TEAM CODE: 144R

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 RESPONDENT

9th GNLU INTERNATIONAL MOOT COURT

COMPETITION

2017

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LIST OF ABBREVIATIONS

$	United States Dollar
%	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
FTA	Free Trade Agreement
FOB	Free on Board
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

INDEX OF AUTHORITIES

CASES

Short Title	Full case Title and Citation
Argentina – Footwear	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999).
Argentina – Footwear	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R (June 25, 1999).
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R (May 3, 2002).
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WTO Doc. WT/DS415/R; WT/DS416/R; WT/DS417/R; WT/DS418/R (Jan. 31, 2012).
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).
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STATEMENT OF FACTS

The Parties

Puerto Sombra is a developing country with a population of 100 million that is steadily growing every year. As of 2007, the country's population was primarily rural with agriculture and certain basic industries being the primary contributors to its economy. Over the last 5 years however, 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.

Unwrought Aluminium in Puerto Sombra

While global growth was uneven and on a decline in certain segments, Puerto Sombra was one of the few countries that was experiencing positive growth. Thus, Puerto Sombra was also experiencing an increase in imports of certain products. Unwrought aluminium had begun to flood the market in Puerto Sombra. Puerto Sombra's government is actively entering into discussions with various countries to assist its domestic industry to expand to new markets that are growing.

One of the countries with which Puerto Sombra's government has been actively involved in discussions to conclude a free trade agreement is Pueblo Faro, a developed country, which is in the same continent as Puerto Sombra. One of the main reasons for Pueblo Faro entering into negotiations for the free trade agreement is to get certain concessions on certain key base metals and articles, including iron & steel and aluminium. However, the negotiations between Puerto Sombra and Pueblo Faro for the free trade agreement failed as even without the presence of any concessions, Pueblo Faro's exports of aluminium as well as various iron and steel products is very high. Moreover, Puerto Sombra has a competent local industry for these products that have the capability to cater to the domestic demand.

Provisional Safeguard Measure

Over the past year, Puerto Sombra's primary aluminium industry has been facing intense competition from imports. Imports of unwrought aluminium have been steadily increasing and the imports are coming primarily from Pueblo Faro. In order to protect themselves, Puerto Sombra's major producers of unwrought aluminium, namely Kimp Aluminium Corporation, Puerto Sombra National Aluminium Corporation and Raven National Aluminium Corporation, which constituted the domestic industry for the safeguard measure, filed an application before the NTC for initiation of a safeguards investigation regarding imports of unwrought aluminium. After examination of the application filed by the domestic industry, the NTC initiated the investigation on 31 July 2016.

On an examination by the NTC of their performance parameters, it was found 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 aluminium. The NTC therefore imposed provisional safeguard measures on imports of unwrought aluminium on 2 August 2016. Subsequently, all the member nations of WTO were invited for consultations pursuant to Article 12.4 of the AoS.

Public Hearing

Subsequent to the imposition of the provisional safeguard measure, a public hearing was duly held on 30 October 2016, which was attended by all the stakeholders. The public hearing conducted by the NTC was attended by a record number of participants. A number of environmental and labour groups also participated in the investigation urging 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 conduct of the public hearing, the NTC conducted a verification on the premises of the producers that constituted the domestic industry to examine the veracity of the data submitted. There were no discrepancies noted and the NTC proceeded to issue the final determination imposing the definitive safeguard duty. The definitive safeguard duty was imposed on 15 November 2016. The NTC confirmed the conclusions in the provisional determination and imposed the definitive safeguard measure for a period of two and half years. The measure was imposed on imports of all countries with the exception of certain developing countries pursuant to the obligation under Article 9.1 of the AoS. Puerto Sombra notified the WTO on 25 November 2016 concerning the decision to impose the definitive safeguard measure. The notification provided all the essential details in the prescribed format.

Panel Establishment

In early December 2016, consultations were held between Pueblo Faro and Puerto Sombra under the WTO DSU. Pueblo Faro requested for the establishment of a WTO Panel. Puerto Sombra objected to the request. Thereafter, Pueblo Faro sent a second request for establishment of a WTO Panel. The DSB thereafter 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. The imposition of the safeguard measures is not in contravention of Article XIX:2 of the GATT and Articles 12.3 and 12.4 of the Agreement on Safeguards
   1.1. The claims referred to by Pueblo Faro in their request for the establishment of the Panel are insufficient to meet the obligations set under Article 6.2 of the Dispute Settlement Understanding
   1.2. Puerto Sombra has fulfilled the obligations set under Article XIX:2 of the GATT and Article 12 of the Agreement on Safeguards
      1.2.1. Puerto Sombra has provided the complaining party with adequate opportunity for consultations
      1.2.2. The information pertaining to the imposition of definitive safeguard measures was duly released by Puerto Sombra
      1.2.3. Puerto Sombra has fulfilled the obligations set under Article 12.4 of the Agreement on Safeguards
2. Puerto Sombra has complied with Article 6 of the Agreement on Safeguards
   2.1. The standard of proof and level of investigation is of a lower threshold for the imposition of a provisional safeguard measure
   2.2. Puerto Sombra has provided adequate and detailed information demonstrating the existence of critical circumstances
3. Puerto Sombra has satisfied Article XIX:1(A) of the GATT
   3.1. Puerto Sombra has adequately demonstrated and evaluated the unforeseen developments as required by Article XIX:1(A) of the GATT
   3.2. Puerto Sombra has adequately demonstrated the logical connection between the unforeseen developments and the increased imports
   3.3. Puerto Sombra has adequately demonstrated the effect of GATT obligations that led to increased imports as envisaged by Article XIX of the GATT
   3.4. The requirement of 'unforeseen developments' goes against the intention of the Agreement on Safeguards
4. Puerto Sombra has fulfilled 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. Puerto Sombra has fulfilled the obligations under Article 2.1 of the Agreement on Safeguards and Article XIX:1(A) of the GATT Puerto Sombra has not fulfilled its

obligations under Article 2.1 of the Agreement on Safeguards and Article XIX:1(A) of the GATT

4.1.1. The product is being imported in increased quantities relative to the domestic production

4.1.2. The product is being imported under such conditions so as to cause serious injury

4.1.3. The product is being imported in such increased quantities to cause serious injury to the domestic industry

4.2. Puerto Sombra has evaluated all relevant factors having a bearing on the situation of the domestic industry as per Article 4.2(a) of the Agreement on Safeguards

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

5. Puerto Sombra's imposition of safeguard measures are neither in contravention of Article I of the GATT nor of Article 9.1 of the Agreement of Safeguards

5.1. Puerto Santo's developing status is self-selected and must be recognised as a developing country

5.2. Puerto Sombra’s identification of Puerto Santo as a developing nation obligates Puerto Santo to be considered developing with regards to the safeguard measure

5.3. Pueblo Faro did not provide a reasoned and adequate explanation against Puerto Santo's status as developing

LEGAL PLEADINGS

1. THE IMPOSITION OF THE SAFEGUARD MEASURES IS NOT 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 that: (i) the claims referred to by Pueblo Faro in their request for the establishment of the panel are insufficient to meet the obligations set under Art. 6.2 of the DSU (**1.1**) and; (ii) it shall be shown that Puerto Sombra has fulfilled the obligations set under Art. XIX:2 of the GATT and Art. 12 of the AoS (**1.2**).

