In the World Trade Organization

Panel Proceedings

United States — Certain Measures on Steel and Aluminium Products

(DS548)

First Written Submission

by the European Union

Geneva, 1 May 2019
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1. **Introduction**

1. In adopting the measures at issue in this case, Donald Trump proclaimed himself to be a "Tariff Man". He announced that he will "protect and build US steel and aluminium industries" and make other WTO Members "pay for the privilege" of "raiding" the "great wealth" of the United States. US Secretary of Commerce Wilbur Ross declared that, for this purpose, national security would be "broadly defined to include the economy", such that "economic security is national security". White House National Trade Council Director Peter Navarro further confirmed that "all we are trying to do" is to "provide our domestic industries an opportunity to earn a decent rate of return". In short, by their own terms, the objective of the measures at issue is to protect the US steel and aluminium industries as an end in itself, and not as a means to an end. In contrast, when consulted on the proposed measures, the US Department of Defence stated that it "does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminium necessary to meet national defence requirements." That did not stop Tariff Man. He went ahead anyway, tweeting that this would be "A BIG WIN" for the United States.

2. Although this case may be politically charged, with many WTO Members participating, it is legally straightforward. As such, it is a classic test of the ability of the WTO and the dispute settlement system to deliver rules-based, objective and fair adjudication, notwithstanding intense political pressure. The WTO's value would be very substantially reduced without a mandatory and binding dispute settlement system; and the dispute settlement system is worthless unless it can ensure rules-based and objective outcomes for all Members. In short, it is cases like this that prove the value of the WTO and its dispute settlement system, and that would risk to seriously undermine or even destroy it if mishandled.

3. The WTO Agreement, which is a single undertaking, contains a delicate balance of obligations and rights. No reservations are permitted. The obligations include the core obligations at issue in this case: Articles I, II and XI of the GATT 1994. The rights include Articles XIX (the right to adopt safeguard measures), XX (the general exceptions) and XXI (the security exceptions). The obligations cannot be construed or applied so as to render the rights meaningless; and neither can the rights, including Article XXI, be construed or applied so as to effectively negate the obligations.
4. Until relatively recently, Members have well-understood this, specifically with respect to Article XXI of the GATT 1994, generally exercising appropriate self-restraint with respect to that provision. As the panel in DS512 has recently confirmed, whilst Article XXI contains certain language that affords significant discretion to Members, it is not "self-judging", but contains important objective elements and is susceptible to judicial review.

5. Regrettably, abandoning the leadership role traditionally played by the United States in the field of international trade, the Trump administration decided to attempt to abuse both its own domestic legislation (Section 232 of the Trade Expansion Act) and Article XXI of the GATT 1994 in order to protect its domestic steel and aluminium industries, and in order to attempt to wrestle additional trade concessions from its trading partners.

6. Accordingly, in order to protect its steel and aluminium industries, the United States has decided to adopt safeguard measures, unilaterally suspending its obligations under, inter alia, Articles I, II and XI of the GATT 1994. At the same time, it would appear that the United States intends to attempt to disguise these measures as justified by Article XXI of the GATT 1994, inter alia by attempting to define "essential security interests" so broadly that it covers economic interests, without any apparent limitation.

7. The United States' arguments are patently fatuous and would apparently have Article XXI of the GATT 1994 eclipse all other exceptions (notably Article XIX) and obligations (notably Articles I, II and XI). They must clearly be rejected by the Panel. The Panel has two ways to do that, which are not mutually exclusive.

8. First, the Panel can find that the measures at issue exhibit the two constituent features of a safeguard measure: they suspend GATT obligations and have as a specific objective the protection of the US steel and aluminium industries; and that they are in any event caught by the grey-area measure provisions of the Agreement on Safeguards. They are therefore subject to the disciplines of the Agreement on Safeguards, but breach multiple provisions of that Agreement, for which Article XXI of the GATT 1994 is not available as a defence. We set out the relevant arguments in Section 3 of this submission.

9. Second, the Panel can find that the measures at issue violate various provisions of the GATT 1994 (including Articles I, II and XI) and are not justified by Article XXI of the GATT 1994. We set out the relevant arguments in Section 4 of this submission.
10. We reiterate and emphasise that this is a legally straightforward case and we respectfully request that the Panel deliver a prompt resolution, one that might assist Tariff Man and his associates in understanding that the WTO, and other WTO Members with which the United States has a multilateral agreement governing such issues, have something to say about whether or not trade wars are “easy to win”, or indeed good for anyone, including the United States. The United States, as opposed to the Trump administration, will thank the Panel for it, or at least should do so.

2. **THE MEASURES AT ISSUE**

11. Through the measures at issue, the United States introduced import adjustments in the form of additional import duties and quantitative restrictions on certain steel and aluminium products. Thus, with respect to certain steel products, the measure at issue consists of the import adjustments, i.e. tariff and non-tariff treatment of all imports; with respect to certain aluminium products, the measure at issue consists of the import adjustments, i.e. tariff and non-tariff treatment of all imports.

12. In the following sections, the European Union will first describe Section 232, the United States’ legislation on the basis of which the import adjustments were adopted. Second, it will provide a summary of the US Government’s official statements, and other statements of high-ranking officials, regarding the measures at issue. Third, it will summarize relevant discussions within the US Government. Fourth, it will describe the import adjustments on steel and aluminium products in detail.

2.1. **SECTION 232 OF THE TRADE EXPANSION ACT OF 1962**

13. The United States’ legislation relevant to the measures at issue is Section 232 of the Trade Expansion Act of 1962\(^1\), as amended (Section 232). According to the United States’ Congressional Research Service, this legislation was enacted during the Cold War “when national security issues were at the forefront”.\(^2\)

14. Section 232 is entitled “Safeguarding national security”. It allows the United States Secretary of Commerce, upon request of the head of any department or agency, upon application of an interested party, or upon his own motion,

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\(^1\) Section 232, “Safeguarding national security”, 19 U.S.C. 1862 (Exhibit EU-1).

to initiate an investigation to determine the effects on the national security of imports of articles.³

15. Section 232 requires the Secretary of Commerce, inter alia, to provide notice of any such initiation to the Secretary of Defence,⁴ to consult with the Secretary of Defence on the methodological and policy questions raised in the investigation, and more generally to seek information and advice from, and consult with, appropriate officers of the United States.⁵ Upon request, the Secretary of Defence is required to provide the Secretary of Commerce with an assessment of the defence requirements of any article that is the subject of an investigation.⁶

16. Within 270 days of initiation, the Secretary of Commerce is required to “submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.”⁷

17. Within 90 days of receipt of a report in which the Secretary of Commerce finds that an article is being imported into the United States “in such quantities or under such circumstances as to threaten to impair the national security”, the President of the United States is required to determine whether he concurs with that finding of the Secretary, and, if so, to determine the “nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”⁸ Any “adjustment of imports” must be implemented within 15 days of the President’s determination to take action.⁹

³ Heading (b)(1)(A).
⁴ Heading (b)(1)(B).
⁵ Heading (b)(2)(A).
⁶ Heading (b)(2)(B).
⁷ Heading (b)(3)(A).
⁸ Heading (c)(1)(A).
⁹ Heading (c)(1)(B).
18. Section 232 foresees, as one possible “action” taken to adjust imports, the “negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security.”\(^{10}\) It does not otherwise enumerate or specify the other possible types of import adjustment.

19. Section 232 lists the criteria that must be “given consideration” by the Secretary of Commerce and the President for the purposes of Section 232, “in the light of the requirements of national security and without excluding other relevant factors”. These are: “domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.”\(^{11}\)

20. Section 232 adds that, “in the administration of this section”, the Secretary of Commerce and the President shall “further recognize” the “close relation of the economic welfare of the Nation to our national security”, and take into consideration “the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports”, in determining “whether such weakening of our internal economy may impair the national security.”\(^{12}\)

21. In recent domestic litigation in the United States, attorneys representing the United States were asked by a federal judge whether or not, if a plaintiff claimed that “what the President had done was purely economic regulation protectionism to protect a particular industry, and to the extent that Subsection (d) of the statute is so broad that it connects any kind of economic concern to national security that the President asserted he had the

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\(^{10}\) Heading (c)(3)(A).

\(^{11}\) Heading (d).

\(^{12}\) Heading (d).
authority to do that”, there would ever be “a point at which one could say that the President misunderstood the power given to him, or exceeded his authority, and that a Court could review that?” In response, the United States’ attorneys argued that the President’s determination of whether or not there is an impairment of national security under Section 232 is “not subject to judicial review.”

22. To the European Union’s knowledge, since its enactment in 1962, Section 232 has been invoked in a total of 30 instances. Prior to the steel and aluminium import adjustments at issue in this dispute, the Secretary of Commerce had made a “positive” determination (finding that an article is being imported into the United States “in such quantities or under such circumstances as to threaten to impair the national security”) in nine instances. Of those nine, eight of which concerned petroleum and/or crude oil products, the President decided to take formal action under Section 232 in five. All of those five concerned petroleum products. In these cases, either licensing fees and additional supplemental fees on imports, or oil embargoes were imposed.

23. To the best of the European Union’s knowledge, before the Trump administration, the last instance in which the United States took any formal action to restrict imports under Section 232 was the oil embargo on Libya imposed by President Ronald Reagan in 1982.

2.2. RELEVANT OFFICIAL STATEMENTS

24. As will be described below, the measures at issue were put into effect through several Proclamations of the President of the United States, Donald J. Trump. In addition to those Proclamations, President Trump has also

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13 Inside U.S. Trade, 4 Jan 2019, p. 4 (Exhibit EU-3).
15 In another instance, related to Metal-cutting and Metal Forming Machine Tools, the President "deferred a formal decision on the Section 232 case and instead sought voluntary restraint agreements starting in 1986 with leading foreign suppliers and developed a domestic plan of programs to help revitalize the industry". Congressional Research Service Report, "Section 232 Investigations: Overview and Issues for Congress, appendix B (Exhibit EU-2).
issued a number of official statements on the social network Twitter,\(^\text{17}\) which provide relevant context for the measures at issue. The European Union cites them below (emphasis added):\(^\text{18}\)

- Prior to the inauguration of President Trump, and during various campaigns:
  - Ohio Gov. Kasich voted for NAFTA, from which Ohio has never recovered. Now he wants TPP, which will be even worse. Ohio steel and coal dying! (13 Mar 2016, still as Candidate Trump)
  - Kasich has helped decimate the coal and steel industries in Ohio. I will bring them back! #MakeAmericaGreatAgain (14 Mar 2016, still as Candidate Trump)
  - We are going to bring steel and manufacturing back to Indiana! (20 Apr 2016, still as Candidate Trump)

- During the investigations into the imports of steel and aluminium:
  - We're going to use American steel, we're going to use American labor, we are going to come first in all deals. (20 Apr 2017)
  - I look forward to reading the @CommerceGov 232 analysis of steel and aluminium - to be released in June. Will take major action if necessary. (27 May 2017)
  - Time to start building in our country, with American workers & with American iron, aluminum & steel. It is time to put #AmericaFirst (9 Jun 2017)
  - Really great numbers on jobs & the economy! Things are starting to kick in now, and we have just begun! Don't like steel & aluminum dumping! (3 Jul 2017)

- In the days surrounding the adoption of the Presidential Proclamations imposing additional duties on steel and aluminium products:
  - Our Steel and Aluminum industries (and many others) have been decimated by decades of unfair trade and bad policy with countries from around the world. We must not let our country, companies and workers be taken advantage of any longer. We want free, fair and SMART TRADE! (1 Mar 2018)
  - We must protect our country and our workers. Our steel industry is in bad shape. IF YOU DON'T HAVE STEEL, YOU DON'T HAVE A COUNTRY! (2 Mar 2018)
  - When a country (USA) is losing many billions of dollars on trade with virtually every country it does business with, trade

\(^{17}\) In the United States, the President’s Twitter statements (‘tweets’) are treated as “official statements by the President of the United States”. See, for example, CNN, “White House: Trump’s tweets are ‘official statements’”, 6 July 2017 (https://edition.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html) (Exhibit EU-4); US District Court for the District of Columbia, James Madison project et al. v. Department of Justice, Defendants’ supplemental submission and further response to plaintiffs’ post-briefing notices, preliminary statement (Exhibit EU-5), p. 4. (“The Court has asked, broadly, about the official status of the President’s tweets. […] In answer to the Court’s question, the government is treating the President’s statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States.”).

\(^{18}\) See also Exhibit EU-6 for screenshots of the tweets.
**wars are good, and easy to win.** Example, when we are down $100 billion with a certain country and they get cute, don't trade anymore - we win big. It's easy! (2 Mar 2018)

- We are on the losing side of almost all trade deals. Our friends and enemies have taken advantage of the U.S. for many years. Our **Steel and Aluminum industries are dead**. Sorry, it’s time for a change! **MAKE AMERICA GREAT AGAIN**! (4 Mar 2018)

- To protect our Country we must **protect American Steel**! **#AMERICA FIRST** (5 Mar 2018)

- Looking forward to 3:30 P.M. meeting today at the White House. We have to **protect & build our Steel and Aluminum Industries** while at the same time showing great flexibility and cooperation toward those that are real friends and treat us fairly on **both trade** and the military. (8 Mar 2018)

- The European Union, wonderful countries who treat the U.S. very badly on trade, are complaining about the tariffs on Steel & Aluminum. **If they drop their horrific barriers & tariffs on U.S. products going in, we will likewise drop ours. Big Deficit. If not, we Tax Cars etc. FAIR!** (10 Mar 2018)

- Despite the Aluminum Tariffs, Aluminum prices are DOWN 4%. People are surprised, I’m not! **Lots of money coming into U.S. coffers and Jobs, Jobs, Jobs!** (6 Apr 2018)

- **After the measures at issue were put into effect:**

  - **Steel is coming back fast!** U.S. Steel is adding great capacity also. So are others. (23 Jun 2018)

  - America is **OPEN FOR BUSINESS** and U.S. Steel is back! (26 Jul 2018)

  - Pennsylvania has to love Trump because unlike all of the others before me, I am **bringing STEEL BACK in a VERY BIG way**. Plants opening up in Pennsylvania, and all over the Country, and Congressman Lou Barletta, who is running for the Senate in Pennsylvania, is really helping! (2 Aug 2018)

  - Tariffs have had a tremendous positive impact on our Steel Industry. Plants are opening all over the U.S., Steelworkers are working again, and **big dollars are flowing into our Treasury**. Other countries use Tariffs against, but when we use them, foolish people scream! (4 Aug 2018)

  - Our Steel Industry is the talk of the World. It has been given new life, and is thriving. **Billions of Dollars is being spent on new plants** all around the country! (17 Sep 2018)

  - Not seen in many years, America’s steelworkers get a hard-earned raise because of my Administration’s policies to help bring back the U.S. steel industry, which is critical to our National Security. I will always protect America and its workers! (14 Nov 2018)

  - Steel Dynamics announced that it will build a brand new 3 million ton steel mill in the Southwest that will create 600 good-paying U.S. **JOBS**. **Steel JOBS are coming back** to America, just like I predicted. Congratulations to Steel Dynamics! (28 Nov 2018)

- General Motors is very counter to what other auto, and other, companies are doing. Big Steel is opening and renovating plants all
over the country. Auto companies are pouring into the U.S., including BMW, which just announced a major new plant. **The U.S.A. is booming!** (29 Nov 2018)

- **I am a Tariff Man.** When people or countries come in to raid the great wealth of our Nation, I want them to pay for the privilege of doing so. It will always be the best way to **max out our economic power.** We are right now **taking in $billions in Tariffs.** MAKE AMERICA RICH AGAIN (4 Dec 2018)

- **The United States Treasury has taken in MANY billions of dollars** from the Tariffs we are charging China and other countries that have not treated us fairly. In the meantime we are doing well in various Trade Negotiations currently going on. **At some point this had to be done!** (3 Jan 2019)

- **Tariffs on the “dumping” of Steel** in the United States have totally revived our Steel Industry. New and expanded plants are happening all over the U.S. We have not only saved this important industry, but created many jobs. Also, **billions paid to our treasury.** A BIG WIN FOR U.S. (28 Jan 2019)

25. On 20 April 2017, President Trump signed presidential memoranda calling on the Secretary of Commerce to prioritize the investigations into steel and aluminium imports. On that occasion, the Department of Commerce issued “fact sheets” that stated inter alia:

**“PRESIDENT DONALD J. TRUMP: STANDING UP TO UNFAIR STEEL TRADE PRACTICES”**

"We're going to use American steel, we're going to use American labor, we are going to come first in all deals." – President Donald J. Trump

**A JUSTIFIABLE AND NECESSARY ACTION:** As imports of steel to the United States continue to rise, an examination of foreign practices is urgently needed. [...] 

**TAKING STEPS TO PUT AMERICA’S STEEL INDUSTRY FIRST:** President Donald J. Trump is taking action to ensure America’s steel industry comes first, in addition to his Buy American and Hire American policies. [...] 

**KEEPING HIS PROMISE TO THE AMERICAN PEOPLE:** President Trump promised that he would scrutinize U.S. steel imports and seek a revitalization of the American steel industry.

- **Then-Candidate Trump:**
  - Observed that foreign nations are “dumping vast amounts of steel all over the United States, which essentially is killing our steelworkers and steel companies.”
  - Promised that “we will put new American steel into the spine of this country.”
Promised that “We’re going to use American steel, we’re going to use American labor, we are going to come first in all deals.”

"PRESIDENT DONALD J. TRUMP STANDS UP FOR AMERICAN-MADE ALUMINUM"

AMERICA’S ALUMINUM INDUSTRY IN TROUBLE: While American manufacturing of aluminum suffers and shuts down, foreign imports continue to pour into our country. […]

KEEPING HIS PROMISE: President Trump promised the American people he would examine aluminum imports into the United States and revitalize the aluminum industry.

o Then-Candidate Trump promised that “we are going to put American steel and aluminum back into the backbone of our country.”

2.3. OTHER STATEMENTS OF HIGH-RANKING OFFICIALS

26. Other public statements of high-ranking US officials provide further insight into the import adjustments at issue. For example:

- With regard to Section 232 investigations, U.S. Secretary of Commerce Wilbur Ross stated: “National security is broadly defined to include the economy, to include the impact on employment, to include a very big variety of things. […] Economic security is military security. And without economic security, you can’t have military security.”

- Regarding the objectives of the import adjustments, White House National Trade Council Director Peter Navarro stated: “All we are trying to do here with the 232 tariffs is to provide our domestic industries an opportunity to earn a decent rate of return and invest in this country. […] What we have is about 15 countries in the aluminum space and about 20 in the steel space who basically are sending a flood of imports into this country. […] These countries should acknowledge that they are the ones running very large trade surpluses… at the expense of jobs in this country.” With respect to the European Union, Canada and Mexico, Navarro stated: “They chose not to offer a reasonable quota, and we had to put the tariffs on.”

- On a separate occasion, Peter Navarro stated: “The guiding principle of this administration, from the president down to his team, is that any country or entity like the European Union, which is exempt from the tariffs, will have a quota and other restrictions.”

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19 Fact Sheet: President Donald J. Trump: Standing Up to Unfair Steel Trade Practices (Exhibit EU-7).
20 Fact Sheet: President Donald J. Trump Stands up for American-Made Aluminum (Exhibit EU-8).
• With regard to exemptions from the steel and aluminium import adjustments, National Economic Council Director Larry Kudlow stated that they depend on trade concessions, not necessarily related to steel and aluminium: "It's very important that some of our friends make some concessions with respect to trading practices, tariffs and taxes [...] One of the issues cropping up is the equal treatment of automobiles. We'd like to see some concessions from Europe."\(^{24}\)

2.4. **The Position of the Department of Defence (DoD)**

27. On 19 April 2017, the Secretary of Commerce notified the Secretary of Defence of the initiation of investigations into the effects of imports of steel and aluminium on national security under Section 232, pursuant to Section 232’s requirements to provide notice to the Secretary of Defence and to consult with the Department of Defence.\(^{25}\)

28. The Secretary of Defence replied to the Secretary of Commerce in late February 2018, after the adoption of the steel and aluminium investigation reports, with an official memorandum (the DoD memorandum). The memorandum agreed with the Department of Commerce’s findings to the extent that "the systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security” and that “imports of foreign steel and aluminium based on unfair trading practices impair the national security” (emphasis added).\(^{26}\)

29. However, the memorandum pointed out that US military requirements for steel and aluminium each only represent about three percent of US production. For that reason, the DoD indicated that it “does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminium necessary to meet national defence requirements.”\(^{27}\)

30. The DoD added that it “continues to be concerned about the negative impact on our key allies regarding the recommended options within the reports”. Among the alternatives proposed by the investigation reports, the DoD argued that, from a national security perspective, “targeted tariffs are more

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\(^{25}\) Section 232 Notification Letter to Secretary of Defense James Mattis (2017-04-19) (Exhibit EU-13); a similar notification was made with respect to aluminium.


\(^{27}\) Memorandum for Secretary of Commerce, subject: “Response to Steel and Aluminium Policy Recommendations” (Exhibit EU-14), p. 1.
preferable than a global quota or a global tariff”. It recommended to “further refine the targeted tariffs”, clarify to management and labour that the tariffs are “conditional”, and to wait before taking steps on aluminium products.\footnote{28} It further suggested that the real underlying issues of concern are “Chinese transhipment” and “Chinese overproduction”.\footnote{29}

2.5. **IMPORT ADJUSTMENTS ON STEEL PRODUCTS**

31. The import adjustments on steel products are based on the findings, conclusions and recommendations of a USDOC report entitled “The Effect of Imports of Steel On the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended (19 U.S.C. 1862), U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 11 January 2018.” (hereinafter: Steel Report). They were put into effect and/or modified through several presidential proclamations:

- Presidential Proclamation 9705 of 8 March 2018, Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States;\footnote{31} (hereinafter: Proclamation 9705)

- Presidential Proclamation 9711 of 22 March 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of 8 March 2018;\footnote{32} (hereinafter: Proclamation 9711)

- Presidential Proclamation 9740 of 30 April 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of 8 March 2018, as amended by Proclamation 9711 of 22 March 2018;\footnote{33} (hereinafter: Proclamation 9740)


\footnote{28} Memorandum for Secretary of Commerce, subject: “Response to Steel and Aluminium Policy Recommendations” (Exhibit EU-14), p. 1.
\footnote{29} Memorandum for Secretary of Commerce, subject: “Response to Steel and Aluminium Policy Recommendations” (Exhibit EU-14), p. 2.
\footnote{31} Federal Register Vol. 83, No. 51, pp. 11625-11630, 15 March 2018 (Exhibit EU-16).
\footnote{32} Federal Register Vol. 83, No. 60, pp. 13361-13365, 28 March 2018 (Exhibit EU-17).
\footnote{33} Federal Register Vol. 83, No. 88, pp. 20683-20705, 7 May 2018 (Exhibit EU-18).
2018, as amended by Proclamation 9711 of 22 March 2018 and
Proclamation 9740 of 30 April 2018\textsuperscript{34} (hereinafter: Proclamation 9759).

32. Proclamation 9705 (8 March 2018) defined the steel articles subject to the
import adjustments as “7206.10 through 7216.50, 7216.99 through
7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through
7306.90, including any subsequent revisions to these HTS classifications.”\textsuperscript{35}
It modified the HTSUS with respect to those products in order to establish
an additional duty of 25 percent \textit{ad valorem} rate on all imports, except with
respect to Canada and Mexico, effective as of 23 March 2018.\textsuperscript{36} It made
provision for the Secretary of Commerce, in consultation with other senior
officials, to “provide relief” from these additional duties for steel articles not
produced in the United States “in a sufficient and reasonably available
amount or of a satisfactory quality” or “based upon specific national security
considerations”, upon a request for exclusion from a directly affected party
“located in the United States”.\textsuperscript{37} It also made provision for the Secretary of
Commerce to monitor imports of steel articles and inform the President of
any circumstances that “might indicate the need for further action by the
President under section 232” or “indicate that the increase in duty rate
provided for in this proclamation is no longer necessary.”\textsuperscript{38} It added that
countries that have a “security relationship” with the United States may
engage in discussions with the United States in order to “arrive at a
satisfactory alternative means” to address the “threat” posed by the imports
of steel from the country concerned, in which case the President may
“remove or modify the restriction on steel articles imports from that country
and, if necessary, make any corresponding adjustments to the tariff as it
applies to other countries.”\textsuperscript{39}

33. Proclamation 9711 (22 March 2018) amended Proclamation 9705 by
exempting imports of steel products from Australia, Argentina, South Korea,
Brazil, and the EU, in addition to existing exemptions for Canada and
Mexico, from the additional duties, ostensibly in order to continue ongoing

\textsuperscript{34} Federal Register Vol. 83, No. 108, pp. 25857-25877, 5 June 2018 (Exhibit EU-19).
\textsuperscript{35} Proclamation 9705 (Exhibit EU-16), para. (1).
\textsuperscript{36} Proclamation 9705, paras. (2) and (5); Annex.
\textsuperscript{37} Proclamation 9705, para. (3); see also Annex, 16(c).
\textsuperscript{38} Proclamation 9705, para.(5)(b).
\textsuperscript{39} Proclamation 9705, para.9.
discussions. With respect to imports from countries that were exempt, Proclamation 9711 makes provision for the President to order the implementation of a quota in order to "prevent transshipment, excess production, or other actions that would lead to increased exports of steel articles to the United States". In any event, under Proclamation 9711, all these exemptions were to be removed and the additional duties were to be applied to imports from all countries as of 1 May 2018 unless the President determined otherwise by further proclamation.

34. Proclamation 9740 (30 April 2018) amended Proclamation 9705, as already amended by Proclamation 9711, in order to:

- first, exclude on a long-term basis imports from South Korea on the basis of an "range of measures" agreed with South Korea, including a "quota that restricts the quantity of steel articles imported into the United States from South Korea";

- second, extend the temporary exemption for imports from Argentina, Australia and Brazil without an expiration date;

- third, extend the exemption for imports from Canada, Mexico and the EU until 31 May 2018, i.e. providing that the additional duties would be applied to imports from those countries as of 1 June 2018.

35. Proclamation 9759 further amended Declaration 9705, as already amended by Proclamations 9711 and 9740. It permanently exempted imports from Argentina, Australia and Brazil from the additional duties on the basis of an agreed "range of measures", including measures to "limit transshipment or surges", reduce "excess" steel production and "excess" steel capacity and to "[restrain] steel articles exports to the United States" from each of those countries. With respect to steel products from Argentina and Brazil, Proclamation 9759 introduced quotas or "quantitative limitations" on their import to the United States.

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40. Proclamation 9711 (Exhibit EU-17), paras. 4-10.
41. Proclamation 9711, para. 12.
42. Proclamation 9711, paras. 11 and (1)-(4).
43. Proclamation 9740 (Exhibit EU-18), paras. 4 and (1)-(2); Annex.
44. Proclamation 9740, paras. 5 and (1).
45. Proclamation 9740, paras. 6-7, (1) and (3).
46. Proclamation 9759 (Exhibit EU-19), para. 5.
47. Proclamation 9759, para. (2).
36. It made provision for the administration of that quota by U.S. Customs and Border Protection (CBP) of the Department of Homeland Security, taking into account all imports from Argentina and Brazil since January 1, 2018, and for its possible subsequent adjustment.\(^{48}\) The Annex to Proclamation 9759, modifying certain provisions of Chapter 99 of HTSUS, specified the relevant quantities. It provided for “annual aggregate limits” to apply starting with calendar year 2018 and for subsequent years, unless modified or terminated”.\(^{49}\) The two tables in the Annex provide a list of “iron or steel products” of Argentina and Brazil respectively, in products subheadings 9903.80.05 through 9903.80.58, to which various yearly quantitative limitations apply, in many cases even “0 kg“. In addition, a “quarterly aggregate limit” is imposed: each quarter, Argentina and Brazil cannot export to the United States an amount of steel products exceeding 500,000 kg and 30 percent of the annual quota for each country.\(^{50}\)

37. According to various reports and official sources, the quota for Argentina amounts to 135 percent of its three-year average of steel exports.\(^{51}\) Brazil’s quota is 100 percent of its three-year average of semi-finished steel exports and 70 percent of its three-year average of finished steel exports.\(^{52}\) South Korea’s quota amounts to 70 percent of its three-year average of steel exports.\(^{53}\)

### 2.5.1. Procedure and product scope
38. The import adjustments at issue were adopted following an investigation conducted by the US Department of Commerce (USDOC).\(^{54}\) This investigation was initiated by the U.S. Secretary of Commerce on April 19, 2017. On April 20, 2017, President Donald Trump signed a Presidential Memorandum directing Secretary Ross to proceed expeditiously in conducting his investigation and submit a report on his findings to the President. The investigation included a published notice of initiation, a public comment period and a public hearing. In the context of the public comments, the Department of Commerce requested interested parties to submit written comments regarding, \textit{inter alia}, the “quantity of the articles subject to the investigation and other circumstances related to the importation of such articles”, “the impact of foreign competition on the economic welfare of any domestic industry essential to our national security”, “the displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects” and “relevant factors that are causing or will cause a weakening of our national economy.”\(^{55}\)

39. The product scope of the investigation was defined as “steel mill products (steel) which are defined at the Harmonized System (HS) 6-digit level as: 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes.” The Steel Report clarifies that these products are “produced by U.S. steel companies and support various applications across the defense, critical infrastructure, and commercial sectors.”\(^{56}\)

40. Presidential Proclamation 9705 also allows for the exclusion of certain steel products from the scope of the measures. The criteria for product exclusion were further clarified in administrative rules adopted by the Department of Commerce in March and September 2018 (the “March Interim Final Rule” and “September Interim Final Rule”).\(^{57}\) Proclamation 9705 authorises the


\(^{55}\) Steel Report, pp. 18-19.

\(^{56}\) Steel Report, p. 21.

Commerce Secretary to “provide relief” from the additional duties if: (1) the relevant product is not produced in the United States “in a sufficient and reasonably available amount”;58 (2) the relevant product is not produced in the United States in a “satisfactory quality”;59 or (3) there are “specific national security-based considerations” to exclude a specific product from the tariffs or the quota.60

41. Subsequently, for countries that were exempted from duties in return for adopting quotas (Argentina, Brazil and South Korea), President Trump issued a Presidential Proclamation introducing an additional product exclusion process. Under this process, a “directly affected party in the United States” may apply for “relief”, such that the relevant imports from these Members are “excluded from the applicable quantitative limitation”.61

When the volume limitation set forth in a country-specific quota has been exhausted, a product that benefits from a Product Exclusion may nevertheless enter the United States.62

2.5.2. The measure at issue was adopted in order to impose import restrictions

42. The measure at issue was adopted in order to introduce import restrictions. All of the Presidential Proclamations listed above refer to Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), which “authorizes the President to embody in the Harmonized Tariff Schedule of the United States


The exclusion review criterion “not produced in the United States in a sufficient and reasonably available amount” is clarified in the September Interim Final Rule, Exhibit EU-25, p. 46058, which provides that it “means that the amount of steel that is needed by the end user requesting the exclusion is not available immediately in the United States to meet its specified business activities. ‘Immediately’ means whether a product is currently being produced or could be produced ‘within eight weeks’ in the amount needed in the business activities of the user of steel in the United States described in the exclusion request’.

58 “Th[is] exclusion review criterion ... does not mean the aluminium needs to be identical, but it does need to be equivalent as a substitute product. ‘Substitute product’ for the purposes of this review criterion means that the steel being produced by an objector can meet ‘immediately’ ... The quality (e.g., industry specs or internal company controls or standards), regulatory, or testing standards, in order for the U.S. produced steel to be used in that business activity in the United States by that end user.” September Interim Final Rule (Exhibit EU-25), p. 46058.

59 Presidential Proclamation 9777, "Adjusting Imports of Steel Into the United States", Federal Register Vol. 83, No. 171, September 4, 2018, pp. 45025-45030, (Proclamation 9777) (Exhibit EU-26), paras. 3-4 and (2)-(4).

60 September Interim Final Rule (Exhibit EU-25), p. 46058.

61 Proclamation 9777 (Exhibit EU-26), para. (1). The Secretary of Commerce is also authorized to grant relief from quota through a second, separate exclusion process limited to steel products, based on the existence of a contract that pre-dates March 8, 2018. See Proclamation 9777 (Exhibit EU-26), paras. 4 and (2).
(HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.”63

2.5.3. The measure at issue is designed to prevent or remedy serious injury to the US steel industry, allegedly caused or threatened by imports

43. According to the proclamations, the measure at issue is designed to prevent or remedy a decline in the domestic industry caused by imports, and to provide a “relief” to that industry from competition with imports. Its objective is, in particular, to enable the domestic industry to increase its production capacity or capacity utilization, and profitability, and to prevent the closures of production facilities.

44. For the purposes of the USDOC investigation, “national security” was defined as referring to the “general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government.”64 The Steel Report states that section 232(d) contains an “illustrative” list of factors to consider in determining whether imports threaten to impair national security, which is “broke[n]... into two equal parts using two separate sentences”. The first sentence refers to “national defense” requirements, as a “subset of the broader term “national security””, whereas the second “focuses on the broader economy”.65

2.5.3.1 Consideration of factors related to national security and national defence

45. The Steel Report states that the first set of factors referred to by Section 232, related to national defence, was considered.66 Those factors are not individually discussed further in the Steel Report.

63  Proclamation 9705 (Exhibit EU-16), para. 7.; Proclamation 9711 (Exhibit EU-17), para. 14; Proclamation 9740 (Exhibit EU-18), para. 10; Proclamation 9759 (Exhibit EU-19), para. 8.
66  These factors are: “domestic production needed for projected national defense requirements; the capacity of domestic industries to meet such requirements; existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries; and the capacity of the United States to meet national security requirements.” Steel Report (Exhibit EU-15), p. 2.
46. The Steel Report does, however, make certain statements on issues pertaining to national security and national defence. It finds that the US Department of Defense’s (DoD) need for steel products currently requires about three percent of U.S. steel production, and that “military programs such as armored vehicles, aircraft, and ships represent approximately 0.03 percent of U.S. steel demand (peacetime requirements).” It then states that these needs must be met by “commercially viable steel producers” which must attract “sufficient commercial (i.e. non-defense) business” in order to do so. Therefore, the import adjustments at issue, even with respect to national defense needs, are justified by the need to enhance the non-defense business of the domestic steel industry.

47. The Steel Report additionally explains how the U.S. Department of Defense has in the past taken “specific actions to assist portions of the U.S. steel industry that are important for national security needs in part due to unique DoD requirements for which there is limited commercial demand” through the Defense Production Act Title III program, which funds projects to “create assured, affordable and commercially viable production capabilities and capacities for items essential for national defense”, for example by funding the expansion of domestic production capacity for certain products.

2.5.3.2 Consideration of “critical industries” or “critical infrastructure sectors”

48. With respect to the second set of factors in Section 232 (those focusing “on the broader economy”), the Steel Report further clarifies that, even though “Section 232 does not contain a definition of “national security””, the Department of Commerce takes the view that “the term “national security” can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements that are critical to the minimum operations of the economy and government.” The Steel Report clarifies that its determination that steel imports threaten to impair national security depends on a
consideration of “domestic production and the economic welfare of the United States.”

49. There are 16 of these so-called “critical industries” as listed in the 2013 Presidential Policy Directive 21 (PPD-21) and referred to in the Steel Report: Chemical Production, Commercial Facilities, Communications, Critical Manufacturing, Dams, Defense Industrial Base, Emergency Services, Energy, Financial Services, Food and Agriculture, Government Facilities, Health Care/Public Health, Information Technology, Nuclear Reactors, Materials, and Waste Sector, Transportation Systems, Water and Waste Water Systems. The Steel Report explains that these industries are all “critical infrastructure sectors” and that they all “use high volumes of steel” for wide-ranging purposes, for example in producing kitchen equipment in commercial facilities, radio/TV antenna masts, building doors and barriers for the financial services industry, canned goods, fence gates, furniture and shelving in government facilities, boats, etc.

2.5.3.3 Consideration of the industrial and commercial sales of US steel producers

50. The Steel Report also makes clear that it is “focused on the larger enquiry” that the Department of Commerce’s 2001 Report into certain steel imports “expressly did not reach” because it considered it to be beyond its remit: “whether imports have harmed or threaten to harm U.S. producers writ large.” Accordingly, the Steel Report points out that, beyond “defense or critical infrastructure steel needs”, it aims to address the “commercial and industrial customer sales” of the domestic steel industry, which “generate the relatively steady production needed for manufacturing efficiency, and the revenue volume needed to sustain the business.” Those sales have been “steadily eroded by a growing influx of lower-priced imported product.” The Steel Report also refers to a congressional finding that “much of the industrial capacity that is relied upon by the United States Government for military production and other national defense purposes is deeply and
directly influenced by – (A) the overall competitiveness of the industrial economy of the United States and (B) the ability of industries in the United States, in general, to produce internationally competitive products and operate profitably while maintaining adequate research and development to preserve competitiveness with respect to military and civilian production...”

2.5.3.4 Findings related to the “weakening of the internal economy” of the United States

51. In determining “whether a weakening of the U.S. economy by [...] imports” may impair national security, so defined, the Steel Report considered the “close relation of the economic welfare of the United States to its national security; the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills, or any other serious effects resulting from the displacement of any domestic products by excessive imports, without excluding other factors”.79

52. The Steel Report states that two factors listed in the second sentence of Section 232(d) (which is concerned with “the broader economy” and “the economic welfare of our Nation”, in contrast to the first sentence which focuses on national defence,80) are “most relevant in this investigation”: “the impact of foreign competition on the economic welfare of individual domestic industries” and “serious effects resulting from the displacement of any domestic products by excessive imports.”81 In addition, the Department of Commerce considered another factor, not listed in Section 232, to be particularly important: the “presence of massive excess capacity for producing steel”, which has resulted in flat US production capacity and loss of market share by the US industry, while steel imports are gaining market share in the United States. These three factors, according to the Report, “create a persistent threat of further plant closures that could leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs.”82 The term “critical

78 Steel Report (Exhibit EU-15), fn 39.
79 Steel Report, p. 2.
80 Steel Report, p. 15.
81 Steel Report, p. 15.
82 Steel Report, p. 16.
industry” should be understood as referring to the 16 industries referred to above.

