In the World Trade Organization

Panel Proceedings

United States — Certain Measures on Steel and Aluminium Products

(DS548)

Integrated Executive Summary

by the European Union

Geneva, 25 June 2021

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". 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.

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, the United States attempted 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 have Article XXI of the GATT 1994 eclipse all other 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.

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.

10. The European Union reiterates that this is a legally straightforward case and we respectfully request that the Panel deliver a prompt resolution, one that might assist the United States 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.

2.1. SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

12. The United States' legislation relevant to the measures at issue is Section 232 of the Trade Expansion Act of 1962, 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".

2.2. RELEVANT OFFICIAL STATEMENTS

13. 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 issued a number of official statements on the social network Twitter, which provide relevant context for the measures at issue.

14. 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".

2.3. OTHER STATEMENTS OF HIGH-RANKING OFFICIALS

15. Other public statements of high-ranking US officials provide further insight into the import adjustments at issue.

2.4. THE POSITION OF THE DEPARTMENT OF DEFENCE (DOD)

16. 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, which 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."

17. The DoD added that it "continues to be concerned about the negative impact on our key allies regarding the recommended options within the reports".

2.5. IMPORT ADJUSTMENTS ON STEEL PRODUCTS

18. 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: Proclamation 9705, Proclamation 9711, Proclamation 9740, Proclamation 9759.

2.5.1. Procedure and product scope

19. The import adjustments at issue were adopted following an investigation conducted by the US Department of Commerce (USDOC). 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."

20. Presidential Proclamation 9705 also allows for the exclusion of certain steel products from the scope of the measures.

21. 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.

2.6. IMPORT ADJUSTMENTS ON ALUMINIUM PRODUCTS

22. 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: Proclamation 9704, Proclamation 9710, Proclamation 9739, Proclamation 9758.

2.6.1. Procedure and product scope

23. The import adjustments at issue were adopted following an investigation conducted by the US Department of Commerce. 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).

24. Presidential Proclamation 9704 also allows for the exclusion of certain products from the scope of the measures (product exclusions).

25. 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.

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

3.1.1. Whether or not a measure falls within the scope of the Agreement on Safeguards is an objective question

26. 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 in *Indonesia – Iron or Steel Products*, 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. 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.

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

28. Indeed, the Appellate Body has previously held in *US — Large Civil Aircraft (2nd complaint)* 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. Similarly, in *Canada — Renewable Energy / Canada — Feed-in Tariff Program* the Appellate Body confirmed that assessment.

29. 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. That is, it must "have a demonstrable link to the **objective** of preventing or remedying injury" to the adopting Member's domestic industry.

30. 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.

31. 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 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.

32. 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.

33. 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. 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.

34. In conducting its assessment the Panel must have regard to the measure "**as a whole**". 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.

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

35. 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.

36. 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%.

37. 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.

38. 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. This 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.

39. 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". 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

40. 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.

41. 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", 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 prices while making it increasingly difficult for U.S. companies to export their steel products."

42. 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." 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.

43. 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 producers can continue to supply all the aluminum necessary for critical industries and national defense." The aim is also described variously as to

"ensure the economic viability of our domestic aluminum industry" or "ensure the economic stability of our domestic aluminum industry", which is "undermined by growing volumes of imported aluminium in key product sectors." In some cases, the proclamations point out the need to reduce production capacity and/or production by competing industries of other WTO Members.

44. Moreover, 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.

45. Thus, consistent with the legal standard identified by the Appellate Body in *Indonesia – Iron or Steel Products*, the measures at issue have **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.

46. Furthermore, this is one of the "most central" aspects of the measures. That is, the available evidence supports the view that a specific objective of the measures is to protect the US steel and aluminium industries, **as an end in itself**; and that, at a minimum, the measures do not have as their sole or exclusive objective to protect the US' essential security interests.

47. 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. Thus, with these two defining characteristics being cumulatively present, the measures at issue clearly fall within the scope of the Agreement on Safeguards.

48. This is clearly supported by an analysis of the "design, structure, and expected operation" of the steel and aluminium measures. 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.

49. 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.

50. 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." This concerns, first, the findings related to so-called "critical infrastructure sectors", which are defined so broadly as to sever any link to

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

51. 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*.

52. *First*, 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).

53. *Second*, 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.

54. Indeed, 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".

55. Similarly, 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".

56. *Third*, 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 were adopted as well as their objectives.

