TEAM CODE: 144C

BEFORE THE PANEL ESTABLISHED BY THE WTO DSB

PUERTO SOMBRA – SAFEGUARD MEASURES ON UNWROUGHT ALUMINIUM

COMPLAINANT: PUEBLO FARO

RESPONDENT: PUERTO SOMBRA

WT/DSxxx

WRITTEN SUBMISSION FOR THE COMPLAINANT

9th GNLU INTERNATIONAL MOOT COURT

COMPETITION

2017

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LIST OF ABBREVIATIONS

%	Percentage
&	And
¶	Paragraph
AB	Appellate Body
AD	Antidumping Duty
AoS	Agreement on Safeguards
Art.	Article
CVD	Countervailing Duties
Doc.	Document
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ed.	Edition
FOB	Free on Board
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade, 1994
GDP	Gross Domestic Product
GNI	Gross National Income
Id.	Ibidem
MT	Metric Tons
NTC	National Trade Commission
p.	Page
PPP	Purchasing Power Parity
R	Report
UNTS	United Nations Treaty Series
US	United States
USD	United States Dollar
WT/DS	World Trade/ Dispute Settlement
WTO	World Trade Organisation

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Short Title	Full case Title and Citation
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Argentina – Footwear	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R (June 25, 1999).
EC-Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WTO Doc. WT/DS246/AB/R (Apr. 7, 2004).
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Dec. 14, 1999).
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R (June 21, 1999).
Ukraine – Passenger Cars	Panel Report, *Ukraine-Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R (June 26, 2015).
US – Lamb	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).
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, (Feb. 15, 2002).
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on* *Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10th, 2003).
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STATEMENT OF FACTS

The Parties

Puerto Sombra is a developing country with a population of 100 million and a founding member of the WTO. Its economy was primarily agricultural with a rural population, but has recently faced rapid urbanization and increased infrastructural activity. Pueblo Sombra has been experiencing positive growth and increased imports, and its government has encouraged foreign participation in its markets. Pueblo Faro, located on the same continent as Puerto Sombra, is a developed nation whose economy is manufacturing based. Its GDP has struggled due to the 2009 recession, with most products having low demand internally and are exported instead. Incentives are placed on exports of finished products and taxes on exports of raw material.

Unwrought Aluminium in Puerto Sombra

Imports of unwrought aluminium have been flooding the market in Puerto Sombra and are steadily increasing, with Pueblo Faro being the primary supplier. A trade negotiation for a free trade agreement between the two countries was ongoing, however there has been stiff opposition by the domestic producers of unwrought aluminium due to the intense competition faced by them from the imports. A leading newspaper in Puerto Sombra claimed that there was rampant corruption in the tenders for bauxite mines, causing high costs of production for the domestic industry.

Provisional Safeguard Measure

Seeking protection, the domestic industry of Puerto Sombra filed an application before the NTC for a safeguard investigation. The NTC initiated the investigation on 31st July 2016. Finding that a delay in providing protection would cause severe damage to the domestic industry, the NTC imposed a provisional safeguard measure on unwrought aluminium on 2nd August 2016. The measure was 20% duty for a period of 200 days, commencing 2nd August 2016. Puerto Sombra notified the WTO on 15th August 2016 of the initiation of the investigation and imposition of the measure.

Reaction to the Safeguard Measure

A number of WTO countries, including Pueblo Faro, questioned the measure, claiming there to not be critical circumstances and calling the measure protectionist in nature. A public hearing

was conducted by the NTC on 30 October 2016. Environmental and labour groups urged for a safeguard measure to combat the practices done in Pueblo Faro that were violative of international labour and environmental standards. The domestic industry, exporters, importers and user associations also presented their views.

Definitive Safeguard Measure

The NTC verified the data submitted by the domestic industry, and imposed a definitive safeguard duty on 15th November 2016 for a period of two and a half years. After the 200th day of the provisional measure, until 1st August 2017, the duty would be 20%. From 2nd August 2017 to 1st August 2018 it would be 15%. From 2nd August 2018 to 1st August 2019 it would be 10%. Puerto Santo, among other developing nations, was excluded. Puerto Sombra notified the WTO on 25th November 2016. The exclusion of Puerto Santo was questioned by certain developed countries, claiming that it was a developed nation and did not merit the exclusion.

Panel Establishment

In early December 2016, Pueblo Faro requested for consultations with Puerto Sombra under the WTO DSU. The consultations were unsuccessful. Pueblo Faro requested for the establishment of a WTO Panel, which was rejected by Puerto Sombra. Upon a second request by Pueblo Faro, the DSB established a panel in January 2017 and the Panel was composed in late January 2017.

MEASURES AT ISSUE

I. WHETHER PUERTO SOMBRA IS IN CONTRAVENTION OF ARTICLE XIX:2 OF THE GATT 1994 AND ARTICLES 12.3 AND 12.4 OF THE AGREEMENT ON SAFEGUARDS

II. WHETHER THE SAFEGUARD MEASURE IS IN CONTRAVENTION OF ARTICLE 6 OF THE AGREEMENT ON SAFEGUARDS

III. WHETHER UNFORESEEN DEVELOPMENTS AND GATT OBLIGATIONS HAVE BEEN DETERMINED WHICH LED TO INCREASED IMPORTS THAT CAUSED SERIOUS INJURY

IV. WHETHER THE SAFEGUARD MEASURE IS BASED ON A PROPER DETERMINATION OF INCREASED IMPORTS THAT LED TO A SIGNIFICANT OVERALL IMPAIRMENT IN THE POSITION OF THE DOMESTIC INDUSTRY

V. WHETHER THE BENEFIT/IMMUNITY GRANTED TO PUERTO SANTO IS VALID

SUMMARY

1. Puerto Sombra's imposition of the safeguard measures are in contravention of Article XIX:2 of the GATT and Articles 12.3 and 12.4 of the Agreement on Safeguards
    1.1. Puerto Sombra has failed to provide the pertinent information required under Article 12.2 of the Agreement on Safeguards
    1.2. Puerto Sombra has failed to notify the WTO Committee on Safeguards immediately after the imposition of the definitive safeguard measure
    1.3. Puerto Sombra has failed to notify the WTO Committee on Safeguards before the imposition of the provisional safeguard measure
2. Puerto Sombra has failed to comply with Article 6 of the Agreement on Safeguards
    2.1. Puerto Sombra has not demonstrated any critical circumstances
    2.2. There are no critical circumstances present in Puerto Sombra
3. Puerto Sombra has failed to satisfy Article XIX:1(a) of the GATT 1994
    3.1. There exists a burden to prove that unforeseen developments must be demonstrated for a safeguard measure to be imposed
    3.2. Puerto Sombra has not adequately demonstrated the requirement of unforeseen developments of Article XIX:1(A) of the GATT
    3.3. Puerto Sombra has failed to prove that the unforeseen developments resulted in increased imports causing serious injury
4. Puerto Sombra has failed to satisfy Article XIX:1(A) of the GATT and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the Agreements on Safeguards
    4.1. The standard of review has not been satisfied
    4.2. Puerto Sombra has not fulfilled its obligations under Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT
        4.2.1. The product is not being imported in increased quantities relative to the domestic production
        4.2.2. The product is not being imported under such conditions so as to cause serious injury
        4.2.3. The product is not being imported in such increased quantities to cause serious injury to the domestic industry
    4.3. Puerto Sombra has defined the domestic industry in a manner that is inconsistent with Article 2.1, Article 4.1(a) and Article 4.1(c) of the Agreement on Safeguards

4.4. Puerto Sombra has not evaluated all relevant factors having a bearing on the situation of the domestic industry

4.5. Puerto Sombra has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards

5. Puerto Sombra's imposition of safeguard measures are in contravention of Article I of the GATT and Article 9.1 of the Agreement on Safeguards

5.1. Puerto Santo’s economic conditions necessitate it to be considered a developed nation

5.2. The benefit/immunity from safeguard duty granted to Puerto Santo is against the objective of Article 9.1 of the Agreement on Safeguards

LEGAL PLEADINGS

1. PUERTO SOMBRA'S IMPOSITION OF THE SAFEGUARD MEASURES ARE IN CONTRAVENTION OF ARTICLE XIX:2 OF THE GATT AND ARTICLES 12.3 AND 12.4 OF THE AGREEMENT ON SAFEGUARDS

1. It is submitted to the Panel that Puerto Sombra has not fulfilled the obligations set under Art. XIX:2 of the GATT and Art. 12 of the AoS as: (i) Puerto Sombra has not provided the pertinent information required by Art. 12.2 and Art. 12.3 of the AoS (**1.1**); (ii) Puerto Sombra has failed to notify the WTO Committee on Safeguards immediately after the imposition of the definitive safeguard measure (**1.2**) and; (iii) Puerto Sombra has failed to notify the WTO Committee on Safeguards before the imposition of the provisional safeguard measure (**1.3**).

