing’ for the purposes of the aforementioned Art.

**84.** This contention is established as: **(A)** Art. 9.1, does not indicate ‘how’ a member must comply with the obligation under it<sup>91</sup> and **(B)** the AoS does not provide any guidelines as to the process of exclusion of such members. Hence, since words that are not there must not be read into an Agreement,<sup>92</sup> the member applying the safeguard is free to impose its own parameters while excluding developing members.<sup>93</sup>

---

<sup>90</sup> *Dominican Republic – Safeguard Measures*, *supra* note 54, ¶ 7.383

<sup>91</sup> *US – Line Pipe*, *supra* note 69, ¶ 127

<sup>92</sup> *US – Line Pipe*, *supra* note 69, ¶ 250

<sup>93</sup> WOLFRUM, STOLL & KOEBELE, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: WTO TRADE REMEDIES, p. 362, Vol. 4 (2008)

85. From the above analysis, it follows that different countries may apply distinct parameters to identify developing members, leading to a scenario where a country is characterized differently by different members. The accession of China as a ‘hybrid’ member, acquiring rights and obligations corresponding with the status of a ‘developing’ member and a ‘developed’ member interchangeably for different agreements<sup>94</sup> illustrates the flexibility of a country’s status allowing it to be treated differently by different countries. This differentiated treatment was illustrated in the exclusion of different countries in the application of steel safeguards by the USA and the EC.<sup>95</sup> The widely varying numbers of developing countries excluded under this provision by different countries applying safeguards<sup>96</sup> confirm this conclusion.

#### **[V.B.] COMPLIANCE WITH ART. I, GATT**

86. The object and purpose of the MFN Clause embodied in Art. I is to prohibit discrimination among like products originating in or destined for different countries.<sup>97</sup> It is one of the two fundamental non-discrimination clauses on which the WTO system rests and is considered to be of central importance from both a legal and economic point of view.<sup>98</sup> This principle finds expression in the AoS in Art. 2.2.<sup>99</sup> Art. 9.1 is a manifestation of the special and differential treatment given exclusively to developing countries<sup>100</sup> and it serves as an exception to the MFN Policy<sup>101</sup> expounded above. Hence, Puerto Sombra does not violate Art. I of the GATT by appropriately complying with its obligation under Art. 9.1.

#### **[V.C.] PUERTO SANTO’S DEVELOPING STATUS IS AFFIRMED BY THE AUTONOMOUS OPERATION OF THE SELF- DESIGNATION MECHANISM**

87. Art. XVIII:I of the GATT provides for a nebulous definition of a ‘developing’ country as one whose economy ‘can only support low standards of living’ and is in the ‘early stages of development’, this has been characterized as being so indeterminate that it can hardly

---

<sup>94</sup> GILBERT WINHAM, PATRICK F.J MACRORY, ARTHUR E. APPLETON & MICHAEL G. PLUMMER, *THE WORLD TRADE ORGANIZATION – LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, p. 1526, Vol. 1 (2005)

<sup>95</sup> *US – Steel Safeguards*, *supra* note 13, ¶ 7.1864

<sup>96</sup> Committee on Safeguards, *Note by Secretariat – Summary of Notifications in relation to Art. 9.1*, G/SG/W/204, p. 2 - 9 (May 22, 2001)

<sup>97</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>98</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>99</sup> Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 4.24, WT/DS202/R (Oct. 29, 2001) [hereinafter *US – Line Pipe*]

<sup>100</sup> WINHAM, MACRORY, APPLETON & PLUMMER *supra* note 94, p. 1552

<sup>101</sup> *Dominican Republic – Safeguard Measures*, *supra* note 54, ¶ 7.70

be called a definition.<sup>102</sup> Since no specific procedure or criteria for determining whether a country qualified as developing emerged from the definition provided, in practice, countries self-designate themselves.<sup>103</sup> The method of self-designation prevalent before the creation of the WTO was wholly adopted and affirmed by Art. XVI.I of the WTO Agreement. This, coupled with the practice of members objecting to the use of economic indicators like GDP per capita as the basis of classification,<sup>104</sup> is indicative of the intention of the member countries to retain the practice of independent self-designation. This intention is well founded as the notion that, measures of international development need to go beyond aggregating national requirements,<sup>105</sup> is becoming increasingly popular. While the self-declaration is subject to the scrutiny of other members, it still holds a relevant degree of recognition and validity.<sup>106</sup> The autonomy in the operation of the self-designation mechanism is further established by the examination of disputes settled under the relevant provisions.