1.1. THE CLAIMS REFERRED TO BY PUEBLO FARO IN THEIR REQUEST FOR THE ESTABLISHMENT OF THE PANEL ARE INSUFFICIENT TO MEET THE OBLIGATIONS SET UNDER ARTICLE 6.2 OF THE DISPUTE SETTLEMENT UNDERSTANDING

2. Art. 6.2 of the DSU requires the complaining party to "*identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*".[1] The Appellate Body in *Korea-Dairy* held that if the respondent is prejudiced in its ability to defend itself by the mere listing of the articles stated to have been violated, then there would be a violation of Art. 6.2 of the DSU.[2]

3. Pueblo Faro has merely listed Art. 12.3 of the AoS under the terms of reference for the establishment of the Panel. The legal provision of Art. 12.3 of the AoS contains multiple obligations of which Pueblo Faro has failed to identify the specific obligations at issue.[3] It has not been made explicitly clear as to whether the legal provision of Art. 12.3 of the AoS has been cited with reference to the provisional safeguard measure or the definitive safeguard measure. Furthermore, the brief summary provided by Pueblo Faro for the legal basis of the complaint does not present the problem clearly. This has seriously prejudiced Puerto Sombra in the preparation of its defence. and thus, Pueblo Faro has failed to meet the requirements set under Art. 6.2 of DSU.

1.2. PUERTO SOMBRA HAS FULFILLED THE OBLIGATIONS SET UNDER ARTICLE XIX:2 OF THE GATT AND ARTICLE 12 OF THE AGREEMENT ON SAFEGUARDS

4. It shall be demonstrated that Puerto Sombra has fulfilled the obligations upon it under Art. XIX:2 of the GATT and Art. 12 of the AoS by: (i) proving that Puerto Sombra has provided

[1] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 6.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
[2] Appellate Body Report, *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products,* ¶ 127, WTO Doc. WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea-Dairy* Appellate Body Report].
[3] Agreement on Safeguards art. 12.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1869 U.N.T.S. 154 [hereinafter AoS].

the complaining party with adequate opportunity for consultations satisfying Art. 12.3 of the AoS and Art. XIX:2 of GATT (**1.2.1**); (ii) demonstrating that the information pertaining to the imposition of definitive safeguard measures was duly released by Puerto Sombra (**1.2.2**) and; (iii) establishing that Puerto Sombra has satisfied the obligations set under Art. 12.4 (**1.2.3**).

1.2.1. Puerto Sombra Has Provided The Complaining Party With Adequate Opportunity For Consultations

5. The Appellate Body in the case of *US-Wheat Gluten* had held that in order to satisfy Art. 12.3, a Member must provide adequate information and time to the exporting Members, in order for a meaningful exchange on the issues identified.[4] The Appellate Body had reaffirmed this position in the case of *US-Line Pipe*, laying emphasis on the fact that the consultations should happen prior to the application of the measure.[5] A combined reading of Articles 12.2 and 12.3 of the AoS indicates that the information to be reviewed during consultations should be provided by notifications under Art. 12.1(b) and Art. 12.1(c) of the AoS.[6]

6. Puerto Sombra has provided the complaining party with adequate opportunity for consultations on the final proposed measure prior to its coming into effect pursuant to Art. 12.3 of the AoS and Art. XIX:2 of GATT. The NTC undertook the decision to impose the definitive safeguard measure on November 15, 2016. As per the *Puerto Sombra Safeguards Act, 1996*, the measure would only come into application or effect from February 18, 2017 as the measure comes into effect upon the expiration of the period of provisional safeguard measure.[7] The information as envisaged under Art. 12.1(b) and Art. 12.1(c) of the AoS has been provided under the Final Determination, which was notified to the WTO on November 25, 2016.[8]

7. The Panel in the case of *Ukraine-Passenger Cars* held that the final step of taking a decision to apply a safeguard measure as envisaged by Art. 12.1 may coincide with the

[4] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 136-7, WTO Doc. WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *US-Wheat Gluten* Appellate Body Report].
[5] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 136, WTO Doc. WT/DS202/AB/R (Feb. 15, 2002) [hereinafter *US-Line Pipe* Appellate Body Report].
[6] AoS art. 12.
[7] Fact Sheet p. 31, Exhibit 3, ¶ 9.
[8] Fact Sheet, p.4, ¶ 14.

second step of making a finding of serious injury or threat of serious injury.[9] The consultations between Puerto Sombra and the complaining party were held in early December, 2016 under the DSU,[10] which is prior to the application of the proposed measure and based upon the pertinent information, as required upon a combined reading of Art. 12.2 and Art. 12.3 of the AoS.

8. Thus, the complaining party was provided with all the pertinent information prior to the consultations and with adequate opportunity for consultations prior to the application of the definitive safeguard measure pursuant to Art. 12.3 of the AoS and Art. XIX:2 of the GATT.

1.2.2. <u>The Information Pertaining To The Imposition Of Definitive Safeguard Measures Was Duly Released By Puerto Sombra</u>

9. On a combined reading of Articles 12.1, 12.2 and 12.3 of the AoS, it is evident that the obligation to notify the WTO Notification Committee is triggered only after the adoption of the measure.[11] This was affirmed by the Panel in the case of *Dominican Republic – Safeguard Measures*, where it was held that Art. XIX:2 of the GATT and Art. 12.1(c) of the AoS, when read together, create an obligation of notification of a definitive measure before it is applied and not before it is adopted.[12] The Appellate Body in the case of *US-Wheat Gluten* held that the degree of urgency or immediacy required to notify the WTO Notification Committee is to be determined on a case-by-case assessment – taking into account the administrative difficulties involved in preparing the notification.[13] The Appellate Body further held that a notification provided within five days after the adoption of the proposed measure was in accordance with the requirement of immediacy contained in Art. 12.1(c) of the AoS.[14] Similarly, the Panel in the case of *Ukraine-Passenger Cars* concluded that notification within seven days following the adoption of the measure was reasonable within the meaning of 12.1(c) of the AoS.[15]

[9] Panel Report, *Ukraine-Definitive Safeguard Measures on Certain Passenger Cars*, ¶ 7.463, WTO Doc. WT/DS468/R (June 26, 2015) [hereinafter *Ukraine-Passenger Cars* Panel Report].
[10] Fact Sheet, p.4, ¶ 15.
[11] AoS art. 12.
[12] Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, ¶ 7.433, WTO Doc. WT/DS415/R; WT/DS416/R; WT/DS417/R; WT/DS418/R (Jan. 31, 2012) [hereinafter *Dominican Republic-Safeguard Measures* Panel Report].
[13] *US-Wheat Gluten* Appellate Body Report, *supra* note 4, ¶ 105.
[14] *Id.*
[15] *Ukraine-Passenger Cars* Panel Report, *supra* note 9, ¶ 7.501.

10. In this case, the Final Determination of November 15, 2016, which is based on Art. 12.1(b) and Art. 12.1(c) of the AoS, was notified to the WTO on November 25, 2016.[16] It is submitted to the Panel that the delay of eight working days is reasonable within the meaning of Art. 12.1 of the AoS. In the case of *US-Wheat Gluten*, where a notification within five days was held to be reasonable, the notification in question was around 790 words long.[17] In the present case, the notification in question is ten pages long with around 3,830 words, which justifies a period of eight working days between the adoption of the measure and its notification within the meaning of Art. 12.1 of the AoS.
11. Thus, the information pertaining to the imposition of definitive safeguard measures was duly released by Puerto Sombra pursuant to Articles 12.1, 12.2 and 12.3 of the AoS.