1.1. PUERTO SOMBRA HAS FAILED TO PROVIDE THE PERTINENT INFORMATION REQUIRED UNDER ARTICLE 12.2 OF THE AOS

2. Art. 12.2 of the AoS aims to provide information and transparency through the provision of pertinent information.[1] This objective of information and transparency was affirmed by the Appellate Body in the case of *Korea-Dairy*.[2] The pertinent information must include a precise description of the product involved. The absence of this precise description of the product under consideration defeats the underlying objective of information and transparency of Art. 12.2 of the AoS.
3. The notification made by Puerto Sombra pursuant to Articles 12.1(b) and (c) on November 25, 2016 is inconsistent with Art. 12.2. Puerto Sombra has failed to provide the precise description of the product involved in any of its notifications, and thus has failed to comply with the pertinent information requirement of Art. 12.2.
4. Puerto Sombra has provided a description of the product under consideration in the Provisional Determination as '*Unwrought Aluminium*' classified under International Harmonised System Customs Tariff Heading 7601 of Chapter 76.[3] However, they have failed to provide the precise description as to whether the product under consideration is primary or secondary unwrought aluminium. There are two forms of unwrought aluminium: (1) primary unwrought aluminium, produced by smelting alumina and (2)

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[1] Agreement on Safeguards art. 12.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 154 [hereinafter AoS].
[2] Appellate Body Report, *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products,* ¶ 107, WTO Doc. WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea-Dairy* Appellate Body Report].
[3] Fact Sheet p. 6, Exhibit 1, ¶ 2.

secondary or recycled unwrought alumina, produced by melting scrap.[4] The Heading 7601 of Chapter 76 under International Harmonised System Customs Tariff covers both primary and secondary aluminium.[5] Secondary unwrought aluminium is covered under the sub-group of 7601.20.90.[6] This classification between primary and secondary unwrought aluminium becomes important considering the fact that, as per the given data, the domestic industry are the producers of only primary unwrought aluminium.[7] However, the investigation data fails to take into consideration any such classification between primary and secondary unwrought aluminium. Puerto Sombra has thus acted inconsistently with Art. 12.2 of the AoS by failing to provide all pertinent information, in the form of a precise description of the product.

5. The requirement to furnish all pertinent information under Art. 12.2 of the AoS is pursuant to the obligation of providing adequate opportunity for prior consultations within the meaning of Art. 12.3 of the AoS.[8] As was recognised by the Appellate Body in the case of *US-Wheat Gluten*, the information identified under Art. 12.2 is required for meaningful consultations to transpire under Art. 12.3.[9] However, in the instant case, Puerto Sombra has failed to provide the precise description of the product involved as envisaged by Art. 12.2 of the AoS. Puerto Sombra has therefore also acted inconsistently with Art. 12.3 of the AoS by failing to provide adequate opportunity for prior consultations, as the consultations are on the basis of the description of the product provided under Art 12.2.
6. Art. 12.3 possesses an explicit link to Art. 8.1,[10] which was further recognised by the Appellate Body in the case of *US-Wheat Gluten*, where it was held that unless adequate opportunity for prior consultations was present, an adequate balance of concessions cannot be endeavoured to be maintained as per Art. 8.1 read with Art. 12.3.[11] Without such provision of pertinent information and adequate opportunity for prior consultations, concessions pursuant to Art. 8.1 of the AoS cannot be determined.

[4] United Nations Conference on Trade and Development, *Review of Accuracy and Completeness of Available Statistics on Bauxite, Alumina and Aluminium and Possible Measures to be Taken Thereon*, U.N. Doc. TD/B/CN.1/RM/BAUXITE/7 (Feb. 4, 1994).
[5] Fact Sheet p. 6, Exhibit 1, ¶ 2.
[6] *Id*.
[7] Fact Sheet, p.2, ¶ 6.
[8] AoS art. 12.3.
[9] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* ¶ 136, WTO Doc. WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *US-Wheat Gluten* Appellate Body Report].
[10] AoS art 8.1.
[11] *US-Wheat Gluten* Appellate Body Report, *supra* note 9, ¶ 146.

7. Puerto Sombra has thus acted inconsistently with Art. 12.3 of the AoS by failing to provide all pertinent information as required under Art. 12.2 of the AoS, which is intended to afford an opportunity for adequate consultations, and thereby, failing to endeavour to maintain a substantially equivalent level of concessions and other obligations within the meaning of Art. 8.1 of the AoS.

1.2. PUERTO SOMBRA HAS FAILED TO NOTIFY THE WTO COMMITTEE ON SAFEGUARDS IMMEDIATELY AFTER THE IMPOSITION OF THE DEFINITIVE SAFEGUARD MEASURE

8. Puerto Sombra has acted inconsistently with Art. 12.1 of the AoS and Art. XIX:2 of the GATT by failing to notify the WTO Committee on Safeguards immediately after the imposition of the definitive safeguard measure. It is evident from a combined reading of Art. 12.1 of the AoS and Art. XIX:2 of the GATT that the obligation to notify the WTO Committee on Safeguards is triggered as soon as the decision to adopt the definitive safeguard measure is undertaken. This was affirmed by *Ukraine-Passenger Cars*, holding that the assessment of whether the notification under Art. 12.1 would be immediate is dependent on the date of the notification and the date on which the triggering event occurred.[12] The sense of urgency required in notifying the WTO Committee on Safeguards had been elaborated by the Appellate Body in the case of *US-Wheat Gluten*, stating that the amount of time for a notification must be kept at a minimum in the aim to provide immediate notification.[13] The Appellate Body clarified that the objective behind an immediate notification is to allow the Committee on Safeguards and the Members the fullest possible period to reflect upon and react to an ongoing safeguard investigation.[14] This indicates that a determination of whether a notification was immediate does not require consideration of whether the Committee or Members received the notification early enough to still allow them in fact to reflect on, or react to it.
9. The Panel in the case of *Ukraine-Passenger Cars* had concluded that notification within seven days following the adoption of the measure was reasonable within the meaning of 12.1(c) of the AoS, specifically and solely because Ukraine's investigation was not conducted in a WTO working language, and the notice was also originally not published in a WTO working language.[15]

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[12] Panel Report, *Ukraine-Definitive Safeguard Measures on Certain Passenger Cars,* ¶ 7.464, WTO Doc. WT/DS468/R (June 26, 2015) [hereinafter *Ukraine-Passenger Cars* Panel Report].
[13] *US-Wheat Gluten* Appellate Body Report, *supra* note 9, ¶ 105.
[14] *Id.* ¶ 106.
[15] *Ukraine-Passenger Cars* Panel Report, *supra* note 12, ¶ 7.501.

10. In this case, the Final Determination of November 15, 2016 was notified to the WTO on November 25, 2016.[16] It is submitted that this delay of 10 days is unreasonable within the meaning of Art. 12.1 of the AoS, The official languages of Puerto Sombra, English and Spanish, are both WTO working languages.[17] There are no such administrative difficulties in terms of language or otherwise before Puerto Sombra which justify a delay of 10 days between publication of the measure and its notification to the WTO within the meaning of Art. 12.1 of the AoS.

11. Puerto Sombra has failed to provide the Committee on Safeguards, and Members, the fullest possible period to reflect upon and react to an ongoing safeguard investigation. Thus, Puerto Sombra acted inconsistently with Art. 12.1 of the AoS and Art. XIX:2 of the GATT, by failing to notify the WTO Committee on Safeguards immediately after the imposition of the definitive safeguard measure.

1.3. PUERTO SOMBRA HAS FAILED TO NOTIFY THE WTO COMMITTEE ON SAFEGUARDS BEFORE THE IMPOSITION OF THE PROVISIONAL SAFEGUARD MEASURE

12. Art. 12.4 of the AoS explicitly states that "*A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6.*"[18] In the instant case, the provisional safeguard measure was imposed on August 2, 2016 by the NTC of Puerto Sombra and the WTO Committee on Safeguards was notified only on August 15, 2016 – a delay of 13 days.[19]

13. By notifying the WTO Committee on Safeguards after the imposition of the provisional safeguard measure and not before, Puerto Sombra has acted inconsistently with Art. 12.4 of the AoS.