53. The Steel Report argues that a “healthy and competitive U.S. [steel] industry” is essential to the national security of the United States, defined as explained above. It analyses whether imports are in such quantities that they “adversely impact the economic welfare of the U.S. Steel Industry”, pointing out for example the increase in steel imports in the first ten months of 2017 over 2016, and that they are priced “substantially lower than U.S. produced steel.\

2.5.3.5 Findings on certain specific injury factors

54. The Steel Report and the Proclamations purport to examine the economic welfare of the domestic industries by reference to a series of injury factors.

55. Thus, they refer to “…the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are “weakening our internal economy,” resulting in the persistent threat of further closures of domestic steel production facilities, stagnant production capacity, decreased production, a declining steel capacity utilization rate, the “displacement of domestic steel by excessive imports”, “a 35 percent decrease in employment in the steel industry,” and causing “the domestic steel industry as a whole to operate on average with negative net income since 2009”. The “expansion of steel production capacity outside of the United States in the last decade” is said to “continue to depress world steel

83 Steel Report, pp. 2-3.
84 Steel Report, pp. 3-4.
85 Proclamation 9705 (Exhibit EU-16), para. 2.; Proclamation 9711 (Exhibit EU-17), para. 3.; Proclamation 9759 (Exhibit EU-19), para. 5. also refers to the avoidance of “import surges” as a way to achieve the objectives of the measure.
86 For further details, see Steel Report (Exhibit EU-15), pp. 41-46, stating for example that “further reduction in basic oxygen furnace capacity” is “inevitable if the present imports continue or increase” (p. 43).
87 Regarding production levels, see also Steel Report (Exhibit EU-15), pp. 46-47.
88 Regarding capacity utilisation, see Steel Report, pp. 47 – 49.
89 Regarding excess capacity, see Steel Report, pp. 51-54.
90 Regarding effects on employment, further detail is provided in Steel Report (Exhibit EU-15), pp. 35-36 and figure 7.
prices while making it increasingly difficult for U.S. companies to export their steel products.\(^{92}\)

56. When explaining the effect of imports on domestic industry, the Steel Report and the Proclamations refer to a number of factors indicating a decline\(^{93}\) in the state of the domestic steel industry, for example “numerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies”;\(^{94}\) “the number of idled facilities despite increased demand for steel in critical industries”\(^{95}\); a “continued loss of viable commercial production capabilities and related skilled workforce”;\(^{96}\) stating that “U.S. prices for hot-rolled steel coil have been higher than in other countries since 2010”, and that US prices “remained substantially higher than in any other area” despite a drop in prices in 2015, even though “relative to prices between 2010 and 2013, prices are still relatively depressed”\(^{97}\).

57. The Steel Report explains that there are “there are numerous examples of U.S. steel producers being unable to fairly compete with foreign suppliers, including the lack of ability to bid on some critical U.S. infrastructure projects”, leading them to “lose out on U.S. business opportunities.”\(^{98}\) The domestic steel industry is under “financial distress” and its “financial viability” is challenged, as illustrated by a negative net income in the last five years, negative growth in revenue, deferment or elimination of production facility capital investments and funding for research and development, high levels of debt, renegotiation of loan agreements, and poor margins threatening the survival of such a capital intensive industry.\(^{99}\) Its ability to fund capital expenditures has been “limited by falling revenue

\(^{92}\) Steel Report, p. 30.

\(^{93}\) Proclamation 9705 (Exhibit EU-16), para. 11 (without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to decline); similarly, Proclamation 9711 (Exhibit EU-17), para. 11; Steel Report (Exhibit EU-15), p. 4 (…”illustrate the decline of the U.S. steel industry”).

\(^{94}\) Steel Report (Exhibit EU-15), p. 4. Regarding steel mill closures, further detail is provided in the Steel Report (Exhibit EU-15), pp. 33-35.

\(^{95}\) Proclamation 9705 (Exhibit EU-16), para. 3.


\(^{97}\) Steel Report, p. 31-33.

\(^{98}\) Steel Report, pp. 36-37.

and reduced profits”, which reflected drops in net sales which “plummeted from $129.6 billion in 2014 to $102 billion in 2015”.

58. Thus, the Steel Report and the Proclamations purport to assess certain injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the Agreement on Safeguards (the rate and amount of the increase in imports, the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production and productivity, capacity utilization, profits and losses, and employment).

2.5.3.6 Conclusions

59. As a general matter, the Steel Report clarifies that Section 232 “does not require a finding that the quantities or circumstances are impairing the national security”, but that it allows the Secretary of Commerce to make an affirmative finding that imports “threaten to impair the national security” before there is actual impairment.

100 Steel Report, p. 40.

101 The European Union addresses the USDOC’s claims regarding increased imports and import penetration in section 2.5.4 below.

102 For example: “Import penetration [of finished and semi-finished steel products] has been above 30 percent for the first ten months of 2017.” Steel Report (Exhibit EU-15), p.29 and section B.2 generally; “Domestic steel” has been “displaced” by “excessive quantities of imports.” Steel Report (Exhibit EU-15), Section C; “Despite efforts to level the playing field through [anti-dumping and countervailing duty orders], there are numerous examples of U.S. steel producers being unable to fairly compete with foreign suppliers.” Steel Report (Exhibit EU-15), p. 36.

103 For example: From 2011-2017, “Domestic steel production supplied only 70 percent of the average demand, even though available U.S. Domestic steel production capacity during the period could have, on average, supplied up to 100 percent of demand.” Steel Report (Exhibit EU-15), p. 47; “U.S. steel production capacity has remained stagnant for more than a decade.” Steel Report (Exhibit EU-15), p. 41; “Multiple U.S. facilities remain idled: there are four idled basic oxygen furnace facilities ... representing almost one third of the remaining basic oxygen furnace facilities in the United States.” Steel Report (Exhibit EU-15), p. 34.

104 For example: “[Capacity] utilization rates are well below economically viable levels.” Steel Report (Exhibit EU-15), p. 36; “Overall, steel mill production capacity utilization has declined from 87 percent in 1998, to 81.4 percent in 2008, to 69.4 percent in 2016.” Steel Report (Exhibit EU-15), p. 47.

105 For example: “Many U.S. steel mills have been driven out of business due to declining steel prices, global overcapacity, and unfairly traded steel.” Steel Report (Exhibit EU-15), p. 33; “Rising levels of imports of steel continue to weaken the U.S. steel industry’s financial health”. Steel Report (Exhibit EU-15), p. 37; “Foreign competition and the displacement of domestic steel by excessive imports ... caused the domestic steel industry as a whole to operate on average with negative net income since 2009.” Steel Report (Exhibit EU-15), p. 4.


60. The Steel Report and the Proclamations point out that “...present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are “weakening our internal economy,” resulting in the persistent threat of further closures of domestic steel production facilities.”108

61. The Steel Report concludes that, as a consequence of the fact that domestic steel is “displaced by excessive imports”, there is an “adverse impact... on the economic welfare of the domestic steel industry”.109 This adverse impact, along with “global excess capacity in steel”, constitutes a “weakening of our internal economy” that, in turn, shows that imports “threaten to impair” national security.110

2.5.3.7 The remedy pursued by the import adjustments

62. The Steel Report and the proclamations clarify that the measure at issue aims to “enable domestic steel producers to use approximately 80 percent of existing domestic production capacity” and thereby “achieve long-term economic viability through increased production”111 as well as ensure “sustained profitability”, “maintain facilities, carry out periodic modernization, service company debt, and fund research and development”112, “help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production”113, and variously “ensure the economic viability of our domestic steel industry”114 or “ensure the economic stability of our domestic steel industry”.115 In some cases, the proclamations point out the need to reduce production capacity and/or production by competing industries of other WTO Members.116

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108 Proclamation 9705 (Exhibit EU-16), para.2.
110 Steel Report, p. 55.
111 Proclamation 9705 (Exhibit EU-16), para. 4; Proclamation 9711 (Exhibit EU-17), para. 10 (“measures that will increase domestic capacity utilization”); Proclamation 9740 (Exhibit EU-18), para. 4 (“measures that will contribute to increased capacity utilization in the United States”).
112 Steel Report (Exhibit EU-15), p. 47. See also p. 4, 40, and 48.
113 Proclamation 9705 (Exhibit EU-16), para. 8
114 Proclamation 9705 (Exhibit EU-16), para. 11.; Proclamation 9711 (Exhibit EU-17), para. 11.
115 Proclamation 9740 (Exhibit EU-18), para. 7. See also Steel Report (Exhibit EU-15), p. 26. (“maintain a financially viable domestic manufacturing capability”).
116 Proclamation 9759 (Exhibit EU-19), para. 5 (“In my judgment, these measures will provide effective, long-term alternative means to address these countries’ contribution to the threatened
63. With respect to the measures agreed with Argentina, Australia, and Brazil, Proclamation 9759 explains that they will “reduce excess steel production and excess steel capacity”, “contribute to increased capacity utilization in the United States”, “prevent the transhipment of steel articles and avoid import surges”, as well as “[restrain] steel articles exports to the United States.” 117

64. The Steel Report concludes that “the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity”,118 and recommends that “the President take immediate action by adjusting the level of these imports through quotas or tariffs, [which] should be sufficient, even after any exceptions (if granted), to enable U.S. steel producers to operate at an 80 percent or better average capacity utilization rate based on available capacity in 2017.”119 It states that “[a]chieving this level of capacity utilization based on the projected 2017 import levels will require reducing imports from 36 million metric tons to about 23 million metric tons.”120 The Report goes on to assess several options (global quota, global tariff, tariffs on a subset of countries, exemptions and exclusions), based on whether and at what level they would enable the domestic steel industry to achieve that capacity utilisation rate.121

65. With respect to the possible exemption of specific countries, the Steel Report clarifies that they would be based on a consideration of the “overriding economic or security interest of the United States.”122 With respect to the possible exclusions of specific products from the tariff, the Steel Report clarifies that they could be granted, inter alia, on the basis of a “lack of sufficient U.S. production capacity of comparable products.”123

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117  Proclamation 9759 (Exhibit EU-19), para. 5.
118  Steel Report (Exhibit EU-15), p. 5.
119  Steel Report, p. 6.
120  Steel Report, p. 58.
121  Steel Report, pp. 7-10.
122  Steel Report, p. 60.
2.5.4. The measure at issue claims to be based on a consideration of whether steel products are imported into the US territory in increased quantities, and in such conditions as to cause or threaten serious injury

66. The proclamations and the Steel Report explain that the import adjustments at issue are based on a consideration of the “quantities” and “circumstances” under which “steel articles are being imported into the United States”\(^\text{124}\); “either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding”\(^\text{125}\).

67. The Steel Report analyses whether imports are in such quantities that they “adversely impact the economic welfare of the U.S. Steel Industry”, pointing out for example the increase in steel imports in the first ten months of 2017 over 2016\(^\text{126}\), and comparing import levels with domestic industry capacity utilisation rates.\(^\text{127}\) It also bases its conclusions on a finding that there is “unlikely to be any market-driven reduction in steel exports to the United States in the near future”,\(^\text{128}\) and determines that “the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity.”\(^\text{129}\)

68. It points out that “a growing influx of lower-priced imported product” has caused “steady erosion” of the domestic steel industry’s commercial and industrial business,\(^\text{130}\) and that the financial weakening of the domestic industry is due to an “ever-increasing wave of steel imports.”\(^\text{131}\) In its conclusions, it states that, due to excess capacity, “U.S. steel producers, for the foreseeable future, will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives”\(^\text{132}\) and that domestic producers are facing “widespread harm from mounting imports”.\(^\text{133}\) It further specifies that the

\(^{124}\) Proclamation 9705 (Exhibit EU-16), para. 2. See also Steel Report (Exhibit EU-15), pp. 12 – 13.


\(^{126}\) Steel Report, pp. 3-4.

\(^{127}\) Steel Report, figure 1.

\(^{128}\) Steel Report, p. 5.

\(^{129}\) Steel Report, p. 5.

\(^{130}\) Steel Report, p. 25.

\(^{131}\) Steel Report, p. 37.


\(^{133}\) Steel Report, p. 56.
adverse impact on the domestic steel industry "has been further exacerbated by the 22 percent surge in imports thus far in 2017 compared with 2016."\(^\text{134}\)

69. The Proclamations refer to the finding of the Secretary of Commerce that "the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy," resulting in the persistent threat of further closures of domestic steel production facilities".\(^\text{135}\) The proclamations refer, in numerous instances, to an "increased level of imports",\(^\text{136}\) or "continued high level of imports"\(^\text{137}\) which cause or threaten to cause a "weakening" or "decline" of the domestic industry.\(^\text{138}\) They also make clear that the specific import adjustments at issue are designed on the basis of an assessment of the quantity of imports. For example, they point out that the import adjustment could be adapted on the basis of an assessment that should "take into account all steel articles imports since January 1, 2018".\(^\text{139}\) They also suggest that one of the objectives of the measure at issue is to limit or prevent "import surges".\(^\text{140}\)

70. The Steel Report explains that "[t]otal U.S. imports rose from 25.9 million metric tons in 2011, peaking at 40.2 million metric tons in 2014 at the height of the shale hydrocarbon drilling boom. For 2017 (first ten months) imports are increasing at a double-digit rate over 2016, pushing finished steel imports consistently over 30 percent of U.S. consumption."\(^\text{141}\) It also details an increase in import penetration for various steel products, especially in 2017.\(^\text{142}\)

\(^{134}\) Steel Report, p. 57. See also p. 58 ("If current import trends for 2017 continue, continued imports without any action are projected to be 36.0 million metric tons, an increase over 2016 of 6.0 million metric tons.")

\(^{135}\) Proclamation 9705 (Exhibit EU-16), para. 2.

\(^{136}\) Proclamation 9705 (Exhibit EU-16), para. 3.

\(^{137}\) Proclamation 9705 (Exhibit EU-16), para. 8.

\(^{138}\) Proclamation 9705 (Exhibit EU-16), para. 9 ("...exports of steel articles to the United States weaken our internal economy...").

\(^{139}\) Proclamation 9711 (Exhibit EU-17), para. 12.

\(^{140}\) Proclamation 9759 (Exhibit EU-19), para. 5.

\(^{141}\) Steel Report (Exhibit EU-15), p. 27. and figure 2.

\(^{142}\) Steel Report (Exhibit EU-15), p. 29. and figure 3.
71. The Steel Report also explains that the “presence of massive excess capacity for producing steel” results in steel imports occurring under “such circumstances” that justify an affirmative finding.143

2.5.5. The measure at issue refers to precedents which include safeguard and other trade remedy measures

72. As pointed out by Proclamation 9705, the measure at issue was adopted on the basis of a consideration of previous U.S. Government measures and actions on “steel articles imports and excess capacity”, including most recently the safeguard measure adopted by the administration of George W. Bush (in 2002).144 Similarly, the Steel Report describes its recommendation as a part of “the history of U.S. Government actions to ensure the continued viability of the U.S. steel industry”145, or a string of “prior significant actions to address steel imports using quotas and/or tariffs [...] taken under various statutory authorities”, including most recently the 2002 safeguard measure.146

73. The Steel Report also places the import adjustments at issue in the context of a number of ongoing antidumping and countervailing duty determinations and investigations.147 It explains that the high number of US antidumping and countervailing duties in effect address the same “problem confronting the U.S. steel industry” that is also addressed by the import adjustments at issue. The import adjustments at issue are explained, in part, by stating that “given the large number of countries from which the United States imports steel and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel” and that “U.S. industry has already spent hundreds of millions of dollars in recent years on AD/CVD cases.”148

74. A “frequently asked questions” document published by the Department of Commerce also explains that the Secretary of Commerce initiated the

143 Steel Report, p. 16.
144 Proclamation 9705 (Exhibit EU-16), para. 3.
146 Steel Report (Exhibit EU-15), p. 6.; see also p. 25. A statement issued at the time of the 2002 safeguard measure explains that the safeguard measure was aimed at addressing the “large influx of foreign steel”, the “excess capacity” of foreign steel producers, and the injury caused by imports and import “surges”, leading to bankruptcies, low prices and losses of the domestic industry. “Temporary Safeguards for Steel Industry”, White House statement, Exhibit EU-27.
147 Steel Report (Exhibit EU-15), p. 25. and Appendix K.
investigation of steel imports because “U.S. Government attempts to address foreign government subsidies and other unfair practices have not ended [the distortion of U.S. and global steel markets]”, noting that the 152 AD and CVD duties and 25 investigations underway “have not substantially alleviated the negative effect global excess capacity on the United States steel industry”.149

75. A separate “frequently asked questions” document further explains that AD and CVD measures are not sufficient to “protect the steel industry”. It states that, “because of their limited scope, antidumping and countervailing duty remedies are not able to resolve the broader structural economic harm to the U.S. steel industry caused by massive global overcapacity and unfair foreign competition” (emphasis added).150

2.5.6. The measure at issue claims to be based on unforeseen developments

76. The measure at issue was introduced on the basis of “dramatic changes in the steel industry since 2001”.151 These recent developments in the steel industry, according to Proclamation 9705, justified a different conclusion to that of a previous investigation of the US Department of Commerce into the effects of steel imports, which could not have foreseen them. The Steel Report specifies that those developments include the level of global excess capacity, the level of imports, the reduction in basic oxygen furnace facilities and employment in the domestic steel industry since 2001.152

2.5.7. The measure at issue is based on a novel interpretation of Section 232

77. The Steel Report also shows that the Department of Commerce has adopted a new interpretation of Section 232, compared to the “2001 Report or other prior Department reports”:

“To the extent that the 2001 Report or other prior Department reports under Section 232 can be read to conclude that imports from reliable sources cannot impair the national security when the Secretary finds those imports are causing substantial unemployment, decrease in

149 Frequently Asked Questions: Section 232 Investigations: The Effect of Steel Imports on the National Security (Exhibit EU-28).
150 Frequently Asked Questions: Steel Anti-dumping (AD) and Countervailing Duty (CVD) Orders (Exhibit EU-29).
151 Proclamation 9705 (Exhibit EU-16), para. 3.
152 Steel Report (Exhibit EU-15), pp. 5. and 16.
revenues of government, loss of skills or investment, or other serious
effects resulting from the displacement of any domestic products by
excessive imports, the Secretary expressly rejects such a reading.”

2.6. **IMPORT ADJUSTMENTS ON ALUMINIUM PRODUCTS**

78. The import adjustments on aluminium products are based on the findings,
conclusions and recommendations of a USDOC report entitled “The Effect of
Imports of Aluminum On the National Security, An Investigation Conducted
Under Section 232 of the Trade Expansion Act of 1962, as Amended, U.S.
Department of Commerce, Bureau of Industry and Security, Office of
Technology Evaluation, 17 January 2018” (hereinafter: Aluminium Report). They were put into effect and/or modified through several
presidential proclamations:

- Presidential Proclamation 9704 of 8 March 2018, Adjusting Imports of
  Aluminum into the United States, including the Annex, To Modify
  Chapter 99 of the Harmonized Tariff Schedule of the United States
  (hereinafter: Proclamation 9704);\(^{155}\)

- Presidential Proclamation 9710 of 22 March 2018, Adjusting Imports of
  Aluminum into the United States, amending Proclamation 9704 of 8
  March 2018 (hereinafter: Proclamation 9710);\(^{156}\)

- Presidential Proclamation 9739 of 30 April 2018, Adjusting Imports of
  Aluminum into the United States, amending Proclamation 9704 of 8
  March 2018, as amended by Proclamation 9710 of 22 March 2018
  (hereinafter: Proclamation 9739);\(^{157}\)

- Presidential Proclamation 9758 of 31 May 2018, Adjusting Imports of
  Aluminum into the United States, amending Proclamation 9704 of 8
  March 2018, as amended by Proclamation 9710 of 22 March 2018 and
  Proclamation 9739 of 30 April 2018 (hereinafter: Proclamation 9758).\(^{158}\)

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153 Steel Report (Exhibit EU-15), fn 21.
154 U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation,
    "The Effect of Imports of Aluminum On the National Security, An Investigation Conducted Under
    Section 232 of the Trade Expansion Act of 1962, as Amended", 17 January 2018 (Exhibit EU-31).
156 Federal Register Vol. 83, No. 60, pp. 13355-13359, 28 March 2018 (Exhibit EU-33).
79. Proclamation 9704 (8 March 2018) defined the aluminium articles subject to the import adjustments. It modified the HTSUS with respect to those products in order to establish an additional duty of 10 percent ad valorem on all imports, except with respect to Canada and Mexico, effective as of 23 March 2018. It made provision for the Secretary of Commerce, in consultation with other senior officials, to “provide relief” from these additional duties for aluminium articles not produced in the United States “in a sufficient and reasonably available amount or of a satisfactory quality” or “based upon specific national security considerations”, upon a request for exclusion from a directly affected party “located in the United States”. It also made provision for the Secretary of Commerce to monitor imports of aluminium articles and inform the President of any circumstances that “might indicate the need for further action by the President under section 232” or “indicate that the increase in duty rate provided for in this proclamation is no longer necessary.” It added that countries that have a “security relationship” with the United States may engage in discussions with the United States in order to “arrive at a satisfactory alternative means” to address the “threat” posed by the imports of aluminium from the country concerned, in which case the President may “remove or modify the restriction on aluminum articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries.”

80. Proclamation 9710 (22 March 2018) amended Proclamation 9704 by exempting imports of steel products from Australia, Argentina, South Korea, Brazil, and the European Union, in addition to existing exemptions for Canada and Mexico, from the additional duties, ostensibly in order to facilitate ongoing discussions on “satisfactory alternative means” to “reduce excess aluminum production and excess aluminum capacity... [and] increase...”
domestic capacity utilization”. With respect to imports from countries that were exempt, Proclamation 9710 makes provision for the President to order the implementation of a quota in order to “prevent transshipment, excess production, or other actions that would lead to increased exports of aluminum articles to the United States”. In any event, under Proclamation 9710, all these exemptions were to be removed and the additional duties were to be applied to imports from all countries as of 1 May 2018 unless the President determined otherwise by further proclamation.

81. Proclamation 9739 (30 April 2018) amended Proclamation 9704, as already amended by Proclamation 9710, in order to:

- first, extend the temporary exemption for imports from Argentina, Australia and Brazil without an expiration date;
- second, extend the exemption for imports from Canada, Mexico and the EU until 31 May 2018, i.e. providing that the additional duties would be applied to imports from those countries as of 1 June 2018.

82. Proclamation 9758 further amended Declaration 9704, as already amended by Proclamations 9710 and 9739. It permanently exempted imports from Argentina and Australia from the additional duties on the basis of an agreed “range of measures”, including measures to “reduce excess aluminum production and excess aluminium capacity”, “contribute to increased capacity utilization in the United States”, “prevent the transhipment of aluminum articles and avoid import surges” and “[restrain] aluminium articles exports to the United States” from those countries, while noting that the exemption could be revisited.

83. With respect to aluminium products from Argentina, Proclamation 9758 introduced “quota treatment” or “quantitative limitations” on their import to the United States. It made provision for the administration of that quota by U.S. Customs and Border Protection (CBP) of the Department of Homeland Security, taking into account all imports from Argentina since January 1,
2018, and for its possible subsequent adjustment.\textsuperscript{170} The Annex to Proclamation 9758, modifying certain provisions of Chapter 99 of HTSUS specified the relevant quantities. It provided for quarterly aggregate limits such that “[b]eginning on July 1, 2018, imports from any such country in an aggregate quantity under any such subheading during any of the periods January through March, April through June, July through September, or October through December in any year that is in excess of 500,000 kg and in excess of 30 percent of the total aggregate quantity provided for a calendar year for such country, as set forth on the Internet site of CBP, shall not be allowed.”\textsuperscript{171} The table in Part B of the Annex further provides for “annual aggregate limits [that] shall apply for the period starting with calendar year 2018 and for subsequent years” or “quantitative limitations” on aluminium products of Argentina of 169,658,877 kg (“Unwrought aluminum, provided for in heading 7601”) and 11,279,691 kg (“Wrought aluminum, provided for in headings 7604, 7605, 7606, 7607, 7606, 7607, 7608, 7609 and castings and forgings of aluminum provided for in subheading 7616.99.51.”)

84. According to press reports, the quota for Argentina amounts to 100 percent of its three-year average of aluminium exports.\textsuperscript{172}

### 2.6.1. Procedure and product scope

85. The import adjustments at issue were adopted following an investigation conducted by the US Department of Commerce.\textsuperscript{173} This investigation was initiated by the U.S. Secretary of Commerce on 26 April 2017. On 27 April 2017, President Donald Trump signed a Presidential Memorandum directing the Secretary of Commerce to proceed expeditiously in conducting his investigation and submit a report on his findings to the President. The investigation included a published notice of initiation, a public comment period and a public hearing. In the context of the public comments, the Department of Commerce requested interested parties to submit written comments regarding, \textit{inter alia}, the “quantity of the articles subject to the

\textsuperscript{170} Paras. (2), (4), (6) and (7).

\textsuperscript{171} Annex, A.3.


\textsuperscript{173} Aluminium Report (Exhibit EU-31), p. 1.
investigation and other circumstances related to the importation of such articles”, “the impact of foreign competition on the economic welfare of any domestic industry essential to our national security”, “the displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects” and “relevant factors that are causing or will cause a weakening of our national economy.”

86. The product scope of the investigation was defined as aluminium products, and further specified in the Proclamations and the Aluminium Report by Harmonized Tariff Schedule (HTS) codes and descriptions: 7601 (Unwrought aluminium), 7604 (Aluminum bars, rods and profiles), 7605 (Aluminum wire), 7606 (Aluminum plates, sheets, and strip, of a thickness exceeding 0.2mm; this category includes can sheet for aluminum can packaging), 7607 (Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2mm), 7608 (Aluminum tubes and pipes), 7609 (Aluminum tube and pipe fittings), 7616.99.51.60 (Other articles of aluminum: castings), and 7616.99.51.70 (Other articles of aluminum: forgings).

87. The Aluminium Report notes that “virtually every person in the United States, and indeed most of the world, uses aluminum every single day”, in applications such as transportation (including aircraft and automobiles), followed by packaging, building construction, electrical and machinery applications.

88. It explains that aluminium originates from the ore bauxite, of which the United States is not a significant source as it cannot be economically extracted there. Bauxite is processed into alumina, which is then smelted to produce pure aluminium metal. It also explains that the industry can be divided into three segments: upstream (“primary” or “unwrought”
aluminum production, in which aluminum is produced from raw materials"), downstream ("processing of aluminum into semi-finished aluminum goods such as rods, bars, sheets, plates, castings, forgings and extrusions" using "primary aluminum, secondary aluminum, or a combination"), and secondary ("based on recycled scrap"). The investigation examined both primary and downstream aluminium products,\textsuperscript{179} noting that the latter category is "diverse - from production of large-volume commodity-grade articles such as can sheet for beverage cans, to high value added goods, including specialized products for the defense sector."\textsuperscript{180}

89. The Report explains that secondary production is the majority of US aluminium production (64% in 2016). Moreover, the United States is "the world’s leading producer of secondary unwrought aluminum, due to its long established aluminum recycling industry".\textsuperscript{181} It then briefly states:

"While aluminum produced through secondary production is an important feedstock for the U.S. aluminum industry, it is fundamentally a different industry sector and is not the focus of this report."\textsuperscript{182}

90. The Aluminium Report later notes that "secondary aluminum production today accounts for a substantial portion of the total supply of aluminum in the United States", adding that U.S. secondary production capacity increased by 5.6 percent between 2011 and 2015, while actual production increased by 13.4 percent during that timeframe", and that "secondary aluminum producers operated at about 80 percent of capacity in 2015."\textsuperscript{183}

91. Presidential Proclamation 9704 also allows for the exclusion of certain steel products from the scope of the measures (product exclusions). The criteria for product exclusion were further clarified in administrative rules adopted by the Department of Commerce in March and September 2018 (respectively, the "March Interim Final Rule" and "September Interim Final

\textsuperscript{179} The HTS explanatory notes confirm that HTS 7601 covers unwrought aluminium "obtained by casting electrolytic aluminium" (i.e. primary); or "by remelting metal waste or scrap" (i.e. secondary). (Exhibit EU-38) The scope of HTS 7601 is further confirmed by a number of rulings of the US Customs and Border Protection. The United States Customs and Border Protection rulings consistently classify recycled, i.e. secondary aluminium products, as falling under HTS 7601. See, e.g. USCBP Ruling N300053 4 September 2018, Exhibit EU-36 (addressing “alloyed aluminum remelt scrap ingots”); USCBP Ruling N301439, 21 November 2018, Exhibit EU-37 (addressing billets made from “aluminium alloy scrap”).

\textsuperscript{180} Aluminium Report (Exhibit EU-31), p. 52.

\textsuperscript{181} Aluminium Report, pp. 21-22.

\textsuperscript{182} Aluminium Report, p. 22.

\textsuperscript{183} Aluminium Report, pp. 49-50.
Rule"). Proclamation 9704 authorises the Commerce Secretary to “provide relief” from the additional duties if: (1) the relevant product is not produced in the United States “in a sufficient and reasonably available amount”;
(2) the relevant product is not produced in the United States in a “satisfactory quality”, or (3) there are “specific national security-based considerations” to exclude a specific product from the tariffs or the quota.

92. Subsequently, for certain countries, that were exempted from duties in return for adopting quotas, President Trump issued a Presidential Proclamation introducing an additional product exclusion process. Under this process, a “directly affected party in the United States” may apply for “relief”, such that the relevant imports from these Members are “excluded from the applicable quantitative limitation”. When the volume limitation set forth in a country-specific quota has been exhausted, a product that benefits from a Product Exclusion may nevertheless enter the United States.

2.6.2. The measure at issue was adopted in order to impose import restrictions

93. The measure at issue was adopted in order to introduce import restrictions. Just like the Presidential Proclamations on steel, the Presidential Proclamations on aluminium listed above all refer to Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), which “authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.”

184 Exhibit EU-24 (March Interim Final Rule); Exhibit EU-25 (September Interim Final Rule).
185 September Interim Final Rule (Exhibit EU-25), p. 46062.
186 September Interim Final Rule, p. 46062.
187 September Interim Final Rule, p. 46062.
189 Proclamation 9776 (Exhibit EU-39), para. (1).
190 Proclamation 9704 (Exhibit EU-32), para. 6 and chapeau of the operative part.; Proclamation 9710 (Exhibit EU-33), para. 14 and chapeau of the operative part; Proclamation 9739 (Exhibit EU-34), para. 9 and chapeau of the operative part; Proclamation 9758 (Exhibit EU-35), para. 8 and chapeau of the operative part.
2.6.3. The measure at issue is designed to prevent or remedy serious injury to the US aluminium industry, allegedly caused or threatened by imports

94. According to the Proclamations, the import adjustments at issue are designed to prevent or remedy a decline in the domestic industry caused by imports, and to provide a “relief” to that industry from competition with imports. The objectives are, in particular, to enable the domestic industry to increase its production capacity or capacity utilization and profitability, and to prevent the closures of production facilities.

95. For the purposes of the USDOC investigation, “national security” was defined broadly as referring to the “general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government.”\(^{191}\) The Aluminium Report states that Section 232(d) contains an “illustrative” list of factors to consider in determining whether imports threaten to impair national security, which is “broke[n]... into two equal parts using two separate sentences”. The first sentence refers to “national defense” requirements, as a “subset of the broader term “national security””, whereas the second “focuses on the broader economy”.\(^{192}\)

### 2.6.3.1 Consideration of factors related to national security and national defence

96. The Aluminium Report states that the first set of factors referred to by Section 232, related to national defense, was considered.\(^{193}\) Those factors are not individually discussed further in the Aluminium Report. The Aluminium Report does, however, make certain statements on issues pertaining to national security and national defence.

97. While the data on average annual defense-related demand for aluminium during peacetime, and what percentage of total US demand it constitutes, are redacted, the Aluminium Report finds that the U.S. Department of


\(^{193}\) These factors are: “domestic production needed for projected national defense requirements; the capacity of domestic industries to meet such requirements; existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries; and the capacity of the United States to meet national security requirements.” Aluminium Report (Exhibit EU-31), p. 1.
Defense (DoD) and its contractors use a “small” or “low” percentage of U.S. aluminum production.”

98. The Report also refers to “high-purity” aluminium, for which it claims that “[t]he U.S. is ... at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems”. It states that high-purity aluminium is critical to the production of “high-performance aluminum alloys used in military aircraft and other applications”. In terms of specific defence needs, however, the Report states that only ten percent of total U.S. manufacturers’ requirements for high-purity aluminium (250,000 metric tons) is used “to support the manufacture of defense-related products”, whereas the United States produced annually, “until recently, 125,000 metric tons of high-purity aluminium.” Similarly, the Report explains that U.S. commercial applications account for 90 percent of high performance aluminium consumption. 

99. It adds that the “pace of expansion of aluminum use in defense and commercial markets may be slower than it might be were it not for the collapse of aluminium prices and loss of revenue at U.S. aluminum producers. At this time most aluminum companies cannot afford to fund research.” Therefore, the import adjustments at issue, even with respect to national defense needs, are justified in large part by the need to enhance the non-defense business of the domestic aluminium industry.

100. The Aluminium Report additionally explains the National Defense Stockpile’s aluminium holding, the purpose of which is to “limit, if not preclude dependence by the United States upon foreign sources in times of a national emergency.” It recalls that the stockpile stands at zero, after Congress progressively reduced it from 920,000 short tons. Congress’ decision to do so was a “consequence of demand/supply modelling by the Institute for Defense Analysis”, which was performed on the basis of “assumptions on

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194 Aluminium Report (Exhibit EU-31), p. 24-25. See also p. 57, specifically on downstream producers: “commercial/industrial sectors account for most of their sales”; “the defense-related production of these companies makes up a small portion of their business”.
195 Aluminium Report (Exhibit EU-31), p. 5.
196 Aluminium Report, p. 27.
197 Aluminium Report, p. 30.
198 Aluminium Report, p. 34.
199 Aluminium Report, p. 34.
the duration and intensity of conflicts, capability to import materials in a
time of war, expansion and contraction of the supplier base, and other
factors.”200

2.6.3.2 Consideration of “critical industries” or “critical infrastructure sectors”

101. With respect to the second set of factors listed in Section 232 (those that
focus “on the broader economy”), the Aluminium Report clarifies that, even
though “Section 232 does not contain a definition of “national security””, the
Department of Commerce takes the view that “the term “national security”
can be interpreted more broadly to include the general security and welfare
of certain industries, beyond those necessary to satisfy national defense
requirements that are critical to the minimum operations of the economy
and government.”201 The Aluminium Report clarifies that its determination
that steel imports threaten to impair national security depends on a
consideration of “the economic welfare of the domestic aluminium industry.”202 The financial viability of the domestic aluminium industry is
described as being in the interest of not just US national security, but also
of “overall economic welfare”.203

102. In order to explain why aluminium is “essential to U.S. national security”,
the Aluminium Report points out that “aluminum products are used widely
across U.S. society in a range of consumer products, commercial
applications, and industrial products”, which makes “aluminum ingot, bar,
rod, coils, sheet, cable and wire, and plate products” essential for the
“functioning of the U.S. economy”, “in industry and in infrastructure critical
to U.S. economic growth.”204 Examples of this are the use of aluminium in
“new construction, production of aircraft, automobiles, bridges, building
materials, heating and cooling systems, housing, power transmission cable,
trucks and trailers and other applications”.205

200 Aluminium Report (Exhibit EU-31), fn 32.
202 Aluminium Report, p. 15.
203 Aluminium Report, p. 105.
204 Aluminium Report, p. 23.
205 Aluminium Report (Exhibit EU-31), p. 23.
103. Like with respect to steel, the Aluminium Report refers to 16 so-called “critical industries” or “critical infrastructure sectors”\(^{206}\), as listed in the the 2013 Presidential Policy Directive 21 (PPD-21) and referred to in the Aluminium Report.\(^{207}\) The Aluminium Report lists six “critical infrastructure sectors” in which there is “significant dependence on aluminium content”:

- "Defense Industrial Base: Design, production, delivery, and maintenance of military weapons systems, subsystems, and components or parts to meet U.S. military requirements"
- Energy: Electric power transmission and distribution (over 6,000 power plants)
- Transportation: Aircraft, automobiles, railroad freight cars, boats, ships, trains, trucks, trailers, wheels
- Containers and Packaging: Cabinets, cans, foils, storage bins, storage tanks
- Construction: Bridges, structural supports, conduit, piping, siding, doors, windows, wiring
- Manufacturing: Machinery, stampings, castings, forgings, product components, consumer goods, heating and cooling devices, and utility lighting fixtures.”\(^{208}\)

104. The Aluminium Report states that these critical infrastructure sectors are all “so vital that their incapacitation or destruction would have a debilitating effect on defense capability, national economic security, national public health or safety.” In turn, almost all of them “rely on aluminum products as a part of their principal missions”.\(^{209}\)

105. Some examples of such vitally important use of aluminium, listed in the Aluminium Report, are: aluminium cable used in commercial office buildings, residential power meters and breaker boxes,\(^{210}\) the manufacture of automobiles, buses, freight and subway cars, boats and ships, tractor trailers, and related components\(^{211}\), canning materials and foils for food packaging, crop irrigation piping,\(^{212}\) door, wall, and door framing; roofs and

\(^{206}\) Aluminium Report, p. 13.