**88.** In the disputes initiated by developed countries under Art. XVIII-B, the basis for their complaint rested on elements other than the developing status of the countries invoking the Art. in question.<sup>107</sup> The status of these countries was implicitly recognized and acquiesced to,<sup>108</sup> indicating the significance given to the self-designated status of a country. In the Australian Waiver dispute,<sup>109</sup> while recognizing the absence of an official list of ‘less developed’ countries, the Working Party, declared itself incompetent to settle the question of determination of criteria to identify developing countries. When called upon to adjudicate upon the question of the ‘developing’ status of a country, both the Panel and the Appellate Body exhibited similar behavior and avoided resolving the issue of China’s status as a developing country.<sup>110</sup> Thus, highlighting the autonomous operation of the self-designation mechanism.

---

<sup>102</sup> SONIA E. ROLLANDE, DEVELOPMENT AT THE WTO, (Feb. 2012), p. 81

<sup>103</sup> ROLLANDE, *supra* note 102, p. 80

<sup>104</sup> Committee on Safeguards, *Minutes of the Regular Meeting Held on 28<sup>th</sup> April 2003*, ¶ 132, Committee on Safeguards, *Minutes of the Regular Meeting Held on 20<sup>th</sup> April 2003*, ¶ 131-133

<sup>105</sup> Oscar Schachter, *The Evolving International Law of Development*, 15 Colum. J. Transnat’l L. 1, p. 1 (1976)

<sup>106</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. 51 (2012)

<sup>107</sup> Verdirame Guglielmo, *The Definition of Developing Countries under GATT and other International Law*, 39 German Yearbook of International Law 164, p. 177 (1996)

<sup>108</sup> Verdirame, *supra* note 107, p. 177

<sup>109</sup> Verdirame, *supra* note 107, p. 177

<sup>110</sup> *US - Steel Safeguards*, *supra* note 35, ¶ 508



89. Hence, the self-designation of Puerto Santo as a developing member of the WTO is significant in affirming the validity of the special and differential treatment conferred on it under Art. 9.1.

**[V.D.] PUERTO SANTO IS A PART OF THE ECONOMICALLY DIVERSE ‘DEVELOPING’  
COUNTRY GROUP**

90. It is contended that the sheer diversity of ‘developing’ members of the WTO allows for the inclusion of Puerto Santo in the same category. Several advanced and relatively wealthy countries that, outside the WTO context, would not be considered developing countries are in fact classified as the same for WTO purposes<sup>111</sup>. Any differentiation between these developing members threatens to open up the system to conflicting demands, leads to the problem of graduation from one category to another and raises issues of instability and adverse incentives<sup>112</sup>. Hence, the economic diversity of developing members is necessary and allows for the valid inclusion of Puerto Santo within this category.

91. Further, the example of Israel establishes that even countries with high values of traditional economic indicators can be classified as ‘developing’ on account of certain non economic characteristics. The Trade Policy Review analyzes Israel as being a highly industrialized and diversified economy, experiencing technological expansion and development, being a part of the high-income group, with a GDP per capita of more than USD 31,000. However, high poverty levels and low labour-market participation rates among the rapidly growing Arab-Israeli and ultra-orthodox communities were identified as areas of concern, that may constitute a hindrance to further sustainable economic growth. Hence, for the purposes of the WTO, Israel is a developing country.<sup>113</sup>

92. Therefore, this example allows for the possibility of a miscellaneous factor in Puerto Santo, not reflected in its economic indicators, contributing to the ‘developing’ status of the same.

---

<sup>111</sup> Bohanes & Garza, *supra* note 106

<sup>112</sup> Tim Josling, *Special and Differential Treatment for Developing Countries*, in AGRICULTURAL TRADE REFORM AND THE DOHA DEVELOPMENT, World Economy, p. 67 (Kym Anderson, and Will Martin, 2006)

<sup>113</sup> *Trade Policy Review Report by the Secretariat: Israel*, ¶ 1, WT/TPS/S/272 (Sept.25, 2012)

## 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 consistent with Art. XIX:2, GATT and Arts. 12.3 and 12.4, AoS.
2. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are consistent with Art. 6, AoS.
3. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are consistent with Art. XIX:1(a), GATT.
4. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are consistent with Art. XIX:1(a), GATT and Arts. 2.1, 4.1(a), 4.2(a) and 4.2(b), AoS.
5. Provisional and Definitive Safeguard Measures imposed by Puerto Sombra are consistent with Art. I, GATT and Art. 9.1, AoS.

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

148R