2. PUERTO SOMBRA HAS FAILED TO COMPLY WITH ARTICLE 6 OF THE AGREEMENT ON SAFEGUARDS

14. It is submitted that Puerto Sombra has not fulfilled the obligations set under Art. 6 of the AoS as (i) Puerto Sombra has not demonstrated any critical circumstances (**2.1**) and; (ii) there are no critical circumstances present (**2.2**).

2.1. PUERTO SOMBRA HAS NOT DEMONSTRATED ANY CRITICAL CIRCUMSTANCES

15. Puerto Sombra has failed to comply with Art. 6 of the AoS, as there is no reasoned or adequate explanation in the provisional determination demonstrating that critical

[16] Fact Sheet, p.4, ¶ 14.
[17] Additional Clarifications, n. 3.
[18] AoS art. 12.4.
[19] Fact Sheet, p.3, ¶ 9.

circumstances existed that warranted immediate application of safeguard measures.[20] The scope of the term *'critical circumstances'* has not been defined in the AoS. Referring to the *Oxford English Dictionary* for clarity on the scope of the term, *'critical'* is defined as *"having the potential to become disastrous; at a point of crisis"*.[21] Thus, the circumstances should have the potential to become disastrous to the extent that there is a risk of damage which it would be difficult to repair. The *Oxford English Dictionary* further defines *'damage'* as *"physical harm that impairs the value, usefulness, or normal function of something"* or *"detrimental effects"*.[22] Thus the circumstances must be of a nature to warrant an immediate intervention through the means of a provisional safeguard measure in order to prevent any disastrous damage that would be difficult to repair. The actualisation of the damage should therefore happen at a pace which cannot be checked sufficiently by a definitive measure. Art. 6 further requires clear evidence of increased imports causing injury to the domestic industry.[23]

16. Furthermore, it would be fallacious to assume that the concept of critical circumstances under Art. 6 of the AoS is the equivalent of serious injury or threat of serious injury under Art. 4.1 of the AoS, as the incorporation of the requirement of critical circumstances within the meaning of Art. 6 of the AoS would otherwise be rendered redundant. The term critical circumstances denotes a situation of grave urgency, a condition not necessarily present in the case of serious injury. To enforce a provisional safeguard measure it must therefore be shown that in addition to the serious injury, the circumstances of the domestic industry are in need of an urgent safeguard measure to protect it immediately from increased imports and thus prevent irreparable harm.

17. The Provisional Determination however equates the determination of causal link between increased imports and serious injury being faced by the domestic industry with the existence of critical circumstances.[24] The Provisional Determination also has no mention of any damage which would be difficult to repair, merely making an assertion that delay would worsen the situation.[25] There are no circumstances identified that are causing or would cause such circumstances that require an immediate safeguard action to be imposed. Thus, there is no reasoned or adequate explanation in the provisional determination

[20] AoS art. 6.
[21] Oxford Reference Dictionary 562 (2nd edition, 2006).
[22] Oxford Reference Dictionary 599 (2nd edition, 2006).
[23] AoS art. 6.
[24] Fact Sheet p. 21, Exhibit 2, ¶ 35.
[25] *Id.*

demonstrating that critical circumstances which would cause irreparable damage existed warranting immediate application of safeguard measures.

18. Additionally, the analysis itself is inadequate, with a mere assertion of correlation and no clear evidence of increased imports causing serious injury. The landed price as well as selling price has not declined due to increased imports, but rather due to saturation of the international market. Capacity utilisation declined in 2015 due to an increase in capacity when there was no capability to meet full capacity due to the inefficiencies present. Profitability has declined due to the increase of costs of production, again caused by the capacity increase. Therefore, there is no clear evidence of the imports causing serious injury.

2.2. THERE ARE NO CRITICAL CIRCUMSTANCES PRESENT IN PUERTO SOMBRA

19. The circumstances identified do not merit a safeguard action and cannot be considered as critical circumstances. Certain factors, such as productivity per day and capacity utilisation, have been improving in 2016.[26] Optimisation of the domestic industry through better economic planning and business practices as well as the gradual reduction in saturation of the international market towards the product will cause profitability to rise. Thus, the circumstances at hand cannot be termed as critical. As the circumstances are not critical, delays would not cause irreparable damage and in fact certain areas would see an improvement with time.

20. Thus, there are no such critical circumstances which have the potential to become detrimental or disastrous nor is there clear evidence of the imports causing serious injury. Puerto Sombra has failed to satisfy the requirement of the existence of critical circumstances where delay would cause irreparable damage,[27] and the link between imports and serious injury. The application of the provisional safeguard measure is in direct contravention of Art. 6 of the AoS.

3. PUERTO SOMBRA HAS FAILED TO SATISFY ARTICLE XIX:1(A) OF THE GATT 1994

21. Under Art. XIX:1(a) of the GATT, there is a requirement for there to be an increase of imports that cause serious injury to the domestic producers. This increase in imports must be a result of unforeseen developments and GATT obligations taken by the country imposing the measure.[28] These developments must be unforeseen at the time of the last

[26] Fact Sheet, p. 15, Exhibit 2, ¶ 19 - ¶ 21.
[27] AoS art. 6.
[28] General Agreement on Trade and Tariffs art. XIX:1(a), Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT].

tariff concession provided by the Member, as had been upheld by *Argentina-Footwear*[29] and *Korea-Dairy*[30]. The Member must also demonstrate the logical connection between the unforeseen developments and the increased imports.[31]

22. It shall be: (i) established that there exists a burden to prove that unforeseen developments must be demonstrated for a safeguard measure to be imposed (**3.1**); (ii) proved that the explanations provided by Puerto Sombra does not satisfy the requirement of unforeseen developments of Art. XIX:1(a) of the GATT (**3.2**); (iii) shown that the demonstration provided by Puerto Sombra is inadequate and based upon incomplete facts and vague speculations (**3.3**).

3.1. THERE EXISTS A BURDEN TO PROVE THAT UNFORESEEN DEVELOPMENTS MUST BE DEMONSTRATED FOR A SAFEGUARD MEASURE TO BE IMPOSED

23. It is submitted that unforeseen developments must be shown for a safeguard measure to be imposed. The legal validity requirement of fulfilling a condition is altered only if the alteration is explicitly mentioned in the AoS, and is not altered by an exclusion of the same from the AoS, as has been held by the Appellate Body in *Argentina-Footwear*.[32] Thus, though the phrase '*unforeseen developments*' as seen in Art. XIX of the GATT[33] has not been included in the text of the AoS, it still is a legal requirement that must be satisfied for the valid imposition of a safeguard measure. Art. 1 states that the AoS "*establishes rules for the application of safeguard measures… provided for in Article XIX:1(a) of the GATT*",[34] showing the continuing importance of Art. XIX:1(a) of the GATT. Art. 11 of the AoS makes clear the validity of Art. XIX:1(a) where it states that unless the requirements of Art. XIX:1(a) are applied in accordance with the provisions of the AoS, an emergency action would fail.[35] In upholding the validity of Art. XIX:1(a) with regards to the AoS and the imposition of a safeguard measure, the condition of unforeseen developments is also upheld.

24. The Appellate Body in *Korea-Dairy* found that unforeseen developments must be applied as a matter of fact for a safeguard measure to be applied consistently with the provisions of Art. XIX:1(a) of the GATT.[36] In the case of *US-Lamb* it was further held that the

[29] Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear,* ¶ 96, WTO Doc. WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Argentina-Footwear* Appellate Body Report].
[30] *Korea-Dairy* Appellate Body Report, *supra* note 2, ¶ 86.
[31] *Argentina-Footwear* Appellate Body Report, *supra* note 29, ¶ 92.
[32] *Argentina-Footwear* Appellate Body Report, *supra* note 29, ¶ 88.
[33] GATT art. XIX:1(a).
[34] AoS art. 1.
[35] AoS art. 11.
[36] *Korea-Dairy* Appellate Body Report, *supra* note 2, ¶ 82 - ¶ 88.

condition of unforeseen developments is a prerequisite that must be met for a safeguard measure to be applied.[37] Thus, the burden of proof to be met has not been altered and is the same as a condition though there is no explicit mentioning of the same within the AoS.

3.2. PUERTO SOMBRA HAS NOT ADEQUATELY DEMONSTRATED THE REQUIREMENT OF UNFORESEEN DEVELOPMENTS OF ARTICLE XIX:1(A) OF THE GATT

25. In the Provisional Determination provided by Puerto Sombra, five factors have been claimed to comprise unforeseen developments[38] – (i) Global recession of 2009 (**3.2.1**); (ii) High demand for the product in Puerto Sombra (**3.2.2**); (iii) Surplus capacities in Pueblo Faro (**3.2.3**); (iv) Antidumping Duties and Countervailing Duties imposed by the five major economies on imports of the product (**3.2.4**) and; (v) Export incentive on FOB value provided by Pueblo Faro (**3.2.5**). It is submitted that none of these factors, taking in isolation or in conjunction, result in any unforeseen developments.