\(^{207}\) Aluminium Report, p. 13.

\(^{208}\) Aluminium Report, p. 36.

\(^{209}\) Aluminium Report (Exhibit EU-31) , p. 36. (listing chemical production, commercial facilities, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, food and agriculture, government facilities, transportation systems, and water management and waste water systems) other than “financial services and nuclear reactors and related waste management”.

\(^{210}\) Aluminium Report (Exhibit EU-31), p. 37.

\(^{211}\) Aluminium Report (Exhibit EU-31), p. 37.

\(^{212}\) Aluminium Report, p. 37.
awnings; architectural trim; utility cabinets; air conditioning systems,\textsuperscript{213} electronics cabinets, water conduits, drainage systems, commercial wiring, green houses, storage buildings, heat sinks in IT systems etc.\textsuperscript{214} According to the Aluminium Report, in the transportation sector, apart from responding to emergencies, the “ready availability of high quality aluminum bar, rod, coils, plate, sheet, and extrusions is critical to the ability of manufacturers to deliver product to their customers in a timely way.”\textsuperscript{215}

\textbf{2.6.3.3 Consideration of the industrial and commercial sales of US aluminium producers}

106. The Aluminium Report makes clear that, beyond “defense or critical infrastructure steel needs”, which are “not sufficient to support a robust aluminum industry”, the import adjustments aim to ensure that U.S. primary and downstream aluminum producers are kept “financially viable and competitive in commercial markets to be able to produce the needed output.”\textsuperscript{216} It refers to the need for domestic industry to “have a strong aluminum manufacturing capability and commercial product portfolio (e.g., automotive, industrial, packaging)”, without which “aluminum manufacturers cannot afford to conduct research and development, make capital investments, nor maintain their production infrastructure.”\textsuperscript{217} With respect to downstream production, the Report similarly clarifies that “[i]t is large-volume standard products that enable the companies to invest in fixed equipment and capacity that support the production of high-value added products, including defense.”\textsuperscript{218}

107. The Aluminium Report finds that maintaining domestic production capability for: “1) primary aluminium production, 2) processing of recycled aluminum into products, and 3) making bar and rod, plate and sheet, coils, extrusions, castings, forgings, pigments and powders, and other aluminum products” is needed not just by “national security requirements for U.S. critical infrastructure and the national defense” but also for “economic stability.”\textsuperscript{219}

\textsuperscript{213} Aluminium Report, p. 37.
\textsuperscript{214} Aluminium Report, table 7, p. 38.
\textsuperscript{215} Aluminium Report, p. 37.
\textsuperscript{216} Aluminium Report, p. 105.
\textsuperscript{217} Aluminium Report, p. 40.
\textsuperscript{218} Aluminium Report, p. 57.
\textsuperscript{219} Aluminium Report (Exhibit EU-31), p. 23.
108. It goes on to explain why not just access to aluminium, but also domestic production of aluminium, is “essential to national security”. Among the reasons for that claim is “critical infrastructure” as well as “economic security”: notably, the Report states that “[to] ensure U.S. national security response capability, the nation must have sufficient domestic aluminum production capacity to meet most commercial demand”, in addition to “DoD contractor and critical infrastructure requirements”.\(^{220}\)

109. The Aluminium Report also refers to a congressional finding that “much of the industrial capacity that is relied upon by the United States Government for military production and other national defense purposes is deeply and directly influenced by – (A) the overall competitiveness of the industrial economy of the United States and (B) the ability of industries in the United States, in general, to produce internationally competitive products and operate profitably while maintaining adequate research and development to preserve competitiveness with respect to military and civilian production...”.\(^{221}\)

### 2.6.3.4 Findings related to the “weakening of the internal economy” of the United States

110. In determining “whether a weakening of the U.S. economy by [...] imports” may impair national security, so defined, the Aluminium Report considered the “close relation of the economic welfare of the United States to its national security; the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills, or any other serious effects resulting from the displacement of any domestic products by excessive imports, without excluding other factors”.\(^{222}\)

111. The Aluminium Report states that two factors listed in the second sentence of Section 232(d) (which is concerned with “the broader economy” and “the economic welfare of our Nation”, in contrast to the first sentence which focuses on national defence,\(^{223}\)) are “most relevant in this investigation”: “the impact of foreign competition on the economic welfare of individual

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\(^{220}\) Aluminium Report, p. 40.

\(^{221}\) Aluminium Report, fn 13.

\(^{222}\) Aluminium Report (Exhibit EU-31), pp. 2 and 14; similarly, Proclamation 9704 (Exhibit EU-32) paras. 2 and 9, referring to the “close relation of the economic welfare of the Nation to our national security.”

domestic industries” and “serious effects resulting from the displacement of any domestic products by excessive imports.”\(^{224}\) These two factors, according to the Aluminium Report, are important because they show, together, an “adverse impact on the economic welfare of the domestic aluminium industry”, which, according to the Report, shows that there is a threat of impairment of national security.\(^{225}\)

112. In addition, the Department of Commerce considered another factor, not listed in Section 232, to be particularly important: the “presence of massive foreign excess capacity for producing aluminium.”\(^{226}\) The importance of this factor lies in the fact that “while U.S. production capacity has declined dramatically in recent years, other nations have increased their production capacity,”, which means that “U.S. aluminum producers, for the foreseeable future, will face increasing competition from imported aluminum, often subsidized by foreign national governments, as other countries export more downstream products.”\(^{227}\) This third factor “results in aluminum imports occurring “under such circumstances” that that they threaten to impair the national security.”\(^{228}\)

113. Together, those three factors are what the Secretary of Commerce concluded are “weakening...our internal economy” and therefore “threaten to impair” the national security.\(^{229}\)

2.6.3.5 Findings on certain specific injury factors

114. The Aluminium Report and the Proclamations purport to examine the economic welfare of the domestic industries by reference to a series of injury factors.

115. The Aluminium Report notes that “[t]he present quantity of imports adversely impacts the economic welfare of the U.S. aluminum industry”, leading to “a substantial negative impact on the economic welfare and


\(^{225}\) It is these three factors – displacement of domestic aluminum by excessive imports and the consequent adverse impact on the economic welfare of the domestic aluminum industry, along with global (primarily Chinese) excess capacity in aluminium – that the Secretary has concluded are “weakening...our internal economy” and therefore “threaten to impair” the national security. Aluminium Report (Exhibit EU-31), p. 15.

\(^{226}\) Aluminium Report, p. 15.

\(^{227}\) Aluminium Report, p. 15.

\(^{228}\) Aluminium Report, p. 15.

\(^{229}\) Aluminium Report, p. 15.
production capacity of the United States primary aluminum industry” and a “decline in U.S. production” “despite growing demand for aluminum both in the U.S. and abroad.”

The “adverse impact” on the welfare of the domestic aluminium industry is also alleged because of: a high proportion of imports to domestic production, a rise in “import penetration” to 90 percent from 66 percent in 2012; decline in US primary aluminium production in 2016 and 2017, low capacity utilization; the fact that “Since 2012, six smelters with a combined 3,500 workers have been permanently shut down”; a loss of jobs of 58 percent in the primary aluminium sector between 2013 and 2016; etc.

116. When explaining the effect of imports on domestic industry, the Proclamations and the Aluminium Report refer to a number of factors indicating a decline in the state of the domestic aluminium industry, for example:

- “idled facilities” and “closed smelters and mills.”
- the decline of US primary aluminium production capacity (noting a “steep decline” since 2000 which corresponds with a “large increase in US imports”), actual production and capacity utilisation, as well as “idle” capacity;
- the fact that only two aluminium smelters in the US are operating at full production capacity;
- closures and potential closures of various aluminium smelters;
- the decline in Century Aluminum’s production of high-purity aluminium, linked to Chinese exports;
- the permanent shutdown of six smelters since 2012, and the associated loss of production and jobs, including a “significant impact on the local economies that relied on them for high quality jobs”, difficulties in

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230 Aluminium Report (Exhibit EU-31), pp. 2-3.
231 Aluminium Report, pp. 3-4.
232 Proclamation 9704 (Exhibit EU-32), para. 10 (“Without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to decline”); similarly, Proclamation 9710 (Exhibit EU-33), para. 11; Aluminium Report (Exhibit EU-31), p. 3, 41, 44, 62, 81, and 104 referring variously to a decline in production, production capacity, capacity utilization, and exports.
233 Proclamation 9704 (Exhibit EU-32), para. 7.
234 Aluminium Report (Exhibit EU-31), pp. 40-43.
236 Aluminium Report, p. 46.
237 Aluminium Report, p. 47.
238 Aluminium Report, p. 47.
bringing back highly skilled workforce and “additional costs for worker training and production delays”;

- flat U.S. production of downstream flat-rolled products between 2012 and 2015, “small and declining” U.S. production of aluminium wire and cable;

- variable capacity utilisation in different parts of the U.S. downstream industry;

- facility closures, reduced activities and bankruptcies in the downstream sector;

- the fact that domestic production is below domestic demand, and fell in 2015 and 2016 even though demand continued to increase;

- increase in dependence on imports (stating variously that “U.S. import dependence for primary aluminum was nearly 90 percent of apparent consumption in 2016, up from 64 percent in 2012” or that there was a “dramatic increase in the share of U.S. consumption that is satisfied through imports in just the past two years, rising from a stable 51 percent from 2011-2013 to over 64 percent for 2016.”);

- a fall in the value and quantity of US exports.

117. The Aluminium Report lists a number of factors which demonstrate a negative impact of imports on the “welfare of the U.S. aluminium industry”:

- declining employment and loss of skills base;

- poor financial performance of the domestic primary aluminium industry, including bankruptcies, negative net income, decrease in EBITDA, drops in sales, all linked to increased imports;

- the shifting of production to higher value-added products and the consequent negative impact on certain product categories in the downstream sector, such as the “U.S. foil industry, which has all but disappeared”;

- limited spending on research and development.

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240 Aluminium Report, pp. 53-54.
241 Aluminium Report, p. 55.
242 Aluminium Report, pp. 57-59.
244 Aluminium Report (Exhibit EU-31), p. 61-62. The Report also points out, for example: “The U.S. in 2016 relied on imports for 89 percent of its primary aluminum requirements, up from 64 percent in 2012.” Aluminium Report, p. 35.
245 Aluminium Report, pp. 75-84
246 Aluminium Report, pp. 89 - 91
247 Aluminium Report (Exhibit EU-31), pp. 91 - 94. See, in particular, “Financial performance of upstream aluminium companies was particularly poor between 2013 and 2016, when aluminum prices began to fall sharply. Chinese production of aluminum soared, and imports into the United States surged.” (p. 92.)
248 Aluminium Report, pp. 94-95.
249 Aluminium Report (Exhibit EU-31), pp. 95-97.
• halted upgrades to smelting operations due to “financial considerations and market conditions”\(^{250}\);

• price drops due to oversupply (“a steep decline in global aluminum prices between 2014 and 2016” during which “a number of U.S. aluminum smelters were forced to permanently shut down, while others were temporarily idled or curtailed their production”\(^{251}\)) and rising inventories;\(^{252}\)

• a drop in prices, due to which “the damage to U.S. aluminum production capability was significant and irreversible.”\(^{253}\)

118. The Report further highlights a trade deficit as an argument in favour of the import adjustments at issue\(^{254}\). It also points out a high import to export ratio, leading to a trade deficit that “will be larger in 2017”.\(^{255}\)

119. Thus, the Aluminium Report and the Proclamations purport to assess certain injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the Agreement on Safeguards (the rate and amount of the increase in imports, the share of the domestic market taken by increased imports (import penetration),\(^{256}\) changes in the level of domestic sales,\(^{257}\) production and productivity,\(^{258}\) capacity utilization,\(^{259}\) profits and losses,\(^{260}\) and employment\(^{261}\)).

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\(^{250}\) Aluminium Report, p. 99.

\(^{251}\) Aluminium Report, p. 104.

\(^{252}\) Aluminium Report, pp. 99-103.

\(^{253}\) Aluminium Report, p. 105.

\(^{254}\) Aluminium Report, p. 88. (“United States exported very little unwrought aluminum, but imported large amounts from Canada, Russia and other countries”).

\(^{255}\) Aluminium Report, p. 84.

\(^{256}\) The European Union further addresses the USDOC’s claims regarding increased imports and import penetration in section 2.6.4.

\(^{257}\) For example, see the references to drops in sales in the Aluminium Report (Exhibit EU-31), pp. 91 – 94.

\(^{258}\) For example: “Since 2012, six smelters with a combined 3,500 workers have been permanently shut down, totalling 1.13 million tons in lost production capacity pre year.” Aluminium Report (Exhibit EU-31), p. 3; “U.S. primary aluminum production in 2016 was about half of what it was in 2015, and output further declined in 2017.” Aluminium Report (Exhibit EU-31), p. 3; “Domestic production [of primary aluminium] is well below demand.” Aluminium Report (Exhibit EU-31), Section D; “Since 2000, there has been a steep decline in US [primary aluminium production]. It corresponds with a large increase in U.S. imports of primary aluminium.” Aluminium Report (Exhibit EU-31), p. 41.

\(^{259}\) For example: US aluminium smelters are “now producing at 43 percent of capacity.” Aluminium Report (Exhibit EU-31), p. 3.

\(^{260}\) For example: “In 2016, three remaining primary aluminum companies reported operating losses totalling [USD] 912 million.” Aluminium Report (Exhibit EU-31), p. 92; “Financial performance of upstream aluminium companies was particularly poor between 2013 and 2016, when aluminum prices began to fall sharply.” Aluminium Report (Exhibit EU-31), p. 92.

\(^{261}\) For example: “The loss of jobs in the primary aluminium sector has been precipitous between 2013 and 2016, falling 58 percent.” Aluminium Report (Exhibit EU-31), p. 89.
2.6.3.6 Findings related to downstream products

120. The Aluminium Report distinguishes between primary aluminium and downstream products. It justifies the imposition of tariffs on the latter category of products by the negative impact of imports on, first, "the U.S. primary aluminum industry through reduced demand for inputs from downstream companies" and, second, "directly on the downstream companies that face increased import penetration in many aluminum product sectors." The Report also notes that the import adjustments will lead to an "increase in primary aluminium prices" that downstream producers will face; this is used as an additional justification for the application of the import adjustments to downstream as well as primary aluminium.

2.6.3.7 Conclusions

121. As a general matter, the Aluminium Report clarifies that Section 232 "does not require a finding that the quantities or circumstances are impairing the national security", but that it leaves it to the "discretion" of the Secretary of Commerce to make an affirmative finding that imports "threaten to impair the national security" before there is actual impairment.

122. The Aluminium Report and the Proclamations point out that "...present quantities of aluminum imports and the circumstances of global excess capacity for producing aluminium are "weakening our internal economy," leaving the United States "almost totally reliant on foreign producers of primary aluminum" and "at risk of becoming completely reliant on foreign producers of high-purity aluminium".

123. The Aluminium Report concludes that, as a consequence of the fact that domestic steel is displaced by "excessive imports", there is an "adverse impact on the economic welfare of the domestic aluminium industry". This adverse impact, along with "global (primarily Chinese) excess capacity in aluminium", constitutes a "weakening of our internal economy" that, in turn, shows that imports "threaten to impair" national security.

262 Aluminium Report (Exhibit EU-31), pp. 5. and 104.
264 Proclamation 9704 (Exhibit EU-32), para. 2.
265 Aluminium Report (Exhibit EU-31), p. 15.
266 Aluminium Report, p. 15.
2.6.3.8 The remedy pursued by the import adjustments

124. The Aluminium Report and the proclamations clarify that the measure at issue aims to “enable domestic aluminium producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production”, in particular by increasing total production, in order to “return to 2012 production and import penetration levels.” Furthermore, the objective of the import adjustments at issue is to “enable U.S. aluminum producers to operate profitably under current market prices for aluminum and will allow them to reopen idled capacity.” The import adjustments must, according to the Aluminium Report, be in effect for a duration that is sufficient to “restart idled smelting capacity”, “build cash flow to pay down debt and to raise capital for plant modernization to improve manufacturing efficiency.”

125. With respect to the measures agreed with Argentina and Australia, Proclamation 9758 explains that they will “reduce excess aluminum production and excess aluminum capacity”, “contribute to increased capacity utilization in the United States”, “prevent the transhipment of aluminum articles and avoid import surges”, as well as “[restrain] aluminum articles exports to the United States.”

126. The proclamations clarify that the aim of the import adjustments is to “help our domestic aluminum industry to revive idled facilities, open closed smelters and mills, preserve necessary skills by hiring new aluminum workers, and maintain or increase production, which will reduce our Nation’s need to rely on foreign producers for aluminium and ensure that domestic

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267 Proclamation 9704 (Exhibit EU-32), para. 3; Proclamation 9710 (Exhibit EU-33), para. 10 (“measures that will increase domestic capacity utilization”); Proclamation 9758 (Exhibit EU-35), para. 5 (“measures that will contribute to increased capacity utilization in the United States”).

268 Aluminium Report (Exhibit EU-31), p. 6 (“Under alternatives 1 and 2, the quotas or tariffs would be designed, even after any exemptions (if granted), to enable U.S. aluminum production to utilize an average of 80 percent of production capacity.”); ibid., p. 107.

269 Aluminium Report (Exhibit EU-31), p. 7 (“A worldwide quota of 86.7 percent on imports described above would restrict aluminum imports sufficiently to allow U.S. primary aluminum producers to increase production by about 669,000 metric tons, bringing total production to about 1.45 million metric tons, or about 80 percent of U.S. primary aluminum production capacity”), p. 8. (“tariff rate of 7.7 percent on imports of unwrought aluminum and the other aluminum product categories listed above should have the same impact as the 86.7 percent quota. This tariff rate would be in addition to any antidumping or countervailing duty collections applicable to any product.”)

270 Aluminium Report (Exhibit EU-31), p. 9.

271 Aluminium Report, p. 6.

272 Proclamation 9758 (Exhibit EU-35), para. 5.
producers can continue to supply all the aluminum necessary for critical industries and national defense."\textsuperscript{273} The aim is also described variously as to "ensure the economic viability of our domestic aluminum industry"\textsuperscript{274} or "ensure the economic stability of our domestic aluminum industry"\textsuperscript{275}, which is "undermined by growing volumes of imported aluminium in key product sectors."\textsuperscript{276} In some cases, the proclamations point out the need to reduce production capacity and/or production by competing industries of other WTO Members.\textsuperscript{277}

127. The Aluminium Report concludes that, in order to "increase and stabilize U.S. production of aluminium" and thus to "remove the threat of impairment", it is "necessary to reduce imports to a level that will provide the opportunity for U.S. primary aluminum producers to restart idled capacity" and prevent the U.S. from losing the capability to smelt primary aluminium.\textsuperscript{278} According to the Report, import adjustments are "designed, even after any exemptions (if granted), to enable U.S. aluminum producers to utilize an average of 80 percent of their production capacity\textsuperscript{279}, aim to "enable U.S. aluminum producers to operate profitably under current market prices for aluminum and will allow them to reopen idled capacity."\textsuperscript{280} The Report goes on to assess several options (worldwide quota or tariff, tariffs on a subset of countries, exemptions and exclusions), based on whether and at what level they would enable the domestic steel industry to achieve that capacity utilisation rate.\textsuperscript{281}

128. With respect to the possible exemption of specific countries, the Aluminium Report clarifies that they would be based on a consideration of the "overriding economic or security interest of the United States", including

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{273} Proclamation 9704 (Exhibit EU-32), para. 7.
    \item \textsuperscript{274} Proclamation 9710 (Exhibit EU-33), para. 11.
    \item \textsuperscript{275} Proclamation 9739 (Exhibit EU-34), para. 6. See also Aluminium Report (Exhibit EU-31), p. 105. ("it is in the interest of U.S. national security and overall economic welfare that the United States retains an aluminum industry that is financially viable").
    \item \textsuperscript{276} Aluminium Report (Exhibit EU-31), p. 40.
    \item \textsuperscript{277} Proclamation 9758 (Exhibit EU-35), para. 5 ("In my judgment, these measures will provide effective, long-term alternative means to address these countries’ contribution to the threatened impairment to our national security by restraining aluminum articles exports to the United States from each of them, limiting transshipment and surges, and discouraging excess aluminum capacity and excess aluminum production.")
    \item \textsuperscript{278} Aluminium Report (Exhibit EU-31), p. 104.
    \item \textsuperscript{279} Aluminium Report (Exhibit EU-31) 107.
    \item \textsuperscript{280} Aluminium Report (Exhibit EU-31) 107.
    \item \textsuperscript{281} Aluminium Report (Exhibit EU-31), p. 108-109.
\end{itemize}
\end{footnotesize}
those countries’ willingness to “work with the United States to address global excess capacity and other challenges facing the U.S. aluminum industry.”\textsuperscript{282} With respect to the possible exclusions of specific products from the tariff, the Aluminium Report clarifies that they could be granted, \textit{inter alia}, on the basis of a “lack of sufficient U.S. production capacity of comparable products.”\textsuperscript{283}

\subsection*{2.6.4. The measure at issue claims to be based on a consideration of whether aluminium products are imported into the US territory in increased quantities, and in such conditions as to cause or threaten serious injury}

129. The Proclamations and the Aluminium Report explain that the import adjustments at issue are based on a consideration of the “quantities” and “circumstances” under which “aluminium is being imported into the United States\textsuperscript{284}, “either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding”.\textsuperscript{285} They are also based on a consideration of “recent import trends”.\textsuperscript{286}

130. The Aluminium Report analyses whether imports are in such quantities that they “adversely impact the economic welfare of the U.S. aluminum Industry”, pointing out for example the ratios of imports to domestic production and domestic consumption in 2016 as compared to earlier periods.\textsuperscript{287} It determines that it is necessary “to reduce imports to a level that will provide the opportunity for U.S. primary aluminum producers to restart idled capacity.”\textsuperscript{288}

131. It states that, due to excess capacity, U.S. aluminum producers are likely to face increased imports of downstream products for the foreseeable future.\textsuperscript{289}

\begin{itemize}
  \item \textsuperscript{282} Aluminium Report (Exhibit EU-31), p. 8.
  \item \textsuperscript{283} Aluminium Report (Exhibit EU-31), p. 9.
  \item \textsuperscript{284} Proclamation 9704 (Exhibit EU-32), paras. 2 and 4.; Proclamation 9710 (Exhibit EU-33), para. 2 ; Proclamation 9739 (Exhibit EU-34), para. 2 ; Proclamation 9758 (Exhibit EU-35), para. 2. See also Aluminium Report (Exhibit EU-31), p. 13.
  \item \textsuperscript{285} Aluminium Report (Exhibit EU-31), p. 13.
  \item \textsuperscript{286} Aluminium Report (Exhibit EU-31), p. 5.
  \item \textsuperscript{287} It states that, in 2016, “the United States imported five times as much primary aluminum on a tonnage basis as it produced”, that “the import penetration level was about 90 percent, up from 66 percent in 2012” (Aluminium Report (Exhibit EU-31), p. 2-3) and that there has been a “dramatic increase in the share of U.S. consumption that is satisfied through imports in just the past two years, rising from a stable 51 percent from 2011-2013 to over 64 percent for 2016” (Aluminium Report (Exhibit EU-31), p. 62.) It explains that “[i]mports accounted for 64 percent of U.S. consumption of aluminum” (Aluminium Report (Exhibit EU-31), p. 4.)
  \item \textsuperscript{288} Aluminium Report (Exhibit EU-31), pp. 104 and 105.
  \item \textsuperscript{289} Aluminium Report, p. 15.
\end{itemize}
It refers, in several places, to “surges” of imports of aluminium into the United States: for example, it links poor financial performance of upstream aluminium companies and falling aluminium prices in the US between 2013 and 2016 to the fact that “imports into the United States surged” 290 and finds that imports of downstream aluminium products are “surging”, up 30 percent in 2017 over 2016 levels.291

132. The Proclamations refer to the finding of the Secretary of Commerce that the “weakening [of] our internal economy” is caused by “present quantities of aluminium imports and the circumstances of global excess capacity for producing aluminium.”292 They refer to a “continued high level of imports since the beginning of the year”.293 They also make clear that the specific import adjustments at issue are designed on the basis of an assessment of the quantity of imports. For example, they point out that the import adjustment could be adapted on the basis of an assessment that should “take into account all aluminum imports since January 1, 2018”.294 They also suggest that one of the objectives of the measure at issue is to limit or prevent “import surges”.295

133. The Aluminium Report makes numerous references to increased quantities of imports, stating for example that imports “toted 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013”; that “[i]n the first 10 months of 2017, aluminum imports rose 18 percent above 2016 levels on a tonnage basis”296; that “[i]n the downstream aluminum sectors of bars, rods, plates, sheets, foil, wire, tubes and pipes, imports rose 33 percent from 1.2 million metric tons in 2013 to 1.6 million metric tons in 2016.”297 Later on, an entire section is dedicated to showing that imports are increasing, noting for example that the value of overall US imports of products subject to the investigation rose 15 percent in 2016 over 2013 levels, and that “[f]or the first ten months of 2017, imports are up 30

290 Aluminium Report, p. 92.
291 Aluminium Report, p. 105.
292 Proclamation 9704 (Exhibit EU-32), para. 2. See also Proclamation 9704 (Exhibit EU-32), para. 8 (“...exports of aluminum to the United States weaken our internal economy...”).
293 Proclamation 9704 (Exhibit EU-32), para. 7.
294 Proclamation 9710 (Exhibit EU-33), para. 12.
295 Proclamation 9758 (Exhibit EU-35), para. 5.
296 Aluminium Report (Exhibit EU-31), p. 4.
297 Aluminium Report, p. 4.
percent on a value basis compared to the same period in 2016.”298 The section goes on to discuss an increase in the quantities of imports in volume terms, by source, and by product category, presenting data on imports quantities in several tables, and devoting separate sections to unwrought (primary) aluminium and categories of downstream aluminium.299

134. The Aluminium Report concludes that the threat of impairment is based, inter alia, on the “continued rise in levels of imports”.300

135. The Aluminium Report also explains that the “presence of massive foreign excess capacity for producing aluminum” results in aluminium imports occurring under “such circumstances” that justify an affirmative finding.301

2.6.5. The measure at issue is placed in the context of other trade remedy measures

136. The Aluminium Report places the import adjustments at issue in the context of a number of ongoing antidumping and countervailing duty determinations and investigations.302 The import adjustments at issue are explained, in part, by stating that, due to the limited scope of antidumping and countervailing duty investigations, “any remedies will not be applicable to the broader aluminum industry” and that, unlike the investigation at issue, “WTO rules require cases to be very specific as to product and origin”.303

137. A “frequently asked questions” document issued by the Department of Commerce similarly explains that the investigation into aluminium imports was initiated because “any existing or potential antidumping and countervailing duty orders on aluminum products that may result from antidumping and countervailing duty investigations, given their specific nature, may not substantially alleviate the negative effects that unfairly traded imports have had on the United States aluminum industry as a whole”.304

298 Aluminium Report, p. 63.
299 Aluminium Report, pp. 63-75.
300 Aluminium Report, p. 104.
301 Aluminium Report, p. 15.
302 Aluminium Report, Appendix D.
303 Aluminium Report (Exhibit EU-31), Appendix D, p. 2.
2.6.6. The measure at issue is based on a novel interpretation of Section 232

138. Like the Steel Report, the Aluminium Report also shows that the Department of Commerce has adopted a new interpretation of Section 232, compared to the 2001 Report or other prior Department reports. This new interpretation does not consider whether aluminium imports are from “reliable sources”:

“[I]t is evident that Congress recognized that those adverse impacts might well be caused by imports from allies or other reliable sources. As a result, the fact that some or all of the imports causing the harm are from reliable sources does not compel a finding that those imports do not threaten to impair national security.”

17 When Congress adopted the text of section 232(d) in 1962 the immediately preceding section was Section 231, 19 U.S.C. § 1861, which required the President, as soon as practicable, to suspend most-favored-nation tariff treatment for imports from communist countries. Given the bipolar nature of the world at the time, the absence of a distinction between communist and non-communist countries in Section 232 suggests that Congress expected Section 232 would be applied to imports from all countries—including allies and other “reliable” sources.”

139. Thus, according to the Aluminium Report, it was reasonable for the Secretary of Commerce to “conclude that, in the absence of adequate domestic supply, imports from allies should not be relied upon.”

140. The Aluminium Report also clarifies that it applied a different legal test than the 2001 Report. It notes:

“The 2001 Report used the phrase “fundamentally threaten to impair” when discussing how imports may threaten to impair national security. See 2001 Report at 7 and 37. Because the term “fundamentally” is not included in the statutory text and could be perceived as establishing a higher threshold, the Secretary expressly does not use the qualifier in this report. The statutory threshold in Section 232(b)(3)(A) is unambiguously “threaten to impair” and the Secretary adopts that threshold without qualification. 19 U.S.C. § 1862(b)(3)(A).”

3. THE MEASURES AT ISSUE FALL WITHIN THE SCOPE OF THE AGREEMENT ON SAFEGUARDS, AND ARE INCONSISTENT WITH CERTAIN PROVISIONS OF THAT AGREEMENT, WITH RESPECT TO WHICH ARTICLE XXI OF THE GATT 1994 IS NOT AVAILABLE AS A DEFENCE

3.1. THE MEASURES AT ISSUE FALL WITHIN THE SCOPE OF THE AGREEMENT ON SAFEGUARDS

305 Aluminium Report (Exhibit EU-31), p. 16.
306 Aluminium Report, p. 16.
307 Aluminium Report (Exhibit EU-31), fn 15.
3.1.1. Whether or not a measure falls within the scope of the Agreement on Safeguards is an objective question

141. The European Union recalls that, according to settled case-law, and as recently confirmed by the Appellate Body in the specific context of the Agreement on Safeguards,\textsuperscript{308} whether or not a measure is subject to the disciplines of the Agreement on Safeguards, or indeed of any of the covered agreements, is an objective question.\textsuperscript{309} It is not a question to be decided unilaterally by the Member imposing the safeguard measure. Rather, it is a question that the Panel must decide based on the objective assessment that it is required to make pursuant to Article 11 of DSU.\textsuperscript{310}

142. In making that objective assessment, the Panel must engage in a case-specific assessment, having regard to all of the relevant facts.\textsuperscript{311} In this respect, the domestic procedures pursuant to which a measure has been adopted are not determinative.\textsuperscript{312}

143. Indeed, the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive of the question of whether or not that measure is governed by the provisions of a particular agreement. In \textit{US — Large Civil Aircraft (2nd complaint)} the Appellate Body stated that:

The US legislative and regulatory framework indicates that procurement contracts are the instruments used when the US Government intends to make a purchase. The label given to an instrument under municipal law, however, is not dispositive and cannot be the end of our analysis [...].\textsuperscript{313} (footnotes omitted)

\textsuperscript{308} Appellate Body Report, \textit{Indonesia – Iron or Steel Products}.

\textsuperscript{309} Appellate Body Report, \textit{Indonesia – Iron or Steel Products}.

\textsuperscript{310} Appellate Body Report, \textit{Indonesia – Iron or Steel Products}, para. 5.33: ("In light of the above, we consider that a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute."); para. 5.60: ("In making its independent and objective assessment ...”); and para. 5.64: ("... a panel must objectively assess ...”). This is so with respect to all of the relevant provisions, including Articles 1 and 11.1(b) of the Agreement on Safeguards, as well as Article XIX of the GATT 1994.

\textsuperscript{311} Appellate Body Report, \textit{Indonesia – Iron or Steel Products}, para. 5.54: ("...whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis.") and para. 5.60: ("As part of its determination, a panel should evaluate and give due consideration to all relevant factors ...”).

\textsuperscript{312} Appellate Body Report, \textit{Indonesia – Iron or Steel Products}, para. 5.60: ("However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.”).

\textsuperscript{313} Appellate Body Report, \textit{US — Large Civil Aircraft (2nd complaint)}, para. 593.
144. Similarly, in *Canada — Renewable Energy / Canada — Feed-in Tariff Program* the Appellate Body confirmed that:

Finally, Japan suggests that the Panel erred by assuming that, if a measure is characterized in a particular manner under domestic law (e.g. as a government purchase), it can never be characterized in a different manner under WTO law. We understand Japan to be arguing that the Panel erred in finding that the characterization of a measure under domestic law is dispositive of its legal characterization under WTO law. Japan is correct in arguing that the manner in which municipal law characterizes a measure is not determinative for its characterization under the covered agreements.314 (footnotes omitted)

145. In the context of Article 1 of the Agreement on Safeguards, in order to be a safeguard measure, a measure must have two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the relevant products.315 That is, it must "have a demonstrable link to the objective of preventing or remedying injury"316 to the adopting Member's domestic industry.

146. The constituent features of a safeguard measure are distinct from and not to be conflated with the conditions that must be met in order for the right to adopt, apply and maintain a safeguard measure to be exercised.

147. For example, if the facts do not demonstrate serious injury but merely injury, or even no injury at all, the conclusion is not that the measure falls outside the scope of the Agreement on Safeguards. Rather, the conclusion is that the measure falls within the scope of the Agreement on Safeguards, but

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315 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60: ("In light of the above, we consider that, in order to constitute one of the “measures provided for in Article XIX”, a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member’s domestic industry caused or threatened by increased imports of the subject product.")

316 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56: ("... where a measure suspends a GATT obligation or withdraws or modifies a tariff concession, but that suspension, withdrawal, or modification does not have a demonstrable link to the objective of preventing or remedying injury, we do not consider that the measure in question could be characterized as one “provided for” under Article XIX.”). See also para. 5.58.
is inconsistent with various provisions of that Agreement. In other words, the focus of the analysis is on the **objective** of the measure. Similarly, if the facts demonstrate that there is no absolute or even relative increase in imports, the conclusion is not that the measure falls outside the scope of the Agreement on Safeguards. Rather, the conclusion is that the measure falls within the scope of the Agreement on Safeguards, but is inconsistent with various provisions of that Agreement.317

148. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. In other words, if the measures have "**a specific objective**" of preventing or remedying serious injury to the Member's domestic industry they are subject to the disciplines of the Agreement on Safeguards.318 This is all the more so when the measure (or the relevant element of it) that results in a “suspension of a GATT obligation or the withdrawal or modification of a GATT concession”, is, by its own terms, designed “to” pursue "**a specific objective**" of preventing or remedying serious injury to the Member's domestic industry.319 That the measures might also be subject to the provisions of some other agreement does not mean that the measures are not subject to the disciplines of the Agreement on Safeguards, or that they do not need to comply fully with the conditions set out in the Agreement on Safeguards in order to benefit from the right to adopt and apply safeguard measures.

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317 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57: (“In carrying out this analysis, it is important to distinguish between the features that determine whether a measure can be properly characterized as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994. Put differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the applicability of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the WTO-consistency of a safeguard measure.”). See also paras. 5.59 and 5.62.

318 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56: (“The use of the word "to" in this connection indicates that the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a **specific objective**, namely preventing or remedying serious injury to the Member's domestic industry.”)

319 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.65: (“We note that both Regulation 137 and the Final Disclosure Report expressly state that Indonesia's imposition of a specific duty on imports of galvalume seeks to counter a threat of serious injury caused by an alleged increase in imports of galvalume over the period of investigation. **This element of the measure at issue may well be designed to pursue the specific objective of preventing or remedying serious injury to Indonesia's domestic industry.**”) (emphasis added)
149. In conducting its assessment the Panel must have regard to the measure "as a whole". As we recall above, in this case the European Union identifies the measure at issue, with respect to steel products, as the tariff and non-tariff treatment provided for, without qualification, (that is, with respect to all WTO Members, as a whole). We do the same for aluminium products.

150. The European Union will now demonstrate that the measures at issue are subject to the disciplines of the Agreement on Safeguards based on the analytical tools identified by the Appellate Body.

3.1.2. The measures at issue suspend a GATT obligation, in whole or in part, or withdraw or modify a GATT concession

151. The measures at issue suspend at least one GATT obligation, in whole or in part, or withdraw or modify at least one GATT concession, which, as we have recalled above, is one of the two defining characteristics of a safeguard measure.

152. Indeed, by their own terms, the measures at issue use as a legal basis Section 604 of the Trade Act of 1974, which authorizes inter alia the "imposition of any rate of duty or other import restriction". Prior to the Section 232 measures the US customs duties on the steel and aluminium products at issue were bound at 0%.

153. However, the measures at issue provide for a customs duty rate of 25% ad valorem for the steel products at issue and 10% ad valorem for the aluminium products at issue.

154. Thus, the measures at issue suspend at least one GATT obligation or withdraw or modify at least one GATT concession. In this respect, the European Union refers in particular to Article II:1(b) of the GATT 1994.

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320 Appellate Body Report, Indonesia – Iron or Steel Products, para. 5.60 ("... a panel is called upon to assess the design, structure, and expected operation of the measure as a whole."). See also paras. 5.64 and 6.6.

321 Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483) (Exhibit EU-41). Proclamation 9705 (Exhibit EU-16), para. 7.; Proclamation 9711 (Exhibit EU-17), para. 14; Proclamation 9740 (Exhibit EU-18), para. 10; Proclamation 9759 (Exhibit EU-19), para. 8. Proclamation 9704 (Exhibit EU-32), para. 6 and chapeau of the operative part.; Proclamation 9710 (Exhibit EU-33), para. 14 and chapeau of the operative part; Proclamation 9739 (Exhibit EU-34), para. 9 and chapeau of the operative part; Proclamation 9758 (Exhibit EU-35), para. 8 and chapeau of the operative part.