57. 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.

58. Indeed, 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.

59. 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

60. 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.

61. 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.

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

63. Aluminium imports from Argentina and Australia were likewise exempted from the additional duties on the basis of an agreed "range of measures".

64. 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.

65. 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.

66. 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.

67. 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.

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

69. 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.

70. 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.

71. 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.

72. 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 proclamations and various official statements explicitly confirm that duties are put in place in order to incentivise other Members to agree voluntary export restraints.

73. 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).

74. 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).

75. All that Article 11.1 does is to reflect, in a logical progression, three types of concerns: those that are safeguards measures, those that are grey-area measures and those that fall under other provisions of the GATT 1994.

76. Article 11.1(a) governs any "emergency action on imports of particular products as set forth in Article XIX of GATT 1994" and prohibits such action that does not conform with provisions of that Article. Article 11.1(b) applies to "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side". Hence, Article 11.1(b) is used to complement Article 11.1(a).

77. The same is true for Article 11.1(c), which refers to "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX". This is to complement (and not to negate) the provisions of Articles 11.1(a) and 11.1(b).

78. The negotiating history, the text and context of Article 11.1(c) confirm that "pursuant to" refers to the last set in a logical progression of three types of measures, and nothing more than that. It only confirms that the Agreement on Safeguards and the GATT 1994 complement each other in such a way that measures may be covered by one or another provision.

79. What the United States is doing is to reverse the logical progression in Article 11.1. If the treaty drafters placed Article 11.1(c) at the end of Article 11.1, that has an obvious meaning. One should first look whether the measure at issue is a safeguard measure - Article 11.1(a). If the measure at issue is not a safeguard measure, then Article 11.1(b) first addresses "grey area" measures by prohibiting them. In fact, the very purpose of Article 11 is to address these grey area measures. Article 11.1(c) only confirms that Members may take measures that are neither safeguard measures, nor grey area measures.

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

80. 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 measure. Article XXI of the GATT 1994 is only the alleged justification (affirmative defence) that the United States has indicated it intends to invoke.

81. 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.

82. 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.

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

83. 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. The European Union demonstrates 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

84. 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

85. 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.

3.2.4. Articles 4.1 and 4.2 of the Agreement on Safeguards

86. **With regard to the Steel Report**

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

88. 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.

89. 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. The analysis is not accompanied by a consideration of occurring trends.

90. 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.

91. *Second*, the USDOC fails properly to demonstrate the existence **of "serious injury" to the "domestic industry"**.

92. 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.

93. The Steel Report fails to evaluate properly injury to the US steel industry as a whole. 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**. However, the DOC's injury assessment focuses overwhelmingly on one segment of the industry: domestic semi-finished BOF producers.

94. 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.

95. **In conclusion**, the USDOC fails to evaluate properly injury to the US steel industry. With respect to several injury factors, 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.

96. The Appellate Body has considered that a lopsided evaluation "may give a misleading impression of the data relating to the industry as a whole", for example, where "some parts of the industry are performing well, while others are performing poorly". Such an evaluation highlights the negative data in the poorly performing part of the industry, while the positive developments in other parts of the industry are overlooked.

97. 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.

98. 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.

99. 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.

100. *Third*, the USDOC fails properly to demonstrate a **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.

101. 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.

102. Therefore, the USDOC fails to establish "a genuine and substantial relationship of cause and effect" between increased imports, and injury to the steel industry. 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.

With regard to the Aluminium Report

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

104. 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. 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.

105. 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.

106. 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. However, the USDOC fails to provide any explanation at all regarding imports of secondary aluminium.

107. *Second*, the USDOC fails properly to demonstrate the existence **of "serious injury" to the aluminium "domestic industry"**.

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

109. 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.

110. Producers of secondary aluminium and downstream aluminium products are not only prosperous, but also the two largest segments of the US aluminium industry.

111. According to the applicable legal standard, 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.

112. 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".

113. 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.

114. **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.

115. 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).

116. 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. Such an assessment clearly falls short of the requirements in Article 4.2(a) of the Agreement on Safeguards.

117. *Third*, the competent authority fails properly to demonstrate a **causal link** between increased imports and serious injury to the domestic US aluminium industry.

118. 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.

119. 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.

120. 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.

121. *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.

122. 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 injury to the primary aluminium sector. Therefore, the United States acted inconsistently with the provisions of Article 4.2(a) of the Agreement on Safeguards.