1.2.3. Puerto Sombra Has Fulfilled The Obligations Set Under Article 12.4 Of The AoS

12. The Panel has previously refrained from making findings with respect to the violation of Art. 12.4 of the AoS by exercising judicial economy pursuant to Art. 3.7 of the DSU, which requires that the Panel only address those claims which are important to secure a positive solution to a dispute.[18]
13. The principle of judicial economy in the case of *Chile-Price Band System* with respect to claims brought under Art. 12.4 of the AoS.[19] The Panel did not consider it important to make findings with respect to Art. 12.4 of the AoS in order to secure a positive solution to the dispute, as the Panel was aiming to address only the claims related to the violations of definitive safeguard measure.[20]
14. The objective behind the establishment of this Panel is to bring the safeguard measure in compliance with the AoS, if it is not already, and can be achieved by addressing the claims brought only with respect to the definitive safeguard measure. Thus, under the principal of judicial economy, it is requested that the claims under Art. 12.4 of the AoS not be considered by this Panel.
15. However, if the Panel considers that it is important to make findings with respect to claims brought under Article 12.4 of the AoS, then it is submitted that Puerto Sombra has fulfilled its obligations set under Article 12.4. Article 12.4 of the AoS has a reference to Article 6

[16] Fact Sheet, p.4, ¶ 14.
[17] *US-Wheat Gluten* Appellate Body Report, *supra* note 4, ¶ 128 - ¶ 130.
[18] DSU art. 3.7.
[19] Panel Report, *Chile – Price Band System and Safeguards Measures Relating to Certain Agricultural Products,* ¶ 7.197, WTO Doc. WT/DS207/R (May 3, 2002) [hereinafter *Chile-Price Band System* Panel Report].
[20] *Id.*

of the AoS.[21] It thus becomes imperative that Article 12.4 of the AoS should be read concurrently with Article 6 of the AoS.

16. Though Article 12.4 of the AoS indicates that a notification to the Committee on Safeguards should be made before taking a provisional safeguard measure, Article 6 of the AoS sets out that the requirements under Articles 2 through 7 and 12 shall be met during the period of the provisional safeguard measure.[22] This implies that, as per Article 6, the notification requirement with respect to a provisional safeguard measure should be fulfilled during the period of the measure, which means after the measure has been applied.
17. There is thus a conflict between Article 12.4 and Article 6 of the AoS with respect to the notification requirement. It therefore becomes pertinent to look into the intention of the negotiators to render correct interpretation to the requirement of notification. In the Uruguay Rounds of negotiations, it was observed that in critical circumstances, a safeguard measure may be adopted provisionally before the consultations referred to above take place, provided that the Contracting Parties are notified forthwith.[23] As per the Oxford English Dictionary, the term "*forthwith*" means immediately.[24] Thus, it can be inferred that the intention of the negotiators was that the notification to the Committee on Safeguards should be made immediately after the provisional safeguard is applied.
18. It is submitted that a notification provided within ten working days after the adoption of the proposed measure is in accordance with the requirement of immediacy, considering the length of the notification in question and the collection of data required.

2. PUERTO SOMBRA HAS COMPLIED WITH ARTICLE 6 OF THE AGREEMENT ON SAFEGUARDS

19. It is submitted that Puerto Sombra has adequately demonstrated the existence of critical circumstances where delay would cause damage difficult to repair, and thus has complied with Art. 6 of the AoS. It shall be demonstrated: (i) that the standard of proof as well as the level of investigation required to determine the existence of critical circumstances for the application of a provisional measure is lower than the threshold of proof required by Art. 4.2 of the AoS for the imposition of a definitive measure (**2.1**) and; (ii) that Puerto Sombra has adequately demonstrated the existence of critical circumstances in its Provisional Determination (**2.2**).

[21] AoS art. 12.4.
[22] AoS art. 6.
[23] GATT Secretariat, *Negotiating Group on Safeguards*, GATT Doc. MTN.GNG/NG9/15 (Apr. 12. 1990).
[24] Oxford Reference Dictionary 1024 (2nd edition, 2006).

2.1. THE STANDARD OF PROOF AND LEVEL OF INVESTIGATION IS OF A LOWER THRESHOLD FOR THE IMPOSITION OF A PROVISIONAL SAFEGUARD MEASURE

20. The scope of the term '*critical circumstances*' has not been defined in the AoS and the same has not been interpreted by the Panel or the Appellate Body. On a plain reading of Art. 6 of the AoS, it is evident that the application of provisional safeguard measure requires the establishment of not only increased imports caused or threatening to cause serious injury, but also circumstances where a delay would cause damage which would be difficult to repair.[25]

21. The third statement of Art. 6 of the AoS contain reference to a subsequent investigation, which shall be conducted following the imposition of the provisional measure.[26] A requirement for a subsequent investigation implies that the initial investigation on its own is neither deemed nor expected to be sufficient for the purposes of the application of a definitive safeguard measure. This is confirmed by the fact that the imposing Member is required to meet the conditions laid down under Articles 2 to 6 of the AoS only after the application of the provisional safeguard measure.[27] Furthermore, since the application of a provisional safeguard measure is premised on a Provisional Determination, the Member proposing to apply a provisional measure only needs to *prima facie* establish that the increased imports have caused or are threatening to cause serious injury which would cause damage difficult to repair.

22. Thus, the threshold of proof as well as the level of investigation required for imposing a provisional measure is lower than the standard of proof required by Art. 4.2 of the AoS for the application of a definitive measure.

2.2. PUERTO SOMBRA HAS PROVIDED ADEQUATE AND DETAILED INFORMATION DEMONSTRATING THE EXISTENCE OF CRITICAL CIRCUMSTANCES

23. A safeguard duty is a measure intended not to rectify trade distortive practices but to protect the domestic industry of the Member. Thus, the determination to gauge critical circumstances for the application of the provisional safeguard measure, similar to a definitive safeguard measure, should represent the economic reality of the domestic industry in terms of its inventories, sales, profit margins and the price of like products.

[25] AoS art. 6.
[26] *Id.*
[27] *Id.*

24. Puerto Sombra, under paragraphs 25 and 26 of the Provisional Determination,[28] has adequately demonstrated the existence of critical circumstances. The data provided shows that there was a sharp decline in the landed value of imports to 80 indexed points in 2016 from 101 indexed points in 2015, and a simultaneous rise in the total quantity of imports to 152 indexed points in 2016 from 120 indexed points in the previous year.[29] This has forced the domestic industry to sell the product under consideration at mere 91 indexed points,[30] indicating that the domestic industry has failed to recover even the cost of production.
25. Further, the domestic industry's capacity utilisation, market share and productivity per day per employee have also declined in the period concerned.[31] These factors are all displaying trends of decline, leading to the conclusion that the prolonged continuation of increased imports will lead to a worsening of injury.
26. Due to a substantial decline in sales realisation, the profits of the domestic industry have reduced significantly and turned into losses during the period of 2016.[32] Furthermore, due to the competition by the increased imports, the domestic industry could not sell their produce in its entirety.[33] In an internationally saturated market they would be unable to export either, causing substantial loss in non-saleable production. Continuation of such competition would cause further excess to form an unsalable stockpile, furthering the loss and injury. As the profits already turned into losses and the domestic industry was operating at unviable levels, it was vital to arrest the surge in the quantity of imports. The magnitude and suddenness of impairment to the industry is well beyond what could be considered to represent normal market fluctuations, and if delayed, would be irreparable. Thus, a provisional safeguard measure was required.
27. Paragraph 25 of the Provisional Determination also cites certain extra-ordinary circumstances – non-economic factors, where e-mail communications from the domestic industry have shown that buyers have clearly threatened to boycott the domestic industry if they fail to bring down its prices at par with the prices of the imported product concerned.[34] These circumstances have threatened to cause serious injury to the domestic industry, which would be difficult to repair.