322 Extract from the United States Schedule of Concessions (Exhibit EU-42).

323 See also Sections 2.5 and 2.6.
is without prejudice to the question of whether or not other GATT obligations are also suspended or other GATT concessions are also withdrawn or modified.

155. The fact that the steel and aluminium measures suspend a GATT obligation is one of "the most central" aspects of these measures, in the sense that, if this aspect of the measures would be removed, the measures would, in effect, no longer have any meaningful existence or purpose. For example, the Steel and Aluminium Reports conclude their discussion of the remedy sought by the measures at issue by stating that imports must be reduced to levels significantly below those recorded in 2017 (i.e. below those recorded under tariffs at bound levels), to which end the President should "adjust the level of those imports through quotas or tariffs".324 In other words, the measures aim to reduce import levels by imposing trade restrictions, including duties that exceed the bound rates in the United States' Schedule.

3.1.3. The measures have "a demonstrable link to the objective of preventing or remedying injury" to the US domestic industries

156. As already explained above, according to the Presidential Proclamations, the measures at issue are designed to prevent or remedy a decline in the respective domestic industries caused by imports, and to provide a "relief" to those industries from competition with imports. That is, the measures aim to enable the respective domestic industries to increase their production capacity or capacity utilization and profitability, and to prevent the closures of production facilities. In this respect the facts are clear: the measures have "a demonstrable link to the objective of preventing or remedying injury" to the US domestic industries.325

157. Indeed, as already explained, the Steel Report and the Proclamations point out that "the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy", resulting in the persistent threat of further closures of domestic steel production facilities"326, stagnant production capacity327,

325 See section 2.5.3 (steel) and section 2.6.3 (aluminium). The European Union refers to the facts as described in more detail in those sections.
326 Proclamation 9705 (Exhibit EU-16), para. 2; Proclamation 9711 (Exhibit EU-17), para. 3; Proclamation 9759 (Exhibit EU-19), para. 5. also refers to the avoidance of "import surges" as a way to achieve the objective of the measure.
decreased production\textsuperscript{328}, a declining steel capacity utilization rate,\textsuperscript{329} the "displacement of domestic steel by excessive imports",\textsuperscript{330} "a 35 percent decrease in employment in the steel industry,"\textsuperscript{331} and causing "the domestic steel industry as a whole to operate on average with negative net income since 2009".\textsuperscript{332} The "expansion of steel production capacity outside of the United States in the last decade" is said to "continue to depress world steel prices while making it increasingly difficult for U.S. companies to export their steel products."\textsuperscript{333}

158. Similarly, as already explained, the Aluminium Report notes that "[t]he present quantity of imports adversely impacts the economic welfare of the U.S. aluminum industry", leading to "a substantial negative impact on the economic welfare and production capacity of the United States primary aluminum industry" and a "decline in U.S. production" "despite growing demand for aluminum both in the U.S. and abroad."\textsuperscript{334} The "adverse impact" on the welfare of the domestic aluminium industry is also alleged because of: a high proportion of imports to domestic production, a rise in "import penetration" to 90 percent from 66 percent in 2012; decline in US primary aluminium production in 2016 and 2017, low capacity utilization; the fact that "[s]ince 2012, six smelters with a combined 3,500 workers have been permanently shut down"; a loss of jobs of 58 percent in the primary aluminium sector between 2-13 and 2016; etc.\textsuperscript{335}

159. The proclamations clarify that the aim of the import adjustments is to "help our domestic aluminum industry to revive idled facilities, open closed smelters and mills, preserve necessary skills by hiring new aluminum workers, and maintain or increase production, which will reduce our Nation’s need to rely on foreign producers for aluminium and ensure that domestic

\textsuperscript{327} For further details, see Steel Report (Exhibit EU-15), p. 41-46, stating for example that "further reduction in basic oxygen furnace capacity" is "inevitable if the present imports continue or increase" (p. 43).

\textsuperscript{328} Regarding production levels, see also Steel Report (Exhibit EU-15), p. 46-47.

\textsuperscript{329} Regarding capacity utilisation, see Steel Report (Exhibit EU-15), p. 47 – 49.

\textsuperscript{330} Regarding excess capacity, see Steel Report (Exhibit EU-15), p. 51-54.

\textsuperscript{331} Regarding effects on employment, further detail is provided in Steel Report (Exhibit EU-15), p. 35-36 and figure 7.

\textsuperscript{332} Steel Report (Exhibit EU-15), p. 4.

\textsuperscript{333} Steel Report (Exhibit EU-15), p. 30.

\textsuperscript{334} Aluminium Report (Exhibit EU-31), p. 2-3.

\textsuperscript{335} Aluminium Report (Exhibit EU-31), p. 3-4.
producers can continue to supply all the aluminum necessary for critical industries and national defense."\textsuperscript{336} The aim is also described variously as to "ensure the economic viability of our domestic aluminum industry"\textsuperscript{337} or "ensure the economic stability of our domestic aluminum industry"\textsuperscript{338}, which is "undermined by growing volumes of imported aluminium in key product sectors."\textsuperscript{339} In some cases, the proclamations point out the need to reduce production capacity and/or production by competing industries of other WTO Members.\textsuperscript{340}

160. Moreover, as explained in sections 2.5.3.5 and 2.6.3.5, the steel and aluminium import adjustments explicitly purport to assess a number of injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the Agreement on Safeguards (the rate and amount of the increase in imports, the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production and productivity, capacity utilization, profits and losses, and employment.

161. Thus, consistent with the legal standard identified by the Appellate Body in \textit{Indonesia – Iron or Steel Products}, the measures at issue have \textbf{a specific objective} of preventing or remedying serious injury to the US domestic steel and aluminium industries caused or threatened by increased imports of the relevant products. That is, that the measures have "a demonstrable link to the objective of preventing or remedying injury" to the respective US domestic industries.

162. Furthermore, this is one of the "most central" aspects of the measures. That is, the available evidence supports the view, as set out above in the factual section, that a specific objective of the measures is to protect the US steel and aluminium industries, \textit{as an end in itself}; and that, at a minimum, the

\textsuperscript{336} Proclamation 9704 (Exhibit EU-32), para. 7.
\textsuperscript{337} Proclamation 9710 (Exhibit EU-33), para. 11.
\textsuperscript{338} Proclamation 9739 (Exhibit EU-34), para. 6. See also Aluminium Report (Exhibit EU-31), p. 105. ("it is in the interest of U.S. national security and overall economic welfare that the United States retains an aluminum industry that is financially viable").
\textsuperscript{339} Aluminium Report (Exhibit EU-31), p. 40.
\textsuperscript{340} Proclamation 9758 (Exhibit EU-35), para. 5 ("In my judgment, these measures will provide effective, long-term alternative means to address these countries' contribution to the threatened impairment to our national security by restraining aluminum articles exports to the United States from each of them, limiting transshipment and surges, and discouraging excess aluminum capacity and excess aluminum production.")
measures do not have as their sole or exclusive objective to protect the US' essential security interests.

163. Finally, this is also a **defining characteristic** of a safeguard measure, together with the characteristic of suspending at least one GATT obligation, in whole or in part, as explained in the previous sub-section. Thus, with these two defining characteristics being cumulatively present, the measures at issue clearly fall within the scope of the Agreement on Safeguards.

164. This is clearly supported by an analysis of the “design, structure, and expected operation”\(^{341}\) of the steel and aluminium measures, as described in the factual section. For example, the measures are “designed” to achieve a certain reduction of imports across all covered product categories (whether those product categories relate to national security considerations or not), such that the situation of the domestic industry as a whole (whether engaged in national security-related production or not) is improved. In particular, the measures are designed to enable the domestic industry to achieve a certain level of capacity utilisation, across all product categories. The measures are “expected to operate” in a way that achieves those goals; for example, they are “expected” to reduce imports to the extent needed to achieve the desired capacity utilisation.

165. Moreover, the measures are also “structured” in a way that reveals that they have, as a specific objective, preventing or remedying injury to domestic industry, as opposed to, for example, objectives related to national security. For example, they deal only in a summary fashion with any factors related to national defence; with respect to those factors, the measures even suggest that no action is needed, since even *domestic* production vastly outstrips demand for defence-related products (see sections 2.5.3.1 and 2.6.3.1).\(^{342}\)

166. Instead, the measures devote much more extensive sections to the question of “whether imports have harmed or threaten to harm U.S. producers writ large.”\(^ {343}\) This concerns, first, the findings related to so-called “critical infrastructure sectors”, which are defined so broadly as to sever any link to

\(^{341}\) Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

\(^{342}\) Indeed, even the part of the analysis concerning national defence ultimately boils down to the need to prevent injury to “industrial and commercial sales” of steel and aluminium in general.

\(^{343}\) Steel Report (Exhibit EU-15), fn 22.
any purported national security concerns; second, the findings on the “industrial and commercial sales” of the domestic industry, which are simply an analysis of the injury caused to domestic industry by imports. Thus, the very structure of the measures, as well as their design and expected operation, shows that they overwhelmingly focus on preventing or remedying injury to the domestic industry. This is clearly, at the very least, “a specific objective” of the measures.

3.1.4. Additional features of the measures at issue that confirm that they are safeguard measures

167. In this sub-section the European Union highlights several characteristics of the measures at issue that confirm that they are safeguards measures within the meaning of the Agreement on Safeguards.

168. While these aspects provide further support for the conclusion that the measures at issue are safeguards, it is not legally necessary to go beyond the two required "constituent features", as explained by the Appellate Body in Indonesia – Iron or Steel Products.

169. **First**, as described in sections 2.5.4 and 2.6.4, the measures repeatedly describe the alleged occurrence of an increase in imports, and justify the import adjustments adopted on that basis. Thus, the measures purport to be based on a consideration typical to a safeguard measure: whether there are increased imports of the product at issue (as referred to, *inter alia*, in Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards).

170. For instance, the Steel Report speaks of the fact that the US imports of steel allegedly continue to increase:

Total U.S. imports rose from 25.9 million metric tons in 2011, peaking at 40.2 million metric tons in 2014 at the height of the shale hydrocarbon drilling boom. For 2017 (first ten months) imports are increasing at a double-digit

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344 To recall, some of the listed examples of such “critical infrastructure sectors” are kitchen equipment for commercial facilities, radio/TV antenna masts, building doors and barriers for the financial services industry, canned goods, fence gates, furniture and shelving in government facilities, boats, aluminium cable used in commercial office buildings, residential power meters and breaker boxes, the manufacture of automobiles, buses, freight and subway cars, boats and ships, tractor trailers, and related components, canning materials and foils for food packaging, crop irrigation piping, door, wall, and door framing; roofs and awnings; architectural trim; utility cabinets; air conditioning systems, electronics cabinets, water conduits, drainage systems, commercial wiring, green houses, storage buildings, heat sinks in IT systems etc.
rate over 2016, pushing finished steel imports consistently over 30 percent of U.S. consumption.  

171. Second, as also described in sections 2.5.4 and 2.6.4, the measures at issue repeatedly discuss whether imports take place "in such quantities and under such circumstances" as to cause or threaten serious injury and impair national security. This language corresponds to the references to imports in certain "quantities" and under certain "conditions" in Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards. This further suggests that the import adjustments at issue purport to be based on considerations typical to those of a safeguard measure.

172. Indeed, as already explained, with regard to steel products the proclamations and the Steel Report explain that the import adjustments at issue are based on a consideration of the "quantities" and "circumstances" under which "steel articles are being imported into the United States"; and that "either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding". 

173. Similarly, as also already explained, with regard to aluminium products the proclamations and the Aluminium Report explain that the import adjustments at issue are based on a consideration of the "quantities" and "circumstances" under which "aluminium is being imported into the United States"; and "either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding". They are also based on a consideration of "recent import trends".

174. Third, as described in sections 2.5.5 and 2.6.5, the measures refer to a number of precedents (earlier trade remedy measures against steel or aluminium products), which include safeguard measures. These precedents illustrate the context in which the import adjustments at issue

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346 Proclamation 9705 (Exhibit EU-16), para. 2. See also Steel Report (Exhibit EU-15), pp. 12 – 13.
348 Proclamation 9704 (Exhibit EU-32), paras. 2 and 4.; Proclamation 9710 (Exhibit EU-33), para. 2 ; Proclamation 9739 (Exhibit EU-34), para. 2 ; Proclamation 9758 (Exhibit EU-35), para. 2. See also Aluminium Report (Exhibit EU-31), p. 13.
350 Aluminium Report (Exhibit EU-31), p. 5.
351 For examples of safeguard measures on steel products see Steel Report (Exhibit EU-15), Appendix J, p. 2.
were adopted as well as their objectives. For instance, the Steel Report provides that:

The number of U.S. antidumping and countervailing duty measures in effect illustrates the scope of the problem confronting the U.S. steel industry. In 1998, at the height of that period's steel crisis, there were just over 100 antidumping and countervailing duty cases against finished steel products. Today there are 164 antidumping and countervailing duty orders in effect for steel, with another 20 steel investigations currently ongoing and another waiting to take effect through publication in the Federal Register (see Appendix K for a full listing of Steel Antidumping and Countervailing Duty Orders in Effect). This represents a 60 percent increase in cases since the last time the Department investigated steel in 2001.352

Furthermore, while the measures are inconsistent with the Article XIX GATT 1994 requirement regarding "unforeseen developments", they affirm that unforeseen developments (e.g. in the form of "dramatic changes in the steel industry since 2001") occurred.353

Indeed, as already explained, these recent developments in the steel industry, according to Proclamation 9705, justified a different conclusion to that of a previous investigation of the US Department of Commerce into the effects of steel imports, which did not make an affirmative determination. The Steel Report specifies that those developments include the level of global excess capacity, the level of imports, and the reduction in basic oxygen furnace facilities and employment in the domestic steel industry since 2001.354

In light of the above, all these additional features confirm that the measures at issue are actually safeguards measures.

3.1.5. In any event, the measures at issue are also voluntary export restraints and/or "measures" "which afford protection" similar to the measures referred to in Article 11.1(b) and footnote 4 of the Agreement on Safeguards, and are caught by that provision

In any event, the measures at issue are also voluntary export restraints and/or "measures" "which afford protection" similar to the measures referred

352  Steel Report (Exhibit EU-15), p. 36. See also the Aluminium Report (Exhibit EU-31), Appendix D: Trade Actions Related to Aluminum.
353  Proclamation 9705 (Exhibit EU-16), para. 3.
354  Steel Report (Exhibit EU-15), pp. 5. and 16.
to in Article 11.1(b) and footnote 4 of the Agreement on Safeguards, and are caught by that provision.

179. In this respect, the European Union points to the "agreements, arrangements and understandings" between the United States and certain other countries. These "agreements, arrangements and understandings" are an important part of the import adjustments on steel and aluminium respectively. Those measures make clear that all countries are invited to discuss with the United States a so-called "satisfactory alternative means" which could lead to an exemption from the increased tariff or its modification, including in the form of a mutually agreed quota, subject to the "security relationship" that they have with the United States.355

180. Indeed, with regard to the steel products at issue the United States reached various agreements with South Korea, Argentina, Australia and Brazil.

181. With regard to steel products from South Korea, Proclamation 9740 (30 April 2018) exempts the imports of steel from the import adjustments at issue, on the basis of a "range of measures" agreed with South Korea, including a "quota that restricts the quantity of steel articles imported into the United States from South Korea."356 With respect to steel products from Argentina and Brazil, Proclamation 9759 implements the agreement between the respective countries by introducing quotas or "quantitative limitations" on their import to the United States.357 The quotas are laid down in detail in the Annexes to the relevant Proclamations.358 Finally, with regard to Australia Proclamation 9759 explains that the introduced measures will "reduce excess steel production and excess steel capacity", "contribute to increased capacity utilization in the United States", "prevent the transhipment of steel articles and avoid import surges", as well as "[restrain] steel articles exports to the United States."359

182. Aluminium imports from Argentina and Australia were likewise exempted from the additional duties on the basis of an agreed "range of measures", including measures to "[restrain] aluminium articles exports to the United States" from

355 Presidential Proclamations issued on 8 March 2018: Proclamation 9705 (Exhibit EU-16) para. 9; Proclamation 9704 (Exhibit EU-32) para. 8.
356 Paras. 4, (1) and (2); Annex.
357 Paras. (2)–(6); Annex.
358 See also section 2.5.
359 Proclamation 9759 (Exhibit EU-19), para. 5.
those countries. With respect to aluminium products from Argentina, Proclamation 9758 implements this agreement by introducing "quota treatment" or "quantitative limitations" on their import to the United States. The quotas are laid down in detail in the Annexes to the relevant Proclamations.

183. As the European Union further explains in the factual section, the exemptions from increased duties granted to South Korea, Argentina, Australia and Brazil are voluntary export restraints, or at least similar measures. Indeed, that the measures invite all interested Members to negotiate such arrangements or attempt to do so means that they "seek" such arrangements. Already for this reason, they are subject to the Agreement on Safeguards, in particular to Article 11.1(b) and footnote 4.

184. Moreover, given the specific features of the measures at issue, even the increased duties, i.e. the tariff treatment of steel and aluminium products, constitute "similar measures" subject to Article 11.1(b) and footnote 4 of the Agreement on Safeguards.

185. In this respect, Article 11.1(b) and footnote 4 clarify that measures similar to voluntary export restraints may be imposed unilaterally by the importing Member.

186. Footnote 4 makes clear that the central defining feature of VERs and "similar measures" is simply that they "afford protection" to the industry of the importing Member. The broad prohibition of such measures reflects the overarching objective of re-establishing multilateral control over safeguards and eliminating measures that escape such control, referred to in the preamble to the Agreement on Safeguards.

187. Finally, the Background Note by the GATT Secretariat "Grey-Area" Measures' of 16 September 1987 catalogues the different types of so-called "grey area

360 Proclamation 9758 (Exhibit EU-35), para. 5, paras. (1)-(2); Annex.
361 See paras. (2), (4), (6) and (7); Annex, A.3.
362 See also section 2.6.
363 Background Note by the GATT Secretariat "Grey-Area" Measures' of 16 September 1987 (MTN.GNG/NG9/W/6)

"8. Concerning the nature of [grey-area] measures it would appear, in general, that:

[...]

(c) Importing countries have also taken unilateral actions affecting imports, involving tariff increases, quota restrictions or price monitoring in relation to imports from particular sources without notification or reference to GATT provisions. [...]"
measures” that Article 11.1(b) and footnote 4 seek to discipline. It clarifies, *inter alia*, that unilateral tariff increases “in relation to imports from particular sources without notification or reference to GATT provisions” fall within the concept of “grey area measures”. 364

188. The steel and aluminium duties fulfil these criteria. They are a unilateral measure of the importing Member, imposing a tariff increase, and have a protective design and effect. Since certain countries are exempt from those duties, they apply to “imports from particular sources.” Finally, the United States has asserted that the steel and aluminium import adjustments as a whole, including the tariffs, are not subject to control either by the Agreement on Safeguards, the GATT 1994, or more broadly by WTO law and WTO dispute settlement.365 Therefore, through these duties, the United States is attempting to “escape multilateral control over safeguards”, without notification or reference to GATT provisions. Therefore, both the duties and the country exemptions are precisely the sort of measure that Article 11.1(b) is meant to discipline.

189. To be clear, this does not mean that every duty in excess of bound rates constitutes a “similar measure” under Article 11.1(b). It is only the very specific context of the measures at issue that qualifies the steel and aluminium duties as “similar measures” to voluntary export restraints. Two factors, in particular, distinguish those duties from other ordinary customs duties in excess of bound rates, which would typically be controlled by Article II:1(b) of the GATT 1994 and not by Article 11.1(b) of the Agreement on Safeguards.

190. First, the increased duties are closely connected to voluntary export restraints (the country exemptions). They are put in place as a “default” option, in all cases where voluntary export restraints are not put in place for a particular exporting Member. In fact, the proclamations366 and various official

364  Ibid.
365  Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018 (Exhibit EU-43); Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 21, 2018 (Exhibit EU-44); Committee on Safeguards, Communication From the United States in Response to the European Union’s Requests Circulated on 16 April 2018, G/S/178, 19 April 2018 (Exhibit EU-45).
366  Presidential Proclamations issued on 8 March 2018: Proclamation 9705 (Exhibit EU-16) Para. 9; Proclamation 9704 (Exhibit EU-32) para. 8. The proclamations also stated on several occasions that tariffs should temporarily not be applied to countries with which the United States was negotiating “in order to finalize the details of these satisfactory alternative means.” Proclamation 9740 (Exhibit EU-18) para. 4, Proclamation 9739 (Exhibit EU-34), para. 5.
statements explicitly confirm that duties are put in place in order to incentivise other Members to agree voluntary export restraints.

191. Second, the United States has itself argued that the duties are not subject to the Agreement on Safeguards or to the GATT 1994. This shows that the measures are designed in order to escape multilateral control under the WTO agreements on trade in goods, which is an important feature of the measures referred to in Article 11.1(b).

192. Finally, the fact that the steel and aluminium duties are subject to Article 11.1(b) does not mean that they cease to be ordinary customs duties under Article II of the GATT 1994 (which they also are, as will be further explained in section 4.1.1). Just as the other disciplines of the Agreement on Safeguards can apply concurrently with those of the GATT 1994, so can those of Article 11.1(b).

193. For the foregoing reasons, considered as a whole, there can be no doubt the measures at issue fall within the four corners of the Agreement on Safeguards and should be assessed accordingly.

3.1.6. The measures at issue are not measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX

194. The measures at issue were not taken "pursuant to" Article XXI of the GATT 1994, but rather "pursuant to" Section 232, which is a domestic US

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367 Thus, with respect to the European Union, Canada and Mexico, White House National Trade Council Director Peter Navarro stated: "They chose not to offer a reasonable quota, and we had to put the tariffs on." Fox Business, “Trump tariffs are about national security: Peter Navarro”, 31 May 2018, https://www.foxbusiness.com/politics/trump-tariffs-are-about-national-security-peter-navarro (and accompanying video), Exhibit EU-10. On a separate occasion, Peter Navarro stated: "The guiding principle of this administration, from the president down to his team, is that any country or entity like the European Union, which is exempt from the tariffs, will have a quota and other restrictions." Fox Business, "Trump tariffs are about national security: Peter Navarro", 31 May 2018, https://www.foxbusiness.com/politics/trump-tariffs-are-about-national-security-peter-navarro (and accompanying video), Exhibit EU-10. National Economic Council Director Larry Kudlow stated that country exemptions depend on trade concessions, not necessarily related to steel and aluminium: "It's very important that some of our friends make some concessions with respect to trading practices, tariffs and taxes [...] One of the issues cropping up is the equal treatment of automobiles. We'd like to see some concessions from Europe." Business Times, “US needs EU 'concessions' to extend steel, aluminum tariff exemptions: Trump aide”, 26 April 2018, https://www.businesstimes.com.sg/government-economy/us-needs-eu-concessions-to-extend-steel-aluminium-tariff-exemptions-trump-aide, Exhibit EU-12. President Trump tweeted: “The European Union, wonderful countries who treat the U.S. very badly on trade, are complaining about the tariffs on Steel & Aluminium. If they drop their horrific barriers & tariffs on U.S. products going in, we will likewise drop ours. Big Deficit. If not, we Tax Cars etc. FAIR!” (10 Mar 2018), (Exhibit EU-6).

368 Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018 (Exhibit EU-43); Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 21, 2018 (Exhibit EU-44); Committee on Safeguards, Communication From the United States in Response to the European Union’s Requests Circulated on 16 April 2018, G/SG/178, 19 April 2018 (Exhibit EU-45).
measure. Article XXI of the GATT 1994 is only the alleged justification (affirmative defence) that the United States has indicated it intends to invoke.

195. The European Union recalls that, as confirmed by the Appellate Body, the question of which domestic procedures were followed in the adoption of the measures at issue is not dispositive.369

196. Thus, the issue is whether or not the measures at issue fall within the scope of the Agreement on Safeguards, which is an objective question, to be determined by examining the design, structure and expected operation of the measures at issue, while giving particular weight to their most central aspects.370

3.2. THE MEASURES AT ISSUE ARE INCONSISTENT WITH CERTAIN PROVISIONS OF THE AGREEMENT ON SAFEGUARDS

3.2.1. Article 2.1 of the Agreement on Safeguards

197. Article 2.1 of the Agreement on Safeguards sets out conditions for the application of safeguard measures. It provides as follows:

A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

198. Article 2.1 requires a competent authority to examine the increase in imports in both absolute terms and relative to domestic production.371

199. Article 2.1 does not refer to just any increase in imports, but to an increase in "such ...quantities" as to cause or threaten to cause serious injury to the domestic industry.372

200. Article 4.1 is part of the context of Article 2.1. In particular, a consideration of Article 4.1 is necessary in order to interpret and apply the phrase "cause

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369 Appellate Body Report, Indonesia – Iron or Steel Products, para. 5.60.
370 Appellate Body Report, Indonesia – Iron or Steel Products, para. 5.60.
371 Articles 2.1 and 4.2(a) are both relevant provisions for examining an increase in imports as a basic prerequisite for the application of safeguard measures. Panel Report, Argentina –Footwear (EC), para. 8.138.
or threaten to cause" in Article 2.1, because Article 4.1 provides the definitions of terms that are crucial to the interpretation of that phrase in Article 2.1: "serious injury" and "threat of serious injury".

201. Article 2.1 "sets forth the conditions for the application of a safeguard measure", while Article 4.2(a) provides "the operational requirements for determining whether the conditions identified in Article 2.1 exist".373

202. Various panels have already found that a finding of violation with respect to Articles 4.1 and 4.2 will also lead to a conclusion of inconsistency of the application of the respective safeguard measure with Article 2.1 of the Agreement on Safeguards.374 The European Union demonstrates below that the United States acted inconsistently with the provisions of Articles 4.1 and 4.2 of the Agreement on Safeguards. Consequently, the United States is also in breach of Article 2.1.

3.2.2. Article 2.2 of the Agreement on Safeguards

203. Article 2.2 of the Agreement on Safeguards provides that:

Safeguard measures shall be applied to a product being imported irrespective of its source.

204. According to Article 2.2, the most-favoured-nation principle governs the imposition of safeguard measures on products from all sources of supply.375 However, Article 9.1 requires that developing countries meeting the respective conditions be exempted from the application of the safeguard measure.376

205. According to the case-law, imports considered for the purposes of the safeguards investigation (in the terms of Articles 2.1 and 4.2 of the Agreement on Safeguards) and the products to which the measure is applied (in the terms of Article 2.2) must be the same. This principle of parallelism is based on the parallel language used in Articles 2.1 and 2.2 of the Agreement on Safeguards, also covering the symmetry that must exist between Articles 2.1 and 4.2 of the Agreement on Safeguards.

373 Panel Report, Argentina – Footwear (EC), paras. 8.139 - 8.140.
375 Panel Report, Argentina – Footwear (EC), para. 8.88.
206. Furthermore, even in a case of a free trade agreement an investigation evaluating whether serious injury or the threat thereof was caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources:

Therefore, we conclude that Argentina’s investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures.

[...] We conclude that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States.377

207. Similarly, in the present case the United States has conducted the steel and aluminium investigations with respect to imports of the products at issue from all sources. It is nowhere mentioned in the steel or aluminium reports that imports from certain countries were excluded.378 Indeed, the Steel and Aluminium reports explicitly explain that the recommended duty increases are designed to achieve a reduction in imports from 2017 levels, and those levels include imports from all sources.379 Thus, the imposition of safeguard measures should also cover products from all sources and cannot exempt certain countries, irrespective of whether they have or have not concluded a free trade agreement with the United States.

208. The United States exempted from the imposition of the additional customs duties steel imports from South Korea, Argentina, Australia and Brazil, and aluminium imports from Argentina and Australia.380 Instead, there were mutually agreed quotas, allowing important quantities of steel and aluminium products duty-free access to the US market. In light of the

377  Appellate Body Report, Argentina – Footwear (EC), paras. 113 - 114.
378  The Steel and Aluminium Reports provide actually trade statistics also with regard to the excluded countries. See, for instance Steel Report, p. 28 (Exhibit EU-15).
379  Thus, the Steel Report (Exhibit EU-15) refers to 36 million metric tons in imports from all sources in 2017, which should be reduced to 23 million metric tons in order to achieve 80 percent capacity utilisation for domestic industry through the remedies laid down in the Report, such as a 24 percent global tariff (see p. 58 and Figure 2). The Aluminium Report (Exhibit EU-31) likewise bases its analysis on imports from all sources (see, for example, Table 1, Figure 2; Table 16-19; Figures 6-7, Tables 20-25, Tables 35 and 36, p. 71, “the total value of U.S. imports (from all sources)”). Its conclusions on pp. 107-109 then simply discuss which measures would reduce the total quantity of imports, from all sources, in order to achieve 80 percent domestic capacity utilisation.
380  See also section 2.5.
clarifications offered by the Appellate Body in *Argentina – Footwear (EC)*,\(^{381}\) the fact that Australia and South Korea have an FTA with the United States cannot be used as a justification for their exemption from the application of the additional customs duties.

209. Thus, it follows that by not applying the safeguard measures to the products at issue irrespective of their source, the United States breaches Article 2.2 of the Agreement on Safeguards.

### 3.2.3. Article 3.1 of the Agreement on Safeguards

210. Article 3.1 of the Agreement on Safeguards provides as follows:

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

211. The first sentence of Article 3.1 imposes the obligation to conduct an investigation before applying a measure, being part of the rules relating to the investigation and analysis which the competent authority must undertake.

212. The second sentence of Article 3.1 provides certain procedural guarantees to interested parties, notably "reasonable public notice" and "public hearings or other appropriate means". Although the term "interested parties" is not defined, it is clear that, at a minimum, it includes importers and exporters.\(^{382}\)

213. The third sentence of Article 3.1, as elaborated by Article 4.2(c), speaks of the obligation of the competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.


\(^{382}\) Panel Report, *Ukraine - Passenger Cars*, para. 7.403.
214. The United States failed to comply with the requirements of Article 3.1 because (i) the competent authorities failed to provide the interested parties with “the opportunity to respond to the presentations of other parties” and (ii) the interested parties have not been provided a central role in the investigations.

215. With regard to the steel investigation, the USDOC published in the Federal Register a “Notice Request for Public Comments and Public Hearings on Section 232 National Security Investigation of Imports of Steel” on 26 April 2017. That Notice invited interested public participants to submit written comments by 31 May 2017 and/or participate in the Public Hearing to be held on 24 May 2017. The Notice identified the issues on which the Department was interested in obtaining the public’s views and set forth the procedures for public participation in the hearing. In its Report, the US Secretary of Commerce noted that the public hearing was held on 24 May 2017 and that the department heard testimony from 37 witnesses at the hearing. It also noted that the department received 201 written public comments concerning the investigation.

216. With respect to the aluminium investigation, the USDOC published in the Federal Register a “Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminium”. That Notice invited interested parties to provide written comments by 29 June 2017 and/or participate in a public hearing to be held on 22 June 2017. The Notice identified the issues on which the Department was interested in obtaining the public’s views and set forth the procedures for public participation in the hearing. In its Report, the US Secretary of Commerce noted that the department received 91 written submissions and that a public hearing was held on 22 June 2017 during which the department heard testimony from 32 witnesses at the hearing.

217. The European Union notes that while in both investigations interested parties have been given an opportunity to comment on the issues identified in the Notice of Request for Public Comments and Public Hearing, they have

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not been given the opportunity to respond to the presentations of other interested parties.

218. In addition, the word “investigation” implies that the authorities “must actively seek out pertinent information” and the Agreement on Safeguards “envisages that the interested parties play a central role in the investigation and that “they will be a primary source of information for the competent authorities”.385 However, this has not been the case in the present steel and aluminium investigations.

219. The competent authorities have invited interested parties to comment on certain issues only at the beginning of the investigation. However, the competent authorities have not actively sought out from the interested parties the information that has been used in the two investigations. In fact, for most of the factors examined in those investigations, in particular the injury factors, the information and data used have not been provided directly by the interested parties (in particular by the domestic producers for the injury factors) but comes from reports of other authorities or outside organisations. Thereby, interested parties have not played a central role in the investigations, contrary to the requirements of Article 3.1 of the Agreement on Safeguards.

220. Finally, the US authorities have failed to provide a reasoned and adequate explanation regarding the existence of unforeseen developments, the effects of the obligations incurred under the GATT 1994, the increase in imports, the serious injury or threat thereof, the causal link and the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury, thereby acting inconsistently with several provisions of the Agreement on Safeguards. Consequently, the United States also acted inconsistently with Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards, as the Steel and Aluminium Reports do not set forth findings and reasoned conclusions on all pertinent issues of fact and law and do not contain a detailed analysis of the case nor a demonstration of the relevance of the factors.386

3.2.4. Articles 4.1 and 4.2 of the Agreement on Safeguards

221. Article 4.1 of the Agreement on Safeguards provides that:

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386 Panel Report, India – Iron and Steel Products, para. 7.289.
For the purposes of this Agreement:

(a) “serious injury” shall be understood to mean a significant overall impairment in the position of a domestic industry;

(b) “threat of serious injury” shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

(c) in determining injury or threat thereof, a “domestic industry” shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

222. Thus, paragraph (a) of Article 4.1 defines "serious injury" as "a significant overall impairment in the position of a domestic industry", while paragraph (b) of the same article defines "threat of serious injury" as "serious injury that is clearly imminent". In other words, "threat of serious injury" is concerned with "serious injury" which has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty but which, based on the specific facts, looks on the very verge of occurring. In any event, the determination of threat of serious injury should not be based on merely an allegation, conjecture or remote possibility.

223. Paragraph (c) of Article 4.1 defines the domestic industry concerned with the determination of injury or threat of injury.

224. As Article 4.1 contains definitions of key concepts, it serves in establishing breaches of other provisions, such as Articles 4.2 and 2.1 of the Agreement on Safeguards.

225. Article 4.2 of the Agreement on Safeguards reads as follows:

(a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, 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.

(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. 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.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

226. Thus, as per the terms of Article 4.2 there are several elements to be taken into account in an investigation:

- an analysis of all relevant factors in order to determine whether increased imports have caused or are threatening to cause serious injury; and
- the determination of a causal link between the increased imports and injury, while considering whether other factors than increased imports are causing injury (non-attribution analysis).

227. With respect to the first element, the Appellate Body in Argentina – Footwear (EC) considered that:

Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned.388

228. Thus, the competent authority must evaluate and explain the effect of each of the relevant factors, and not merely engage in a box-ticking exercise.

229. Article 4.2(a) refers to an evaluation of the increase in imports, absolute or relative to domestic production.

230. Article 4.2(a) requires the competent authority to consider the "rate and amount of the increase in imports". This means that the competent authority cannot establish an increase in imports "through a simple mathematical comparison of data for the two end points marking the beginning and end of

the period of investigation”, by comparing imports in one year against imports in another year.\(^{389}\)

231. Indeed, a point-to-point analysis risks masking important intervening events that may be relevant to the determination whether an increase in imports is such as to cause serious injury:

Thus, we do not dispute the Panel’s view and ultimate conclusion that the competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a).\(^{390}\)

232. Accordingly, instead of a point-to-point analysis, the competent authority must evaluate (and explain) the significance of intervening trends of imports – including their “speed and direction” – over the period of investigation.\(^{391}\) This evaluation is “unavoidable when making a determination of whether there has been an increase in imports ‘in such quantities’ in the sense of Article 2.1”.\(^{392}\)

233. The competent authority must establish the existence of **serious injury (or threat thereof) to the domestic industry**. Thus, the respective Member must define the domestic industry and then establish “serious injury” (or threat thereof) to that industry.

234. As discussed above, Article 4.1(a) provides the definitions of serious injury and domestic industry. The **domestic industry** is comprised of producers of products that are like or compete directly with the imported products at issue. The Appellate Body emphasized in **US – Lamb** that:

> [T]he legal basis for imposing a safeguard measure exists only when imports of a specific product have prejudicial effects on domestic producers of products that are ‘like or directly competitive’ with that imported product.\(^{393}\)

235. Thus, the domestic industry must include domestic producers of products like or competing with those imported products subject to the respective safeguard measure.

236. The Appellate Body also explained in **US – Lamb** that:

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\(^{389}\) Panel Report, **Ukraine – Passenger Cars**, para. 7.132.

\(^{390}\) Appellate Body Report, **Argentina – Footwear**, para. 129.

\(^{391}\) Panel Report, **Argentina – Footwear**, paras. 8.161-8.162.

\(^{392}\) Panel Report, **Argentina – Footwear**, paras. 8.161-8.162.

\(^{393}\) Appellate Body Report, **US – Lamb**, para. 86.
We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the "domestic industry". What is sufficient in any given case will depend on the particularities of the "domestic industry" at issue.394

237. As "serious injury" is defined in Article 4.1(a) as a "significant overall impairment in the position of a domestic industry", the scope of the injury assessment is logically determined by the scope of the domestic industry.

238. The determination of the existence of a causal link should follow a multiple stage approach:

Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are distinguished from the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was actually caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the Agreement on Safeguards.395

239. In a different case the Appellate Body summarized the analysis of the causal link by referring to:

[T]wo distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a demonstration of the 'existence of the causal link between increased imports of the product concerned and serious injury or threat thereof '. Second,
the injury caused by factors other than the increased imports must not be attributed to increased imports.\textsuperscript{396}

240. Thus, it is important that injury caused by factors other than increased imports is not attributed to the increased imports, but to those other factors (e.g. poor management decisions concerning the products of a certain company). For illustrative purposes, the Anti-Dumping Agreement offers examples of factors which may be relevant in the non-attribution analysis including, \textit{inter alia}, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and export performance and productivity of the domestic industry.\textsuperscript{397}

\textbf{With regard to the Steel Report}

241. \textit{First}, the USDOC fails properly to demonstrate the existence of \textbf{increased imports}.