123. 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.

3.2.5. Article 5.1 of the Agreement on Safeguards

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

125. *First*, the European Union has already demonstrated 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 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 *prima facie* case of a violation of Article 5.1.

126. *Second*, regardless of whether they are inconsistent with Article 4.2(b), 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.

127. *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.

128. Achieving an 80 percent capacity utilisation rate is not 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.

129. 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.

130. 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 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.

131. *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.

132. 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

133. 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.

134. 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.

3.2.7. Article 9.1 of the Agreement on Safeguards

135. 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

136. The United States' measures at issue in this dispute are safeguards, i.e. emergency action on imports of particular products. Those measures do not conform with the provisions of Article XIX of GATT 1994. Moreover, those measures are also applied inconsistently with numerous provisions of the Agreement on Safeguards.

137. 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.

3.2.9. Article 11.1(b) of the Agreement on Safeguards

138. 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."

139. 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.

140. 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

141. 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

142. 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.

3.2.10.3 Article 12.3 of the Agreement on Safeguards

143. 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. Thus, 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

144. 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 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.

3.4. IN ANY EVENT, THE MEASURES AT ISSUE ARE NOT JUSTIFIED BY ARTICLE XXI OF THE GATT 1994

145. The European Union refers to the arguments presented in the following section on GATT 1994 claims.

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

146. 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.

147. This is confirmed by the way in which the duties were imposed under United States' municipal law. 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." This legislation 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.

148. In the present case, the bound duties provided in the United States' Schedule for the steel and aluminium products at issue are 0%, 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.

149. 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).

150. 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

151. The import adjustments at issue in the present proceedings impose, *inter alia*, quantitative restrictions (quotas).

152. With regard to steel products from South Korea, Argentina and Brazil, there were introduced quotas or "quantitative limitations" on their import to the United States.

153. Aluminium imports from Argentina and Australia were likewise exempted from the additional duties on the basis of an agreed "range of measures".

154. 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

155. 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.

156. 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.

157. 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.

158. 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.

159. 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

160. 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**.

161. With regard to **product exclusions**, *first*, the Presidential Proclamations with regard to steel and aluminium, constitute laws, regulations, judicial decisions and administrative rulings of the kind described in Article X:1.

162. *Second*, the United States "administers" the product exclusions with regard to steel and aluminium products as per the provisions of the mentioned Requirements. Accordingly, the competent authority may grant or deny the requested exclusions through individual decisions addressed to each applicant.

163. *Third*, the obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members have to comply with them cumulatively.

164. 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.

165. 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.

166. 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.

167. 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 relationship", "satisfactory alternative means", and "no longer threaten to impair the national security".

168. 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.

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

169. 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.

170. 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 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.

171. 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.

4.2. THE MEASURES AT ISSUE ARE NOT JUSTIFIED BY ARTICLE XXI OF THE GATT 1994

4.2.1. Article XXI is not self-judging

172. The US' view that that Article XXI is "self-judging" has been convincingly rejected by the Panel Report in *Russia — Traffic in Transit*. It is wrong in light of the text, context, object and purpose, and indeed useful effect of the GATT 1994. It is not supported by any of the materials referred to in Articles 31 and 32 of the VCLT, including supplementary means of interpretation.

173. In addition, while certain GATT Contracting Parties have expressed the view that Article XXI(b) is "self-judging", several others have repeatedly expressed diametrically opposed positions. Thus, the enquiry into the GATT 1947 palaeontology does not support the US position.

174. 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.

175. *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 XXIII of GATT 1994. 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.

176. *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.

177. 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".

178. Thus, the present dispute differs from the case under the GATT 1947 opposing the United States and Nicaragua, where the terms of reference explicitly precluded that panel from examining or judging the validity or motivation for the invocation of Article XXI(b)(iii) by the United States.

179. *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.

180. *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.

181. *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.

182. 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. For instance, an express text that comes very close to the idea of non-justiciability can be found in the KORUS FTA. There is no such text agreed by the WTO Membership in any of the covered agreements.

183. 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. Other remarks on the US' 'invocation' of Article XXI

184. 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.

185. 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, 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."

186. 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.

187. The European Union fails to understand how Article XXI(a) can exempt the US from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Any discretion accorded under it is not unlimited.