[28] Fact Sheet p.17, Exhibit 2, ¶ 25 - ¶ 26.
[29] Fact Sheet p.17, Exhibit 2, ¶ 24.
[30] *Id.*
[31] Fact Sheet p.15, Exhibit 2, ¶ 16 - ¶ 21.
[32] Fact Sheet p.16, Exhibit 2, ¶ 22.
[33] Fact Sheet p.13, Exhibit 2, ¶ 7 - ¶ 11.
[34] Fact Sheet p.17, Exhibit 2, ¶ 25.

28. The Provisional Determination therefore shows that: (1) significant surge in imports coupled with falling unit prices during the entire period of investigation, which led to poor performance of the domestic industry which caused serious injury and; (2) the threat of boycotting the domestic industry by the customers which resulted in a further threat of serious injury to the domestic industry. These together would cause damage which would be difficult to repair, and thus constituted critical circumstances which show clear evidence of serious injury to the domestic industry, warranting the application of the provisional measure.

3. PUERTO SOMBRA HAS SATISFIED ARTICLE XIX:1(A) OF THE GATT

29. It is submitted that Puerto Sombra has satisfied Art. XIX:1(a) of the GATT: (i) by identifying and demonstrating the unforeseen developments that led to increased imports causing injury to the domestic industry (**3.1**); (ii) by adequately demonstrating the logical connection between the unforeseen developments and the increased imports (**3.2**); (iii) by providing a reasoned and adequate explanation as to how the effect of GATT obligations led to increased imports that led to injury to the domestic industry (**3.3**). Furthermore, it is submitted, *in arguendo*, that the requirement of unforeseen developments goes against the intention of the AoS (**3.4**).

3.1. PUERTO SOMBRA HAS ADEQUATELY DEMONSTRATED AND EVALUATED THE UNFORESEEN DEVELOPMENTS AS REQUIRED BY ARTICLE XIX:1(A) OF THE GATT

30. It follows from the text of Art. XIX:1(a) of the GATT that a Member proposing to apply a safeguard measure must identify the unforeseen developments that led to increased imports causing injury to the domestic industry.[35] These developments must be unforeseen at the time of the last tariff concession provided by the Member, as had been upheld by *Argentina-Footwear*[36] and *Korea-Dairy*[37]. Thus, in the present case, the developments should have been unforeseen at the time of tariff concessions provided on the product concerned in 2013. The Appellate Body in *Argentina-Footwear* further drew a distinction between unforeseen and unforeseeable and held that the former term implies a lesser threshold than the latter one.[38] Thus, the panel's review of a Member's safeguard determination must be specific to the factual circumstances of the particular case at hand

[35] General Agreement on Trade and Tariffs art. XIX, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT].
[36] 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].
[37] *Korea-Dairy* Appellate Body Report, *supra* note 2, ¶ 86.
[38] *Argentina-Footwear* Appellate Body Report, *supra* note 36, ¶ 92.

rather than what might or might not have been foreseeable. The Member must also demonstrate the logical connection between the unforeseen developments and the increased imports.

31. It is submitted that the NTC has adequately identified the unforeseen developments as well as demonstrated and evaluated the link between the unforeseen developments and the increased imports in the Provisional Determination. There are five factors that comprise the unforeseen developments[39] – (i) Global recession of 2009; (ii) High demand for the product in Puerto Sombra; (iii) Surplus capacities in Pueblo Faro; (iv) Antidumping Duties and Countervailing Duties imposed by the five major economies on imports of the product and; (v) Export incentive on FOB value provided by Pueblo Faro. The AD and CVD imposed are closely interlinked to the global recession and the surplus in Pueblo Faro, and therefore all three will be evaluated together (**3.1.1**). Further, it has been evaluated that the FOB value imposed (**3.1.2**) and the high demand of the product (**3.1.3**) are unforeseen developments. It shall then be demonstrated that the developments when taken as a confluence of events can be considered as an unforeseen development (**3.1.4**).

3.1.1. Anti-Dumping Duties And Countervailing Duties Imposed Upon Pueblo Faro, Global Recession of 2009 & Surplus Capacities in Pueblo Faro Are All Unforeseen Developments

32. It is submitted that the AD and CVD imposed by five major economies in the past two years upon Pueblo Faro, taken in conjunction with the global recession of 2009 and the surplus capacities in Pueblo Faro constitute unforeseen developments that led to increase of injurious imports.

33. The effects of the global recession of 2009 had saturated the domestic industries of various countries, causing a decline in infrastructural activities and consumerism.[40] As demand of unwrought aluminium is primarily based on infrastructural activities and consumerism, the demand of the same in these markets declined. However, Puerto Sombra was one of the few countries which experienced positive growth at a rate of 9%,[41] and further possesses a large population of 100 million people.[42] Further, in the last five years, Puerto Sombra witnessed rapid urbanisation, leading to a substantial growth in consumerism and infrastructural activities.[43]

[39] Fact Sheet p.19, Exhibit 2, ¶ 31.
[40] Fact Sheet p.18, Exhibit 2, ¶ 28.
[41] *Id.*
[42] Fact Sheet, p.1, ¶ 1.
[43] *Id.*

34. In order to aid growth in infrastructure, as well as to provide assistance to the domestic market, the government of Puerto Sombra in 2013 entered into tariff concessions of 10%, reducing the tariff upon unwrought aluminium to 5%.[44]
35. However, the magnitude of increase in imports of unwrought aluminium was unprecedented and unexpected. This is due to the five major economies, which were major importers of the product concerned, imposing AD and CVD on Pueblo Faro,[45] a country which accounts for 60% of global production of the same.[46] Imposition of AD and CVD led to a surplus of the product in the domestic market of Pueblo Faro.
36. Pueblo Faro and Puerto Sombra are located in the same continent, and thus the trade between the two is naturally high, following the gravity model of international trade.[47] Considering this naturally high level of trade and high demand of the domestic market, the surplus was focussed into Puerto Sombra.
37. The imposition of AD and CVD by the five major economies over the last two years, coupled with the continuing effect of the global recession of 2009 in most of the international markets led to surplus capacities of unwrought aluminium in Pueblo Faro. These developments could not have been foreseen by Puerto Sombra while providing the tariff concessions of 10% in 2013, and have led to an increase of imports that have injured the domestic industry.

3.1.2. Export Incentive On FOB Value Provided By Pueblo Faro

38. The governments of Pueblo Faro and Puerto Sombra had entered into negotiations towards the creation of an FTA between the two countries.[48] The same failed, as the two countries could not reach consensus on the inclusion of certain base metals, such as iron & steel and aluminium.[49]
39. Despite the failure of the negotiations, in order to boost imports of aluminium, Puerto Sombra reduced the tariff concessions from 15% to 5% in 2013.[50] However, this was followed by an export incentive of 5% of the FOB value by Pueblo Faro on the concerned product in 2015.[51]

[44] Fact Sheet p.20, Exhibit 2, ¶ 32.
[45] Fact Sheet p.18, Exhibit 2, ¶ 28.
[46] Fact Sheet p.18, Exhibit 2, ¶ 27.
[47] Fact Sheet, p.1, ¶ 4.
[48] *Id.*
[49] Fact Sheet, p.2, ¶ 5.
[50] Fact Sheet p.19, Exhibit 2, ¶ 32.
[51] Fact Sheet p.19, Exhibit 2, ¶ 30.

40. When granting the tariff concessions in 2013, Puerto Sombra did not foresee that Pueblo Faro would provide an incentive of 5% for two reasons: firstly, had it done so, the tariff concession would naturally have been reduced by an amount lesser than 10%; and secondly, the government of Pueblo Faro was known to incentivize exports of finished products,[52] while unwrought aluminium is a semi-finished product. This provision of an FOB incentive led to an increase in imports that have caused injury to the domestic industry.