3.2.1. Global Recession Of 2009

26. It is submitted that the repercussions of the 2009 global recession would be known by Puerto Sombra, as they provided a concession in December 2013,[39] four years after the recession hit. There was no following substantial change in the conditions, and thus there are no occurrences that would account for an unforeseen development leading to an increase in injurious imports.
27. Furthermore, while the demand for unwrought aluminium in various other countries had stagnated due to the recession, it was instead at a high level in Puerto Sombra, since Puerto Sombra had started shifting towards an industrialised economy with high levels of consumerism.[40] The government of Puerto Sombra – in an effort to both attract investors in order to make its mark in the international trade sphere and to meet this large domestic demand – aided in the trade of the product concerned by entering into trade negotiations and providing tariff concessions in December 2013, desiring an increase in the imports. Thus, the claim that that the increase in imports due to unforeseen developments cannot be held as the increase was in fact desired by Puerto Sombra.
28. In paragraphs 28 and 31 where the claim of the global recession as being an unforeseen development is made,[41] there is no reasoning or justification provided as to why the effect

[37] Appellate Body Report, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, ¶ 76, WTO Doc. WT/DS177/AB/R; WT/DS178/AB/R (May 1, 2001) [hereinafter *US-Lamb* Appellate Body Report].
[38] Fact Sheet p. 19, Exhibit 2, ¶ 31.
[39] Fact Sheet p. 19, Exhibit 2, ¶ 32.
[40] Fact Sheet, p.1, ¶ 1.
[41] Fact Sheet p. 19, Exhibit 2, ¶ 28 - ¶ 31.

of the same was unforeseen, when in 2013 the tariff concession was made. The presumption of the government being aware of the consequences of its decision stands in the absence of this information. Hence there is no link present between the global recession and the claimed increase of injurious imports due to unforeseen developments, and the claim raised by Puerto Sombra lies unsubstantiated.

3.2.2. High Demand For The Product In Puerto Sombra

29. The 108% increase in imports and thus the high demand for the product should have been foreseen by the government of Puerto Sombra. Puerto Sombra is a developing economy experiencing a shift in its growth, transitioning from an agricultural economy to an economy with a focus in infrastructural activities and consumerism.[42] Further Puerto Sombra possesses a population of 100 million and a rapid development rate of 9%,[43] providing a very large and continually increasing consumer base. This shift created a rapidly increasing demand in certain infrastructural products, such as unwrought aluminium; a demand necessary to be catered to in order to strengthen its domestic industry which had never been catered to earlier.

30. The effects of the global recession had left stagnated market economies world over, due to which unwrought aluminium saw a sharp decline in demand. The product would therefore be channelled in increased amounts to developing markets like Puerto Sombra. Nevertheless, the government of Puerto Sombra further incentivized imports via a tariff concession of an additional 10% tariff.[44] Further, the trend of imports of the product concerned saw an increment of 20% in 2013 in comparison to 2012 in the absence of any tariff concessions,[45] already showing an increasing trend of imports. Thus, it is submitted that these conditions would lead to a foreseeable increase in imports, and the strength of the domestic market cannot be unforeseen, leading to such high demands.

31. Furthermore, the increase in imports in and of itself was not injurious. This can be observed through the table provided in Paragraph 24 of the Provisional Determination[46]. The domestic industry was able to maintain profitability in 2014 in the wake of such increased imports.[47] The decline in profitability was instead caused primarily due to factors such as increase in price of production from capacity expansion. The investigating authorities have

[42] Fact Sheet, p.1, ¶ 1.
[43] Fact Sheet p. 18, Exhibit 2, ¶ 28.
[44] Fact Sheet p. 19, Exhibit 2, ¶ 32.
[45] *Id.*
[46] Fact Sheet p. 17, Exhibit 2, ¶ 24.
[47] Fact Sheet p. 16, Exhibit 2, ¶ 22.

not provided the data required to demonstrate the link between the increased imports as a result of the claimed unforeseen strength of the domestic market and the serious injuries caused to the domestic industry. Thus, the strength of the domestic market should have been foreseen and there is no adequate link provided between the injury and imports.

3.2.3. Surplus Capacities In Pueblo Faro

32. Pueblo Faro and Puerto Sombra are relatively close in terms of distance.[48] Economic relations of two countries are directly proportional to the distance between the countries, a relation held by the gravity model of trade.[49] Pueblo Faro is further a manufacturing based economy with a high production of unwrought aluminium[50] and a domestic consumption that could not meet the same. Thus, there would be a surplus of unwrought aluminium in an economy hit by recession with a global decline in demand of the product. As has been established, there is already an increasing demand for the product in Puerto Sombra. Therefore, it can be reasonably foreseen that there would be an increase in imports from Pueblo Faro into Puerto Sombra upon tariff concessions and the surplus capacities of the product cannot be claimed to be an unforeseen development.

3.2.4. Antidumping Duties And Countervailing Duties Imposed By The Five Major Economies On Imports Of The Product

33. It can be observed that even in the absence of CVD and AD imposed by the five major importers, there was a 108% increase in imports in 2014 in comparison to 2013,[51] which was caused by the reduction in tariffs. Prior to the reduction in tariffs, there was a 20% increase in import of products concerned in 2013 in comparison to 2012.[52] Post reduction, there was again a 20% surge in imports in 2015 in comparison to 2014.[53] This is merely a continuance of the past trends observed and not as a result of the duties imposed by the five major economies of the product concerned. Thus, the duties imposed cannot be considered as unforeseen developments.

3.2.5. Export Incentive On FOB Value Provided By Pueblo Faro

34. Pueblo Faro, as claimed by Puerto Sombra's domestic industries, accounts for 60% of global production of the product concerned.[54] Since 2009, the aftermath of the recession

[48] Fact Sheet, p.1, ¶ 4.
[49] James E. Anderson, The Gravity Model (National Bureau of Economic Research Working Paper No. 16576, Dec. 2010), http://www.nber.org/papers/w16576.pdf.
[50] Fact Sheet, p.1, ¶ 4.
[51] Fact Sheet p. 19, Exhibit 2, ¶ 32.
[52] *Id.*
[53] *Id.*
[54] Fact Sheet p. 18, Exhibit 2, ¶ 27.

saw a general decline in demand of the concerned product. This led to the incentivisation by Pueblo Faro so as to ameliorate the condition of the impaired industry. An incentive of 5% is not large enough to constitute a diversion in the policy toward exports. It is in pursuance of liberalising international trade that the same was imposed.

35. Furthermore, the increase in injurious imports was not a product of either the 5% incentive provided on FOB value nor on the AD or CVD laid down by the five countries. Imports from countries which neither had an FOB incentive nor AD or CVC amounted to 100,000 MT, 75,000 MT and 68,400 MT in the years 2014-2016,[55] saw complete consumption in Puerto Sombra. While these imports neither saw an incentive in their FOB value nor were there any CVD or AD laid down upon them, they did displace the domestic production of Puerto Sombra. Therefore, the injurious increase in imports is wrongly being attributed to the supposed unforeseen developments, when in fact the increase was due to the tariff concession which was foreseen by the government of Puerto Sombra.

3.3. PUERTO SOMBRA HAS FAILED TO PROVE THAT THE UNFORESEEN DEVELOPMENTS RESULTED IN INCREASED IMPORTS CAUSING SERIOUS INJURY

36. The Appellate Body has interpreted the phrase "*as a result of*" in Article XIX:1(a) of GATT as a logical connection existing between the first two clauses of Article XIX of GATT. Thus, a logical connection must be established between the elements of the first clause of Article XIX:1(a) – "*as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions*"[56] – and the conditions set forth in the second clause of that Article – "*increased imports causing serious injury*" – for the imposition of a safeguard measure.[57] Article XIX of GATT, therefore, requires a demonstration that the unforeseen developments resulted in increased imports into Puerto Sombra.

37. It is submitted that the analysis of the NTC demonstrating a link between unforeseen developments and increase in imports is based upon incomplete facts and vague speculations. The data required to adequately demonstrate the link has not been provided.