242. As explained in section 2.5.1., the US steel measures apply to different groups of products, produced in the United States by different industry segments, using different production techniques and facing different competitive situations: (i) basic oxygen furnace (BOF) steel; (ii) electric arc furnace (EAF) steel; and (iii) finished steel products.\textsuperscript{398}

243. According to the already recalled case-law, an evaluation of increased imports must take into account the rate and significance of any increase in imports of the different groups of steel products to enable an assessment of whether the domestic industry as a whole, taking account of its different segments, has been seriously injured by increased imports.

244. The USDOC’s analysis of steel consists of an endpoint-to-endpoint comparison, from 2011 to 2017, of all subject steel imports, with no evaluation of imports of the different groups of steel products.\textsuperscript{399}

245. However, even with respect to an aggregate evaluation of all subject steel imports, an endpoint-to-endpoint comparison is deficient. Such an analysis must be accompanied by a consideration of occurring trends. Indeed, an evaluation of trends is an important part in determining whether imports

\begin{itemize}
\item \textsuperscript{396} Appellate Body Report, \textit{US – Line Pipe}, para. 208.
\item \textsuperscript{397} Article 3.5 of Anti-Dumping Agreement.
\item \textsuperscript{398} World Steel Association, Fact Sheet, Steel and raw materials, p. 1 (Exhibit EU-62).
\item \textsuperscript{399} Steel Report, Figure 2, p. 28.
\end{itemize}
have increased “in such quantities” as to cause domestic producers serious injury (or threat thereof).

246. Furthermore, in order to evaluate whether “increased imports” are causing serious injury (or threat thereof) to the domestic industry, the USDOC was required to address the rate and significance of any increased imports of the different groups of steel products subject to the measures at issue. Instead, the USDOC provides aggregate data for all steel products, with no data or explanation for imports of the different groups of steel products at issue.

247. In conclusion, the Steel Report fails to demonstrate any increase in imports of the products is such as to have caused serious injury to the domestic industry producing the imported products at issue.

248. Second, the USDOC fails properly to demonstrate the existence of “serious injury” to the “domestic industry”.

249. The USDOC focuses on a particular segment of the steel industry (domestic semi-finished BOF producers), largely ignoring the two other segments of the industry (US producers of semi-finished EAF steel products and US producers of finished steel products). This runs contrary to Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation showing that the US steel industry as a whole is seriously injured.

250. The European Union will briefly explain certain relevant facts regarding the steel industry and then demonstrate that the Steel Report fails to provide a proper evaluation of serious injury to the US steel industry.

251. As factual background, steel is an alloy consisting mostly of iron and less than 2% carbon. To recall, the USDOC’s steel investigation covers two categories of steel products: (i) semi-finished steel products (BOF and EAF); and (ii) finished steel products.

252. Semi-finished steel is an upstream product that is subsequently converted, through additional manufacturing processes, into finished steel products. Semi-finished steel can be produced using two different production methods: (i) basic oxygen furnace production (semi-finished BOF steel) and (ii) electric arc furnace production (semi-finished EAF steel). Although the

400 World Steel Association, Fact Sheet, Steel and raw materials, (Exhibit EU-62) p. 2.
401 World Steel Association, Fact Sheet, Steel and raw materials, p. 1.
production processes differ, the semi-finished steel products that result from the two processes are physically and functionally the same.

253. The BOF method uses as inputs raw materials such as iron ore, coal, and limestone.\textsuperscript{402} The EAF process is cheaper, using technology allowing for the re-use of scrap steel and relying on electricity.\textsuperscript{403}

254. A big difference between the two steelmaking methods is in the capital investment costs involved: a typical integrated (BOF-route) steel mill costs around USD 1100 per tonne of installed capacity, while a medium-size EAF-route mini-mill costs under USD 300 per tonne in terms of the initial capital outlay.\textsuperscript{404}

255. Finished steel products are manufactured by further processing semi-finished steel, either through a hot rolling mill (long products), a hot strip mill (flat products), or a plate mill (tube products and others):

256. The Steel Report identifies four categories of finished steel products: (i) carbon and alloy flat products, (ii) carbon and alloy long products, (iii) carbon and alloy pipe and tube products and (iv) stainless products.\textsuperscript{405}

257. The US steel tariffs apply to all types of semi-finished and finished steel products. There are three major US domestic steel industry segments: (i) producers of semi-finished BOF steel; (ii) producers of semi-finished EAF steel; and (iii) producers of finished steel products.

258. In terms of semi-finished steel, the BOF segment dominates global production, accounting for around 75 percent of crude steel output in 2016.\textsuperscript{406} However, the situation is different in the United States, where the BOF share was only 33% in 2016 and has been slowly declining.\textsuperscript{407}

259. The EAF production enjoys several advantages as compared with BOF production in the United States. As a result, the EAF method dominates now

\textsuperscript{402} World Steel Association, Fact Sheet, Steel and raw materials, p. 1.
\textsuperscript{403} The White Book of Steel, World Steel Association, 2012 (Exhibit EU-63), pp. 24, 29-31.
\textsuperscript{404} Basic Oxygen Furnace Steelmaking, (https://www.steel-technology.com/articles/oxygenfurnace) Exhibit EU-64.
\textsuperscript{405} Steel Report (Exhibit EU-15), p. 21.
\textsuperscript{406} Steel Report (Exhibit EU-15), p. 44.
\textsuperscript{407} Steel Report, p. 44.
the production of semi-finished steel in the United States, accounting for 66% of the US steel production in 2016.\textsuperscript{408}

260. The Steel Report fails to evaluate properly injury to the US steel industry as a whole. Under Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards, the USDOC was required to determine that the “domestic [steel] industry has suffered serious injury”. The “domestic industry” comprises producers of domestic products that are “like or directly competitive” with the imported products subject to the safeguard measure.

261. To recall, the steel tariffs apply to the following steel products: (i) semi-finished BOF steel; (ii) semi-finished EAF steel; and (iii) finished steel products. The origin is the only criterion to distinguish between domestic and imported products falling within each of these three categories. The respective products within each of these categories are, therefore, like products. Furthermore, all semi-finished steel products are physically and functionally the same and, thus, like each other, irrespective of the method of production used.

262. As a result, the US domestic industry comprises three segments: US producers of semi-finished BOF steel products; US producers of semi-finished EAF steel products; and US producers of finished steel products.

263. Consistent with the legal standard already described, the USDOC was required to provide a reasoned and adequate explanation that the US steel industry as a whole has suffered serious injury, taking into account the economic position of all three industry segments.

264. However, the DOC’s injury assessment focuses overwhelmingly on one segment of the industry: domestic semi-finished BOF producers. The USDOC’s assessment largely ignores the economic position of the other two industry segments: domestic semi-finished EAF producers, and finished producers.

265. According to Article 4.2(a) of the Agreement on Safeguards, a proper investigation should address all relevant injury factors, such as: the share of the domestic market taken by increased imports, changes in the level of sales, production and productivity, capacity utilization, profits and losses, employment or capital expenditure.

\textsuperscript{408} Steel Report, p. 44.
266. However, the USDOC does not provide explanations with regard to any of the injury factors with respect to EAF steel and does not address production and productivity, and capacity utilization with regard to finished steel (while also not explaining the other factors with respect to this last category).

267. Thus, in assessing each of the injury factors, the USDOC makes several errors. In particular, it focuses on a single, poorly performing segment of the industry (the semi-finished BOF steel segment), without providing equivalent data or explanation that addresses the differing situations of the other two industry segments (the semi-finished EAF steel and finished steel segments). In addition, it uses aggregate data that masks differences in the economic performance of the different industry segments, without adequate consideration of the performance of the segments in question. Furthermore, some of the aggregate data is selective and not representative.

268. With respect to the share of the domestic market taken by increased imports, changes in the level of sales, the USDOC fails to provide any explanation of how it took into account the situation of the semi-finished steel EAF and BOF segments. Therefore, the Steel Report fails to account for the position of semi-finished steel producers altogether.

269. On finished steel production, the USDOC shows “import penetration”, which refers to the share of imports in total domestic sales. Figure 3 shows that the extent of the rise of this share. Thus, domestic sales remained at levels exceeding 70 percent. The USDOC provides no explanation of how this trend in the share of imports, and the sustained high levels of domestic sales, supports its injury determination.

270. The Steel Report also mentioned two types of finished products in particular: steel and pipe tube. It noted that “import penetration” for these products “was 74 percent in 2016 and further increased in 2017”. However, the USDOC fails to assess changes in market share for these two types of finished steel products in any of the other years subject to its assessment. It also fails to provide the same information with respect to any other finished products.

271. In sum, the USDOC fails to address the position of BOF and EAF semi-finished steel production and it fails to explain how the data on finished steel production supports its injury determination.

409 Steel Report, p. 29.
272. With regard to **production and productivity**, the USDOC explains only how the data supports an injury finding in relation to semi-finished BOF producers.

273. On **semi-finished production**, the USDOC first presents a variety of data on semi-finished steel production capacity and production, in Figures 11, 15, and 16.\footnote{Steel Report, p. 41.}

274. Figure 11 presents aggregated data for EAF and BOF on production capacity for the period 1995-2017: a single figure is given for EAF and BOF production capacity together, for each year. This aggregate data masks the respective performance of the EAF and BOF segments. In addition, in its explanation of this aggregate data, the USDOC addresses solely the BOF segment, without mentioning the EAF segment. The USDOC states that “the present situation with respect to basic oxygen furnace production is significantly worse than the situation [in 2001]”.\footnote{Steel Report, p. 43.}

275. In Figure 15, the USDOC presents further data on US semi-finished steel production capacity, and also actual production, this time for the period 2011-2017, again without distinguishing between EAF and BOF production. These data show that, when assessed in aggregate, EAF and BOF production capacity and production have declined, which leads the USDOC in reaching a much broader conclusion: the US steel production generally has declined.\footnote{Steel Report, p. 46.} However, the USDOC does not distinguish, in its explanation or conclusion, between the semi-finished BOF and EAF steel products, and does not refer to finished steel products.

276. Figure 16 presents disaggregated data on actual production of semi-finished BOF and EAF steel between 1998-2016 (but does not provide such disaggregated data on production capacity). The USDOC’s disaggregated production data shows that the BOF segment alone suffered a decline in production, while between 2000-2016 the EAF production increased. The USDOC does not explain why it provides only aggregated data for production capacity, but disaggregated data for production.

277. Indeed, the growth in EAF production appears to be important to the steel industry as a whole. EAF production is shown to be consistently much higher
than BOF production since 2005, replacing BOF production over time. One can notice that the decrease in BOF production almost corresponds to the increase in EAF production. This also shows that an important part of the decline in domestic BOF production is due to a switch to domestic EAF production, factor that should have been taken into account in the non-attribution analysis, as the European Union will further explain.

278. Furthermore, in Figure 13 it is presented data on the total number of semi-finished BOF and EAF facilities in the United States, in five-year increments from 1975 to 2016.413 This data clearly shows the continuing shift to EAF production over the years. The Steel Report does not explain this trend in the evolution of US semi-finished steel production nor its significance for the US steel industry as a whole.

279. In terms of the absolute number of facilities and units, the data shows that the number of both BOF and EAF facilities declined in the 16-year period from 2000-2016, with BOF facilities declining by 36 percent and EAF facilities by 15 percent.

280. In addressing this data, the DOC comments exclusively on the BOF segment, for which it says only that “the number of basic oxygen furnace facilities and units has declined precipitously since 1999”.414 The USDOC gives no explanation with regard to the EAF segment.

281. A reduction in the number of production facilities does not necessarily indicate that a segment is suffering poor economic performance. For instance, the percentage decline for the EAF segment is small over time (15 percent decline in 16 years). A decline in the total number of production facilities could be caused by the closure of smaller, inefficient facilities, and investment in fewer larger facilities. In that respect, although the absolute number of EAF facilities declined (Figure 13), the USDOC’s actual production data shows that EAF production increased from 2000-2016 (Figure 16).

282. With respect to US finished steel producers, the DOC Report does not present or explain any data for the segment. Instead, it refers to one anecdotal instance of the closure of a single facility (“Acelor Mittal has announced the closure of its plate rolling mill in Conshohocken”).415 The

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413 Steel Report, p. 44.
414 Steel Report, p. 43.
415 Steel Report, p. 33.
closure of one facility does not provide any indication of production and productivity for an entire industry segment, unless is the only one operating in that segment.

283. In conclusion, for the data provided on semi-finished steel products, the Steel Report focuses on only one (smaller) segment of production (BOF steel), without providing a proper explanation of equivalent data for EAF steel production. With respect to finished products, the DOC provides no data or explanation of production and productivity, failing altogether to take this aspect of the economic position of the US steel industry into account.

284. With respect to capacity utilization, the USDOC presents only aggregated data in relation to the semi-finished BOF and EAF segments and entirely fails to examine the different situations of the EAF and BOF segments. The DOC presents no data at all in respect of finished steel capacity utilization, failing to address this segment altogether.

285. With respect to semi-finished production, Figure 16 provides aggregated capacity utilization rates for EAF and BOF production. As already mentioned, the same figure shows disaggregated production data, by volume, for EAF and BOF production from 1998-2016. The DOC does not explain why, in the same figure, it provided disaggregated production data for the two segments, but only aggregated capacity utilization data. Aggregated data masks performance differences between the two segments.

286. Using aggregated capacity utilization data, the USDOC concludes that the capacity utilization of US semi-finished steel producers is declining. However, the USDOC fails to consider the relative situation of the EAF and BOF segments, which moved in different directions. Indeed, the EAF segment is not declining, but on an increasing trend.

287. With respect to finished production, the USDOC presents no data at all, thus wholly failing to account for this aspect of the economic position of the US steel industry in concluding that the industry as a whole is seriously injured.

288. With regard to profits and loses, the USDOC presents data for a selection of steel producing companies. It provides income data for a group of six selected companies (Figure 8), and then financial performance and debt

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416 Steel Report, p. 38.
data for a second group of six companies (Figure 9),\(^\text{417}\) with some overlap between the two groups.

289. The USDOC fails to explain several important aspects, such as why it provided financial performance data just for a selection of companies, why it selected different companies in the two groups, how it selected the companies in each group and which steel product(s) the selected companies produce.

290. Beyond providing data for two different groups of selected companies, the USDOC does not present any representative data showing, in a systematic way, the profits and loses of either the industry as a whole or the three industry segments, which face quite different competitive forces.

291. Despite recognizing that the three industry segments face different competitive forces, that lead to different financial performance, the USDOC does not provide any data or explanation which takes into account those differences.

292. With respect to employment, the USDOC relies again on aggregated data, without distinguishing between different industry segments. The USDOC does not confirm whether the aggregated data is fully representative of all three segments of the industry. The USDOC also does not explain why it provides only aggregate data, when it provides disaggregated data for some other injury factors.

293. The USDOC provides aggregate data for a 20-year period, covering 1997-2017 (figure 7).\(^\text{418}\) In the first decade of this period, aggregate employment rates declined sharply. However, in more recent years, starting with 2011, the rates are essentially constant. The USDOC does not explain how this data supports its injury finding. In particular, it fails to explain the significance of stable employment in the most recent 6-year period.

294. The USDOC also provides no data or explanation that addresses the differing situations of the three industry segments. The USDOC’s omission, once again, masks the respective performance, this time, of all three industry segments. As we have seen, semi-finished BOF and EAF producers have experienced different economic trajectories. As a result of competitive advantages, the EAF segment has grown at the expense of the BOF

\(^{417}\) Steel Report, p. 39.

\(^{418}\) Steel Report, p. 36.
With regard to **capital expenditure**, the USDOC presents aggregate data, purportedly for the whole steel industry.\(^{419}\) However, the USDOC does not explain whether and how this data is representative of the industry. Further, this aggregate data, again, masks the respective performance of the three industry segments.

The USDOC does not explain why it provides only aggregate data, when it provides disaggregated data for other injury factors. As already mentioned, the EAF segment has grown at the expense of the BOF segment, which suggests that trends in capital expenditures have evolved differently. The USDOC’s approach masks these differences instead of explaining them, and how they are relevant to an overall assessment of the industry.

**In conclusion**, the USDOC fails to evaluate properly injury to the US steel industry. With respect to several injury factors described above, the USDOC focuses on a single, poorly performing segment of the industry (the BOF steel). The USDOC does not provide equivalent data and/or explanations that address the situation of the other two industry segments (semi-finished EAF steel and finished steel). As a result, the DOC offers an incomplete and partially lopsided assessment of the steel industry.

As already explained, the Appellate Body has considered that a lopsided evaluation “may give a misleading impression of the data relating to the industry as a whole”,\(^{420}\) for example, where “some parts of the industry are performing well, while others are performing poorly”.\(^{421}\) Such an evaluation highlights the negative data in the poorly performing part of the industry,\(^{422}\) while the positive developments in other parts of the industry are overlooked.

This is precisely the situation of the Steel Report. It focuses on the poor performance of the BOF segment, while largely ignoring the much more developed EAF segment and the finished steel producers.

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\(^{419}\) Figure 10 includes data for “NAICS Codes 3311 and 3312 combined”. Steel Report (Exhibit EU-15), p. 40.

\(^{420}\) Appellate Body Report, *US – Hot Rolled Steel*, para. 204.

\(^{421}\) Appellate Body Report, *US – Hot Rolled Steel*, para. 204.

\(^{422}\) Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
300. In addition, certain data is presented in an aggregated manner, masking the actual evolutions in economic performance of entire segments of the steel industry. Sometimes the USDOC conflates the semi-finished EAF and BOF steel segments, and other times it conflates all three industry segments.

301. In a situation of a segmented industry like in the present case, it is important for a competent authority to assess injury to that industry as a whole in light of the performance of the different segments, and of the relationship between those segments. While some parts of an industry may be “performing well, [...] others are performing poorly”, which is relevant to consideration of the industry as a whole.\footnote{Appellate Body Report, \textit{US – Hot Rolled Steel}, para. 204.} The economic relationship between different segments should also be analysed.

302. Finally, sometimes the USDOC’s purportedly aggregate data seems to be selectively picked to cover a subset of industry participants. The USDOC fails to explain why it resorts to such selective data or how it made its selections. Selective data cannot provide a reliable basis for an injury determination.

303. As a result of the above deficiencies, the USDOC creates a “misleading impression of the data relating to the industry as a whole”, and fails to provide a proper explanation for the its conclusion that the US steel industry is injured.

304. Third, the USDOC fails properly to demonstrate a \textbf{causal link} between increased imports and serious injury, by not complying with its obligation to ensure that injury caused by factors other than increased imports is not attributed to those imports.

305. The assessment of injury to the US steel industry is focused on just one segment of that industry, namely producers of semi-finished steel using the BOF production method. The USDOC fails to show injury to the two other segments of the US steel industry (producers of semi-finished EAF steel and producers of finished steel). As a result, the DOC fails to show that the US steel industry as a whole is injured.

306. Absent a causation examination relating to the industry as a whole, taking proper account of the three industry segments, the United States fails to comply with its obligations under Article 4.2(b) of the Agreement on Safeguards.
307. Even with respect to US producers of semi-finished BOF steel (the injury assessment focuses on this industry segment) the USDOC’s examination of the causes of injury does not meet the requirements of Article 4.2(b) of the Agreement on Safeguards. In particular, the evidence before the USDOC indicates that the decline of US producers of semi-finished BOF steel is attributable, at least in part, to other factors than increased imports. In other words, the US semi-finished BOF steel sector suffers from certain structural problems, related to costs and “traditional” production method domestic competitiveness, and not attributable to increased imports.

308. Indeed, the USDOC fails to take into account the causal impact of the growth of the US semi-finished EAF production on US semi-finished BOF production.

309. However, the USDOC’s record suggests that US producers are switching from BOF to EAF production of semi-finished steel, with the latter largely replacing the former in the market.

310. For example, a report taken into account in the Steel Report explains that “cheap scrap has given so-called mini-mills that melt scrap in electric arc furnaces the cost edge over integrated producers, which utilize resource intensive blast furnaces”. 424

311. The USDOC also explains that “EAFs can be quickly stopped (or used for few shifts) and then restarted more easily than blast furnaces”. 425 As a result, the USDOC recognizes that semi-finished EAF producers are more “flexible” and “profitable” than semi-finished BOF producers. 426

312. The evidence before the competent authority shows therefore that one of the factors causing injury to domestic semi-finished BOF steel producers is competition with another segment of the US steel industry, namely the producers of semi-finished EAF steel. Domestic EAF production has largely replaced the “declining” domestic BOF production. The USDOC fails to take this market evolution into account for the non-attribution analysis.

313. In addition, the USDOC’s evidence refers to a variety of other causal factors, besides increased imports. The USDOC does not examine any of these other

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factors, either to dismiss their causal relevance or, where relevant as causal factors, to attribute a portion of the injury to them.

314. However, the USDOC acknowledges the importance of the regulatory burden facing US producers: the US steel industry has lost market share because prices of US steel are higher due to “higher taxes, healthcare, environmental standards, and other regulatory expenses”.\textsuperscript{427} The USDOC fails to address the causal effects of these factors.

315. As another example, a news report quoted in the Steel Report identifies “[s]ix reasons why the Sparrows point steel mill collapsed”.\textsuperscript{428} None of the six reasons identified is increased imports. Instead, the closure is attributed to: reliance on obsolete BOF facilities, poor management strategy and remote ownership, union politics, a poor location, and cancellations of customer orders.

316. The Steel Report also cites to a report that attributes the decline in the US steel industry to “homegrown problems”, explaining that “fundamentals within the local market continue to weaken the domestic industry”.\textsuperscript{429} The USDOC also mentions a report that identifies further non-attribution factors, describing mill closures as “part of an ongoing adjustment in operations due to challenging market conditions, including fluctuating oil prices, reduced rig counts, depressed steel prices and unfairly traded imports”.\textsuperscript{430}

317. The USDOC fails to examine the causal impact of any of these other factors, which are already on the USDOC’s own investigation record, disentangling their effects from those of increased imports.

318. Therefore, the USDOC fails to establish “a genuine and substantial relationship of cause and effect” between increased imports, and injury to the steel industry.\textsuperscript{431} Thus, the United States acted inconsistently with Article 4.2(b) of the Agreement on Safeguards, by failing to conduct a proper causal link analysis.

\textsuperscript{427} Steel Report (Exhibit EU-15), p. 33.
\textsuperscript{428} Six reasons why the Sparrows Point steel mill collapsed, 25 May 2012 (Exhibit EU-66), quoted in footnote 46 to the Steel Report.
\textsuperscript{429} Losing strength: US steel industry analysis, White & Case, 16 April 2016 (Exhibit EU-65), quoted in footnote 57 to the Steel Report.
\textsuperscript{430} U.S. Steel lays off 200 more workers in Fairfield, 18 March 2016 (Exhibit EU-67), quoted in footnote 49 to the Steel Report.
With regard to the Aluminium Report

319.  First, the USDOC fails properly to demonstrate the existence of increased imports.

320.  To recall, for aluminium the tariffs cover three groups of aluminium products: (i) primary aluminium products, (ii) secondary aluminium products, and (iii) downstream aluminium products.⁴³² These groups of products are produced, in the United States, by different industry segments, comprising different groups of producers, using different production techniques, facing different competitive situations.

321.  As a result, under Article 2.1, to evaluate adequately whether “increased imports” have occurred “in such quantities” as to cause serious injury to the domestic industry as a whole, a competent authority must address the different situations facing the different industry segments, including the rate and significance of any increase in import levels that each group faces.

322.  The USDOC fails to conduct such an analysis. It shows increased imports solely with respect to two of the three groups of subject aluminium products, specifically primary aluminium and downstream aluminium products.⁴³³ However, the USDOC fails to provide any explanation at all regarding imports of secondary aluminium.

323.  The contrast between the USDOC’s treatment of imports of primary and secondary aluminium is marked. For primary aluminium, the USDOC provides disaggregated import data for imports from 2013-2016,⁴³⁴ and an explanation of that data.⁴³⁵ In so doing, the DOC expressly limits its analysis to primary aluminium, to the exclusion of secondary aluminium. The DOC Report is quite explicit about its limited consideration of secondary aluminium, which it says “is not the focus of this report”.⁴³⁶

324.  The USDOC’s failure to evaluate imports of secondary aluminium is consistent with the lopsided approach it takes to serious injury, with the USDOC giving little-to-no consideration of injury to the secondary aluminium segment of the US industry, even though it is the world’s leading

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⁴³² See also section 2.6.1.
⁴³³ Aluminium Report (Exhibit EU-31), pp. 70-75.
⁴³⁴ Aluminium Report, Table 20, p. 70.
⁴³⁵ Aluminium Report, p. 70.
⁴³⁶ Aluminium Report (Exhibit EU-31), p. 22.
producer of secondary aluminium. The competent authority’s approach reflects its undue focus on serious injury to US producers of primary aluminium.

325. In conclusion, the Aluminium Report fails to demonstrate an increase in imports of the products that is such as to have caused serious injury to the domestic industry producing the imported products at issue.

326. Second, the USDOC fails properly to demonstrate the existence of “serious injury” to the aluminium “domestic industry”.

327. As factual background, the European Union presents an overview of the US aluminium industry, on the basis of the Aluminium Report and of a preceding report prepared by the US International Trade Commission (USITC Report) in 2017 and cited several times by the Aluminium Report.

328. Aluminium is an “elemental material”, meaning that its basic properties do not change with mechanical or physical processing.\(^{437}\) Once produced from raw materials, aluminium can be “recycled repeatedly without any loss in quality and reused in the manufacture of consumer and industrial products”.\(^{438}\)

329. There are two methods to produce the unprocessed or “unwrought” form of aluminium.

330. The so-called “primary” unwrought aluminium can be produced by converting raw materials into aluminium (primary aluminium).\(^{439}\) Primary aluminium production has high fixed costs because it is extremely energy intensive.\(^{440}\) The process also requires non-stop production cycles. As a consequence, firms may choose to shut down production capacity altogether to save energy costs (rather than run at reduced capacity) during periods of weak demand or low prices.\(^{441}\)

331. According to a second method, the so-called “secondary” aluminium can be produced by melting recycled aluminium scrap (secondary aluminium).\(^{442}\)

\(^{437}\) Aluminum: The Element of Sustainability, the Aluminum Association, September 2011 (Exhibit EU-68), p. 2.

\(^{438}\) Aluminum: The Element of Sustainability, the Aluminum Association, September 2011 (Exhibit EU-68), p. 19.

\(^{439}\) USITC Aluminium Report (Exhibit EU-69), p. 51.

\(^{440}\) USITC Aluminium Report, p. 52.

\(^{441}\) USITC Aluminium Report (Exhibit EU-69), p. 52.

\(^{442}\) USITC Aluminium Report, p. 52.
Given the “elemental” properties of aluminium, this process of recycling “will generate a piece of metal with exactly the same properties as the metal used to manufacture the recycled product”.\textsuperscript{443} “There is no functional difference between primary and secondary aluminum”.\textsuperscript{444} Production of secondary aluminium production requires 90% less energy than that of primary aluminium.\textsuperscript{445}

332. Then, primary and secondary unwrought aluminium products can be processed, essentially through mechanical working, into downstream wrought aluminium products (downstream products). The downstream aluminium products can be divided into three product categories: flat-rolled products, extruded products, and wire.

333. The US aluminium tariffs apply to all three aluminium product categories: primary unwrought aluminium, secondary unwrought aluminium, and downstream wrought products.\textsuperscript{446} The Aluminium Report describes three “major segments” of the industry:\textsuperscript{447} (i) producers of primary aluminium products, (ii) producers of secondary aluminium products, and (iii) producers of downstream aluminium products.

334. As the USITC Report explains, the three industry segments are affected by different competitive conditions. Similarly to the steel sector, for primary aluminium producers the major proportion of production costs are those related to energy, while for secondary aluminium producers competitiveness is influenced by access to cheap and reliable scrap supplies. Finally, for those producers of downstream aluminium products, competitiveness is influenced by several factors, amongst which access to unwrought aluminium, in particular lower-cost recycled aluminium.\textsuperscript{448}

335. The USITC Report explains that different competitive conditions in Canada and the United States have led to the development of an integrated North American (Canada / United States) aluminium market, where Canada is

\textsuperscript{443} Aluminum: The Element of Sustainability, the Aluminum Association, September 2011 (Exhibit EU-68), p. 46.
\textsuperscript{444} Aluminum: The Element of Sustainability, the Aluminum Association, September 2011 (Exhibit EU-68), p. 29.
\textsuperscript{445} USITC Aluminium Report (Exhibit EU-69), p. 52.
\textsuperscript{446} See Section 2.6.1.
\textsuperscript{447} Aluminium Report (Exhibit EU-31), p. 21.
\textsuperscript{448} USITC Aluminium Report (Exhibit EU-69), p. 35.
focused on “the energy-intensive primary unwrought aluminum segment”.\textsuperscript{449} The extent of integration in the Canadian and US markets is reflected in the Aluminium Report section addressing “Canadian primary aluminum capacity” in the part on the “domestic aluminum capacity”,\textsuperscript{450} explaining that “Canadian primary aluminum production is important to the U.S. aluminum industry”.\textsuperscript{451}

336. In these circumstances, the United States has “intensified its focus on secondary and wrought production in an increasingly integrated North American Market”;\textsuperscript{452} the United States is the world’s leading producer of secondary aluminium, and the world’s second largest producer of downstream aluminium products.\textsuperscript{453}

337. Producers of secondary aluminium and downstream aluminium products are not only prosperous, but also the two largest segments of the US aluminium industry.\textsuperscript{454}

338. The European Union submits that the Aluminium Report fails to properly evaluate serious injury to the US aluminium industry as a whole.

339. As already explained in section 2.6.1 by reference to the relevant HS codes, the aluminium tariffs apply to: (i) primary aluminium products, (ii) imported secondary aluminium products; and (iii) downstream aluminium products. Domestic and imported products falling within each of these three groups are “like” products, the only difference residing in their origin. In addition, primary and secondary unwrought aluminium products are also physically and functionally identical and, thus, “like” products, irrespective of their method of production. Thus, the US “domestic industry” comprises three segments: US primary aluminium producers, US secondary aluminium producers, and US producers of downstream aluminium products.

340. According to the legal standard already described, the competent authority was required to provide a reasoned and adequate explanation that the US aluminium industry as a whole has suffered injury, taking into account the economic position of all three industry segments.

\textsuperscript{449} USITC Aluminium Report, p. 185. See also p. 205.
\textsuperscript{450} Aluminium Report (Exhibit EU-31), p. 51.
\textsuperscript{451} Aluminium Report, p. 52.
\textsuperscript{452} USITC Aluminium Report, p. 185. See also pp. 120-121.
\textsuperscript{453} E.g. Aluminium Report (Exhibit EU-31), pp. 21-22.
\textsuperscript{454} USITC Aluminium Report, pp. 129-130.
341. However, the injury assessment in the Aluminium Report focuses on a single segment of the industry: the US primary aluminium producers, largely ignoring the two bigger industry segments: US secondary aluminium producers and US downstream aluminium producers. The Aluminium Report clearly says that secondary aluminium “is fundamentally a different industry sector” but then continues by admitting that it is “not the focus of this report”.455

342. According to Article 4.2(a) of the Agreement on Safeguards, a proper investigation should address all relevant injury factors such as: the share of the domestic market taken by increased imports, changes in the level of sales, production and productivity, capacity utilization, profits and losses, employment and capital expenditure.

343. However, the Aluminium Report focuses on US primary producers, at the expense of US secondary and downstream producers, which are the biggest parts of the industry, also very successful economically. Thus, the USDOC fails to provide a reasoned and adequate explanation for its conclusion that the domestic industry as a whole is injured. The United States has, therefore, acted inconsistently with Article 4.2(a) of the Agreement on Safeguards.

344. The European Union offers a more detailed analysis below, with regard to each of the relevant injury factors.

345. With respect to the share of the domestic market taken by increased imports, changes in the level of sales, the Aluminium Report addresses only the position of US primary aluminium producers. The competent authority explains inter alia that imported primary aluminium has taken an increased share of domestic sales, with an import penetration level of about 90%, up from 66% in 2012.456

346. The USDOC presents no data on the share of domestic sales taken by US secondary and downstream aluminium producers. Thus, with respect to the two largest industry segments, the USDOC fails to address this injury factor.

347. With regard to production and productivity, similarly to the Steel Report, the competent authority only explains how the data in relation to producers

455 Aluminium Report (Exhibit EU-31), p. 22.
456 Aluminium Report (Exhibit EU-31), p. 3.
of primary aluminium supports its injury finding. Indeed, one can note a
decline in production for producers of primary aluminium.457

348. For producers of secondary aluminium (which accounts for 84% of total US
unwrought production) the Aluminium Report refers to the USITC Aluminium
Report, which found that “U.S. secondary production capacity increased by
5.6 percent between 2011 and 2015, while actual production increased by
13.4 percent during that timeframe”.458 However, it is not explained how
these increases were taken into account when reaching the injury
conclusions.

349. With regard to downstream aluminium, the production rates of flat-rolled
products are described as “essentially flat” between 2012 and 2015. However, Table 13 shows that production of HTS 7606, 7607 products
increased from 4,088 to 4,180 thousands of metric tons during that
period.459 There is no explanation provided as to how this positive economic
performance was taken into account in the injury findings. As one can easily
note, flat-rolled products account for almost two-thirds of all US
downstream production, while downstream production is the largest of the
three US aluminium industry segments.460

350. Another shortcoming in the Aluminium Report is the fact that while extruded
aluminium products (accounting for almost one-third of the total US
downstream production) experienced a production increase of 13 percent
during the period from 2012 to 2015,461 there is no explanation provided on
how this positive economic performance was taken into account in reaching
the injury conclusions.

351. As one can note from Table 13, wire and cable products are the only
category of downstream products for which the DOC tries to prove a decline
in production. The USDOC refers to USITC Aluminium Report figures
showing a decline of wire and cable production, which is a very small

457 Table 9 shows a decline in production from 2,070 (000) metric tons in 2012 to 840 (000) metric
tons in 2016. Aluminium Report, p. 44.
459 Aluminium Report, Table 13, p. 54.
460 USITC Aluminium Report (Exhibit EU-69), p. 151.
461 Aluminium Report, Table 13, p. 54.
category of downstream products.\(^{462}\) It is not explained how a decrease in production in a small category of downstream products can lead to reaching the conclusion that the US downstream aluminium segment, or the US aluminium industry as a whole, experiences a decline in production and productivity.

352. Table 14 shows that production capacity increased between 2012 and 2015 for the majority of downstream products.\(^{463}\)

353. In conclusion, the Aluminium Report shows that the two largest segments of the US aluminium industry (producers of secondary aluminium and downstream products) have experienced increased production and production capacity. The competent authority does not explain how it took this data into account when concluding that the US aluminium industry is injured by imports.

354. With respect to capacity utilization, the Aluminium Report addresses the position of US primary aluminium producers. It explains that “U.S. smelters are now producing at 43% of capacity.”\(^{464}\)

355. However, the USDOC presents no data on capacity utilization levels of US secondary aluminium producers.

356. For downstream aluminium producers Table 13 shows a reduction in capacity utilization for HTS 7606, 7607 products from 71% to 69% during the period 2012-2015,\(^{465}\) while Table 14 shows an increase in capacity utilization for certain products falling within the same codes and for the same period, from 90% to 92.8%.\(^{466}\) Of note, capacity utilization is on the rise for most of the downstream products, as well as for this industry segment as a whole, from 75.5% to 78.4%.\(^{467}\)

357. With regard to profits and loses, the competent authority explains data only in respect to producers of primary aluminium. Table 41 shows data reflecting reductions in, \textit{inter alia}, sales revenue and net income for certain

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\(^{462}\) Aluminium Report (Exhibit EU-31), Table 13, p. 54. Of note, US production of wire and cable accounts only for 6 percent of downstream (wrought) aluminium products. USITC Aluminium Report (Exhibit EU-69), p. 151.

\(^{463}\) Aluminium Report (Exhibit EU-31), Table 14, p. 56.

\(^{464}\) Aluminium Report, p. 3.

\(^{465}\) Aluminium Report, Table 13, p. 54.

\(^{466}\) Aluminium Report, Table 14, p. 56.

\(^{467}\) Aluminium Report (Exhibit EU-31), Table 14, p. 56.
companies operating primary aluminium smelter facilities in the United States.468

358. However, the competent authority presents no data on the financial performance of secondary aluminium producers. It simply jumps from the upstream industry sector (in fact analysing only primary aluminium producing companies) to the downstream industry sector. To recall, secondary aluminium producers represent a bigger, growing segment of the US aluminium industry.

359. With respect to producers of downstream products, the Aluminium Report only briefly mentions that this segment has “experienced modest job growth across a range of industrial sectors between 2013 and 2016 based on increased demand for their products”, and that downstream producers “have made investments in capital equipment”.469 However, it is not explained how this positive economic performance was taken into account in reaching the conclusion that the US aluminium industry suffers injury.

360. With respect to employment, Table 39 shows falling employment rates for producers of primary aluminium from 2013 to 2016.470 The Aluminium Report explains that “the loss of jobs in the primary aluminium sector has been precipitous between 2013 and 2016, falling 58% as several smelters were either permanently shut down or temporarily idled”.471

361. However, a closer look to Table 39 reveals that not only there was an increase in employment for producers of secondary aluminium and of downstream products, but there was an overall increase of 3 percent in the three industry sectors combined. It follows that the drastic decrease in the primary sector was not only compensated, but exceeded by the employment growth in the other sectors, denoting an overall industry growth. There is no explanation of how these positive developments were taking into account so as to reach a final conclusion of injury to the US aluminium industry.