3.1.3. High Demand For The Product In Puerto Sombra

41. It is submitted that the demand of unwrought aluminium by an amount as high as 108% from a mere 10% tariff concession was an unforeseen development.

42. This 10% tariff concession in 2013 was provided with the intention of improving the infrastructural sector. Unwrought aluminium is primarily alloyed with iron & steel products for construction and other infrastructural activities. In the absence of any concession of iron & steel products, the use of aluminium in these fields is naturally restricted. Thus, the primary use of aluminium falls upon the secondary sector in production of consumer goods. Puerto Sombra, being a developing country, was only recently a primarily rural, agricultural society where such an increase in demand of consumer goods could not have been foreseen.

3.1.4. The Series Of Events As A Confluence Of Developments Are Unforeseen

43. As has been held in *US-Steel Safeguards* a confluence of developments can together be held as the basis of unforeseen developments that lead to an increase in imports which cause serious injury to the domestic industry.[53]

44. The imposition of AD and CVD by the five major economies over the last two years, coupled with the continuing effect of the global recession of 2009 in most of the international markets led to surplus capacities of unwrought aluminium in Pueblo Faro. This was followed by an unexpected increase in consumer goods in Puerto Sombra, leading to a high demand for the product and a subsequent incentive of 5% FOB value upon exports from Pueblo Faro. The confluence or the simultaneous occurrence of these developments also amount to an unforeseen development in the present case.

[52] Fact Sheet, p.1, ¶ 4.
[53] Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 10.97 - ¶ 10.100, 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].

3.2. PUERTO SOMBRA HAS ADEQUATELY DEMONSTRATED THE LOGICAL CONNECTION BETWEEN THE UNFORESEEN DEVELOPMENTS AND THE INCREASED IMPORTS

45. The Appellate Body in *Argentina-Footwear* has interpreted the phrase "*as a result of*" in Art. XIX:1(a) of the GATT as a logical connection existing between the first two clauses of Art. XIX of the GATT.[54] Thus, a logical connection must be established between the elements of the first clause of Art. XIX:1(a) – "*as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement*"[55] – and the conditions set forth in the second clause of the Article – increased imports causing serious injury[56] – for the imposition of a safeguard measure.
46. It has been established that the AD and CVD imposed on Pueblo Faro by the five major economies constitute an unforeseen development. The tariff concessions of 10% made by Puerto Sombra in December, 2013[57] were succeeded by AD and CVD on Pueblo Faro by the five major economies in 2014.[58] This led to a surplus in Pueblo Faro which was channelled in increased amounts to Puerto Sombra due to the continuing effects of global recession. The step taken by Puerto Sombra to incentivise imports in 2013 led to the flooding of this surplus present in Pueblo Faro.
47. This explains the rapidly increasing share of imports from Pueblo Faro in the total imports i.e. from 60% in 2014 to 82% in 2016.[59] It also elucidates the exponential increase in imports in 2014 in comparison to 2013. In 2013, as the domestic industry had not expanded its capacities, there was no increase in the cost of the product concerned. Despite this, there was an unsold stock of 20% in 2014, whereas, all the imports were sold off.[60] Thus, the production of the domestic industry was injuriously displaced by imports.
48. Thus, the FOB incentive and the upward trend of imports from Pueblo Faro due to international saturation led to a reduction in the landed value of the product in Puerto Sombra, causing competition to respond and the equilibrium price to shift from 101 to 80 indexed points in 2016 compared to 2015.[61] Even though the cost of production was relatively controlled, the unsold amount by the domestic industry remained similar to past trends. Therefore, all factors have a clear connection to the increased imports which are

[54] *Argentina-Footwear* Appellate Body Report, *supra* note 36, ¶ 92.
[55] GATT art. XIX.
[56] *Id.*
[57] Fact Sheet p.20, Exhibit 2, ¶ 32.
[58] Fact Sheet p.18, Exhibit 2, ¶ 28.
[59] *Id.*
[60] Fact Sheet p.13, Exhibit 2, ¶ 7 - ¶ 12.
[61] Fact Sheet p.17, Exhibit 2, ¶ 24.

causing injury. Thus, Puerto Sombra has adequately demonstrated the logical connection between the unforeseen developments and the increased imports.

3.3. PUERTO SOMBRA HAS ADEQUATELY DEMONSTRATED THE EFFECT OF GATT OBLIGATIONS THAT LED TO INCREASED IMPORTS AS ENVISAGED BY ARTICLE XIX OF THE GATT

49. A Member imposing a safeguard measure must, pursuant to Art. XIX of the GATT, demonstrate that a product has been imported in increased quantities as a result of the effect of GATT obligations of the Member concerned.[62] The Panel in the case of *Ukraine-Passenger Cars* held that the demonstration of the effect of GATT obligations necessitates not only the identification of the specific relevant obligation(s) but also its effect.[63]. The Panel further held that when providing tariff concessions, both the bound tariff rate and any different rates applicable to sub-groups of the product involved are important.[64]

50. The NTC of Puerto Sombra has, in its Initiation Notification dated July 31, 2016, adequately demonstrated the bound tariff rate and the different rates applicable to the sub-groups of unwrought aluminium, as classified under International Harmonised System Customs Tariff Heading 7601 of Chapter 76.[65] Further, they have also adequately demonstrated the effect of the GATT obligations under paragraphs 32 and 33 of the Provisional Determination.[66] The reduction in the applied tariff from 15% to 5% in 2013 pursuant to GATT obligations along with the unforeseen developments led to the increase in imports by 108%. The subsequent rise of imports by 20% in 2015 and 27% in 2016[67] further deteriorated the conditions of the domestic injury. Puerto Sombra has thus adequately demonstrated the effect of GATT obligations that led to increased imports, as envisaged by Art. XIX of the GATT.

3.4. THE REQUIREMENT OF 'UNFORESEEN DEVELOPMENTS' GOES AGAINST THE INTENTION OF THE AGREEMENT ON SAFEGUARDS

51. *In arguendo*, it is submitted that the requirement of unforeseen developments, is superfluous with the intention of the AoS and Art. XIX of the GATT which is to act as an escape clause or emergency action. If the term '*unforeseen developments'* were interpreted to restrict safeguard measure to contingencies that were only unforeseen or unforeseeable

[62] GATT art. XIX.
[63] *Ukraine-Passenger Cars* Panel Report, *supra* note 9, ¶ 7.96.
[64] *Id.*
[65] Fact Sheet p.6, Exhibit 1, ¶ 2.
[66] Fact Sheet p.20, Exhibit 2, ¶ 32 - ¶ 33.
[67] Fact Sheet p.19, Exhibit 2, ¶ 32.

ex ante, it would defeat the object of an escape clause from the perspective of the negotiators. The negotiators inserted an escape clause, as they could foresee certain circumstances under which it would become paramount to revoke concessions for the purpose of extending protection to the troubled domestic industry.

52. The requirement of unforeseen developments was dropped from the original draft of the AoS during the Uruguay rounds.[68] This clearly demonstrates that the intention of the negotiators in the Uruguay Rounds was to avoid the requirement of unforeseen developments for the imposition of a safeguard measure. If the condition of unforeseen developments is taken, it takes the position of a condition and causes a conflict between Article 2 of the AoS and Article XIX:1(a) of GATT. In the case of such a conflict, the AoS takes precedence. Thus, there would be no requirement to prove unforeseen developments.

4. PUERTO SOMBRA HAS FULFILLED 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

53. It was stated in *US-Steel Safeguards* that the burden of proof rests upon the party, whether complaining or defending, who makes a particular claim or defence.[69] Further *Dominican Republic-Safeguard Measures* held that the burden of proving that the impugned safeguard measure is inconsistent with the relevant provisions of the covered agreements lies with the complainant.[70] The burden of proof thus rests upon Pueblo Faro to show that the application of the safeguard measure is invalid. The complainant, in the present case must present a prima facie case in the absence of which the complaint is dismissed.