38. The investigating authorities have mentioned the decline in global demand due to the recession of 2009 as one of the unforeseen developments. This claim however has not been supported with any data indicating by what margin the demand of unwrought aluminium has declined in the domestic market of Pueblo Faro. Similarly, the investigating authorities

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[55] Fact Sheet p. 19, Exhibit 2, ¶ 29.
[56] GATT art. XIX.
[57] *Id.*

have failed to provide the data of the disruption in foreign consumption after the onset of global recession. With this lack of data, there cannot be a conclusion drawn as to whether the producers of the same in Pueblo Faro were forced to export to Pueblo Sombra at such low prices. Thus, there is no adequate demonstration as to the link between increased imports and worsening injury as a result of the unforeseen developments of global recession and surplus capacities.

39. Further, in the claims of the unforeseen developments of AD and CVD by the five major economies on the imports of unwrought aluminium from Pueblo Faro, the investigating authorities have failed to provide adequate statistics. There has been no data as to the decline in exports into these five major economies from Pueblo Faro and by what margin. As a result, the investigating authorities have failed to link the market displacements to the specific increased imports into Puerto Sombra.

40. Additionally, Puerto Sombra has claimed that injurious displacement of unwrought aluminium produced by the domestic industry has occurred due to the dislocation of the domestic product by the imports. This has been demonstrated in paragraphs 7 and 11 of the Provisional Determination where 50,000 MT and 60,000 MT of unwrought aluminium remained unsold for the years 2015 and 2016 (annualised) respectively.[58] The share of imports from countries other than Pueblo Faro constituted 25% and 18% of the total imports – 75,000 MT and 62,800 MT in 2015 and 2016 respectively.[59] These countries, in contrast to Pueblo Faro, have not had three of the five unforeseen developments affect them (AD and CVD impositions, 5% FOB incentive and surplus capacities present in Pueblo Faro).

41. It is evident from the claims made under paragraph 24 of the Provisional Determination[60] that the loss suffered by the domestic industry has not happened solely due to reduction in average value of imports but also an inability to sell the product, since the share of imports from countries apart from Pueblo Faro have not seen these unforeseen developments affect them. Therefore, three of the five unforeseen developments have been assigned to the imports from exporters when they were not affected by the same, and thus the unforeseen developments claimed are inadequate.

[58] Fact Sheet p. 13, Exhibit 2, ¶ 7 - ¶ 11.
[59] Fact Sheet p. 19, Exhibit 2, ¶ 29.
[60] Fact Sheet p. 17, Exhibit 2, ¶ 24.

42. Puerto Sombra has, thus, failed to provide a reasoned and adequate explanation that unforeseen developments resulted in increased imports causing serious injury as required by Article XIX:1(a) of the GATT.

4. PUERTO SOMBRA HAS FAILED TO SATISFY ARTICLE XIX:1(A) OF THE GATT AND ARTICLES 2.1, 4.1(A), 4.2(A) AND 4.2(B) OF THE AGREEMENTS ON SAFEGUARDS

43. It shall be established that: (i) the standard of review has not been satisfied (**4.1**); (ii) Puerto Sombra has not fulfilled its obligations under Art. 2.1 of the AoS and Art. XIX:1(A) of the GATT (**4.2**); (iii) Puerto Sombra has inconsistently defined the domestic industry (**4.3**); (iv) Puerto Sombra has not identified all the relevant factors as per Art. 4.2(a) of the AoS (**4.4**) and; (v) Puerto Sombra has acted inconsistently with Art. 4.2(b) of the AoS (**4.5**).

4.1. THE STANDARD OF REVIEW HAS NOT BEEN SATISFIED

44. The provisions of Art. 11 of the DSU are applicable if the relevant WTO multilateral agreement does not provide for a standard of review.[61] The Panel in *Korea-Dairy* upheld the application of the same to the AoS.[62] According to Art. 11, a panel should make an "*objective assessment of the facts of the case and the applicability and the conformity with the relevant covered agreements*".[63]

45. In the present case, a discrepancy of 10,000 MT between the production and sale of the producers of the domestic industry is present in the notifications provided by Puerto Sombra.[64] With a clear discrepancy, the national authorities should have provided an adequate explanation of how the facts supported the determination made as had been laid down in the Panel report in *Korea-Dairy*.[65] As was held in the same case, the authority's explanation and reasoning for its conclusion, if not provided in the original investigation report should not be accepted.[66]

4.2. PUERTO SOMBRA HAS NOT FULFILLED ITS OBLIGATIONS UNDER ARTICLE 2.1 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT

46. Art. 2.1 of the AoS and Art. XIX:1(a) of the GATT lay down certain requirements that must be met before a safeguard measure can be imposed.[67] These requirements are: (i) The product is being imported in increased quantities either absolutely or relative to the

[61] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
[62] Panel Report, *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products,* ¶ 7.26, WTO Doc. WT/DS98/R (June 21, 1999) [hereinafter *Korea-Dairy* Panel Report].
[63] AoS art. 11.
[64] Fact Sheet p. 13, Exhibit 2, ¶ 7 - ¶ 12.
[65] *Korea-Dairy* Panel Report, *supra* note 62, ¶ 7.30.
[66] *Korea-Dairy* Panel Report, *supra* note 62, ¶ 7.72.
[67] AoS art. 2.1.

domestic production (**4.1.1**); (ii) under such conditions so as to cause serious injury to the domestic industry(**4.1.2**) and (iii) in such increased quantities to cause serious injury to the domestic industry (**4.1.3**).

47. Furthermore, the burden of proof required to prove that Art. 2.1 and Art. 4 of the AoS and Art. XIX:1(a) of the GATT are satisfied has been held to be that of an '*exacting*' level in the cases of *US-Wheat Gluten*[68] and *US-Lamb*[69], noting the usage of the word '*serious*'. This very high level of injury must be present so as to impose a safeguard measure.

4.2.1. The Product Is Not Being Imported In Increased Quantities Relative To The Domestic Production

48. Art. 2.1 and Art. XIX:1(a) of the GATT require that the imports must be in increased quantities either absolutely or relative to the domestic production. *Argentina-Footwear* clarified this requirement, holding that an increase in imports should be evident in both an endpoint comparison and an analysis of intervening trends. The Panel further held that the two analyses must be mutually reinforcing, and when they are not, doubts are raised as to whether the imports actually increased in the sense of Art. 2.1.[70] Furthermore, *US-Steel Safeguards* stated that there must be an explanation by the competent authority as to how the trend in imports supports the contention raised as to the increased quantities of imports within the meaning of Art. XIX:1(a) of the GATT and Art. 2.1 of the AoS. This explanation of the trends in imports allows for a demonstration as to the satisfaction of the requirement of increased imports.[71]

49. It is submitted that there has neither been a trend of increasing imports relative to the domestic industry nor an analysis as to the intervening trends with regards to the investigation of serious injury. When comparing the intervening trends of increase of imports and production by the domestic industry, it can be noted that the rate of increase of the domestic production was substantially greater than the imports in 2015 – 133 indexed points to 120 indexed points.[72] While on an end-point analysis, the imports have increased relative to the domestic production, the trends are divergent of this finding in

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[68] *US-Wheat Gluten* Appellate Body Report, *supra* note 9, ¶ 149.
[69] *US-Lamb* Appellate Body Report, *supra* note 37, ¶ 124 - ¶ 126.
[70] Panel Report, *Argentina-Safeguard Measures on Imports of Footwear*, ¶ 8.157, WTO Doc. WT/DS121/R (June 25, 1999) [hereinafter *Argentina-Footwear* Panel Report].
[71] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 374, WTO Doc. WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R (Nov. 10th, 2003) [hereinafter *US-Steel Safeguards* Appellate Body Report].
[72] Fact Sheet p. 13, Exhibit 2, ¶ 7.

terms of the rate of increase. There has been no explanation as to how the trends of increasing imports relative to the domestic industry supports the contention of increased quantity and injury caused. Though there has been an increase in absolute terms of the imports, this has been the product of a developing economy, and thus the imports cannot be said to have increased in the manner envisioned by Art. 2.1 of the AoS.

4.2.2. The Product Is Not Being Imported Under Such Conditions So As To Cause Serious Injury

50. The requirement '*under such conditions*'[73] has been held to not require a separate analysis in the case of *Korea-Dairy*[74]. The Panel in *Argentina-Footwear* further clarified this, stating that this condition does not require a separate legal analysis but instead refers to the substance of the causation test under Art. 4.2.[75]

51. However, while a separate analysis is not required, this requirement creates an obligation to provide an overall analysis of the domestic industry and serious injury faced by it in conjunction with the analysis into causation and relevant factors, as held by the case of *US-Wheat Gluten*[76]. This obligation has not been met by Puerto Sombra, as the explanation and investigation of causation and relevant factors with regards to serious injury has not been a conjunctive analysis, instead being taken in isolation of each other. There has been no analysis as to the overall state of the domestic industry with respect to the relevant factors and causation. The causation analysis itself shall be dealt with in the subsequent section.