362. Finally, with regard to capital expenditure, Table 42 shows a slight increase in capital expenditure by primary aluminium producers from 2013 to 2015.472 However, the USDOC anticipates that “data for 2016 would likely

468 Aluminium Report, pp. 91-94.
469 Aluminium Report, p. 95.
470 Aluminium Report, p. 90.
471 Aluminium Report, p. 3.
472 Aluminium Report, p. 98.
show a decline in capital expenditures by the primary aluminium sector”, 473 without explaining the forecasted decline.

363. Table 42 shows that capital expenditures by producers of secondary aluminium and downstream products also increased from 2013 to 2015. Indeed, for downstream producers, the USDOC acknowledges that the USITC data shows that “capital spending rose by 65% between 2011 and 2015”. 474 The competent authority makes no projections for capital spending with regard to these two major industry segments in 2016. The USDOC also does not explain how it took into account the positive economic performance of these two industry segments in finding that the aluminium industry has seen a decrease in capital expenditures and is injured.

364. In conclusion, the competent authority fails to properly evaluate serious injury to the US aluminium industry. The USDOC provides a biased explanation that focuses almost exclusively on a smaller and poorly performing segment of the industry, primary aluminium producers. This is the kind of situation that fits within the Appellate Body’s description of an investigation which “highlight[s] the negative data in the poorly performing part” of the industry. 475

365. The competent authority ignores in its assessment the positive economic performance of the two largest segments of the US aluminium industry, namely the US producers of secondary aluminium and of downstream products, who are global leaders of the aluminium industry. The USDOC fails to take into account the fact that the decline in the US primary aluminium production is accompanied by the economic growth of the larger segments of the US aluminium industry (secondary aluminium and downstream products).

366. As a result, the competent authority’s biased explanation creates a “misleading impression of the data relating to the industry as a whole”, which fails to explain how the US aluminium industry is seriously injured. 476 Such an assessment clearly falls short of the requirements in Article 4.2(a) of the Agreement on Safeguards.

473 Aluminium Report, p. 98.
474 Aluminium Report, p. 97.
367. Third, the competent authority fails properly to demonstrate a causal link between increased imports and serious injury to the domestic US aluminium industry.

368. As already explained, the USDOC focuses its assessment of injury to the US aluminium industry on just one segment of that industry, the US producers of primary aluminium. However, this leaves aside the two largest segments of the US aluminium industry (producers of secondary aluminium and downstream products). To the contrary, relevant data shows that these two segments enjoy positive economic performance and not a decline like in the case of the primary aluminium producers. By largely ignoring the major parts of the US aluminium industry, the USDOC fails to show that the US aluminium industry as a whole is injured.

369. The same truncated approach is reflected in the causation analysis. As there is no assessment of injury to US producers of secondary aluminium and downstream products, or to the US aluminium industry as a whole, the USDOC could not draw any conclusions with respect to potential causes of unidentified injury to these two industry segments, or to the industry as a whole.

370. The failure to conduct an examination of causation relating to the aluminium industry as a whole, taking proper account of the three industry segments, is inconsistent with Article 4.2(b) of the Agreement on Safeguards.

371. Even with respect to the US producers of primary aluminium (the only industry segment that subject to an injury assessment), the examination of the causes of serious injury does not meet the requirements of Article 4.2(b) of the Agreement on Safeguards, as it lacks a proper non-attribution analysis.

372. The USDOC concludes that US producers of primary aluminium are injured, and attributes this injury to increased imports of primary aluminium. However, the evidence before the USDOC indicates that the decline of US producers of primary aluminium is attributable, at least in part, to two other factors than increased imports. In other words, the US primary aluminium sector suffers from certain structural problems, related to costs and “traditional” production method domestic competiveness, and not attributable to increased imports.

477 See e.g. Aluminium Report, p. 105.
373. **On the one hand**, the USITC Aluminium Report explains that US producers are at a competitive disadvantage in primary aluminium production: “chief determinant of competitiveness” in primary aluminium production is “electricity costs”.\(^{478}\) The USITC finds that the United States has “relatively high electricity rates”, which it explains “has contributed to the United States’ loss of competitiveness in this segment in recent years”.\(^{479}\)

374. The USDOC acknowledges in the Aluminium Report that high US electricity costs is a major contributing factor in the decline of the US primary aluminium segment: “one of the main reasons for the decline in U.S. primary aluminum production capacity is that the United States is a relatively high cost producer … because aluminum production is highly energy intensive”.\(^{480}\)

375. However, the USDOC fails to explain the extent to which the decline in US primary aluminium production is attributable to the high costs of US production, as opposed to increased imports. In fact, the Aluminium Report seems to explain that US aluminium users switched to imported primary aluminium because US primary production had declined, and not the other way around: “U.S. import reliance increased because domestic primary aluminum production decreased, so U.S. manufacturers by necessity filled their materials needs through imports”.\(^{481}\)

376. Thus, the competent authority fails to separate the causal effects of this factor (high electricity costs) from those of increased imports and does not ensure that the causal effects of the former are not improperly attributed to the latter.

377. **On the other hand**, similarly to the “twin” steel investigation, the USDOC fails to account for the *causal effects of the growth of US secondary aluminium production*. To recall, in the case of the Steel Report the European Union has explained that the decline of the BOF semi-finished steel segment was partially due to competition with the continuously rising EAF semi-finished steel segment producers.

\(^{478}\) USITC Aluminum Report (Exhibit EU-69), pp. 29 and 35.

\(^{479}\) USITC Aluminum Report, p. 37.

\(^{480}\) Aluminium Report (Exhibit EU-31), p. 41.

\(^{481}\) Aluminium Report, p. 62.
378. The evidence in the Aluminium Report shows that the decline in US primary production has been accompanied by strong growth in US secondary production, which has contributed, as a matter of fact, to the decline in primary production.

379. In that regard, the USITC Aluminium Report shows that the increase in US secondary aluminium production corresponds with, and has more than compensated for, the decrease in US primary aluminium production.482

380. As one can easily note, Figure 4.4 in the USITC Aluminium Report shows that, as the market share of primary aluminium declined by 8 percent from 2011-2015, the market share of US secondary aluminium increased by 6 percent during that reference period. At the same time, the market share of imported unwrought aluminium increased by only 2 percent.483 This suggests that consumers are switching to domestic secondary aluminium at a higher rate than they are switching to unwrought imported products.

381. On the basis of this data, one can conclude that the most important part of the decline in the market share of US primary aluminium production is attributable to the US industry’s own switch to production of secondary aluminium.

382. When concluding that increased imports caused injury to US producers of primary aluminium, the competent authority does not provide an assessment of the concomitant raise of market share of US secondary aluminium producers with the decline of primary aluminium producers, denoting a switch by US producers and consumers to secondary aluminium production. Thus, the competent authority fails to separate the causal effects of this factor from those of increased imports and does not ensure that the causal effects of the former are not improperly attributed to the latter.

383. In sum, the competent authority failed to disentangle the effects of these two factors (electricity costs and domestic secondary aluminium competition) from the effects of imports and, thus, failed to establish “a genuine and substantial relationship of cause and effect” between increased imports and

482  USITC Aluminium Report (Exhibit EU-69), pp. 148 -151.
483  Table 4.4, USITC Aluminum Report, p. 154. Secondary aluminium is referred to as “scrap recovery” in that table.

384. In light of the above, the USDOC failed properly to demonstrate in the “twin” investigations: (i) an increase in imports of the steel and aluminium products at issue, (ii) the existence of serious injury (or threat thereof) to the US domestic steel and aluminium industries and (iii) a causal link between increased imports and serious injury (or threat thereof) with respect to the steel and the aluminium industries. Thus, the United States breaches the provisions of Articles 4.1 and 4.2 of the Agreement on Safeguards.

\subsection*{3.2.5. Article 5.1 of the Agreement on Safeguards}

385. Article 5.1 of the Agreement on Safeguards provides, in relevant part:

\begin{quote}
A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. […]
\end{quote}

386. This requirement is not relevant to the legal characterization of a measure as a safeguard measure for purposes of determining the applicability of the WTO safeguard disciplines.\footnote{Appellate Body Report, \textit{Indonesia – Iron or Steel Products}, para. 5.59.}

387. Even where there is a right to apply a safeguard measure, that right is not unlimited; it can be exercised only to the extent necessary.\footnote{Appellate Body Report, \textit{US-Line Pipe}, para. 84.} To that end, the first sentence of Article 5.1 “sets the maximum permissible extent for the application of a safeguard measure under the Agreement on Safeguards”\footnote{Appellate Body Report, \textit{US-Line Pipe}, para. 245.} and “imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.”\footnote{Appellate Body Reports, \textit{Korea-Dairy}, para. 96; \textit{US-Line Pipe}, para. 230.} The maximum permissible extent for the application of a safeguard measure is, therefore, on the one hand, that which is necessary to prevent or remedy serious injury; and on the other hand, that which is necessary to facilitate adjustment.
388. A Member can only satisfy this obligation to ensure that the safeguard measure is “calibrated” if there is, “at a minimum, a rational connection between the measure and the objective of preventing or remediying serious injury and facilitating adjustment.”489

389. In applying this provision, it is therefore relevant whether there is a “rational connection” between the way in which the duty or other restriction imposed by the safeguard measure is determined, and the “state of the domestic industry below which (a threat of) serious injury will be experienced.”490

390. The Appellate Body has further explained that "the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."491 Moreover, the Appellate Body found that "the extent of the remedy permitted by Article 5.1, first sentence, is not determined by the characterization in the determination of the situation of the industry as "serious injury" or "threat of serious injury", but by the extent to which that "serious injury" or "threat of serious injury" has been caused by increased imports."492

391. By establishing a violation of Article 4.2(b) of the Agreement on Safeguards, a complainant also makes a \textit{prima facie} case that the application of the safeguard measure "was not limited to the extent permissible under Article 5.1"; in the absence of a rebuttal of this \textit{prima facie} case, it must be found that the safeguard measure was applied beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment".493

392. The safeguards measures at issue are inconsistent with Article 5.1 for four independent reasons.

393. \textit{First}, the European Union has already demonstrated in section 3.2.4 that those measures are inconsistent with Article 4.2(b), because the United States failed to demonstrate the existence of a causal link, including by not attributing injury caused by factors other than increased imports. Since a causal link has not been demonstrated, and because it has not been ensured

\footnotesize{489  Panel Report, \textit{Chile – Price Band System}, para. 7.183.}
\footnotesize{490  Panel Report, \textit{Chile – Price Band System}, para. 7.184.}
\footnotesize{491  Appellate Body Report, \textit{US-Line Pipe}, para. 260.}
\footnotesize{492  Appellate Body Report, \textit{US-Line Pipe}, para. 176.}
that injury has not been attributed to factors other than increased imports, it follows that the safeguard measure was applied beyond the permissible limits. Therefore, the European Union has already made a \textit{prima facie} case of a violation of Article 5.1.

394. \textit{Second}, regardless of whether they are inconsistent with Article 4.2(b), and for the same reasons discussed in section 3.2.4., the measures at issue do not meaningfully assess whether there is a causal link between increased imports and any serious injury or threat of serious injury to domestic industry. They also do not meaningfully assess non-attribution factors. In other words, they do not distinguish between any serious injury or threat of serious injury to a domestic industry that is caused by increased imports, and any serious injury or threat of serious injury that is caused by other factors. This is contrary to the requirement that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports.\footnote{Appellate Body Report, \textit{US-Line Pipe}, para. 260.}

395. \textit{Third}, the duties and other restrictions imposed by the measures are not calibrated, and are not sufficiently rationally connected, to the objective of preventing or remedying serious injury. This lack of calibration is demonstrated by the following.

396. As will be further discussed in section 3.2.6, the application of the safeguard measures is not limited in time, and certainly not limited to the period which is necessary to prevent or remedy serious injury; moreover, the measures do not provide for progressive liberalization at regular intervals. It follows that those measures are applied to an extent that goes beyond what is necessary to prevent or remedy serious injury.

397. Furthermore, the measures claim to be calibrated to the objective of achieving an 80 percent capacity utilisation rate for the domestic steel and aluminium industries respectively. This objective would ostensibly be achieved by reducing the total quantities of imports into the United States, from all sources, such that an increased domestic demand would lead to greater capacity utilization rates.

398. Achieving an 80 percent capacity utilisation rate is not, however, necessarily the same as addressing any serious injury, or threat of serious injury, of the domestic industries concerned. The measures at issue do not explain why
that particular capacity utilisation rate is necessary, or why a situation of serious injury, or threat of serious injury, persists for any capacity utilisation rate below 80 percent. See section 3.2.4 for a detailed analysis of the injury and causal link determinations and of their serious deficiencies.

399. Moreover, even if an 80 percent capacity utilisation rate was acceptable as a proxy for the absence of a (threat of) serious injury, the measures at issue are not calibrated to achieving that particular capacity utilisation rate. The Steel and Aluminium Reports make clear that the 80 percent rate was calculated on the basis of a global duty that would apply to all imported products, from all sources. However, the measures at issue introduce exemptions for imports from certain countries, and exceptions for certain product categories. They do so without any adjustment to the applicable duty, or to the 80 percent capacity utilisation rate.

400. In addition, both for steel and aluminium products, the measures at issue impose a duty that exceeds what USDOC determined to be necessary for the attainment of the desired 80-percent capacity utilisation rate. Thus, the Steel Report finds that a 24 percent tariff on all imports would achieve that objective, but the duty imposed by the relevant Proclamations is 25 percent. The Aluminium Report finds that a “worldwide” tariff of 7.7 percent would achieve the desired capacity utilisation rate for the domestic industry, but the duty imposed by the relevant Proclamations is 10 percent. Thus, with respect to aluminium, the United States imposed a duty that is almost by a third higher than what USDOC itself considered to be necessary to achieve even USDOC’s capacity utilisation objective (which, in itself, does not translate into preventing or remedying serious injury or facilitating adjustment). With respect to steel, one might argue that the differences are small (around 4 percent). But Article 5.1 makes no allowance for de minimis breaches. It prohibits the application of any safeguard measure to any extent beyond what is necessary to achieve the objectives listed in Article 5.1. Thus, a fortiori, it also prohibits a measure that is, by its own terms, excessive even with respect to its own targets.

401. Finally, with respect to imports from certain countries, the measures at issue introduce a quota. They do not, however, explain on what basis those particular quotas were set; for example, whether and why any of those

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495 Steel Report (Exhibit EU-15), pp. 59-60.
496 Aluminium Report (Exhibit EU-31), p. 108.
quotas are calibrated to achieving an 80 percent capacity utilisation rate of the domestic industry, or to any other objective that might serve as a proxy for the absence of a (threat of) serious injury.

402. *Fourth*, even if the measures at issue were calibrated to the need to prevent or remedy (the threat of) serious injury, which they are not, they are not designed to apply only to the extent necessary to facilitate adjustment. Indeed, those measures are premised on avoiding the need for the domestic industry to adjust, because their objective is to simply protect that industry from imports, for an indefinite period, to the extent needed for that industry to reach and maintain a certain capacity utilisation rate.

403. As discussed in section 3.2.6, the application of the safeguard measures is not limited in time, and certainly not limited to the period which is necessary to facilitate adjustment; moreover, the measures do not provide for progressive liberalization at regular intervals. It follows that those measures are applied to an extent that goes beyond what is necessary to facilitate adjustment. Indeed, the measures are geared towards avoiding any need for adjustment on the part of the domestic industry, since their application is unlimited in time.

404. Moreover, the measures at issue do not discuss what would be needed for the domestic industry to adjust to foreign competition, such as improving its efficiency or capacity to innovate. They do not discuss the development of the domestic industry in a scenario in which import adjustments would be eliminated. Therefore, the extent of the duties and quotas imposed is in no way connected to any identified adjustment needs of the domestic industry.

405. Therefore, the United States has failed to apply its safeguard measures at issue only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment, and has thus acted inconsistently with Article 5.1 of the Agreement on Safeguards.

3.2.6. Article 7 of the Agreement on Safeguards

3.2.6.1 Article 7.1 of the Agreement on Safeguards

406. Article 7.1 of the Agreement on Safeguards provides:

A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.
This requirement is not relevant to the legal characterization of a measure as a safeguard measure for purposes of determining the applicability of the WTO safeguard disciplines.\(^{497}\)

The application of the safeguard measures on steel and aluminium is not limited in time, to four years or to any other period. Those measures contain no discussion of any particular period of time that may be necessary to prevent or remedy serious injury or to facilitate adjustment. They even specifically instruct the United States customs authorities to apply additional duties and quantitative restrictions for an unlimited period of time, or at least until the measures are modified or terminated. Thus, aside from imports from countries that were temporarily or permanently exempted, the additional duties apply to all "goods entered, or withdrawn from warehouse for consumption, on or after" a certain date (e.g. 12:01 a.m. eastern daylight time on March 23, 2018).\(^{498}\) The Proclamations explicitly state that the increased duties "shall continue in effect, unless such actions are expressly reduced, modified, or terminated."\(^{499}\) The modifications to the HTSUS in the Annexes to the Proclamations contain no temporal limitation on any rate of duty or quota imposed or agreed.\(^{500}\) Even with respect to the quotas on imports from certain countries, the "annual aggregate limits shall apply for the period starting with calendar year 2018 and for subsequent years, unless modified or terminated."\(^{501}\)

\(^{497}\) Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.59.

\(^{498}\) Proclamation 9705 (Exhibit EU-16) para. (2); see also Proclamation 9711 (Exhibit EU-17) para. (1); Proclamation 9740 (Exhibit EU-18) para. (1); see also Proclamation 9740 (Exhibit EU-18) para. (2), requiring CBP to "implement this quota as soon as practicable, taking into account all steel articles imports from South Korea since January 1, 2018"; Proclamation 9759 (Exhibit EU-19) para. (2), specifying that the the quota for Argentina and Brazil "shall be effective for steel articles entered for consumption, or withdrawn from warehouse for consumption, on or after June 1, 2018". With respect to aluminium products, see Proclamation 9704 (Exhibit EU-32) para. (2); see also Proclamation 9710 (Exhibit EU-33), para. (1); Proclamation 9739 (Exhibit EU-34), para. (1); Proclamation 9758 (Exhibit EU-35), para. (1); Proclamation 9758 (Exhibit EU-35), para. (2), requiring CBP to "implement this quota as soon as practicable, taking into account all steel articles imports from [Argentina] since January 1, 2018"; Proclamation 9758 (Exhibit EU-35), Annex B.

\(^{499}\) Proclamation 9705 (Exhibit EU-16), para. (5)(a); Proclamation 9704 (Exhibit EU-32), para. (5)(a).

\(^{500}\) Proclamation 9705, (Exhibit EU-16), Annex; Proclamation 9704 (Exhibit EU-32), Annex; Proclamation 9739 (Exhibit EU-34), Annex.

\(^{501}\) Proclamation 9740 (Exhibit EU-18) Annex B.; Proclamation 9759 (Exhibit EU-19) para. (2);Proclamation 9759 (Exhibit EU-19) para. (3) ("imports from any such country in an aggregate quantity under any such subheading during any of the periods January through March, April through June, July through September, or October through December in any year that is in excess of 500,000 kg and 30 percent of the total aggregate quantity provided for a calendar year for such country, as set forth on the internet site of CBP, shall not be allowed."); Proclamation 9759 (Exhibit EU-19) Annex. See also Proclamation 9758 (Exhibit EU-35), para. (4); Proclamation 9758 (Exhibit EU-35), Annex B.
409. The Steel and Aluminium Proclamations suggest that the measures at issue may be modified in case of developments that "indicate the need for further action by the President under section 232" or "indicate that the increase in duty rate [...] is no longer necessary." However, this in itself does not entail or even foresee any temporal limitation, much less the specific temporal limitations referred to in Article 7.1.

410. Therefore, the measures at issue make no provision for their application only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment, and without limitation to four years or any other period of time. Those measures are therefore inconsistent with Article 7.1 of the Agreement on Safeguards.

3.2.6.2 Article 7.4 of the Agreement on Safeguards

411. Article 7.4 of the Agreement on Safeguards provides:

   In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

412. As explained above, the application of the safeguard measures at issue is not temporally limited. Therefore, their expected duration is over one year. Indeed, at the moment of the filing of this submission, the measures have already been applied to imported steel and aluminium products for more than one year. This triggers the Article 7.4 obligation to progressively liberalize the measures at regular intervals during the period of application.

502 Proclamation 9705 (Exhibit EU-16) para. (5)(b), Proclamation 9704 (Exhibit EU-32) para. (5)(b).

503 Proclamation 9705, para. (5)(b). Proclamation 9704 (Exhibit EU-32) para. (5)(b). See also, with respect to quota restrictions, Proclamation 9759 (Exhibit EU-19) para. (2) ("The Secretary of Commerce shall monitor the implementation of the quantitative limitations applicable to subheadings 9903.80.05 through 9903.80.58 and shall, in consultation with the Secretary of Defense, the United States Trade Representative, and such other senior Executive Branch officials as the Secretary deems appropriate, inform the President of any circumstance that in the Secretary’s opinion might indicate that an adjustment of the quantitative limitations is necessary.")
413. Article 7.4 is a “substantive provision that requires actual liberalization of the measure.”\textsuperscript{504} The meaning of this obligation is that the safeguard-imposing Member must provide for modifications of the safeguard measure that reduce its restrictiveness.\textsuperscript{505} Those modifications must be provided for at regular intervals, which means “intervals that are equally separated in time”. The purpose of this is to “facilitate adjustment” of the domestic industry by “exposing it to greater foreign competition following a pattern that allows – and forces – the industry to adjust to each stage of that liberalization, and prepare itself for the next one, at equal time intervals.” Article 7.4 therefore prohibits “back-loading liberalization, i.e. not taking any liberalization steps until a late stage in the period of application of a safeguard measure.”\textsuperscript{506}

414. The measures at issue make no provision for liberalisation of the measure at regular (or any) intervals. Indeed, as explained above, those measures specifically instruct the United States customs authorities to continue applying the same additional duties and quantitative restrictions for an unlimited period of time, or at least until the measures are modified or terminated. As mentioned before, the Steel and Aluminium Proclamations suggest that the measures at issue may be modified in case of developments that “indicate the need for further action by the President under section 232”\textsuperscript{507} or “indicate that the increase in duty rate […] is no longer necessary.”\textsuperscript{508} However, this in itself does not provide for liberalisation (presumably, the increased duty or quota could be replaced by a different or more severe type of restriction), is entirely discretionary, and does not refer to any intervals.

415. Therefore, by failing to make provision for the progressive liberalisation at regular intervals during the period of application of the measures at issue, the expected duration of which is over one year, the United States acted inconsistently with Article 7.4 of the Agreement on Safeguards.

\textsuperscript{504} Panel Report, \textit{Ukraine – Passenger Cars}, para. 7.360.

\textsuperscript{505} Panel Report, \textit{Argentina – Footwear (EC)}, para. 8.303.


\textsuperscript{507} Proclamation 9705 (Exhibit EU-16), para. (5)(b).

\textsuperscript{508} Proclamation 9705, para. (5)(b). Proclamation 9704 (Exhibit EU-32) para. (5)(b). See also, with respect to quota restrictions, Proclamation 9759 (Exhibit EU-19) para. (2) (“The Secretary of Commerce shall monitor the implementation of the quantitative limitations applicable to subheadings 9903.80.05 through 9903.80.58 and shall, in consultation with the Secretary of Defense, the United States Trade Representative, and such other senior Executive Branch officials as the Secretary deems appropriate, inform the President of any circumstance that in the Secretary’s opinion might indicate that an adjustment of the quantitative limitations is necessary.”)
3.2.7. Article 9.1 of the Agreement on Safeguards

416. Article 9.1 of the Agreement on Safeguards provides:

Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.

417. Article 9.1 obliges Members not to apply a safeguard measure against products originating in developing countries whose individual exports are below a de minimis level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product.\textsuperscript{509} As the Appellate Body has explained, "duties are "applied against a product" when a Member imposes conditions under which that product can enter that Member's market [...] irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether."\textsuperscript{510}

418. The jurisprudence has made clear that Members which apply safeguard measures are obliged to undertake efforts to "make certain" that de minimis imports from developing countries are excluded, or in other words to take "all reasonable measures available to them to exclude all developing countries that meet the requirements in Article 9.1 of the Agreement on Safeguards".\textsuperscript{511}

419. The panel in Dominican Republic – Safeguard Measures further explained:

There is a degree of flexibility regarding the way in which each Member may comply with Article 9.1. Irrespective of the way in which each Member complies with this provision, however, the Member concerned must show that it has made the efforts it can to exclude all those Members covered by the provision in Article 9.1 of the Agreement on Safeguards.\textsuperscript{512}

\textsuperscript{509} Appellate Body Report, US - Line Pipe, para. 129.
\textsuperscript{512} Panel Report, Dominican Republic – Safeguard Measures, para. 7.396.
420. The United States' measures at issue make no effort to ensure that developing country Members' de minimis imports are excluded from the measures at issue. The import adjustments at issue exempt steel imports from South Korea, Argentina, Australia and Brazil, and aluminium imports from Argentina and Australia, from the imposition of the additional customs duties, but not from quotas or other restrictive measures. This is not done on the basis of those Members being developing countries (indeed, some of them are not developing countries), or on the basis of any consideration of whether imports from those Members are de minimis.

421. Furthermore, the additional duties on steel and aluminium provided in the measures at issue impose conditions for the entry of imports from developing countries into the United States. Indeed, they are levied on all imports other than those from the Members exempted on bases unrelated to whether they are developing countries and whether imports from those countries are de minimis. Therefore, it is clear that the United States is "applying duties against the products" of the developing countries referred to in Article 9.1.

422. Therefore, the United States failed to take the reasonable measures available to it to exclude all developing countries that meet the requirements of Article 9.1, and is applying safeguard measures against the products originating in such countries, in violation of Article 9.1 of the Agreement on Safeguards.

3.2.8. Article 11(1)(a) of the Agreement on Safeguards

423. Article 11(1)(a) of the Agreement on Safeguards provides:

A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

424. The Appellate Body has clarified that, according to the ordinary meaning of that provision, "any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards."513 It has also been made clear that "the reference to "emergency action" in this provision simply describes the type of (safeguard)
action that may be taken by a Member once the conditions of Article XIX and the Agreement on Safeguards are fulfilled.\footnote{Panel Report, \textit{US – Line Pipe}, para. 7.305.}

425. The United States' measures at issue in this dispute are safeguards, i.e. emergency action on imports of particular products. As the European Union explains in section 4.1.5., those measures do not conform with the provisions of Article XIX of GATT 1994. Moreover, as the European Union explains in section 3.2, those measures are also applied inconsistently with numerous provisions of the Agreement on Safeguards.

426. Thus, the United States' measures at issue do not conform with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards, and are therefore inconsistent with Article 11(1)(a) of the Agreement on Safeguards.

\textbf{3.2.9. Article 11.1(b) of the Agreement on Safeguards}

427. Article 11.1(b) of the Agreement on Safeguards provides:

Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.\footnote{Panel Report, \textit{China – GOES}, footnote 109.} These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

\footnote{An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.}

\footnote{Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.}

428. This provision prohibits Members from seeking, taking, maintaining, or in any sense "using"\footnote{Panel Report, \textit{US – Line Pipe}, para. 7.305.} voluntary export restraints or "any other similar measures on the export or the import side", whether taken unilaterally or on the basis of "agreements, arrangements and understandings" with other Members.
Article 11.1(b) applies whether or not the measure said to be inconsistent with it is itself a safeguard measure.

429. Article 11.1(b) does not define “voluntary export restraints” (“VERs”). Nevertheless, the meaning of that term is clear. It refers to restraints on exports, whether in the form of a duty, quota, or any other type of restraint, that is sought, taken or maintained on a voluntary basis, for example on the basis of an explicit or tacit agreement between the exporting and importing Members, or even imposed unilaterally by either Member.\textsuperscript{516} Measures that have the similar effect of restraining exports, such as those listed in footnote 4, are also prohibited. Footnote 4 makes clear that the common and central feature of VERs and “similar measures” is simply that they “afford protection” to the industry of the importing Member. The broad prohibition of VERs reflects the overarching objective of re-establishing multilateral control over safeguards and eliminating measures that escape such control, referred to in the preamble to the Agreement on Safeguards.

430. For example, a quantitative restriction on imports, or any measure of a similar protective effect, based on a formal or informal agreement, arrangement or understanding between the exporting and importing Member, would certainly constitute a voluntary export restraint or a similar measure.

431. The exemptions of imports from certain countries from the steel and aluminium measures at issue demonstrate that the United States has sought,

\textsuperscript{516} Before the Uruguay Round, VERs and similar measures were referred to as “grey area” measures. While Article 11.1(b) of the Agreement on Safeguards removes any doubt that such measures are WTO-inconsistent, discussions on the concept of “grey area” measures may shed some light on what is meant by a “voluntary export restraint”. Thus, the Background Note by the GATT Secretariat “Grey-Area” Measures’ of 16 September 1987 (MTN.GNG/NG9/W/6) provides the following explanations, which may be helpful to the Panel:

“8. Concerning the nature of [grey-area] measures it would appear, in general, that:

(a) Many of the so-called "grey-area" measures are bilateral restraint arrangements of a [voluntary export restraint] or [orderly marketing arrangement] type (usually in the form of quantitative restrictions, surveillance systems or price undertakings) concluded between importing and exporting countries; they may take the form of export forecasts by the exporting country. [...]"

(c) Importing countries have also taken unilateral actions affecting imports, involving tariff increases, quota restrictions or price monitoring in relation to imports from particular sources without notification or reference to GATT provisions. [...]"

10. Concerning the reasons that have led exporting countries to accept such measures, it would appear that:

(a) In many cases these actions have been accepted primarily because of the threat that the alternatives would be unilateral action which (even if in conformity with the General Agreement) could involve considerably more severe cutbacks in the trade of the exporting country. [...]"
taken, and is maintaining voluntary export restraints or similar measures. It has done so either unilaterally or on the basis of “agreements, arrangements and understandings” with the countries concerned. Thus, while the import adjustments on steel and aluminium products are safeguard measures that are inconsistent with several provisions of the Agreement on Safeguards, it follows from Article 11.1(b) that they are additionally and independently subject to, and inconsistent with, the disciplines of that Agreement.

432. The United States has sought voluntary export restraints or similar measures as a condition for exempting imports from certain countries from the import adjustments at issue. Thus, the Presidential Proclamations issued on 8 March 2018 invited countries that have a “security relationship” with the United States to engage in discussions with the United States in order to “arrive at a satisfactory alternative means” to address the “threat” posed by the imports from the country concerned, in which case the President may “remove or modify the restriction on... imports from that country.”517

433. Accordingly, the Proclamations of 22 March 2018 temporarily exempted imports from Canada, Mexico, Australia, Argentina, South Korea, Brazil and the EU “in order to continue ongoing discussions” on reducing the “excess” production and production capacity of the product at issue in the countries concerned.518 519 They further provided for the President to order the implementation of a quota in order to “prevent transshipment, excess production, or other actions that would lead to increased exports [of the products concerned] to the United States”.520

434. The Proclamations of 30 April 2018 continued to seek voluntary export restraints or similar measures by extending the temporary exemption for imports from Argentina, Australia and Brazil without an expiration date, and extending the exemption for imports from Canada, Mexico and the EU until 31 May 2018. In the case of Argentina, Australia, and Brazil, this extension was explained by the fact that “the United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means to address the threatened impairment to our national security posed

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517 Proclamation 9705 (Exhibit EU-16), para. 9 ; Proclamation 9704 (Exhibit EU-32), para. 8.
518 Proclamation 9711 (Exhibit EU-17), paras. 4-10.
519 Proclamation 9710 (Exhibit EU-33), paras. 4-10.
520 Proclamation 9711 (Exhibit EU-17), para. 12; Proclamation 9710 (Exhibit EU-33), para. 12.
521 Proclamation 9740 (Exhibit EU-18), paras. 5 and (1); Proclamation 9705 (Exhibit EU-16), paras. 4 and (1); Annex.
by [steel or aluminium] articles imported from these countries”, and that tariffs should temporarily not be applied “in order to finalize the details of these satisfactory alternative means.” 522

435. Thus, it is clear from the Proclamations that the United States sought to put in place voluntary export restraints or similar measures by attempting to achieve unilateral action or an agreement, arrangement or understanding at least with Argentina, Australia, Brazil, Canada, the EU, Mexico, and South Korea, but also with any country with which the United States has a “security relationship”. The United States envisaged, in particular, to put in place a quota or a similar measure restraining exports from the country concerned. In return, imports from the country concerned would be exempted from the steel or aluminium tariffs.

436. The Proclamations further demonstrate that the United States has taken, and maintains, voluntary export restraints or similar measures.

437. Thus, Proclamation 9740 (30 April 2018) exempts the imports of steel from South Korea from the import adjustments at issue, on the basis of a “range of measures” agreed with South Korea, including a “quota that restricts the quantity of steel articles imported into the United States from South Korea.” 523

438. Proclamation 9759 similarly exempts imports from Argentina, Australia and Brazil from the additional duties on the basis of an agreed “range of measures”, including measures to “limit transhipment or surges”, reduce “excess” steel production and “excess” steel capacity and to “[restrain] steel articles exports to the United States” from each of those countries. 524 With respect to steel products from Argentina and Brazil, Proclamation 9759 implements this agreement by introducing quotas or “quantitative limitations” on their import to the United States. 525 The quotas are laid down in detail in the Annexes to the relevant Proclamations. 526

439. Aluminium imports from Argentina and Australia were likewise exempted from the additional duties on the basis of an agreed “range of measures”, including measures to “reduce excess aluminum production and excess

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522 Proclamation 9740 (Exhibit EU-18), para. 4, Proclamation 9705 (Exhibit EU-16), para. 5.
523 Para. 4; paras. (1)-(2); Annex.
524 Para. 5.
525 Paras. (2)-(6); Annex.
526 See also section 2.5.
aluminium capacity”, “contribute to increased capacity utilization in the United States”, “prevent the transhipment of aluminium articles and avoid import surges” and “[restrain] aluminium articles exports to the United States” from those countries. With respect to aluminium products from Argentina, Proclamation 9758 implements this agreement by introducing “quota treatment” or “quantitative limitations” on their import to the United States. The quotas are laid down in detail in the Annexes to the relevant Proclamations.

According to various reports and official sources, the steel quota for Argentina amounts to 135 percent of its three-year average of steel exports. Brazil’s quota is 100 percent of its three-year average of semi-finished steel exports and 70 percent of its three-year average of finished steel exports. South Korea’s quota amounts to 70 percent of its three-year average of steel exports. With respect to aluminium, according to press reports, the quota for Argentina amounts to 100 percent of its three-year average of aluminium exports.

Thus, the exemptions from additional duties for steel imports from South Korea, Argentina, Australia and Brazil, and for aluminium imports from Argentina and Australia, are all explicitly based on actions taken by the United States and/or the countries concerned, whether taken unilaterally or under an agreement, arrangement or understanding, through which the United States — Certain Measures on Steel and Aluminium Products European Union (DS548) First Written Submission
United States takes or maintains voluntary export restraints or similar measures.

442. In addition, as the European Union already explained, given the specific features of the measures at issue, even the increased duties, i.e. the tariff treatment of steel and aluminium products, constitute “similar measures” subject to Article 11.1(b) and footnote 4 of the Agreement on Safeguards. There is also no doubt that the United States has sought, taken, and is maintaining those duties.

443. The United States has therefore acted inconsistently with Article 11.1(b) of the Agreement on Safeguards.

3.2.10. Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards

3.2.10.1 Article 12.1 of the Agreement on Safeguards

444. Under Article 12.1 of the Agreement on Safeguards:

A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

445. The Appellate Body has clarified that Article 12.1 of the Agreement on Safeguards "sets out three separate obligations to make notification to the Committee on Safeguards, each of which is triggered "upon" the occurrence of an event specified in one of the three subparagraphs"; the notifications "must be made "immediately...upon" the occurrence of the triggering events".534

446. Even where the requisite notifications are made, Article 12.1 is infringed if the notification is less than immediate. Whatever the degree of "urgency or immediacy", and whatever administrative difficulties may be involved, "the amount of time taken to prepare the notification must, in all cases, be kept to a minimum."535 The Appellate Body has made clear that "immediate"

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notification is "that which allows the Committee on Safeguards, and Members, the fullest possible period to reflect upon and react to an ongoing safeguard investigation", and that "anything less than "immediate" notification curtails this period", regardless of whether or not individual Members "suffered actual prejudice through an insufficiency in the notification period."536 It follows a fortiori that Article 12.1 is infringed where no notification is made at all.

447. The United States has at no point notified the Committee on Safeguards of the safeguard measures on steel and aluminium at issue in this dispute. It has failed to notify the Committee on Safeguards of the initiation of the investigation relating to serious injury or threat thereof or the reasons for it; of any finding of serious injury or threat thereof caused by increased imports; and of any decision to apply or extend any of the safeguard measures at issue.

448. Therefore, by failing to make the notifications listed in Article 12.1 of the Agreement on Safeguards, the United States has acted inconsistently with that provision.

3.2.10.2 Article 12.2 of the Agreement on Safeguards

449. Article 12.2 of the Agreement on Safeguards provides, in relevant part:

In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. [...]