54. It will be proved (i) Puerto Sombra has fulfilled the obligations under Art. 2.1 of the AoS and Art. XIX:1(a) of the GATT (**4.1**); (ii) Puerto Sombra has satisfied Art. 4.2(a) by identifying all relevant factors (**4.2**); (iii) Puerto Sombra has demonstrated a satisfactory analysis as per Art. 4.2(b) (**4.3**).

4.1. PUERTO SOMBRA HAS FULFILLED THE OBLIGATIONS UNDER ARTICLE 2.1 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) OF THE GATT

55. Art. 2.1 of the AoS read with Art. XIX:1(a) of the GATT lays down certain requirements that must be met before a safeguard measure can be imposed. These requirements are: (i) The product is being imported in increased quantities either absolutely or relative to the domestic production (**4.1.1**); (ii) Under such conditions so as to cause serious injury to the

[68] Negotiating Group on Safeguards Chairman, *Draft Text*, GATT Doc. MTN.GNG/NG9/W/25 (June 27, 1989).
[69] *US-Steel Safeguards* Panel Report, *supra* note 53, ¶ 10.28.
[70] *Dominican Republic-Safeguard Measures* Panel Report, *supra* note 12, ¶ 7.16.

domestic industry (**4.1.2**) and (iii) In such increased quantities to cause serious injury to the domestic industry (**4.1.3**).

4.1.1. The Product Is Being Imported In Increased Quantities Either Absolutely Or Relative To The Domestic Production

56. Art. 2.1 of the AoS 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. The Panel in *US-Steel Safeguards* clarified that this condition must be analysed on both an endpoint-to-endpoint comparison – that is the beginning and end of the investigation period – as well as an analysis of intervening trends over that period.[71] The Panel in *Argentina-Footwear* also stated that an increase in imports should be evident both in an endpoint-to-endpoint comparison and in an analysis of intervening trends over the period. Thus, the two analyses should be mutually reinforcing.[72]

57. As has been demonstrated by the investigating authorities, the imports of unwrought aluminium in Puerto Sombra have increased substantially over the investigation period annually, from 250,000 to 300,000 to 380,000 (annualised) MT.[73] Thus, imports have increased absolutely on an endpoint analysis as well as in the intervening period and are mutually reinforcing of the proof that the imports have been in increased quantities.

4.1.2. The Product Is Being Imported Under Such Conditions So As To Cause Serious Injury

58. The second requirement, '*under such conditions*', has been held to not require a separate analysis in the case of *Korea-Dairy,* where it was instead held that the phrase '*under such conditions*' refers more generally to the obligation imposed on the importing country to make an adequate determination of the impact of the increased imports and the market under investigation.[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] *US-Wheat Gluten* later elucidated that this requirement obligates a conjunctive overall explanation and investigation of serious injury

[71] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 354-355, 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] Panel Report, *Argentina-Safeguard Measures on Imports of Footwear*, ¶ 8.156 - ¶ 8.157, WTO Doc. WT/DS121/R (June 25, 1999) [hereinafter *Argentina-Footwear* Panel Report].
[73] Fact Sheet p.12, Exhibit 2, ¶ 2,
[74] Panel Report, *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products,* ¶ 7.52, WTO Doc. WT/DS98/R (June 21, 1999) [hereinafter *Korea-Dairy* Panel Report].
[75] *Argentina-Footwear* Panel Report, *supra* note 72, ¶ 92.

with causation and investigation of relevant factors with serious injury.[76] Thus, this requirement shall be resolved in the subsequent section on causation.

4.1.3. The Product Is Being Imported In Such Increased Quantities To Cause Serious Injury To The Domestic Industry

59. Art. 2.1 of the AoS and Art. XIX:1(a) of the GATT require that the increase be in such quantities so as to cause serious injury to the domestic industry, a position affirmed by *Argentina-Footwear*[77] and *US-Wheat Gluten*[78]. On a combined reading with Art. 4.1(a), it can be observed that such increase in imports must lead to a significant overall impairment to the domestic industry.[79] This was further clarified in the *Argentina-Footwear*, where it was held that the increase in imports must be sudden, recent, sharp and significant enough, both qualitatively and quantitatively, to cause serious injury.[80]

60. It is submitted that the imports have in fact increased in such quantities and are sudden, recent, sharp and significant enough to cause serious injury, as has been observed by the investigating authorities. The imports have been recent, as they have increased in the past three years, from 2014. The imports have satisfied the *Oxford English Dictionary* definition of sudden,[81] as they have increased quickly, by 20% then by an additional 32%, and unexpectedly, as has been elucidated in the previous section on unforeseen developments. Further, the increase has been sharp and substantial, increasing by marked amounts in terms of absolute numbers and rate increase over the period investigated. Thus, as per the requirements laid down by Art. 2.1 and Art. XIX:1(a) of the GATT read with Art. 4.1(a), the imports have been in such increased quantities to cause serious injury to the domestic industry.

61. Furthermore, the imports present in such increased quantities and low prices have caused the consumption of unwrought aluminium in Puerto Sombra to drastically increase to unsustainable levels. Though the demand of unwrought aluminium as a base metal is relatively inelastic, the demand becomes highly price elastic when the same aluminium is used majorly in consumer goods, as is currently occurring in Puerto Sombra, since consumer goods are highly reactive to price fluctuations. Due to this high elasticity, the consumption is highly dependent on the price of the product.

[76] *US-Wheat Gluten* Appellate Body Report, *supra* note 4, ¶ 78.
[77] *Argentina-Footwear* Panel Report, *supra* note 72, ¶ 8.161.
[78] 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].
[79] AoS art. 4.1.
[80] *Argentina-Footwear* Appellate Body Report, *supra* note 36, ¶ 131.
[81] Oxford Reference Dictionary 3095 (2nd edition, 2006).

62. Thus, the cheap availability of aluminium saw the increase in consumption of the imports vis-à-vis the domestic produce. As a result, 30,000, 50,000 and 60,000 (annualised) MT of the domestic product remained unsold through 2014 to 2016 respectively.[82] Simultaneously, the consumption patterns increased and used all the other cheaply available aluminium which saw consumption of 470,000, 570,000 and 680,000 (annualised) MT through 2014 to 2016 respectively.[83]

63. This high level of consumption at such low prices cannot be realistically met by the domestic producers, however is expected of them by the consumers, forcing the domestic producers to sell at far lower prices than profitable. Thus, as has been stated by the investigating authority, there has been a significant overall impairment in the position of the domestic industry in terms of their expectations, capabilities and current status, and it can be concluded that the imports have increased in such quantities to cause serious injury as per Art. 2.1 read with Art. 4.1(a).

4.2. PUERTO SOMBRA HAS EVALUATED ALL RELEVANT FACTORS HAVING A BEARING ON THE SITUATION OF THE DOMESTIC INDUSTRY AS PER ARTICLE 4.2(A) OF THE AGREEMENT ON SAFEGUARDS

64. Art. 4.2(a) obligates an evaluation of all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry in the investigation as to increased imports.[84] Thus, economic factors that are informative of the situation of the domestic industry must be considered to determine whether serious injury has occurred. The rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment are all factors to be investigated and evaluated under Art. 4.2(a).[85] The Panel in the case of *Korea-Dairy* held that these factors are especially relevant and informative of the domestic industry and its position.[86] Thus, the factors laid down in Art. 4.2(a) must explicitly be evaluated, affirmed again by *Argentina-Footwear*.[87] *US-Lamb* further held that a future-oriented, fact based evaluation must be made, stating that there is a two-part requirement – the formal aspect in whether the authorities have evaluated all relevant

[82] Fact Sheet p.14, Exhibit 2, ¶ 11.
[83] Fact Sheet p.14, Exhibit 2, ¶ 14.
[84] AoS art. 4.2(a).
[85] *Id.*
[86] *Korea-Dairy* Panel Report, *supra* note 74, ¶ 7.55.
[87] *Argentina-Footwear* Appellate Body Report, *supra* note 36, ¶ 136.

factors and the substantive aspect is whether a reasoned and adequate explanation for the determination has been provided[88].