4.2.3. The Product Is Not Being Imported In Such Increased Quantities To Cause Serious Injury To The Domestic Industry

52. As espoused by Art. 2.1 of the AoS and Art. XIX:1(a) of the GATT, an increase to be considered as sufficient to allow the imposition of a safeguard measure must be in such quantities to cause serious injury to the domestic industry. Upon a combined reading with Art. 4.1(a), the imports must be so increased so as to cause an overall impairment in the position of the domestic industry.[77] *Argentina Footwear*[78] and later *US-Wheat Gluten*[79] held that to determine that the imports are increased in such quantities, it must be shown

[73] AoS art. 2.1.
[74] *Korea-Dairy* Panel Report, *supra* note 62, ¶ 7.52.
[75] *Argentina-Footwear* Panel Report, *supra* note 70, ¶ 8.250.
[76] *US-Wheat Gluten* Appellate Body Report, *supra* note 9, ¶ 76 - ¶ 78.
[77] AoS art. 4.1(a).
[78] *Argentina-Footwear* Appellate Body Report, *supra* note 29, ¶ 131.
[79] Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* ¶ 8.31, WTO Doc. WT/DS166/R (July 31, 2000) [hereinafter *US-Wheat Gluten* Panel Report].

that the increase in imports were sudden enough, recent enough, sharp enough and significant enough, both qualitatively and quantitatively, to cause serious injury.

53. It is submitted that the imports in question are not sudden, sharp or significant. The *Oxford English Dictionary* definition of '*sudden*' is "*Occurring or done quickly and unexpectedly or without warning*"[80]. As has been previously stated, the increase in imports is neither unexpected nor without warning and hence cannot be classified as sudden. Furthermore, the imports have increased to meet the increase in consumption at equivalent rates as the domestic industry, and thus are not particularly significant. It is not of such a large magnitude so as to be considered sharp. The explanation provided by the investigating authorities further is neither clear nor unambiguous, and thus cannot be held to be a valid or adequate analysis. The imports cannot be held to have caused an overall impairment in the position of the domestic industry. Thus, the imports in question are not of such increased quantities to have caused serious injury.

4.3. PUERTO SOMBRA HAS DEFINED THE DOMESTIC INDUSTRY IN A MANNER THAT IS INCONSISTENT WITH ARTICLE 2.1, ARTICLE 4.1(A) AND ARTICLE 4.1(C) OF THE AGREEMENT ON SAFEGUARDS

54. A combined reading of Articles 2.1 and 4.1(c) of the AoS require for the domestic producers to include producers of like or directly competitive products.[81] The Appellate Body in the case of *US-Lamb* held that a safeguard measure pursuant to Article 2.1 of the AoS may only be imposed if the imported product has the stated effects upon the domestic industry that produces like or directly competitive products as envisaged by Article 4.1(c) of the AoS.[82]

55. It is submitted that the NTC of Puerto Sombra has failed to include all the producers of the like product within the territory of Puerto Sombra in the Provisional Determination as well as the Final Determination. The initial step in ascertaining the scope of the domestic industry is the identification of the products under consideration. It is submitted that Puerto Sombra has provided the description of the product under consideration in the Initiation Notification as Unwrought Aluminium classified under the International Harmonised System Customs Tariff Heading 7601 of Chapter 76.[83] There are two forms of unwrought aluminium: (1) primary unwrought aluminium, produced by smelting alumina and (2)

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[80] Oxford Reference Dictionary 3095 (2nd edition, 2006).
[81] AoS art. 2.1 & 4.1(c).
[82] *US-Lamb* Appellate Body Report, *supra* note 37, ¶ 86.
[83] Fact Sheet p. 6, Exhibit 1, ¶ 2.

secondary or recycled unwrought alumina, produced by melting scrap.[84] The Heading 7601 of Chapter 76 under International Harmonised System Customs Tariff covers both primary and secondary aluminium.[85]

56. The import data for investigation, thus, includes data for both primary and secondary unwrought aluminium. However, while determining the scope of the total domestic industry, the NTC has only included the producers of primary unwrought aluminium. Thus, the determination of the domestic industry by NTC does not accurately represent the total domestic production as required by Article 4.1(c) of the AoS, as it fails to include the producers of the like product of secondary unwrought aluminium within the territory of Puerto Sombra.

57. For the determination of injury caused to the domestic industry, the term '*domestic industry*' should be said to include the supporters of the applicants, and not just restricted to the major proportion of the producers. This is because this inclusion of all producers gives a clearer reference for the determination of injury caused vis-à-vis the absence of the supporters of the applicants.[86]

58. Puerto Sombra has thus defined the domestic industry in a manner that is inconsistent with Article 2.1and Article 4.1(c) of the AoS, and has, thereby, failed to establish the existence of a determination of significant overall impairment of the domestic industry within the meaning of Article 4.1(a) of the AoS.

4.4. PUERTO SOMBRA HAS NOT EVALUATED ALL RELEVANT FACTORS HAVING A BEARING ON THE SITUATION OF THE DOMESTIC INDUSTRY

59. Art. 4.2(a) of the AoS obligates the investigating authorities to make a fact based, future oriented evaluation of all relevant factors that have a bearing on the situation of the domestic market.[87] However, the evaluation of relevant factors cannot be limited to merely the specific factors mentioned in the text. It must take into account each and every factor that has a bearing on the domestic industry. As stated by *Argentina-Footwear*, all relevant factors must be analysed, while considering the overall position of the domestic industry, in order to determine whether there has been a significant overall impairment to the domestic industry.[88] This requirement of evaluating all factors has been affirmed in the

[84] *Supra* note 4.
[85] *Id.*
[86] *US-Lamb* Appellate Body Report, *supra* note 37, ¶ 132.
[87] Art. 4.2(a).
[88] *Argentina-Footwear* Appellate Body Report, *supra* note 29, ¶ 139.

subsequent case of *US-Wheat Gluten.*[89] It was further held in *Argentina-Footwear* that a mere perfunctory evaluation is not enough – there must be explicit connections to the injury and effect to the domestic industry.[90] *US-Lamb* additionally held that in evaluating all relevant factors, the competent authorities must satisfy both the formal aspect of identifying all relevant factors as well as the substantive aspect of a reasoned and adequate explanation as to how the facts support the determinations.[91] It was further held in *US-Line Pipe* that the time period, while not explicitly mentioned, is of utmost relevance and must be taken at the correct points.[92]

60. Moreover, *Argentina-Footwear* held that all factors that affect the competition between the imported and domestic products are relevant, and must be analysed in order to obtain an objective causation analysis.[93] As provided by *US-Steel Safeguards*, as well as Art. 2.1 read with Articles 4.2(a) and 3.1, the information provided must be objective evidence, which is lacking in the explanation provided.[94]

61. Puerto Sombra has not evaluated all the relevant factors, nor has it made the analyses of the factors that have been investigated in connection with the injury and effect to the domestic industry. There has been no evaluation of the conditions of the industry previous to 2014, and in particular of 2013, before the imports increased and the imposition of tariff concessions. This time period is highly relevant to analyse the trends in the domestic industry and market and is required to determine whether there has been serious injury. Furthermore, the conditions of the non-applicant producers of Puerto Sombra has not been evaluated, as to their productivity, injury and profitability. This information is essential towards proving both causation and non-attribution so as to determine whether the injury caused by the increase in imports is exclusive of factors related to the non-applicants, such as increased competition from these producers. In addition, the debts and high interest rates as well as the increased fixed costs caused by capacity expansion in 2015 have not been investigated. Both are relevant to determining non-attribution and causation and how such factors have caused injury to the domestic industry.

62. The NTC has also failed to consider whether there is any captive or internal consumption of unwrought aluminium by the domestic industry, as for each product, at least some of

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[89] *US-Wheat Gluten* Panel Report, *supra* note 79, ¶ 8.80.
[90] *Argentina-Footwear* Panel Report, *supra* note 70, ¶ 8.254.
[91] *US-Lamb* Appellate Body Report, *supra* note 37, ¶ 141.
[92] Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,* ¶ 7.201, WTO Doc. WT/DS202/R (Oct. 29, 2001) [hereinafter *US-Line Pipe* Panel Report].
[93] *Argentina-Footwear* Panel Report, *supra* note 70, ¶ 8.251.
[94] *US-Steel Safeguards* Appellate Body Report, *supra* note 71, ¶ 485-491.

the production is internally consumed. The operation of an industry with respect to its production for captive or internal consumption is a factor which may have an impact on the performance of that industry. Thus, it must be evaluated in order to ascertain the true nature of the serious injury.