188. The European Union acknowledges that information relating to essential security interests is of a highly sensitive nature, but the respondent is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if the US was justified in not providing certain information pursuant to Article XXI(a), that would not discharge the US from its burden of proof in relation to Article XXI(b).

189. Regarding the interpretation of Article XXI, in the European Union's view, the phrase "which it considers" refers only to the necessity test and not to any other provisions. There are objective elements in the legal test, including "for", "essential" and whether the alleged interest are security interests.

190. Furthermore, the subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision, and cannot be considered cumulative in nature. All those distinct circumstances are objective, and susceptible to a panel's assessment. Moreover, the terms "other emergency in international relations" do not extend to an "emergency" in commercial or trade relations.

191. Concerning the negotiating history raised by the US, even under the Havana Charter, the correct position would have been that the predecessor to Article XXI is "justiciable", and not self-judging. Even under the Havana Charter, all issues arising out of the Charter were intended to be subject to the dispute settlement procedures provided therein, whether involving the ITO itself (Articles 93-95 of the Havana Charter), or the ICJ (Article 96 of the Havana Charter). The evolution towards the WTO covered agreements, and notably the provisions of the DSU, further confirms that position.

192. Furthermore, the 1949 GATT Council decision cited by the US cannot be considered as a subsequent agreement on the interpretation even of the GATT 1947, or in any way binding to all the contracting parties to the GATT 1947. Still less could it be considered as binding under the GATT 1994. In any event, it also supports the complainants' position rather than that of the US.

193. In sum, according to the United States, all that is required by Article XXI(b) is for the respondent to "indicate, in the context of dispute settlement, that it has made… a determination [that it considers one or more of the circumstances set forth in Article XXI(b) to be present]." For the United States, the Panel is not only precluded from making an objective assessment of the measure. It is not even allowed to ask whether the US authorities have, in the real world, made a particular determination. Instead, all that is needed is for the US representatives to make that assertion during panel proceedings.

194. In other words, in all but name, the United States persists in the view that Article XXI is non-justiciable. This proposition is extreme, it contradicts the jurisprudence, and the Panel cannot accept it.

195. The Panel has no doubt noticed that the United States has made certain statements on what may or may not constitute an "emergency in international relations" in the context of the steel and aluminium measures. Whatever the relevance of those statements may be, it should be clear that they do not constitute a defence under Article XXI(b).

196. Like any other exception in the GATT 1994, Article XXI(b) requires the invoking Member to set out its case: to explain, on the facts, which of the conditions in that provision are met and for which reasons. The United States has not just failed to do so. It refused to do so.

197. The United States asserts that the "findings in the steel and aluminium reports" (i.e. not the measures at issue as such, only certain findings in two legal instruments) are "consistent with the United States considering the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations." In making that assertion, the United States is not claiming that the conditions of Article XXI(b) are met. Instead, it is claiming that certain findings taken in the context of the steel and aluminium measures demonstrate the US authorities' view that anything they consider necessary will, for that very reason, satisfy all of the conditions in Article XXI(b).

198. And indeed, if the adopting Member takes such a view, it would be entirely consistent with that view to impose duties and quotas in order to protect domestic industry from import competition, and to label that as "national security" because it is a convenient way to escape legal scrutiny. And this is what has occurred.

199. At best, the United States seems to be explaining why the findings of the steel and aluminium reports are consistent with Section 232. But this is of course not the pertinent question. Consistency with Section 232 does not equal fulfilment of the conditions of Article XXI of the GATT 1994.

200. In any event, even if the United States' assertions on why an emergency in international relations might have been "considered" to exist amounted to a defence – which they do not – the defence would fail.

201. The fact that the United States makes these assertions so late in the proceedings for the first time betrays either an (understandable) lack of confidence in the argument that Article XXI is self-judging, or a secret wish that the Panel will make the case for the United States.

202. The DSU clearly does not allow the Panel to do that, as the European Union has explained. In any case, the assertions concerning the alleged "emergency in international relations" do not come close to meeting the United States' burden of proof. The problem of steel overcapacity is of course serious, but it is not the type of situation envisaged in Article XXI(b), as interpreted in the jurisprudence. Moreover, the link between the measures and the alleged emergency is manifestly insufficient. For instance, steel overcapacity does not explain the need for restrictions of imports of aluminium. Moreover, even if there was a link between overcapacity and the welfare of domestic industry, this does not yet demonstrate the existence of any of the conditions in Article XXI(b). In this case, measures are taken because imports hurt the welfare of the domestic industry writ large, even when it produces soda cans. This is then merely declared to be a national security issue, even though it is clear that the measures seek to protect domestic industry as an end in itself. Incredibly, the United States' only answer to this point is that the measures were taken pursuant to Section 232, and not pursuant to domestic safeguard legislation. Again, for the United States, unilateral domestic "invocation" settles all the substantive legal questions.