65. It is submitted that all the factors laid down in the text have been clearly evaluated in the correct manner by the NTC under paragraphs 2 to 23 of the Provisional Determination. Further, the NTC has identified and evaluated all other relevant factors to the determination of serious injury and the situation of the domestic industry, with a view of the future in terms of serious injury. The initial notification noted the trends that occurred in terms of the factors laid down under Art. 4.2(a), whereas a reasoned and adequate explanation of each factor with regards to the determination and overall investigation was made in the provisional determination. Thus, both the formal and substantive aspects of Art. 4.2(a) have been satisfied.

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

66. 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. An analytical approach towards satisfying Art. 4.2(b) has been laid down by the Panel in *US-Wheat Gluten*,[89] following the manner laid down by *Argentina-Footwear*.[90]

67. 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 (**4.3.1**); (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 (**4.3.2**); 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 the imports (**4.3.3**).[91] The coincidence and competition analysis together show the causal link between increased imports and worsening of injury. These analyses together would

[88] Appellate Body Report, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, ¶ 141, WTO Doc. WT/DS177/AB/R; WT/DS178/AB/R (May 1, 2001) [hereinafter *US-Lamb* Appellate Body Report].
[89] *US-Wheat Gluten* Panel Report, *supra* note 78, ¶ 8.91.
[90] *Argentina-Footwear* Panel Report, *supra* note 72, ¶ 8.229.
[91] *Id.*

show a genuine and substantial relationship of cause and effect between the increased imports and serious injury thereof

4.3.1. Coincidence Analysis

68. As held by *Argentina-Footwear*, central to a coincidence analysis the relationship between the movements and trends in imports and the movements and trends in injury factors.[92] Furthermore, as stated by *US-Wheat Gluten*, there must also be an overall coincidence of the upward trend in increased imports and downward trend of injury.[93]

69. It is submitted that there is a clear coincidence between the worsening of the injury and the increase of imports in Puerto Sombra, and the authorities have undertaken this coincidence analysis when determining the causal link. In the present scenario, there is an evident relationship noted by the investigating authorities between the two, as the trend of increase in imports has coincided with a trend of worsening of injury factors. The selling price has been forced to an untenable level due to the influx of cheap imports from Pueblo Faro. This has led to a sharp drop in profitability, falling steadily to a loss.[94] Further the market share of the domestic industry has decreased and has been replaced by the imports.[95] There has been a decline in the rate of increase of production and sales of the domestic market as well,[96] contrary to the expectations of a developing industry.

70. An overall coincidence is also clearly visible and has been proved by the NTC. A conjunctive analysis of serious injury and relevant factors has been carried out by the investigating authorities, demonstrating the coincidence of increased imports and worsening injury. The domestic industry has greatly suffered, to the point of non-profitability, while imports have steadily risen. The imports have continued to gain relevance and control in Puerto Sombra while the domestic industry has steadily declined to the degree that it can no longer sustain itself.

71. The conditions of the industry have been affected to the point where it requires a safeguard measure so as to remain viable to continue operating. It is normally evident that there is a temporal relationship between the increase in imports and the decline in injury factors, in terms of specific factors as well as overall, satisfying the coincidence analysis and Art. 2.1.

[92] *Argentina-Footwear* Appellate Body Report, *supra* note 36, ¶ 144.
[93] *US-Wheat Gluten* Panel Report, *supra* note 78, ¶ 8.95.
[94] Fact Sheet p.16, Exhibit 2, ¶ 22.
[95] Fact Sheet p.15, Exhibit 2, ¶ 16.
[96] Fact Sheet p.13, Exhibit 2, ¶ 7 - ¶ 12.

4.3.2. Competition Analysis

72. The second analysis to be considered is an analysis of competition between the imports and the domestic producers leading to worsening of injury, however as held by the case of *US-Steel Safeguards,* in the case of a clear coincidence, there is no need for further analysis apart from a non-attribution analysis.[97] Thus, the obligation of proving a causal link under Art. 4.2(b) has been met through the coincidence analysis.

73. However, *in arguendo,* a causal link is evident from an analysis of the competition between the imports and domestic production, and has been provided by the investigating authorities. 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).[98] Volume of imports, imports' market share, changes in the level of sales and profit and losses in particular have been held as relevant, each of which has been analysed by the investigating authorities.

74. Each of these factors are declining for the domestic market and increasing for the imports. The volume of imports has increased steadily over the period of investigation, far outpacing the domestic market.[99] The market share has shifted towards the imports.[100] Pueblo Faro, due to a variety of factors – including cheap raw material, exploitation of environmental and labour standards and a developed industry and economy – can produce at a far cheaper rate than the domestic industry and thus control the domestic market. This competition has culminated in the producers being forced to sell at such a low unsustainable price.

75. Furthermore, due to the lack of demand of the domestic product in comparison to the imports, the domestic producers cannot produce at their full capacity and their rate of production has declined. They cannot sell the entire amount they produce to the domestic market, and in an internationally saturated market have nowhere else to sell the goods, thus causing their produce to collect into an unsalable and economically unusable stockpile, perpetuating the losses suffered. The competition from the imports has thus caused the domestic industry to be under such conditions that it cannot compete nor can it continue to operate without incurring heavy losses. Thus, the requirements of such conditions that led to serious injury, and causation under Art. 2.1 and Art. 4.2(b) have been satisfied.

[97] *US-Steel Safeguards* Panel Report, *supra* note 53, ¶ 10.307.
[98] *US-Steel Safeguards* Panel Report, *supra* note 53, ¶ 10.318 - ¶ 10.319.
[99] Fact Sheet p.12, Exhibit 2, ¶ 2.
[100] Fact Sheet p.15, Exhibit 2, ¶ 16.

4.3.3. Non-Attribution Analysis

76. 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*"[101] mandates that a non-attribution analysis be undertaken. As clarified by the Appellate Body in *US-Wheat Gluten*[102] and *US-Lamb*[103], this does not imply that increased imports need be the sole reason for the injury, but instead that the injury caused by other factors are not attributed to the increased imports by the investigating authorities.
77. It is submitted that the increase in imports are the causation for the incurring of debts by the domestic industry. Due to the high demand caused by the increase in imports as has been demonstrated above, the domestic industry was forced to expand its capacity, and therefore took debts to fulfil the same. However, the sudden fall in the landed value of imports resulted in the displacement of the domestic industry in the domestic market. This consequently led to the idling of the increased capacities. Thus, the imports are *causa proxima* to the debts incurred by the domestic industry, therefore to the injury suffered.
78. Furthermore, it is clear from Art. 4.2(b) that a separate assessment of non-attribution was envisaged. However, considering that the imports and other factors may be inextricably linked, a separate evaluation for assessing and separating the injurious effects of the factors other than increased imports involves practical difficulties and costly economic analysis which might not always be possible.
79. In the present case, in coherence with the findings of the Appellate Body in the case of *US-Wheat Gluten*[104], there is a genuine and substantial relationship of cause and effect between imports and injury caused.
80. It is submitted that in the year 2014 when the capacity of the industry was 200,000MT and the debts of the domestic industry were not reflected in the cost price, there still lay 30,000 MT or about 20% of the applicants' total production unsold.[105] The figure only increased to 25% and 27.27% (annualised) in 2015 and 2016 respectively.[106] While the debts might have increased the costs of production – thus reducing the sales – it only added to the injury caused. Even in the absence of any factors, the imports caused injury serious enough to merit a safeguard action.