63. These factors have been neglected from the evaluation of the domestic situation. The factors identified have been evaluated in isolation and not in connection to the injury and effect to the domestic market. Furthermore, the information evaluated must be accurate and adequate, which precisely depict the situation of the domestic industry at hand. This obligation has not been met by Puerto Sombra. The data available of 2016 is only of half the year, yet it has been annualised. In the event of improving conditions, as is present in certain economic factors of the domestic industry of Puerto Sombra, this is misleading and inaccurate. This data in fact neglected to include the information of the month of August, which was readily available. Further, the data provided possesses errors, in particular the sales of the non-applicants has been miscalculated by 10,000 USD.[95] Thus, Puerto Sombra has not satisfied Art. 4.2(a) and a proper determination of serious injury cannot be made.

4.5. PUERTO SOMBRA HAS ACTED INCONSISTENTLY WITH ARTICLE 4.2(B) OF THE AGREEMENT ON SAFEGUARDS

64. To satisfy Art. 4.2(b) of the AoS read with Art. 2.1 and Art. XIX:1(a) of the GATT, both a causation analysis and a non-attribution analysis must be taken, showing that there is a causal link between increased imports and worsening of injury and that the injury caused by other factors was not attributed to the increased imports. A general approach has been laid down by the Panel in *US-Wheat Gluten*,[96] following the manner laid down by *Argentina-Footwear.*[97]

65. This approach delineates three analyses to be completed: (i) whether an increase in imports coincides with worsening of the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why nevertheless the data show causation (**4.4.1**); (ii) whether the conditions of competition between the imported and domestic product as analysed demonstrate the existence of the causal link between the imports and any injury (**4.4.2**); and (iii) whether other relevant factors have been analysed and it is established that the injury caused by factors other than imports has not been attributed to

[95] Fact Sheet p. 12, Exhibit 2, ¶ 7 - ¶ 12.
[96] *US-Wheat Gluten* Panel Report, *supra* note 79, ¶ 8.91.
[97] *Argentina-Footwear* Panel Report, *supra* note 70, ¶ 8.229.

the imports (**4.4.3**).[98] The coincidence and competition analysis together show the causal link between increased imports and worsening of injury. These analyses together would show a genuine and substantial relationship of cause and effect between the increased imports and serious injury thereof, or a lack of the same if not satisfied.

4.5.1. Coincidence Analysis

66. As held by *Argentina-Footwear*, the relationship between the movement in imports and movement in injury factors is central to a coincidence analysis.[99] The absence of a coincidence of increase in imports with worsening of injury factors, as held by *Argentina-Footwear*, creates serious doubts as to the existence of a causal link and requires a compelling argument as to why causation would still be present.[100] An overall analysis of the domestic industry and imports has been held by *US-Wheat Gluten* to be a necessary part of the coincidence analysis.[101]

67. In the present scenario, the conditions of the domestic industry show no evidence of worsening injury with increasing imports, and in fact have actually shown signs of improvement in certain areas. There has been no analysis of the relationship between movement of imports and injury factors by the investigating authority, merely an assertion of correlation. The assertion is further only related to the endpoint of the investigation and not the intervening trends.

68. Even in the wake of increasing imports the domestic production has considerably grown, with only a slight decrease in rate of increase in production – a statistic expected from a developing industry where the optimisation of production is a gradual process – and thus would initially increase at high levels before slowing down. The difference between the rate of increase of production and the rate of increase of imports is minimal.[102] Production in Puerto Sombra outpaced the imports in 2015 as well,[103] thus contradicting any purported relationship of trends of increasing imports with worsening injury. Sales also have been increasing on an absolute level.[104] There has further been only a 2% decrease in market share,[105] a minimal amount that can be attributed to a variety of reasons – none of which has been done by the investigating authority.

[98] *Id.*
[99] *Argentina-Footwear* Appellate Body Report, *supra* note 29, ¶ 144.
[100] *Argentina-Footwear* Panel Report, *supra* note 70, ¶ 8.237 - ¶ 8.238.
[101] *US-Wheat Gluten* Panel Report, *supra* note 79, ¶ 8.101.
[102] Fact Sheet p. 12, Exhibit 2, ¶ 2.
[103] Fact Sheet p. 13, Exhibit 2, ¶ 7.
[104] Fact Sheet p. 14, Exhibit 2, ¶ 11.
[105] Fact Sheet p. 15, Exhibit 2, ¶ 16.

69. The primary correlation claimed by the investigating authorities – that of decline of landed value, selling prices and profitability caused by increased imports – is a fallacious correlation that does not satisfy the coincidence test of the causation analysis under Art. 4.2(b). Looking at the intervening trends, there has actually been an increase in both the landed value and selling price in 2015.[106] Considering that the domestic industry sold more in 2015, and at a higher price, their profits should have gone up, however it instead declined to half the profitability as the previous year. This observed decline of profitability is in fact a consequence of the high cost of production caused by the expansion in capacity, and not due to any effect of the increased imports. In 2016, the landed value and the selling price were forced to decrease as it could no longer command a higher price due to the international saturation of the product. Thus, in terms of trends and overall causation, there is no correlation or causation with regards to increased imports and worsening of injury.
70. There is no overall coincidence of increase in imports and worsening of injury, primarily due to the improvement of many factors of the domestic industry, including capacity and productivity per day. Due to this lack of decline in injury factors, there can be no temporal relationship ordinarily evident between the increase of imports and the supposed worsening of injury factors. The absence of any coincidence between increasing imports and worsening injury causes serious doubt as to the causal link between the two.

4.5.2. Competition Analysis

71. It is submitted that the analysis of the competition faced by the domestic industry due to the increase in imports is also insufficient. The factors to be considered for such an analysis have been held in *US-Steel Safeguards* to be the same as the factors referred to in Art. 4.2(a).[107] While the relevant factors under Art. 4.2(a) have not been analysed, considering what has been evaluated, it is evident that there is no injurious competition between the imports and the domestic industry. The investigating authorities have not made any explanation as to the injury caused by the competition, mentioning solely a correlation, with juxtapositions of injury factors with statistics, an approach *Argentina-Footwear* has held as inadequate.[108]
72. The decline in landed value as well as selling price is a result of international saturation. When there is no demand for a product, the product cannot command a high selling price.

[106] Fact Sheet p. 17, Exhibit 2, ¶ 24.
[107] Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products,* ¶ 10.318 – ¶ 10.319, WTO Doc. WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R (July 11, 2003) [hereinafter *US-Steel Safeguards* Panel Report].
[108] *Argentina-Footwear* Panel Report, *supra* note 70, ¶ 8.254.

The drop in profitability is an outcome of the same international market saturation, as well as high costs of production due to the increased capacity and inefficient business models. The capacity cannot be fully realised due to a lack of optimisation and inefficiencies within the domestic industry. Market share has decreased by a minimal amount, which is a consequence of the rapidly increasing consumption which can only be met by the increased imports, thus causing a decline of market share by the domestic industry.[109]

73. Furthermore, this increase in imports is primarily due to the rapid increase of consumption, at a level much greater than the total domestic production can meet. The increase in imports is merely meeting the high demand that exists. Due to such a high consumption level, the competition between the imports and domestic production is naturally limited to a marginal amount. Thus, the competition analysis, already lacking from the explanation provided in Paragraphs 24-26 in the Provisional Determination,[110] would also not lead to the conclusion that the increased imports are causing serious injury meriting a safeguard measure.

4.5.3. Non-Attribution Analysis

74. Art. 4.2(b) through the text, "*When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports*"[111] mandates that a non-attribution analysis be undertaken. As clarified by the Appellate Body in *US-Wheat Gluten*, this implies that the injury caused by other factors must not be attributed to the increased imports by the investigating authorities.[112]

75. The conditions of the non-applicants have not been considered. While the non-applicants have been improving their conditions at a rate almost equivalent to the domestic industry and are selling their entire production, the domestic industry has been struggling to sell their entire production.[113] This implies that the non-applicants provide competition to the domestic industry. The domestic industry is facing difficulties that are endemic only to them and not to the entire industry of Puerto Sombra.