450. The Appellate Body made clear that, under Article 12.2, "a Member must, at a minimum, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting "all pertinent information", as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation."537 The Appellate Body also explained:

Article 12.2 is related to, and complements, Article 12.1 of the Agreement on Safeguards. Whereas Article 12.1 sets forth when notifications must be made during an investigation, Article 12.2 clarifies what detailed information must be contained in the notifications under Articles 12.1(b) and 12.1(c) [...]. A Member could notify "all pertinent information" in its Articles 12.1(b) and 12.1(c) notifications, and thereby satisfy Article 12.2, but still act inconsistently with Article 12.1 because the relevant notifications were not made "immediately". Similarly, a Member could satisfy the Article 12.1 requirement of "immediate" notification, but act inconsistently with Article 12.2 if the content of its notifications was deficient. 

451. Therefore, even where the notifications under Articles 12.1(b) and 12.1(c) are made immediately, they would still be inconsistent with Article 12.2 if they did not contain "all pertinent information", including at a minimum the items listed in Article 12.2. A fortiori, when a Member entirely fails to make the requisite notifications under Articles 12.1(b) and 12.1(c), as the United States failed to do in this instance, a violation of Article 12.2 necessarily follows. The United States failed to provide any pertinent information, including the items listed in Article 12.2, to the Committee on Safeguards.

452. Therefore, the United States acted inconsistently with Article 12.2 of the Agreement on Safeguards.

3.2.10.3 Article 12.3 of the Agreement on Safeguards

453. Article 12.3 of the Agreement on Safeguards provides:

A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

454. Article 12.3 requires the Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to "allow for the possibility, through consultations, for holding a meaningful exchange on the issues identified". Information on the proposed measure "must be

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provided in advance of the consultations, so that the consultations can adequately address that measure".\textsuperscript{539}

455. The panel in \textit{Ukraine - Passenger Cars} found:

As these consultations are meant to be "prior consultations" on the proposed safeguard measure, they must precede the application of a safeguard measure. And since one of the stated objectives of these consultations is to allow for a review of the information provided under Article 12.2, the relevant information must have been provided in advance of the consultations. Moreover, the information whose review must be possible during the consultations is that which was "provided under paragraph 2 [of Article 12]".\textsuperscript{540}

456. That panel also clarified that, even if prior consultations are held, the exporting Members referred to in Article 12.3 must be provided with "all pertinent information identified in Article 12.2 prior to the consultations". Otherwise, the Member proposing to apply or extend a safeguard measure acts inconsistently with Article 12.3.\textsuperscript{541}

457. The United States provided no opportunity for prior consultations with the European Union, which is a Member with a substantial interest as exporter of the steel and aluminium products concerned.

458. The United States adopted the decisions to apply the safeguard measures without any prior request for consultations with exporting Members. On 16 April 2018, the European Union requested consultations with the United States.\textsuperscript{542} In that request for consultations, the European Union noted that the United States adopted the safeguard measures at issue without notifying the Committee on Safeguards of its decision to apply safeguard measures. It also noted that the European Union is a "major exporting Member of the products involved", and that it requests consultations under Article 12.3 of the Agreement on Safeguards with a view, \textit{inter alia}, "to exchange views and seek clarification regarding the proposed measures and reaching an


\textsuperscript{540} Panel Report, \textit{Ukraine - Passenger Cars}, para. 7.534.

\textsuperscript{541} Panel Report, \textit{Ukraine - Passenger Cars}, para. 7.537-7.538.

\textsuperscript{542} Committee on Safeguards, Communication from the European Union, Imposition of a Safeguard Measure by the United States on Imports of Certain Steel and Aluminium Products: Request for Consultations under Article 12.3 of the Agreement on Safeguards, G/SG/173, 16 April 2018 (Exhibit EU-46).
understanding on ways to achieve the objectives set out in Article 8.1 of the Agreement on Safeguards."543

459. The United States replied on 18 April 2018. In its communication, it confirmed that it did not submit notifications with respect to the Steel and Aluminium Proclamations, and stated its view that "there is no basis to conduct consultations under the Agreement on Safeguards with respect to these measures", because Article 12.3 of the Agreement on Safeguards does not apply. The United States stated that it was "open to discuss this or any other issue with the European Union", but not under the Agreement on Safeguards.544

460. As explained above, it is undisputed that the United States made none of the notifications to the Committee on Safeguards required by Article 12.1, and that it failed to provide the Committee on Safeguards with any pertinent information required by Article 12.2. Nevertheless, on 8 March 2018, the United States decided to apply the safeguard measures to imports of some Members as of 23 March 2018,545 and made further decisions regarding the application of those measures, including to the imports of the European Union, in subsequent Presidential Proclamations. This demonstrates that, by failing to provide an adequate opportunity for prior consultations, the United States acted inconsistently with Article 12.3 of the Agreement on Safeguards.

461. The fact that the European Union attempted to consult with the United States, in good faith but unsuccessfully, cannot affect that conclusion. First, the European Union's request for consultations under Article 12.3 was rejected by the United States; the statement of readiness to "discuss any issue" does not constitute an acceptance of consultations under Article 12.3. Second, even if the United States had accepted the European Union's request and engaged in consultations, those consultations would not have preceded the decision to apply the safeguard measure, and would have therefore in any event not complied with the Article 12.3 requirement to afford opportunity for "prior" consultations.546 Third, the United States failed to provide any information on the proposed measure, including in particular the

543  Exhibit EU-46, paras. 1, 3, 4, and 6.
544  Committee on Safeguards, Communication from the United States in Response to the European Union's Requests Circulated on 16 April 2018, G/SG/178, 19 April 2018, (Exhibit EU-45).
545  Proclamations 9704 (Exhibit EU-32) and Proclamation 9705 (Exhibit EU-16).
546  Panel Report, Ukraine - Passenger Cars, para. 7.534.
pertinent information the provision of which is required by Article 12.2, ahead of any consultations.

462. For these reasons, the United States acted inconsistently with Article 12.3 of the Agreement on Safeguards.

3.3. **Article XXI of the GATT 1994 is not available as a defence to justify inconsistencies with the Agreement on Safeguards**

463. The European Union does not wish to speculate whether the United States will invoke the GATT security exceptions as a defence to these violations of the Agreement on Safeguards. However, the European Union will briefly explain why Article XXI of GATT 1994 is not available as a defence to justify measures that are inconsistent with the Agreement on Safeguards, reserving the right to further develop its arguments should the United States raise this matter.

464. Similarly to Article XX, the text of Article XXI establishes that its provisions apply to "this Agreement", i.e. to the GATT 1994. When another covered agreement specifically cross-references Article XXI of GATT 1994 and incorporates these security exceptions by reference, then the Article XXI exceptions will also apply to that other agreement. The classic example is Article 3 of TRIMs Agreement, which expressly provides that "[a]ll exceptions under GATT 1994 shall apply", which clearly includes Article XXI of GATT 1994. Along the same lines, Article 24.7 of the Trade Facilitation Agreement (TFA) provides that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement".547

465. The European Union notes that the Agreement on Safeguards does not contain a similar provision, which would lead to the incorporation by reference of the security exceptions of the GATT 1994. Thus, the GATT 1994 security exceptions are not available to justify breaches of the Agreement on Safeguards.

466. To confirm such a conclusion it is useful to follow a standard "analytical approach" developed by the Appellate Body, which entails an agreement-by-agreement analysis that starts with the text of the covered agreement in question, while keeping in mind that the lack of an express textual reference to a particular enumerated provision is not dispositive in and of itself.548 This standard analytical approach is described in the Appellate Body's statement.

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547 The TFA entered into force on 22 February 2017.

548 Appellate Body Reports, *China – Rare Earths*, paras. 5.61-5.63.
that the specific relationship between provisions of different covered agreements must be:

ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments.549

467. At this stage, the European Union will only recall that in China – Publications the Appellate Body based its assessment on the wording of paragraph 5.1 of China's Accession Protocol, which states that:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, [...].550

468. The Appellate Body thus concluded that this specific language allows reliance upon the general exceptions.551

469. In contrast, in China - Raw Materials the panels552 and then the Appellate Body could not rely in the same way on the wording of paragraph 11.3 of China's Accession Protocol, which reads:

China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.553

470. The Appellate Body concluded that the lack of specific language in paragraph 11.3 means that the general exceptions are not available to China in that particular context.554 It further stated that this was the common intention of the Members.555 A similar conclusion was reached by the panels and the Appellate Body in China- Rare Earths.556

549 Appellate Body Reports, China – Rare Earths, para. 5.55.
552 Panel Reports, China - Raw Materials, para. 7.154.
554 Appellate Body Reports, China - Raw Materials, para. 306.
555 Idem, para. 293.
556 Appellate Body Reports, China – Rare Earths, paras. 5.73 - 5.74.
471. More recently, the Article 21.5 panel in *Thailand — Cigarettes (Philippines)* found that the general exceptions in Article XX of GATT 1994 are not applicable to the obligations in the Customs Valuation Agreement.557

472. It is up to the United States whether or not it wishes to invoke Article XXI of the GATT 1994 at all in this case and, should it wish to do so, to develop arguments taking into account the guidance provided by the Appellate Body in previous cases. In the European Union’s assessment, an analysis along the above lines confirms the conclusion that the GATT security exceptions are not available to justify breaches of the Agreement on Safeguards.

3.4. **In any event, the measures at issue are not justified by Article XXI of the GATT 1994**

473. The European Union refers to the section 4.2. on Article XXI of the GATT 1994.

4. **The measures at issue are inconsistent with certain provisions of the GATT 1994 and are not justified by Article XXI of the GATT 1994**

4.1. **The measures at issue are inconsistent with certain provisions of the GATT 1994**

4.1.1. **Articles II:1(a) and(b) of the GATT 1994**

474. Article II:1(b) first sentence of the GATT 1994 provides that:

>The products described in Part I of the Schedule relating to any [Member], which are the products of territories of other [Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

475. Previous panels have shed light on the meaning of "ordinary customs duties". For instance, in *India - Additional Import Duties*, the panel noted that "the term 'ordinary' in the phrase 'ordinary customs duties' (...) is defined as meaning 'occurring in regular custom or practice; normal, customary, usual' or 'of the usual kind, not singular or exceptional'".558 Further guidance on this concept is offered by the panel in *Dominican Republic - Safeguard Measures*:

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The expression "ordinary customs duties" in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute "customs duties" in the strict sense of the term (*stricto sensu*); this expression does not cover possible extraordinary or exceptional duties collected in customs.559

476. One may distil from the case-law what features may or may not be seen as guiding criteria on this matter. It is neither the form, nor "the fact that the duty is calculated on the basis of exogenous factors, such as the interests of consumers or of domestic producers".560 Indeed, "ordinary customs duties" may take different forms. In addition, the time such duties are collected or paid (e.g. at the time of importation) is not decisive with regard to their legal characterization as customs duties, as opposed to internal charges.561

477. What matters in determining whether a charge is a customs duty is whether the obligation to pay that charge accrues due to the importation or due to an internal event (e.g. sale).562

478. However, such a detailed analysis is not necessary in the present case. The additional customs duties instituted by the United States on steel and aluminium products from the European Union are *ad valorem* duties imposed because of importation, which is the "standard" example of ordinary customs duties.

479. This is confirmed by the way in which the duties were imposed under United States’ municipal law.563 The steel and aluminium measures refer to Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), which “authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.”564 This legislation

559  Panel Report, *Dominican Republic - Safeguard Measures*, para. 7.85.
561  Appellate Body Reports, *China - Auto Parts*, para. 162.
562  Appellate Body Reports, *China - Auto Parts*, para. 162.
563  Thus, the Panel in *India — Iron and Steel Products* assessed “the operation of measures under domestic law” as one aspect in the analysis of whether they constitute ordinary customs duties. Panel Report, *India — Iron and Steel Products*, para. 7.40.
564  Proclamation 9704 (Exhibit EU-32), para. 6 and chapeau of the operative part.; Proclamation 9710 (Exhibit EU-33), para. 14 and chapeau of the operative part; Proclamation 9739 (Exhibit EU-34), para. 9 and chapeau of the operative part; Proclamation 9758 (Exhibit EU-35), para. 8 and chapeau of the operative part.
governs ordinary customs duties. Accordingly, the increased duties imposed through those measures are inscribed into the HTSUS, just like all other ordinary customs duties. Indeed, when amending various paragraphs of HTSUS and its accompanying notes, the Annexes to the steel and aluminium Presidential Proclamations repeatedly explain that what is being amended is the “ordinary customs duty treatment” of the products at issue.565

480. Once it is established that a duty is an ordinary customs duty within the meaning of Article II:1(b), it is then to be determined whether those customs duties are in excess of those set forth and provided in that Member’s Schedule. If so, those duties are inconsistent with Article II:1(b). It is not necessary, for that purpose, to demonstrate that excessive duties have actually been levied, or for example what their effect is on trade volumes.566

481. In the present case the bound duties provided in the United States’ Schedule for the steel and aluminium products at issue are 0%,567 while the duties imposed through the Presidential Proclamations are 25% ad valorem for steel products and 10% ad valorem for aluminium products. Therefore, the United States has not exempted the imports of those products from ordinary customs duties in excess of those provided in its Schedule, inconsistently with Article II:1(b) of the GATT 1994.

482. Article II:1(a) of the GATT 1994 provides that:

Each [Member] shall accord to the commerce of the other [Members] treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

483. This provision requires WTO Members to provide the other Members a treatment at least as favourable as the one foreseen in their Schedule.

484. The Appellate Body stated with regard to the relationship between Articles II:1(a) and Article II:1(b) of the GATT 1994 that:

565  See, for example, Proclamation 9740 (Exhibit EU-18), Annex, A.1 and A. 3; Proclamation 9739 (Exhibit EU-34), Annex A.1.

566  Panel Report, Russia — Tariff Treatment, para. 7.18.

567  Exhibit EU-42.
Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule.\textsuperscript{568}

485. Thus, whenever an applied tariff exceeds the binding in a Member's Schedule and is declared incompatible with the first sentence of Article II:1(b), such a tariff would also amount to a less favourable treatment within the meaning of Article II:1(a) of the GATT 1994.\textsuperscript{569}

486. Consequently, once a violation of Article II:1(b) has already been demonstrated, it will automatically follow that the measure at issue also constitutes a violation of Article II:1(a).\textsuperscript{570}

487. In the present case the European Union has already demonstrated that the additional customs duties imposed by the United States on steel and aluminium products from the European Union and other Members are inconsistent with Article II:1(b). Consequently, the United States also acted inconsistently with Article II:1(a) of the GATT 1994.

4.1.2. Article XI:1 of the GATT 1994

488. Article XI:1 of GATT 1994, under the title "General Elimination of Quantitative Restrictions" provides:

   No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

489. Previous panel and Appellate Body reports are helpful in understanding the meaning of "restrictions" in Article XI:1. Those findings were constantly based on the design, architecture and revealing structure of the measure at issue considered in its relevant context.\textsuperscript{571} Panels applied a legal test considering the

\textsuperscript{568} Appellate Body Report, Argentina—Textiles and Apparel, para. 45.
\textsuperscript{569} Appellate Body Report, Argentina—Textiles and Apparel, para. 47.
\textsuperscript{570} Panel Report, EC—IT Products, para. 7.1504.
\textsuperscript{571} Appellate Body Report, Argentina – Import Measures, para. 5.217, referring to Appellate Body Reports, China – Raw Materials, paras. 319-320.
implications on the competitive situation of an importer. It is not required to conduct an analysis of the actual impact of the measure on trade flows.\footnote{Panel Report, \textit{Colombia – Ports of Entry}, para. 7.240, Panel Report, \textit{Argentina – Import Measures}, para. 6.451.}

490. Indeed, the Appellate Body has constantly held, in the context of other key GATT provisions, that an analysis of the actual effects on trade is neither determinative nor necessary for the respective legal analysis. The purpose of provisions such as the national treatment and MFN provisions is to ensure "equality of competitive conditions between imported and like domestic products",\footnote{Appellate Body Report, \textit{Canada – Periodicals}, p. 18.} "to preserve the equality of competitive opportunities for like imported products from all Members".\footnote{Appellate Body Report, \textit{EC – Seal Products}, para. 5.87.}

491. As indicated by its very title, "General Elimination of Quantitative Restrictions", Article XI relates to prohibitions and restrictions that limit the quantity of an imported (in this case) product. The word "restrictions" suggests that Article XI:1 is applicable to conditions that are "limiting" or have a "limiting effect".\footnote{Panel Report, \textit{India – Quantitative Restrictions}, para. 5.128; Panel Report, \textit{India – Autos}, para. 7.265.}

492. The import adjustments at issue in the present proceedings impose, \textit{inter alia}, quantitative restrictions (quotas).

493. With regard to steel products from South Korea, Proclamation 9740 (30 April 2018) exempts the imports of steel from the import adjustments at issue, on the basis of a "range of measures" agreed with South Korea, including a "quota that restricts the quantity of steel articles imported into the United States from South Korea."\footnote{Para. 4; paras. (1)-(2); Annex.}

494. With respect to steel products from Argentina and Brazil, Proclamation 9759 implements the agreement between the respective countries by introducing quotas or "quantitative limitations" on their import to the United States.\footnote{Paras. (2)-(6); Annex.} The quotas are laid down in detail in the Annexes to the relevant Proclamations.\footnote{See also section 2.5.}

495. Aluminium imports from Argentina and Australia were likewise exempted from the additional duties on the basis of an agreed "range of measures", including measures to "[restrain] aluminium articles exports to the United States" from...
those countries. With respect to aluminium products from Argentina, Proclamation 9758 implements this agreement by introducing "quota treatment" or "quantitative limitations" on their import to the United States. The quotas are laid down in detail in the Annexes to the relevant Proclamations.

496. Thus, the violation of Article XI:1 of the GATT 1994 can very easily be established, as the respective measures constitute prohibitions or restrictions on imports or exports, which have limiting effects.

4.1.3. Article I:1 of the GATT 1994

497. Article I:1 of the GATT 1994 provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

498. Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision:

- the measure at issue falls within the scope of application of Article I:1;
- the imported products at issue are "like" products within the meaning of Article I:1;
- the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and
- the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.

579 Proclamation 9758 (Exhibit EU-35), paras. 5, (1)-(2); Annex.
580 See paras. (2), (4), (6) and (7); Annex, A.3.
581 See also section 2.6.
499. The Appellate Body in Canada – Autos discussed the object and purpose of Article I:1 and reasoned as follows:

Tho[e] object and purpose [of Article I] is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.582

500. Similarly, in EC – Seal Products, the Appellate Body noted that the fundamental purpose of Article I:1 is "to preserve the equality of competitive opportunities for like imported products from all Members".583

501. The measures at issue impose customs duties of 25% on steel products and 10% on aluminium products from the European Union and other Members. Thus, they are textbook examples of measures that are covered by Article I:1: customs duties imposed on or in connection with importation within the meaning of Article I:1.

502. With respect to the likeness test, it is well established in WTO case-law that measures distinguishing between goods solely on the basis of national origin satisfy the "like product" requirement.584 In the present case the products at issue receive a certain tariff treatment solely on the basis of their origin, for example because they are produced in the European Union or in another WTO Member.

503. Indeed, where a Member draws an origin-based distinction, a comparison of specific products is not required and it is not necessary to examine the various likeness criteria – such as, physical properties, end-uses and consumers’ tastes and habits.585

504. Thus, it follows that the condition pertaining to the likeness of the products is also satisfied as the United States de jure distinguishes between different products solely based on their origin.

582 Appellate Body Report, Canada – Autos, para. 84.
583 Appellate Body Report, EC – Seal Products, para. 5.87.
585 Panel Report, Turkey – Rice, para. 7.214 and the cases cited therein.
505. In order to establish a violation of Article I:1, there must be an advantage of the type covered by Article I:1, which is not accorded immediately and unconditionally to all "like products" of all WTO Members.586

506. The term "advantage" within Article I:1 of the GATT 1994 has been interpreted broadly by the Appellate Body.587 The panel in EC – Bananas III (Ecuador) considered that "advantages" within the meaning of Article I:1 are those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins.588 Thus, such advantages affect the commercial opportunities in such a way as to create "more favourable competitive opportunities" for products of a certain origin. This is in line with the approach taken in respect of Article III of GATT 1994.

507. Article I:1 thus prohibits discrimination among like imported products originating in, or destined for, different countries, by protecting expectations of equal competitive opportunities for like imported products from all Members. Accordingly, an inconsistency with Article I:1 is not contingent upon the actual trade effects of a measure.589

508. In the present case the imposition of additional customs duties of 25% on steel and 10% on aluminium from the European Union creates more favourable competitive opportunities on the US market for products of origins other than the European Union, namely for products from countries that were exempted from the additional duties on steel and aluminium and have chosen instead a quota regime. In the case of those countries, quotas or other import restrictions were mutually agreed with the United States, which means that within those quotas, or as long as the other relevant conditions for the exemption are respected, the customs duties continued to be zero.

509. In effect, countries qualifying for country exemptions are able to choose the US import regime for their goods: either the quota or the tariff, which confers them an advantage within the meaning of Article I:1.

510. The Presidential Proclamations confer an advantage on imports from WTO Members that are eligible for a country exemption. The Proclamations provide that the United States is willing to “discuss” with any country with which it has

587 Appellate Body Report, Canada – Autos, para. 79.
588 Panel Report, EC – Bananas III (Ecuador), para. 7.239.
589 Appellate Body Report, EC – Seal Products, para. 5.87.
“a security relationship” “alternative ways” to address the national security impact of imports from that country. If the United States and another country “arrive at a satisfactory alternative means”, the United States may exempt imports from the other country from the tariffs.590

511. The United States has reached agreement on “alternative means” with several countries. Under these agreements, the United States has been willing to grant imports from the qualifying countries with an exemption from the tariffs. Such exemptions have been agreed with Argentina, Australia, Brazil, and Korea.591 In those cases the United States offered an exemption from tariffs in return for the acceptance of a quota. Pursuant to these quota, the steel and/or aluminium imports from these three countries are subject to product-specific annual quota levels, which differ for each of these countries. This choice has important consequences for the competitive conditions that apply to goods imported from the qualifying countries. The imposition of tariffs normally raises prices for goods subject to that tariff. However, when qualifying goods are imported under a quota, they do not face the tariff. As a result, qualifying goods can be sold at a lower price, leading to improved sales opportunities for those sales, or they can be sold at a higher price in line with the price of goods paying the tariff, leading to higher margins.

512. Finally, the advantage that certain other countries enjoy (e.g. the possibility to choose between a quota and a tariff) is not extended immediately and unconditionally to like steel and aluminium products from all WTO Members, including to the European Union. Indeed, the products at issue from the European Union are subject to 25% and 10% ad valorem customs duties. The advantage afforded to qualifying countries is premised on non-qualifying countries having no choice: imports from non-qualifying countries face tariffs of 10% or 25%, respectively. This fact means that qualifying countries can decide whether their goods would benefit from being subject to the same import regime (tariffs), or a different import regime (quotas), as like goods from non-qualifying countries.

513. In light of the above, a violation of Article I:1 of the GATT 1994 can be clearly established.

4.1.4. Article X:3(a) of the GATT 1994

590  Proclamation No. 9704 (Exhibit EU-32), para. 8; Proclamation No. 9705 (Exhibit EU-16), para. 9.
591  Proclamation No. 9740 (Exhibit EU-32); Proclamation No. 9758 (Exhibit EU-35); Proclamation No. 9759 (Exhibit EU-19).
514. Article X of the GATT 1994 provides in its relevant part that:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, [...]  

3. (a) Each [Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

515. The European Union submits that the measures at issue are inconsistent with Article X:3(a) in two respects: with regard to product exclusions and with respect to country exemptions.

516. Thus, to demonstrate a violation of Article X:3(a), the European Union will establish the following elements:

(i) the measures at issue fall within the scope of laws, regulations, decisions and rulings of the kind described in Article X:1;

(ii) the United States "administers" the product exclusions and country exemptions with regard to steel and aluminium products; and

(iii) the administration of the product exclusions and country exemptions by the United States is not uniform, impartial or reasonable.592

517. With regard to product exclusions, first, the Presidential Proclamations with regard to steel and aluminium, including those that deal specifically with the product exclusion process,593 as well as the associated Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum into the United States (March Interim Final Rule)594, the Submissions of Exclusion Requests and

592  Panel Reports, Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama), para. 7.351.


594  Exhibit EU-24.
Objections to Submitted Requests for Steel and Aluminum (September Interim Final Rule)\textsuperscript{595} constitute laws, regulations, judicial decisions and administrative rulings of the kind described in Article X:1.

518. For instance, Proclamation 9705, issued on 8 March 2018 provides that:

The Secretary, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the United States Trade Representative (USTR), the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and such other senior Executive Branch officials as the Secretary deems appropriate, is hereby authorized to provide relief from the additional duties set forth in clause 2 of this proclamation for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and is also authorized to provide such relief based upon specific national security considerations. Such relief shall be provided for a steel article only after a request for exclusion is made by a directly affected party located in the United States. If the Secretary determines that a particular steel article should be excluded, the Secretary shall, upon publishing a notice of such determination in the Federal Register, notify Customs and Border Protection (CBP) of the Department of Homeland Security concerning such article so that it will be excluded from the duties described in clause 2 of this proclamation. The Secretary shall consult with CBP to determine whether the HTSUS provisions created by the Annex to this proclamation should be modified in order to ensure the proper administration of such exclusion, and, if so, shall make such modification to the HTSUS through a notice in the Federal Register.\textsuperscript{596}

519. Indeed, these Presidential Proclamations and the respective Requirements are measures of general application, which are mandatory for the companies seeking to obtain product exclusions.

520. \textit{Second}, previous panels have interpreted the term "administer" as "putting into effect" or applying a legal instrument of the kind described in Article X:1,\textsuperscript{597} and may include administrative processes.

521. In the present case, the United States "administers" the product exclusions with regard to steel and aluminium products as per the provisions of the

\textsuperscript{595} Exhibit EU-25.

\textsuperscript{596} Proclamation 9705 (Exhibit EU-16), para. (3).

mentioned Requirements. Accordingly, the competent authority may grant or deny the requested exclusions through individual decisions addressed to each applicant.

522. Third, the obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members have to comply with them cumulatively. It means that a violation of any of the three obligations will lead to a violation of the obligations under Article X:3(a). Each of these obligations should be assessed on a case-by-case basis.

523. According to research done for the US Congress, different companies complained about the intensive, time-consuming process to submit exclusion requests, as well as the lengthy waiting period to hear back from the US Department of Commerce, which exceeded the 90 days in some cases. Some considered as arbitrary the acceptances and denials, while all exclusion requests to that date were rejected when a U.S. steel or aluminium producer objected.

524. Furthermore, a study published in January 2019 by Mercatus had the following key findings:

1. Tariff exclusion requests are taking longer than expected to process. Commerce expected a 90-day waiting period, but 76 percent of steel requests have taken longer than that.

2. Over half of tariff exclusion requests are still pending a decision. The shutdown began December 22 and lasted over a month. As a result, the existing backlog and wait times are expected to increase.

3. The exclusion request process lacks transparency and firms are often left with uncertainty about the status of their claims. Documents are delayed several days before they are publicly posted, supporting documents have different identification numbers than

598 According to settled case-law a legal instrument can “administer” another legal instrument: While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument. Appellate Body Report, _EC – Selected Customs Matters_, para. 200.

599 Panel Reports, _China - Raw Materials_, para. 7.685.

the exclusion request, and there is no notification system in place.\textsuperscript{601}

525. In light of the above, it follows that the administration of the product exclusions by the United States was not uniform, impartial or reasonable. Thus, it can be established that the United States acted inconsistently with Article X:3(a) of the GATT 1994.

526. In addition, the administration of the country exemptions is not reasonable, due to the absence of any administrative process that applicant countries should follow in seeking an exemption, and due to the use of inherently vague and undefined eligibility criteria.

527. The United States fails to establish any administrative process by which applicant countries may seek a country exemption. The Presidential Proclamations merely state that “[a]ny country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country”. The Proclamations provide very few details on the conditions governing the grant of a country exemption.\textsuperscript{602}

528. If the President considers these conditions to be met, he ”may” grant the applicant country an exemption from the tariffs for its steel/aluminium goods.\textsuperscript{603}

529. The United States has granted certain countries temporary and/or permanent exemptions from its aluminium and steel tariffs, as mentioned in section 2.5.

530. Thus, the United States fails to set out the basic features of an administrative process. It does not indicate what information applicant countries should present, and to whom that information should be presented. There are no procedural rights provided for applicant countries, such as opportunities for an applicant to be heard, to respond to counterarguments, and to receive an explanation of a decision. There is no provision of administrative steps to be followed by the United States. Further, the United States does not explain the applicable criteria: “security


\textsuperscript{602} Proclamation 9704 (Exhibit EU-32), para. 8; Proclamation 9705 (Exhibit EU-16), para. 9.

\textsuperscript{603} Proclamation 9705, para. 8; Proclamation 9704, para. 8.
relationship”, “satisfactory alternative means”, and “no longer threaten to impair the national security”.604

531. The Presidential Proclamations constitute measures of general application “pertaining to ... rates of duty ... or to requirements, restrictions or prohibitions on imports or export” as described under Article X:1.

532. The United States’ administration of the country exemptions falls short of the “minimum standards for transparency and procedural fairness” that are required under Article X:3(a).605

533. In particular, the European Union notes the absence of any administrative process that applicant countries should follow in seeking an exemption and, the use of inherently vague and undefined eligibility criteria.

534. In the words of the Appellate Body in US – Shrimp, the United States’ undefined “process” is “singularly informal and casual”.606 Indeed, the defining feature of the US administration is the total absence of any kind of administrative process, which creates uncertainty for applicant countries.

535. The United States fails to provide a “formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it”, and to receive an explanation of a decision to grant/deny a request.607 Applicant countries are thereby deprived of the security and predictability that is intended to flow from the “minimum standards for transparency and procedural fairness” inherent in Article X:3(a).608

536. Furthermore, the uncertainty in the process for administering the country exemptions is exacerbated because the United States applies eligibility criteria that are “undefined and vaguely worded”.609 Thus, there is uncertainty both in terms of the process to be followed, and the criteria to be applied.

537. In light of the above, the United States’ administration of the country exemptions is unreasonable and thus inconsistent with Article X:3(a) of the GATT 1994.

604 Proclamation 9704 (Exhibit EU-32), para. 8; Proclamation 9705 (Exhibit EU-16), para. 9.
609 Panel Reports, China – Raw Materials, para. 7.744.
4.1.5. Article XIX of the GATT 1994, considered alone and in conjunction with each of the obligations in the Agreement on Safeguards that are the subject of the European Union’s other claims

538. Article XIX:1(a) of the GATT 1994 provides that:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a [Member] under this Agreement, including tariff concessions, any product is being imported into the territory of that [Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the [Member] shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

539. Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards together set out the conditions for applying a safeguard measure under the WTO Agreement and they apply cumulatively.610

540. The European Union has already explained that there are certain features that determine whether a measure can be properly characterized as a safeguard measure: first, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession and second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. Those features should be distinguished from the conditions that must be met in order for the measure to be consistent with Article XIX of the GATT 1994 and with the Agreement on Safeguards.

541. Thus, in order for a safeguards measure to be consistent with the provisions of Article XIX:1(a) several conditions should be met:

- two factual pre-requisites should be demonstrated before any safeguard may be applied: (a) the existence of unforeseen developments, and (b) the existence of one or several obligation(s) under the GATT 1994;

- then, several "independent conditions" that must also be established, including an increase in imports in such quantities and under such conditions as to cause or threaten to cause serious injury to domestic

610  Appellate Body Report, Argentina – Footwear (EC), paras. 86 and 89.
producers of like or directly competitive products and the existence of a "logical connection" between, on the one hand, the two factual pre-requisites and, on the other hand, the increase in imports of the subject product that is causing or threatening to cause serious injury to the domestic industry of the importing Member.\footnote{Panel Report, \textit{Indonesia - Iron or Steel Products}, para. 7.50.}

542. With regard to the two factual pre-requisites, the expression "unforeseen developments" means developments that were "unexpected" at the time the importing Member incurred the relevant GATT obligation.\footnote{Appellate Body Report, \textit{Argentina – Footwear (EC)}, para. 93.} The published report of the competent authority must demonstrate and not simply allege how these developments were unexpected.\footnote{Appellate Body Report, \textit{US – Lamb}, paras. 71-73, Panel Report, \textit{Argentina – Preserved Peaches}, para. 7.33.}

543. The Steel Report speaks of the fact that the global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy, as free markets globally are adversely affected by substantial chronic global excess steel production led by China.\footnote{Steel Report (Exhibit EU-15), p. 51} Similarly, the Aluminium Report refers to the global excess aluminium capacity, and in particular the rapid increase in production in China.\footnote{Aluminium Report (Exhibit EU-31), p. 15.}

544. However, the two reports stop short of demonstrating that the global excess steel and aluminium capacity amounts to "unforeseen developments" within the meaning of Article XIX:1(a).

545. Indeed, the United States failed to demonstrate the existence of unforeseen developments, as required by Article XIX:1(a) of the GATT 1994, since neither the Steel and Aluminium Reports, nor the relevant Presidential Proclamations imposing the adjustment measures on imports of steel and aluminium properly identify any events as constituting "unforeseen developments".

546. With regard to the steel measures, Proclamation 9705 indicates that the US Secretary of Commerce in its investigation considered the investigation of iron ore and semi-finished steel imports in 2001 but found the recommendations not to take any action in that previous investigation outdated "given the dramatic changes in the steel industry since 2001",\footnote{Appellate Body Report, \textit{US – Lamb}, paras. 71-73, Panel Report, \textit{Argentina – Preserved Peaches}, para. 7.33.}

\footnote{Panel Report, \textit{Indonesia - Iron or Steel Products}, para. 7.50.}
\footnote{Appellate Body Report, \textit{Argentina – Footwear (EC)}, para. 93.}
\footnote{Appellate Body Report, \textit{US – Lamb}, paras. 71-73, Panel Report, \textit{Argentina – Preserved Peaches}, para. 7.33.}
\footnote{Steel Report (Exhibit EU-15), p. 51}
\footnote{Aluminium Report (Exhibit EU-31), p. 15.}
including "the increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency."\textsuperscript{616} Moreover, the Steel Report describes global excess steel capacity as a “circumstance” that contributes to the weakening of the domestic economy.\textsuperscript{617} Similarly, the Aluminium Report refers to “massive foreign excess capacity for producing aluminum” as resulting in “aluminum imports occurring ‘under such circumstances’ that that they threaten to impair the national security”.\textsuperscript{618}

547. Even if one were to accept that the United States identified the global excess capacity in steel and aluminium sectors as an unforeseen development, the competent authority failed to demonstrate why such global excess capacity constitutes an “unforeseen development”. As explained by the panel in 
\textit{Argentina – Preserved Peaches}, in order to satisfy the requirement to demonstrate the existence of “unforeseen developments”, the competent authorities need to provide "as a minimum, some discussion […] as to why [such developments] were unforeseen at the appropriate time".\textsuperscript{619} However, the Steel and Aluminium Reports, as well as the relevant Presidential Proclamations do not provide the necessary explanations in that respect.

548. Moreover, neither the Steel and Aluminium Reports nor the relevant Presidential Proclamations identify or demonstrate the existence of the obligations incurred by the United States under the GATT 1994 that resulted in the increased imports allegedly causing serious injury to the domestic steel/aluminium industry. \textit{A fortiori}, those documents also fail to demonstrate the existence of a logical connection between the increased imports allegedly causing serious injury or threat of serious injury and the unforeseen developments and the obligations incurred under the GATT 1994.

549. In light of the above, by imposing the steel and aluminium measures at issue without demonstrating the existence of unforeseen developments and the obligations incurred by the United States under the GATT 1994, as well as

\textsuperscript{616} Proclamation 9705, (Exhibit EU-16) recital 3. Steel Report, (Exhibit EU-15) pp. 5 and 17.
\textsuperscript{617} Steel Report, (Exhibit EU-15) p. 51.
\textsuperscript{618} Aluminium Report (Exhibit EU-31), p. 15.
\textsuperscript{619} Panel Report, \textit{Argentina – Preserved Peaches}, para. 7.23.
the existence of a logical connection between the increased imports and the unforeseen developments and the obligations incurred under the GATT 1994, the United States acted inconsistently with Article XIX:1(a) of the GATT 1994.

550. Finally, the measures at issue are also inconsistent with Article XIX:1(a) of the GATT 1994 and several provisions of the Agreement on safeguards, in particular Articles 2.1 and 4.2(a) because the United States has applied those measures without having first determined that the products at issue “were imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions” as to cause or threaten to cause serious injury to the domestic industry, in accordance with those provisions. In this respect, the European Union refers to the relevant parts in section 3.2.

4.2. **The measures at issue are not justified by Article XXI of the GATT 1994**

4.2.1. **Article XXI is justiciable**

551. Article XXI is in the nature of an affirmative defence and it is up to the United States to raise it in the present dispute, should it consider it necessary to do so. The European Union will not second-guess the possible arguments that the United States may put forward, but only provide its preliminary views on the justiciability of the security exceptions.

552. The panel in *Russia – Traffic in Transit* confirmed the European Union’s understanding, expressed as a third party in those proceedings (and diametrically opposed to the position expressed by the United States), with regard to the jurisdiction of panels in cases where national security exceptions are raised as defences.

553. In order to ascertain whether it had jurisdiction, the panel first recalled that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction, one aspect of which is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction.

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554. The panel then recalled the provisions of Articles 1.1, 1.2, 7.2 and 7.3 of the DSU, which support the understanding\(^{622}\) that:

> Given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU.\(^{623}\)

555. In that case, the panel's evaluation of Russia's jurisdictional plea required it to interpret Article XXI(b)(iii) of the GATT 1994 in order to ascertain whether it is a self-judging provision.