[101] AoS art. 4.2(b).
[102] *US-Wheat Gluten* Appellate Body Report, *supra* note 4, ¶ 70.
[103] *US-Lamb* Appellate Body Report, *supra* note 88, ¶ 170.
[104] *US-Wheat Gluten* Appellate Body Report, *supra* note 4, ¶ 67.
[105] Fact Sheet p.13, Exhibit 2, ¶ 11.
[106] *Id.*

5. PUERTO SOMBRA'S IMPOSITION OF SAFEGUARD MEASURES ARE NEITHER IN CONTRAVENTION OF ARTICLE I OF THE GATT NOR OF ARTICLE 9.1 OF THE AGREEMENT OF SAFEGUARDS

81. It is submitted: (i) that Puerto Santo recognises itself as a developing nation under self-selection and therefore must be considered a developing nation (**5.1**); (ii) Puerto Sombra's identification of Puerto Santo as developing necessitates it to be considered a developing nation with regards to the safeguard measure (**5.2**) and; (iii) Pueblo Faro did not provide an adequate and reasoned explanation as to why Puerto Santo should not be considered a developing nation (**5.3**).

5.1. PUERTO SANTO'S DEVELOPING STATUS IS SELF-SELECTED AND MUST BE RECOGNISED AS A DEVELOPING COUNTRY

82. While there is an absence of a definition of a 'developing country' in the WTO legal texts and a lack of procedure laid down to determine the same, it has been a longstanding GATT practice that the developing status is self-elected. This is a practice that has not changed with the creation of the WTO. This practice has also been recognised by the member of the WTO with regards to the AoS by various scholars.[107]

83. When a country has determined itself to be a developing nation, another WTO member cannot unilaterally, arbitrarily or selectively reject or redefine such status. The presumption lies that the country must be considered a developing nation, and this high burden can only be refuted with a reasoned and detailed explanation as to why the country should not be entitled to such treatment and should specifically not be excluded from the safeguard measure– a burden that Pueblo Faro has not met when rejecting Puerto Santo's status as a developing nation. Such interference would allow for severe weakening of the special and differential treatment that developing nations are accorded under the Enabling Clause and Art. 9.1 of the AoS.

84. As Puerto Santo is a self-elected developing nation, and satisfies the *de minimis* test, by having less than 3 per cent share of imports, Puerto Sombra is obligated under Art. 9.1 to exclude Puerto Santo from the safeguard measure and such safeguard measure is neither a violation of Art. I of GATT nor of Art. 9.1 of the AoS.

[107] MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW PRACTICE AND POLICY 374 (1st ed. 2003).

5.2. PUERTO SOMBRA'S IDENTIFICATION OF PUERTO SANTO AS A DEVELOPING NATION OBLIGATES PUERTO SANTO TO BE CONSIDERED DEVELOPING WITH REGARDS TO THE SAFEGUARD MEASURE

85. As stated by the Appellate Body in *US – Line Pipe*, Art. 9.1 of the AoS does not indicate how a Member is meant to comply with the obligation it lays down.[108] It is submitted however that Art. 9.1, when read within the context of the AoS, implies an obligation of identification of the developing countries excluded from the safeguard measure upon the importing Member that lays down such measure.[109]

86. Footnote 2 of Art. 9.1 and Art. 12 both lay obligations solely upon the importing Member, providing no role to any other Member in the process of imposition or determination of the measure.[110] Footnote 2 requires that only the Member taking an action under Art. 9.1 to notify the Committee on Safeguards. Art. 12 implies an obligation of notification upon the importing Member alone. Thus, as with Art. 12, obligations lie entirely on the importing Member imposing such a measure. Art. 9.1 read within such context implies that the obligation of identification rests upon the importing Member that lays down the safeguard measure.

87. Furthermore, considering the obligation and process of application of the measure falls exclusively on the importing Member imposing such measure, the Member may determine how to comply with such a measure. Since the importing Member must comply with the requirements of Art. 9.1, the duty of identification of which Members are developing nations and whether the *de minimis* test is satisfied rests upon the importing Member.

88. This obligation of identification must be met in consonance with the GATT practice of self-election. When a Member nation has declared itself as developing, identification of developing nations by the importing Member with respect to the safeguard measure imposed must take the same into account. Provided the *de minimis* test is satisfied, such nations identified as developing must be excluded from the measure as provided by Art. 9.1 of the AoS.

89. Thus, in congruence with Puerto Santo's self-election of developing status, Puerto Sombra's recognition and identification of such developing status obligates Puerto Santo to be excluded from the safeguard measure imposed.

[108] *US-Line Pipe* Appellate Body Report, *supra* note 5, ¶ 127.
[109] AoS art. 9.1.
[110] AoS art. 12.

5.3. PUEBLO FARO DID NOT PROVIDE A REASONED AND ADEQUATE EXPLANATION AGAINST PUERTO SANTO'S STATUS AS DEVELOPING

90. The burden of proof rests upon Pueblo Faro to show that the application of the safeguard measure is invalid. The complainant, in the present case must present a prima facie case in the absence of which the complaint is dismissed. The burden on the defendant is adequately satisfied where an effective refutation to the same has been met.

91. Given that Puerto Santo has declared itself as a developing country, a declaration supported by Puerto Sombra recognising it as developing with regards to the safeguards measure, the presumption lies that Puerto Santo is in fact a developing country and can only be refuted by an adequate and reasoned explanation from Pueblo Faro as to why the WTO should consider it a developed country instead, an obligation they have not fulfilled.

92. The arguments provided by Pueblo Faro, of high GDP, as well as other factors such as GNP, industrialisation and human development, are not the metrics used by the WTO. Furthermore, on a comparative scale, it can be seen that countries with similar GDPs – Azerbaijan,[111] Turkey[112] and Mauritius[113] - are all recognised as developing by the WTO.[114] Further, most countries of the world have crossed a GNI of $1000 in 2005, and thus such a statistic is irrelevant in determining the status of the country as developing or developed. The claims made by Pueblo Faro of Puerto Santo possessing a highly-industrialised economy have not been substantiated and is mere conjecture. The assertion that the HDI of Puerto Santo is comparable to any developed nation has not been substantiated with any further information, and furthermore, is not in and of itself enough to prove that Puerto Santo is a developed nation. There is no explanation as to the assertions provided by Pueblo Faro, nor is there a connection of the assertions to the safeguard measure at hand, and thus Pueblo Faro did not meet its burden of proof. Puerto Santo therefore must be considered a developing nation.

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[111] *GDP per Capita, PPP (Current International $)*, WORLD BANK http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?year_high_desc=true (last visited Jan. 15, 2017).
[112] *Id.*
[113] *Id.*
[114] Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement* 4(1) TRADE L.& DEV. 45 (2012).

REQUEST FOR FINDINGS

Wherefore in light of the Legal Pleadings and Issues Raised, the Respondent, Puerto Sombra would request the Panel to adjudge and:

a. reject all the claims raised by Pueblo Faro in this dispute in their entirety;
b. find that Pueblo Faro has failed to meet the standards set under Art. 6.2 of the DSU by merely listing Article 12.3 of the AoS and under the terms of reference for the establishment of the Panel and failing to identify the specific obligations at issue.

All of which is respectfully submitted and affirmed,

Agent(s) of the Respondent.