76. The increase in capacity has caused significant increases in fixed costs, debts, inefficiency and injury – all of which have not been analysed. By increasing capacity without being able to meet the same, costs of production increases and thus profitability decreases. This lack of optimisation as well as the inefficient business models of the domestic industry –

[109] Fact Sheet p. 15, Exhibit 2, ¶ 16.
[110] Fact Sheet p. 17, Exhibit 2, ¶ 24 - ¶ 26.
[111] Art 4.2(b).
[112] *US-Wheat Gluten* Appellate Body Report, *supra* note 9, ¶ 67.
[113] Fact Sheet p. 14, Exhibit 2, ¶ 12.

in the form of expensive raw materials due to corruption prevalent in the suppliers, huge debts and high interest rates, large fixed costs and inefficient labour increased beyond capability – have been the primary causes of injury. This has led to high costs of production, drops in profitability, inability to meet full capacity and declining rates of increase of production. Further, the productivity per day per employee reduced from 113 in 2015 to 111 in 2016.[114] The employment also increased from 120 to 130 (indexed).[115] This indicates a higher cost price vis-à-vis gains made by the industry concerned which ensued from injudicious decision making rather than imports. These factors however have not been analysed and thus have been attributed, along with the injury caused by competition of the non-applicants, to the increased imports.

77. The economic landscape, in terms of international saturation of the market of unwrought aluminium, has not been mentioned in the Provisional Determination, when it would naturally cause the selling price of the product to decrease and thus contribute to the injury. Thus, the investigating authorities have failed their obligation to satisfy the non-attribution burden under Art. 4.2(b) of the AoS.

5. PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES ARE IN CONTRAVENTION OF ARTICLE I OF THE GATT AND ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

78. It shall be established that: (i) the economic conditions of Puerto Santo necessitate it to be considered as a developed nation (**5.1**) and; (ii) excluding Puerto Santo from the measure is against the objective of Art. 9.1 of the AoS (**5.2**).

5.1. PUERTO SANTO'S ECONOMIC CONDITIONS NECESSITATE IT TO BE CONSIDERED A DEVELOPED NATION

79. It is submitted that Puerto Santo is a developed nation and should not be given the benefits and immunity that Art. 9.1 grants from the safeguard duty. Puerto Santo's various economic conditions – a GDP of USD 18,562, GNP crossing USD 1000 in 2005 itself, a high level of industrialization and a high HDI comparable to any country[116] – are all equivalent to any other developed nation and thus necessitate Puerto Santo to be considered a developed country.

80. A high level of industrialisation and a high HDI, in conjunction with a high GDP, has a high correlative index to a highly developed secondary and tertiary sector - conditions more often found in developed nations than developing nations. A high GDP per capita is

[114] Fact Sheet p. 16, Exhibit 2, ¶ 21.
[115] *Id.*
[116] Fact Sheet p.4, ¶ 14.

an indication of a relatively wealthy population, and thus shows a higher level of development. Thus, there is a clear indication of Puerto Santo being a developed nation.

81. The metric used by the IMF provides clarity as to determining the status of Puerto Santo, where it is based on per capita income level, export diversification and degree of integration into the global financial system.[117]

82. Puerto Santo has a per capita income level comparable to most developing countries of USD 18,562.[118] Income per capita is further directly related to export quality, and by the time GDP per capita reaches USD 20,000, as is nearly the case with Puerto Santo, the quality increase is largely complete.[119] Further, considering the high degree of industrialization within Puerto Santo, the quality of the imports would naturally be at a very high level. A high level of export quality would lead to wide export diversification – particularly of the horizontal variety – and complementary towards development of the country.[120] Thus, Puerto Santo possesses a high level of export diversification and would naturally possess a developed economy. Considering the high level of industrialization as well as the high HDI of Puerto Santo,[121] Puerto Santo would possess a deep integration into the global financial system. Further, the maintenance of a high GDP and GNP equivalent to any developed country during a time of global recession allows for the natural assumption of a deep integration into the global financial system. Thus, under this metric, Puerto Santo would be considered a developed nation.

83. Furthermore, most of the other WTO members consider Puerto Santo as a developed country for the purposes of trade investigations as well as with regards to this specific measure. The practice of self-selection is being exploited by Puerto Santo to unfairly obtain advantages that it neither requires nor merits.

84. Puerto Santo is a developed country equivalent to any other developed nation and thus allowing it to be exempted from the safeguard measure is a violation of the MFN principle enshrined in Art. I of the GATT[122] as well as Art. 9.1 of the AoS.

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[117] *Frequently Asked Questions,* INTERNATIONAL MONETARY FUND, https://www.imf.org/external/pubs/ft/weo/faq.htm (last visited Jan. 14, 2017).

[118] Fact Sheet p.4, ¶ 14.

[119] Christian Henn, Chris Papageorgiou & Nikolas Spatafora, Export Quality in Advanced and Developing Economies: Evidence from a New Dataset (World Trade Organisation Working Paper No. ERSD 2015-02, Feb. 20, 2015), https://www.wto.org/english/res_e/reser_e/ersd201502_e.pdf.

[120] *Id.*

[121] Fact Sheet p.4, ¶ 14.

[122] GATT art. I.

5.2. THE BENEFIT/IMMUNITY FROM SAFEGUARD DUTY GRANTED TO PUERTO SANTO IS AGAINST THE OBJECTIVE OF ARTICLE 9.1 OF THE AGREEMENT ON SAFEGUARDS

85. The exclusion of Puerto Santo from the safeguard measure is against the very objective behind Art. 9.1 of the AoS as well as Art. I of the GATT.[123] The objective behind Art. 9.1 is to protect the exporting markets of developing nations, while ensuring that the overall goal of protecting the domestic market of the importing nation is still met. This can be understood from the preamble of the AoS which recognises "*The need to enhance rather than limit competition in international markets*"[124].

86. Since the market conditions in Puerto Santo resemble likeness to the expected conditions of a developed market economy, the safeguard measure must include Puerto Santo. Absence of the same would infringe upon the legitimate rights of developing economies to benefit from the same.

87. Furthermore, Art. 9.1 is a special and differential treatment provision specifically for developing countries, and as was argued by the EC in *EC-Tariff Preferences* of all the special and differential treatment provisions, is designed to achieve effective equality among Members.[125] It was further argued that it is critical in achieving one of the fundamental objectives of the *WTO Agreement*, as identified in its Preamble: ensuring that developing countries "*secure a share in the growth in international trade commensurate with the needs of their economic development*".[126]

88. Puerto Santo should not be entitled to any special and differential treatment as it resembles the conditions of a developed country and therefore is not eligible for such favourable treatment. Such exclusion is contrary to the goal of equality, and Puerto Santo does not need such exclusion for their economic development. Therefore, it is submitted that the exclusion of Puerto Santo from the safeguard measure exploits the very objective behind Art. 9.1 of the AoS and Art. I of the GATT, and thus should be rejected.

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[123] AoS art. 9.1.
[124] AoS Preamble.
[125] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* ¶ 14, WTO Doc. WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC-Tariff Preferences* Appellate Body Report].
[126] *EC-Tariff Preferences* Appellate Body Report, *supra* note 125, ¶ 15.

REQUEST FOR FINDINGS

Wherefore in light of the Legal Pleadings and Issues Raised, the Complainant, Pueblo Faro would request the Panel to find that:

Puerto Sombra's imposition of provisional and definitive safeguard measures are in contravention of its WTO commitments *under* -

I. *Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards, as Puerto Sombra did not provide an opportunity to hold consultations prior to the imposition of the safeguard measure and the information relating to these matters was only released after the actual imposition of the measure. Further, Article 12.4, of AoS, as Puerto Sombra failed to make a notification to the WTO before imposing the provisional safeguard measure;*

II. *Article 6 of the Agreement on Safeguards, as there is no reasoned or adequate explanation in the provisional determination demonstrating that critical circumstances existed warranting immediate application of safeguard measures;*

III. *Article XIX:1(a) of the GATT 1994 as the safeguard measure is not based on a proper determination or reasoned and adequate explanation of any unforeseen developments and the effect of GATT obligations that led to increased imports;*

IV. *Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(a), 4.2(a) and 4.2(b) of the Agreement on Safeguards, as the safeguard measure is not based on a proper determination or a reasoned and adequate explanation of such increased imports, which led to a significant overall impairment in the position of the domestic industry;*

V. *Article I of the GATT and Article 9.1 of the Agreement on Safeguards, as the benefit/immunity from safeguard duty granted to Puerto Santo was incorrect because Puerto Santo is a developed country;*

All of which is respectfully submitted and affirmed,

Agent(s) on behalf of the Complainant.