556. That panel correctly found that there are objective elements in Article XXI(b) susceptible to judicial review. The discretion of the invoking Member is not unfettered. Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia in those proceedings.\(^{624}\) Thus, that panel concluded that:

> Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is "non-justiciable", to the extent that this argument also relies on the alleged totally "self-judging" nature of the provision.\(^{625}\)

557. Should the United States' position in the present dispute imply that any dispute raising questions of national security may fall outside the jurisdiction of WTO panels – more precisely, that it would be enough for the defending party to make an assertion invoking Article XXI of GATT 1994 in order to exclude the jurisdiction of a panel – the European Union adds the following observations.

558. First, Article XXI of GATT 1994 is an affirmative defence, which may be invoked to justify a measure that would be otherwise inconsistent with any of the obligations imposed by the GATT 1994. But it does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and

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XXIII of GATT 1994\(^{626}\). Nor do any of those rules provide any basis for arguing that Article XXI of GATT 1994, or any other provision of the covered agreements, is to be regarded as non-justiciable. The DSU contains no security exception and applies equally in respect of any provision of the covered agreements, subjecting these to the compulsory jurisdiction which the DSU has created. In turn, Article XXII of GATT 1994 applies “with respect to any matter affecting the operation of this Agreement”, while Article XXIII of GATT 1994 makes no distinction between different provisions of the GATT 1994.

559. Second, interpreting Article XXI of the GATT 1994 as a non-justiciable provision in this dispute would be inconsistent with the terms of reference of the Panel. Indeed, it is recalled that the present Panel has the standard terms of reference provided for in Article 7.1 of the DSU\(^{627}\), i.e.:

“To examine, in the light of the relevant provisions [in the agreement cited by the parties to the dispute] the matter referred to the DSB […]”.

560. Those terms of reference are, of course, in no way conditioned upon one of the Parties making, or not making, arguments on the basis of particular provisions of the covered Agreement. It would be plainly contrary to those terms, and to Article 7.1 of the DSU, for the Panel to decide not to examine any part of the matter referred to by the European Union in light of the provisions cited by the European Union. However, this is precisely what the Panel would do were it to agree with the US position that the mere invocation of Article XXI of the GATT by the United States prevents the Panel from examining the matter before it.

561. Article 7.2 of the DSU further specifies that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute”.

562. Thus, the present dispute differs from the case under the GATT 1947 opposing the United States and Nicaragua, where the terms of reference explicitly

\(^{626}\) In fact, the Decision concerning Article XXI of the General Agreement of 30 November 1982 recognizes explicitly, in paragraph 2, that “[w]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.” (L/5426). This includes the right to have recourse to dispute settlement procedures.

\(^{627}\) The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS548/14 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements. (WT/DS548/15).
precluded that panel from examining or judging the validity or motivation for the invocation of Article XXI(b)(iii) by the United States.628

563. Third, interpreting Article XXI of the GATT 1994 as a non-justiciable provision would make it impossible for the Panel to comply with its obligation under Article 11 of DSU to “make an objective assessment of the matter before it”. Indeed, the “matter” before the Panel must also include in this case any defence under Article XXI of GATT 1994 raised by the United States.

564. Fourth, interpreting Article XXI of the GATT 1994 as a non-justiciable provision would undermine one of the fundamental objectives of the DSU, as expressed in Article 3(2) of DSU:

The dispute settlement system is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law [...].

565. Fifth, Article 23 of the DSU mandates Members to have recourse to the rules and procedures of the DSU, inter alia, when they seek redress of a violation of obligations under the covered agreement. The same article prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to dispute settlement in accordance with the DSU. Should Article XXI of the GATT 1994 escape a panel’s jurisdiction, no determination of a violation could be made in accordance with the DSU, following the mere invocation of Article XXI of the GATT 1994 by the defending party. In other words, a WTO Member, rather than the WTO adjudicating bodies, would be deciding unilaterally the outcome of a dispute. This would run against the objectives of the DSU as reflected in Article 23 of DSU.

566. Finally, by way of illustration, the European Union would like to point out that there are fundamental differences in the way that security exceptions are drafted in the GATT and in other international agreements.

567. For instance, an express text that comes very close to the idea of non-justiciability can be found in the KORUS FTA. In this respect, footnote 2 provides that:

For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.629

568. There is no such text agreed by the WTO Membership in any of the covered agreements.

569. For the reasons submitted above, the European Union considers that Article XXI of GATT 1994 is a justiciable provision and that its invocation by a defending party does not have the effect of excluding the jurisdiction of a panel.

4.2.2. General remarks on the US' possible invocation of Article XXI

570. The European Union took note of the United States' declarations in the DSB meetings of October and November 2018. A careful reading of those declarations confirms the true nature of the measures at issue as safeguards measures.

571. Indeed, the measures at issue suspend at least one GATT obligation. This suspension is so obvious that it is implicitly confirmed by the United States when feeling the need to refer to an alleged justification under Article XXI. A reference to justifications such as security exceptions is not needed if there is no breach of at least one obligation in first place:

The United States has made clear that it considers the Section 232 measures necessary for the protection of its essential security interests, given the key roles steel and aluminum play to our national defense.

The U.S. measures are therefore justified under Article XXI of the GATT 1994 and not subject to review by a WTO panel. [...] 

Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by the European Union. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States. We therefore do not see any reason for this matter to proceed further.630

629 Free Trade Agreement between the United States of America and the Republic of Korea, Chapter 23 (Exceptions) (Exhibit EU-50), footnote 2.

630 Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 21, 2018 (Exhibit EU-44).
572. Furthermore, from the said DSB statements by the United States it follows that the measures at issue have "a demonstrable link to the objective of preventing or remedying injury" to the US domestic industries:

As noted under the previous item, WTO Members are well aware that the steel and aluminum sectors have been suffering under conditions of massive excess capacity.

WTO Members have recognized that this situation is untenable, and has resulted in a crisis for the global economic system. [...] We agree with the European Union that overcapacity “poses an existential threat” and “requires urgent solutions.” [...] Because the United States understands “existential” as “relating to existence” and “urgent” as “requiring immediate action,” we view the EU’s diagnosis as, in fact, supporting the U.S. actions on steel and aluminum.631

573. Thus, what the United States is describing in its DSB statements is that it suspended at least a GATT obligation because of its objective to prevent or remedy injury to the US steel and aluminium industries. Such a situation meets the defining characteristics of a safeguard measure and cannot be properly characterized as a measure falling under Article XXI of the GATT 1994.

574. In this context, the European Union notes the striking similarities between the position of the United States with regard to steel and aluminium products and the position of Sweden with regard to certain footwear products in 1975, asserting a similarly expansive reading of Article XXI under which an industry providing boots to the military could be protected with no possibility of review under the provisions of the GATT. At the time, many GATT contracting parties, including the United States, were vocal in arguing that such a position is untenable because unilateral assertions cannot suffice to meet the objective (and reviewable) conditions of Article XXI. In stark contrast to its position in these proceedings, it was recorded that "the US did not consider the Swedish measures sufficiently motivated and called for a date when the measures were to be repealed."632

631  Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018 (Exhibit EU-43)

632  Sweden: Notes from the GATT Council meeting of 31 October 1975, Swedish original with English translations of relevant sections (Exhibit EU-51).
575. Indeed, the GATT security exceptions were never intended to justify protectionist measures, but only to cater for the essential security interests of the invoking Member.

576. The European Union does not intend to second-guess which particular part of Article XXI the United States may be invoking and thus we will not get at this stage into the details of the Article XXI legal test. The European Union will further develop Article XXI arguments only after receiving the US submissions.


577. In addition to the claims against the import adjustments on steel and aluminium products, the European Union also makes claims against a distinct measure: Section 232, as repeatedly interpreted by the United States’ authorities, in particular during the administration of President Donald J. Trump (Section 232 as interpreted).

578. This measure provides for the United States’ Secretary of Commerce and President to determine, ostensibly because of an alleged threat to the national security of the United States, that additional import duties or other trade restrictive measures be imposed because imports of certain products (such as steel or aluminium), in particular quantities and/or at particular prices, cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable.

579. Before describing this measure at issue, the European Union underscores that it is not making claims against Section 232 writ large, i.e. against Section 232 as a piece of legislation. Rather, the measure at issue, as described below, is a particular interpretation of Section 232 that has been followed in the recent past, and is presently followed, by the authorities of the United States. That particular interpretation, to the extent that it is followed, gives rise to a number of inconsistencies with the covered agreements.

5.1. **SECTION 232 AS INTERPRETED: A DESCRIPTION OF THE MEASURE AT ISSUE**

580. The central element of Section 232 as interpreted, which also distinguishes it from other interpretations of Section 232 as a piece of legislation, is that
it provides for the United States’ authorities to impose trade-restrictive measures on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable.

581. The European Union will first demonstrate that this particular interpretation of Section 232 has recently been followed, and continues to be followed, by the authorities of the United States; second, that this interpretation does not necessarily follow from the Section 232 legislation, and that it had not been followed previously, such that it represents a break from the past.

5.1.1. The authorities of the United States have followed and continue to follow this interpretation of Section 232

582. The authorities of the United States have steadfastly followed this interpretation of Section 232 in the recent past, specifically during the administration of President Donald J. Trump, and they continue to do so. This is demonstrated by the elements below.

5.1.1.1 Policy statements

583. First, the fact that this interpretation of Section 232 is followed is clear in numerous official policy statements of the President of the United States, as well as in statements by other high-ranking officials.

584. For example, President Trump has repeatedly explained the rationale behind the import adjustments on steel and aluminium as “bringing steel and manufacturing back”, “using American steel”, “using American labour”, “building in our country, with American workers and with American iron, aluminium and steel”, improving the “numbers on jobs and the economy”, “protecting and building our Steel & Aluminium industries”, fighting against “dumping”, reducing the trade deficit of the United States (arguing that the United States is “losing many billions of dollars on trade with virtually every country it does business with”), achieving negotiating leverage (“The European Union, wonderful countries who treat the U.S. very badly on trade, are complaining about the tariffs on Steel & Aluminum. If they drop their horrific barriers & tariffs on U.S. products going in, we will likewise drop ours. Big Deficit. If not, we Tax Cars etc. FAIR!”), as well as increasing US
Government revenue and employment in the United States ("Lots of money coming into U.S. coffers and Jobs, Jobs, Jobs!").

585. He also explained that the steel and aluminium import adjustments are successful because investments are made in the steel and aluminium sector, plants are being opened, US workers are being employed, and “big dollars are flowing into our Treasury”. Therefore, President Trump concluded that tariffs on steel and aluminium are working well because other countries are “paying for the privilege of raiding the great wealth of our Nation”, which is the best way “to max out our economic power” and “MAKE AMERICA RICH AGAIN”.

586. In an interview with FOX Business on 22 March 2019, President Trump further explained the rationale of the Section 232 investigation into the imports of automobiles and automobile parts. When asked whether automobiles and automobile parts pose a national security risk, he stated:

“Well, no. What poses a national security risk is our balance sheet. We have to have -- we need a strong balance sheet. Otherwise you don't have national security. So people are always saying, "Well, what do cars have to do with national security?" When Germany is sending cars and we virtually don't tax them, and yet they won't accept our cars, namely the European Union -- which frankly, treats us as badly as China. [...] I'll tell you what the end game is. They'll build their plants in the United States and they have no tariffs.”

587. Similarly, U.S. Secretary of Commerce Wilbur Ross explained that, under the interpretation of Section 232 followed by the Trump administration, national security is “broadly defined to include the economy, to include the impact on employment, to include a very big variety of things.” Under this interpretation, in the words of Secretary Ross, “economic security is military security”. In other words, the Trump administration considers that threats or impairments to “economic security”, i.e. to the welfare of certain domestic industries, in themselves constitute threats or impairments to national security sufficient to invoke Section 232.

588. Along the same lines, White House National Trade Council Director Peter Navarro explained: "All we are trying to do here with the 232 tariffs is to provide our domestic industries an opportunity to earn a decent rate of

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633 Twitter statements by President Donald J. Trump (Exhibit EU-6).
634 Twitter statements by President Donald J. Trump (Exhibit EU-6).
return and invest in this country.” (emphasis added) He added that the Trump administration uses Section 232 to prevent countries from “running very large trade surpluses... at the expense of jobs in this country.”636

589. Rather than national security concerns, these statements reflect simply a desire to protect domestic commercial producers, increase domestic investment and employment, increase governmental revenue, and achieve other trade and economic objectives.

5.1.1.2 The import adjustments on steel and aluminium

590. This interpretation of Section 232 is also reflected in the import adjustments on steel and aluminium. Thus, for the purposes of the USDOC’s investigations into those imports, “national security” was defined as referring to the “general security and welfare of certain industries, beyond those necessary to satisfy national defence requirements, which are critical to minimum operations of the economy and government.”637 In both investigations, Section 232 was interpreted as referring to criteria for the imposition of restrictive measures which are divided into two “equal parts” independent of each other: one referring to “national defence” requirements, and the other to “the broader economy”.

591. Even with regard to the first set of criteria referring to national defence, the investigation reports interpret Section 232 as essentially providing for the protection of the viability of domestic commercial production, and not production of defence-related products or even production for defence-related purposes. Thus, the reports interpret the Section 232 criteria related to national defence as allowing for restrictive measures in order to enable the steel and aluminium sector to attract “commercial (i.e. non-defence) business.” 638

592. Moreover, the reports draw no conclusions from important indicators that the import adjustments at issue are wholly unnecessary for national defence purposes: for example, the miniscule proportion of even domestic US

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638 Steel Report (Exhibit EU-15), appendix H, p. 3 and 4. Aluminium Report (Exhibit EU-31), p. 34. (The “pace of expansion of aluminum use in defense and commercial markets may be slower than it might be were it not for the collapse of aluminum prices and loss of revenue at U.S. aluminum producers. At this time most aluminum companies cannot afford to fund research.”)
production of steel and aluminium that is required for national defence, 639 successful ongoing DoD funding programs for those sections of the steel industry that are important for national defence needs, 640 and Congress' decision to reduce the aluminium stockpile to zero. 641

593. With regard to what is referred to as the second set of criteria (the “broader economy”), the investigation reports interpret Section 232 as a straightforward consideration of “domestic production and the economic welfare of the United States.” 642

594. For example, they characterise as “critical industries” or “critical infrastructure sectors” numerous activities that can only reasonably be described as run-of-the-mill commercial production. Some of the listed examples of such “critical infrastructure sectors” are kitchen equipment for commercial facilities, radio/TV antenna masts, building doors and barriers for the financial services industry, canned goods, fence gates, furniture and shelving in government facilities, boats, 643 aluminium cable used in commercial office buildings, residential power meters and breaker boxes, 644 the manufacture of automobiles, buses, freight and subway cars, boats and ships, tractor trailers, and related components 645, canning materials and foils for food packaging, crop irrigation piping, 646 door, wall, and door framing; roofs and awnings; architectural trim; utility cabinets; air conditioning systems, 647 electronics cabinets, water conduits, drainage systems, commercial wiring, green houses, storage buildings, heat sinks in IT systems etc. 648 This description fails to meaningfully identify any “critical infrastructure” that one could distinguish from the mere objective of protecting domestic commercial production.

639 Steel Report (Exhibit EU-15), p. 23 and appendix H, p. 4. Aluminium Report (Exhibit EU-31), pp. 24-25. See also p. 57, specifically on downstream producers: "commercial/industrial sectors account for most of their sales"; "the defense-related production of these companies makes up a small portion of their business".
640 Steel Report (Exhibit EU-15), appendix H, p. 3.
641 Aluminium Report (Exhibit EU-31), fn 32.
643 Steel Report, Appendix I.
645 Aluminium Report, p. 37.
646 Aluminium Report, p. 37.
647 Aluminium Report, p. 37.
648 Aluminium Report, table 7, p. 38.
595. The interpretation of Section 232 as providing simply for the protection of domestic commercial production from competition from imports does not stop even at this extremely expansive interpretation of “critical infrastructure”. The steel and aluminium reports confirm that, beyond national defence needs and beyond critical infrastructure needs, they are “focused” on a larger enquiry, expressly not reached by Section 232 determinations in the same industry prior to the Trump administration: “whether imports have harmed or threaten to harm U.S. producers writ large,” addressing the domestic industry’s “commercial and industrial customer sales,” helping domestic industry to “have a strong aluminum manufacturing capability and commercial product portfolio (e.g., automotive, industrial, packaging)” and more generally ensuring “economic stability.”

596. On the basis of this interpretation, the steel and aluminium reports ultimately base their finding that imports are “weakening the internal economy” of the United States simply on the “impact of foreign competition on the economic welfare of individual domestic industries.”

5.1.1.3 The Section 232 investigation into imports of automobiles and automobile parts

597. This interpretation is also the basis for the United States’ decision to conduct a Section 232 investigation into imports of automobiles and automobiles parts. This investigation was initiated by Secretary of Commerce Wilbur Ross on 23 May 2018, “following a conversation with President Donald J. Trump”. On 17 February 2019, Secretary Ross formally submitted to President Donald J. Trump the results of the investigation.

598. At the time of writing, neither the investigation report nor any subsequent decision have been published. Nevertheless, it is clear from all the available

649 Steel Report (Exhibit EU-15), fn 22.
650 Steel Report, p. 25.
651 Aluminium Report (Exhibit EU-31), p. 40.
652 Aluminium Report, p. 23.
654 "Statement from the Department of Commerce on Submission of Automobiles and Automobile Parts Section 232 Report to the President", 17 February 2019, (Exhibit EU-54).
information that the initiation and conduct of this investigation are based on the interpretation of Section 232 that is at issue.

599. Thus, Secretary Ross explained that the reason for the investigation is that “imports from abroad have eroded our domestic auto industry”. The USDOC’s statement at the time of the initiation further explained that the investigation is aimed at assessing the declining employment in motor vehicle production in the United States, as well as the declining share of United States automotive industry in “global research and development”.655

600. In its Notice of Request for Public Comments and Public Hearing,656 USDOC listed a number of specific requests for information on topics that mirror similar requests in the steel and aluminium investigations, which further show the interpretation of Section 232 followed by USDOC. The majority of these topics do not refer to national security issues at all:

“[…]

• The existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce automobiles and automotive parts;
• The growth requirements of the automobiles and automotive parts industry to meet national defense requirements and/or requirements to assure such growth, particularly with respect to investment and research and development;
• The impact of foreign competition on the economic welfare of the U.S. automobiles and automotive parts industry;
• The displacement of any domestic automobiles and automotive parts causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;
• Relevant factors that are causing or will cause a weakening of our national economy; […]”

601. In his opening remarks at the investigation hearing, Secretary Ross further explained the interpretation of Section 232 underlying the investigation. He stated, for example, that “President Trump understands how indispensable the U.S. auto industry is to our economy and the “close relation” of our economic strength to national security”. An investigation into the automobile industry is warranted, in particular, because that industry “drives American

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innovation”, “provides the backbone of our industrial economy” and “supports millions of Americans with high-paying jobs”. Only as an ancillary point, a reference is made to “leading edge technologies” in the automobile sector that are allegedly related to national security. The ultimate question for the investigation, as explained by Secretary Ross, was simply “whether government action is required to assure the viability of U.S. domestic production” of automobiles and automobile parts.657

602. President Trump himself has explained the rationale of the autos investigation as promoting domestic production and achieving leverage in trade negotiations, making no mention of national security issues. On 22 June 2018, he tweeted:

“Based on the Tariffs and Trade Barriers long placed on the U.S. & its great companies and workers by the European Union, if these Tariffs and Barriers are not soon broken down and removed, we will be placing a 20% Tariff on all of their cars coming into the U.S. Build them here!”658

603. A US Congressional Research Service report sheds light on the objectives of the Section 232 auto investigation: protecting domestic industry, as well as other trade-related objectives:

“The Section 232 investigation is a component of a broader agenda related to U.S. trade and the auto industry including: (1) expanding domestic auto manufacturing and domestic content in autos; (2) addressing bilateral trade deficits; and (3) reducing disparities in U.S. and trading partner tariff rates. At 2.5%, U.S. passenger auto tariffs are lower than some trading partners, including the European Union (EU), with auto tariffs of 10%. U.S. tariffs on light trucks, including pick-ups and sport utility vehicles, are much higher at 25%. President Trump has stated a desire to place a 25% tariff on auto imports.”659

604. This is echoed in a number of the comments received during the investigation. For example, the US Chamber of Commerce has argued that “no credible argument has been advanced that imports of autos and auto parts put at risk America’s national security.” Rather, they argue, the “true objective is to leverage this tariff threat in trade negotiations”, which is “an inappropriate and unlawful use” of Section 232.660

657 Opening Remarks at the Section 232 Hearing on Automobile and Automotive Parts Imports, 19 July 2018 (Exhibit EU-56).

658 President Trump’s Twitter statement of 22 June 2018 (Exhibit EU-57).


5.1.2. This interpretation of Section 232 is not required by the Section 232 legislation, and it departs from earlier interpretations

605. The interpretation of Section 232 that is at issue is not required by the Section 232 legislation. Moreover, in several ways it represents a break from past interpretations of Section 232.

606. First, the ordinary meaning of Section 232 legislation does not provide for the imposition of trade-restrictive measures on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable. Rather, Section 232 provides for a list of relevant criteria that must be "given consideration" by the Secretary of Commerce and the President for the purposes of Section 232, “in the light of the requirements of national security”, which are closely tethered to national defense and the “capacity of the United States to meet national security requirements.”

607. Factors such as the “close relation of the economic welfare of the Nation to our national security”, “the impact of foreign competition on the economic welfare of individual domestic industries”, and “weakening of our internal economy” are listed in a subsequent clause of Section 232, which states that such factors are only to be “further recognized” in the “administration of this section.”

608. Thus, the actual drafting of Section 232 strongly suggests that this is, at best, a secondary set of concerns to be “further” taken into account rather than serving as an independent basis for the imposition of trade-restrictive measures. This stands in stark contrast to the interpretation of Section 232 at issue. At the very least, the ordinary meaning of these provisions of Section 232 cannot be said to mandate the interpretation of Section 232 that is at issue.

609. Other factors also demonstrate that this measure departs in important respects from the way in which Section 232 was interpreted previously.

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661 Exhibit EU-1, section (d).
662 Exhibit EU-1, section (d).
610. First, as already explained, the Steel Report explains that it departs from earlier interpretations of Section 232. It states that “focused on the larger enquiry” that the Department of Commerce’s 2001 Report into certain steel imports “expressly did not reach” because it considered it to be beyond its remit: “whether imports have harmed or threaten to harm U.S. producers writ large.”

611. Second, in adopting both the steel and aluminium reports, the Department of Commerce adopted a new interpretation, rejecting the approach of prior USDOC Section 232 reports under which imports from reliable sources do not impair national security. Thus, the Steel Report explains that, compared to the “2001 Report or other prior Department reports”:

“To the extent that the 2001 Report or other prior Department reports under Section 232 can be read to conclude that imports from reliable sources cannot impair the national security when the Secretary finds those imports are causing substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports., the Secretary expressly rejects such a reading.”

612. Third, as mentioned before, the Aluminium Report further clarifies that it applied a different legal test than the 2001 Report, because it relied on a less strict legal standard (“threaten to impair” as opposed to “fundamentally threaten to impair”).

613. The fact that the interpretation of Section 232 at issue exists, i.e. that it is followed and applied by US authorities during the Trump administration, and the fact that it represents a break from the ordinary meaning of Section 232 and its past interpretation, are also recognised by numerous high-ranking members of the United States’ legislature. For example, US Senators Portman (former United States Trade Representative), Jones, Ernst, Alexander, Feinstein, Fischer, Sinema and Young reacted to that interpretation of Section 232 by introducing the bipartisan bill Trade Security Act, aimed at restricting the ability of the President to invoke Section 232 as a tool for economic protectionism. Announcing the bill, the Senators pointed out the need to “better align [Section 232] with its original intent as a trade remedy tool for the president and Congress to respond to genuine threats to national security”, prevent the “misuse of the section 232 statute to impose

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663 Steel Report (Exhibit EU-15), fn 22.
665 Aluminium Report (Exhibit EU-31), fn 15.
tariffs on automobiles and auto parts”, and “ensure [Section 232] is used only for true national security purposes.” Senator Feinstein stated that “Congress gave the president Section 232 authority to quickly respond to national security threats, not to pick political fights with our trading partners.” 666

614. Finally, the fact that this interpretation of Section 232, followed in particular during the Trump administration, breaks from past practice and past interpretations is also evident from the statistics on the application of Section 232. As already explained in the factual section, between 1962 and the Trump administration, the Secretary of Commerce had made a “positive” Section 232 determination in only nine instances, eight of which concerned petroleum and/or crude oil products, and the President only decided to take formal action under Section 232 in five, all of which concerned petroleum products.667 Before the Trump administration, the last instance in which the United States took any formal action to restrict imports under Section 232 was the oil embargo on Libya imposed by President Ronald Reagan in 1982.668

5.2. The European Union’s Claims Against Section 232 as Interpreted

615. Section 232 as interpreted, as described above, is inconsistent with a number of provisions of the GATT 1994 and the Agreement on Safeguards. These inconsistencies stem from that particular interpretation, and not necessarily from the Section 232 legislation itself. They are further evidenced by the inconsistencies of the steel and aluminium import adjustments at issue, as instances of the application of Section 232 as interpreted, with the same provisions, as explained below.


667 In another instance, related to Metal-cutting and Metal Forming Machine Tools, the President “deferred a formal decision on the Section 232 case and instead sought voluntary restraint agreements starting in 1986 with leading foreign suppliers and developed a domestic plan of programs to help revitalize the industry”. Congressional Research Service Report, “Section 232 Investigations: Overview and Issues for Congress, 21 November 2018 (Exhibit EU-2), appendix B.

668 Congressional Research Service Report, “Section 232 Investigations: Overview and Issues for Congress, 21 November 2018 (Exhibit EU-2), appendix B. The CRS Report additionally notes that, “arguably”, a President acted under Section 232 in 1986, prior to the founding of the WTO, seeking voluntary export restraint agreements with foreign exporters of metal-cutting and metal-forming machine tools. However, the CRS Report also notes that the President deferred a formal decision under Section 232 in that case. Congressional Research Service Report, “Section 232 Investigations: Overview and Issues for Congress, 21 November 2018 (Exhibit EU-2), appendix B p. 4 and appendix B.
5.2.1. Section 232 as interpreted is inconsistent with the GATT 1994

5.2.1.1 Section 232 as interpreted is inconsistent with Article II:1(a) and (b) of the GATT 1994

616. Section 232 as interpreted is, first, inconsistent with Article II:1(a) and (b) of the GATT 1994, because it provides for the United States’ authorities to impose duties in excess of those provided for in the United States’ Schedule. Therefore, that measure accords to the commerce of other Members, including the European Union, treatment less favourable than that provided for in the United States’ Schedule, and does not exempt the products of other Members, including the European Union, from ordinary customs duties and all other duties or charges of any kind imposed on or in connection with importation in excess of those provided for in the United States’ Schedule.

617. Section 232 as interpreted provides for the imposition of import restrictions, specifically through the use of the authority granted to the US President under Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), to “embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.”

618. Under Section 232 as interpreted, such an import restriction, in the form of a duty, is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable. Neither the Section 232 legislation, nor the interpretation of Section 232 that is at issue, provide for any consideration of whether or not any import restriction that is imposed, including in the form of a duty, is consistent with Article II:1(a) and (b) of the GATT 1994, or with the tariff bindings in the United States’ Schedule. Moreover, by taking the view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the GATT 1994, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Article II:1(a) and (b) of the GATT 1994, and thus fails to ensure consistency with those provisions.

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669 Proclamation 9705 (Exhibit EU-16), para. 7; Proclamation 9711 (Exhibit EU-17), para. 14; Proclamation 9740 (Exhibit EU-18), para. 10; Proclamation 9759 (Exhibit EU-19), para. 8.
619. The European Union further refers to section 4.1.1. The reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with Article II:1(a) and (b) of the GATT 1994, also apply to the European Union’s claim against Section 232 as interpreted, mutatis mutandis.

5.2.1.2 Section 232 as interpreted is inconsistent with Article XI:1 of the GATT 1994

620. Section 232 as interpreted is inconsistent with Article XI:1 of the GATT 1994, because it provides for the United States’ authorities to impose restrictions other than duties, taxes or other charges, made effective through quotas on the importation of products of the territory of other Members.

621. Section 232 as interpreted provides for the imposition of import restrictions, specifically through the use of the authority granted to the US President under Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), to “embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.”

622. Under Section 232 as interpreted, such an import restriction, in the form of a quota, is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable. Neither the Section 232 legislation, nor the interpretation of Section 232 that is at issue, provide for any consideration of whether or not any import restriction that is imposed, including in the form of a quota, is consistent with Article XI:1 of the GATT 1994. Moreover, by taking the view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the GATT 1994, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Article XI:1 of the GATT 1994, and thus fails to ensure consistency with that provision.

670 Proclamation 9705 (Exhibit EU-16), para. 7; Proclamation 9711 (Exhibit EU-17), para. 14; Proclamation 9740 (Exhibit EU-18), para. 10; Proclamation 9759 (Exhibit EU-19), para. 8.
623. The European Union further refers to section 4.1.2. The reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with Article XI:1 of the GATT 1994, also apply to the European Union’s claim against Section 232 as interpreted, mutatis mutandis.

5.2.1.3 Section 232 as interpreted is inconsistent with Article XIX:1(a) of the GATT 1994

624. Section 232 as interpreted is inconsistent with Article XIX:1(a) of the GATT 1994, because it provides for the United States’ authorities to suspend tariff concessions without the products at issue being imported into the territory of the United States in such increased quantities and under such conditions as to cause or to threaten serious injury to domestic producers in the United States of like or directly competitive products, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994.

625. Section 232 as interpreted provides for the imposition of import restrictions, specifically through the use of the authority granted to the US President under Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), to “embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.”

626. Under Section 232 as interpreted, such an import restriction, including a suspension of United States’ tariff concessions, is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable. Neither the Section 232 legislation, nor the interpretation of Section 232 that is at issue, provide for any consideration of whether or not any import restriction that is imposed, including a suspension of United States’ tariff concessions, is consistent with Article XIX:1(a) of the GATT 1994. In particular, Section 232 as interpreted does not provide for any consideration of whether increased imports are a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994. Moreover, by taking the

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671 Proclamation 9705 (Exhibit EU-16), para. 7.; Proclamation 9711 (Exhibit EU-17), para. 14; Proclamation 9740 (Exhibit EU-18), para. 10; Proclamation 9759 (Exhibit EU-19), para. 8.
view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the GATT 1994, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Article XIX:1(a) of the GATT 1994, and thus fails to ensure consistency with that provision.

627. The European Union further refers to section 4.1.5. The reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with Article XIX:1(a) of the GATT 1994, also apply to the European Union’s claim against Section 232 as interpreted, mutatis mutandis.

5.2.2. Section 232 as interpreted is inconsistent with the Agreement on Safeguards

628. Section 232 as interpreted falls within the scope of the Agreement on Safeguards because it provides for the United States’ authorities to impose a safeguard measure on imports (specifically through the use of the authority granted to the US President under Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), to "embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction") on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable.

629. With respect to the applicability of the Agreement on Safeguards, the European Union refers to all the reasons already stated with respect to the steel and aluminium import adjustments, as instances of the application of Section 232 as interpreted, in section 3.1, mutatis mutandis.

5.2.2.1 Section 232 as interpreted is inconsistent with Article 4.2 of the Agreement on Safeguards

630. Section 232 as interpreted is inconsistent with Article 4.2(a) and (b) of the Agreement on Safeguards because it provides for the United States’ authorities to impose a safeguard measure on imports without making

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672 Proclamation 9705 (Exhibit EU-16), para. 7.; Proclamation 9711 (Exhibit EU-17), para. 14; Proclamation 9740 (Exhibit EU-18), para. 10; Proclamation 9759 (Exhibit EU-19), para. 8.
provision for a proper evaluation of all relevant factors having a bearing on the situation of the domestic industry, and without requiring a proper demonstration of a causal link between increased imports and serious injury or the threat thereof, including a demonstration that the injury was not caused by factors other than increased imports.

631. Under Section 232 as interpreted, a safeguard measure is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable. Neither the Section 232 legislation, nor the interpretation of Section 232 that is at issue, provide for the proper consideration of all of the injury factors listed in Article 4.1(a) of the Agreement on Safeguards, nor do they provide for the proper consideration of whether there is a causal link between increased imports of the product concerned and serious injury or threat thereof, or a proper assessment of whether or not injury caused by other factors is attributed to increased imports, as required by Article 4.2(b) of the Agreement on Safeguards. Thus, Section 232 as interpreted provides for the imposition of safeguard measures regardless of their consistency with Article 4.2(a) and (b) of the Agreement on Safeguards. Moreover, by taking the view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the Agreement on Safeguards, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Article 4.2(a) and (b) of the Agreement on Safeguards, and thus fails to ensure consistency with that provision.

632. The European Union further refers to section 3.2.4. The reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with Article 4.2(a) and (b) of the Agreement on Safeguards, also apply to the European Union’s claim against Section 232 as interpreted, mutatis mutandis.

5.2.2.2 Section 232 as interpreted is inconsistent with Article 5.1 of the Agreement on Safeguards

633. Section 232 as interpreted is inconsistent with Article 5.1 of the Agreement on Safeguards because it provides for the United States’ authorities to impose a safeguard measure on imports beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment.
634. **Under Section 232 as interpreted, a safeguard measure is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable.** Neither the Section 232 legislation, nor the interpretation of Section 232 that is at issue, provide for the application of any such safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Thus, Section 232 as interpreted provides for the imposition of safeguard measures regardless of their consistency with Article 5.1 of the Agreement on Safeguards. Moreover, by taking the view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the Agreement on Safeguards, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Article 5.1 of the Agreement on Safeguards, and thus fails to ensure consistency with that provision.

635. The European Union further refers to section 3.2.5. The reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with Article 5.1 of the Agreement on Safeguards, also apply to the European Union’s claim against Section 232 as interpreted, *mutatis mutandis*.

5.2.2.3 **Section 232 as interpreted is inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards**

636. **Section 232 as interpreted is inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards because it provides for the United States’ authorities to impose a safeguard measure on imports beyond the period necessary to prevent or remedy serious injury and to facilitate adjustment, without limitation to four years, and without making provision for liberalisation at regular intervals.**

637. **Under Section 232 as interpreted, a safeguard measure is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable.** Neither the Section 232 legislation, nor the interpretation of Section 232 that is at issue, provide for any temporal limitation or progressive liberalisation of any such safeguard measure. Thus, Section 232 as interpreted provides for the imposition of safeguard measures regardless of their consistency with Articles 7.1 and 7.4 of the Agreement on Safeguards.
Moreover, by taking the view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the Agreement on Safeguards, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Articles 7.1 and 7.4 of the Agreement on Safeguards, and thus fails to ensure consistency with those provisions.

638. The European Union further refers to section 3.2.6. The reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards, also apply to the European Union’s claim against Section 232 as interpreted, mutatis mutandis.

5.2.2.4 Section 232 as interpreted is inconsistent with Article 11.1(a) of the Agreement on Safeguards

639. Section 232 as interpreted is inconsistent with Article 11.1(a) of the Agreement on Safeguards because it provides for the United States’ authorities to take emergency action on imports of particular products as set forth in Article XIX of the GATT 1994, without such action conforming with Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards.

640. Under Section 232 as interpreted, a safeguard measure is imposed on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable. As already explained, Section 232 as interpreted provides for the imposition of safeguard measures inconsistently with the requirements of Article XIX:1(a) of the GATT 1994, and with the requirements of several provisions of the Agreement on Safeguards. Consequently, Section 232 as interpreted is also inconsistent with Article 11:1(a) of the Agreement on Safeguards. Moreover, by taking the view that the mere assertion that a measure at issue is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the Agreement on Safeguards, Section 232 as interpreted is designed to apply in disregard of the United States’ obligations under Article 11:1(a) of the Agreement on Safeguards, and thus fails to ensure consistency with that provision.

641. The European Union further refers to section 3.2.8. The reasons why the steel and aluminium import adjustments at issue, as instances of application
of Section 232 as interpreted, are inconsistent with Article 11:1(a) of the Agreement on Safeguards, also apply to the European Union’s claim against Section 232 as interpreted, *mutatis mutandis*.

5.2.3. **Section 232 as interpreted fails to ensure the conformity of US laws, regulations and administrative procedures with the US' obligations under the WTO Agreement, in a manner that is inconsistent with Article XVI:4 of the WTO Agreement and with the balance of rights and obligations in the WTO Agreement**

642. Article XVI:4 of the WTO Agreement provides that each Member must ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the covered Agreements.

643. Section 232 as interpreted, i.e. the interpretation of Section 232 that is at issue, fails to ensure the conformity of US laws, regulations and administrative procedures with the US' obligations under the WTO Agreement.

644. This failure is, first, a consequence of all the inconsistencies of Section 232 as interpreted with the covered agreements already identified. Second, that failure is also demonstrated by that interpretation’s spurious presentation of the mere protection of domestic production as a national security matter, in order to somehow avoid scrutiny under the covered agreements, and thus to avoid complying with the US' obligations under the WTO Agreement. Thus, this interpretation of Section 232 adopts an extremely expansive interpretation of Article XXI of the GATT 1994, which disregards any of the limitations for invoking that provision. Rather, it interprets Article XXI as allowing any WTO Member, for any reason, to assert that a measure at issue is subject to that provision and that this assertion suffices to exclude it from the disciplines of the GATT 1994.

6. **Conclusions**

645. For the reasons set out in this submission, the European Union requests the Panel to find that the measures at issue are inconsistent with the US' obligations under the Agreement on Safeguards and the GATT 1994 as detailed in this submission.