203. The US arguments about an alleged "emergency in international relations" perfectly illustrate why the panels in *Russia – Traffic in Transit* and *Saudi Arabia – Protection of IPRs* were right to find that an "emergency in international relations" means "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state" and not just, as the United States would have it, "a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention."

204. Many things could be said about the United States' definition. But one point is particularly glaring. Under the United States' definition, the circumstances enabling the imposition of a safeguard would always amount to an "emergency in international relations". This is because the US definition overlaps almost perfectly with Article XIX of the GATT 1994. All valid safeguard measures are taken in situations of "danger" (of serious injury) concerning economic contact between nations (trade in goods), arising unexpectedly (due to unforeseen developments), and requiring urgent attention ("to the extent and for such time as is necessary to prevent or remedy the injury"). Thus, whenever anybody imposes a safeguard, there would be an emergency in international relations and Article XXI(b) could apply.

205. This overlap is not a coincidence. It follows necessarily from the whole logic of the United States' arguments. The United States argues that a measure which is a safeguard in all but name is not a safeguard, and that it is protected by Article XXI(b). To do that, it must diminish the Agreement on Safeguards – by persuading the Panel that it only applies to measure unilaterally labelled as safeguards – and augment Article XXI(b) – by persuading the Panel that it covers any safeguard measure that has not been unilaterally labelled as a safeguard. The European Union does not think the Panel should do either of those things. Instead, the Panel should follow the agreements and the jurisprudence.

5. SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (19 U.S.C. §1862), AS REPEATEDLY INTERPRETED BY THE US' ADMINISTRATIVE AND JUDICIAL AUTHORITIES, IS INCONSISTENT WITH THE US' OBLIGATIONS AND RIGHTS SET OUT IN THE WTO AGREEMENT

206. 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).

207. 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.

5.1. SECTION 232 AS INTERPRETED: A DESCRIPTION OF THE MEASURE AT ISSUE

208. 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.

5.1.1. The authorities of the United States have followed and continue to follow this interpretation of Section 232

209. 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.

210. 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.

211. 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.

212. 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." 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".

213. 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.

5.1.2. This interpretation of Section 232 is not required by the Section 232 legislation, and it departs from earlier interpretations

214. 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.

215. 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.

216. Other factors also demonstrate that this measure departs in important respects from the way in which Section 232 was interpreted previously.

217. *First*, the Steel Report explains that it departs from earlier interpretations of Section 232. *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. *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").

218. *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. 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. 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.

5.2. THE EUROPEAN UNION'S CLAIMS AGAINST SECTION 232 AS INTERPRETED

219. Section 232 as interpreted 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.

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

220. 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.

5.2.1.2 Section 232 as interpreted is inconsistent with Article XI:1 of the GATT 1994

221. 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.

5.2.1.3 Section 232 as interpreted is inconsistent with Article XIX:1(a) of the GATT 1994

222. 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.

5.2.2. Section 232 as interpreted is inconsistent with the Agreement on Safeguards

223. 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.

224. 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, *mutatis mutandis*.

225. Similarly, the reasons why the steel and aluminium import adjustments at issue, as instances of application of Section 232 as interpreted, are inconsistent with various provisions of the Agreement on Safeguards, also apply to the European Union's claim against Section 232 as interpreted, *mutatis mutandis.*

5.2.2.1 Section 232 as interpreted is inconsistent with Article 4.2 of the Agreement on Safeguards

226. 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 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.

5.2.2.2 Section 232 as interpreted is inconsistent with Article 5.1 of the Agreement on Safeguards

227. 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.

5.2.2.3 Section 232 as interpreted is inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards

228. 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.

5.2.2.4 Section 232 as interpreted is inconsistent with Article 11.1(a) of the Agreement on Safeguards

229. 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.

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

230. 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.

231. 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.

232. 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 United States' 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

233. For the reasons set out in its submissions, the European Union requests the Panel to find that the measures at issue are inconsistent with the United States' obligations under the Agreement on Safeguards and the GATT 1994.