

WORLD TRADE ORGANIZATION

Panel established pursuant to Article 6 of the Understanding on Rules and
Procedures Governing the Settlement of Disputes

**UNITED STATES – CERTAIN MEASURES ON STEEL
AND ALUMINIUM PRODUCTS**

WT/DS556

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<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
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<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
<i>US – Fur Felt Hats</i>	Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT/CP/106, adopted 22 October 1951
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
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US – Softwood Lumber IV	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
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<p><i>US – Steel Safeguards</i></p>	<p>Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i>, WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273</p>
<p><i>US – Tuna II (Mexico)</i> <i>(Article 21.5 – Mexico)</i></p>	<p>Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i>, WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW, DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653</p>
<p><i>US – Wheat Gluten</i></p>	<p>Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i>, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717</p>
<p><i>US – Wool Shirts and Blouses</i></p>	<p>Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i>, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323</p>
<p><i>US – Zeroing (EC)</i></p>	<p>Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i>, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417</p>

TABLE OF ABBREVIATIONS

Abbreviation	Definition
1982 Glass-Lined Chemical Processing Equipment	USDOC, Investigation of Imports of Glass-Lined Chemical Processing Equipment, Federal Register, Vol. 47, No. 53, 18 March 1982, pp. 11746-11754
1983 Nuts, Bolts and Large Screws Report	USDOC, The Effect of Imports of Nuts, bolts, and Large Screws on the National Security, Report to the President on an Investigation Conducted Under the Authority of Section 232 of the Trade Expansion Act of 1962, as Amended (19 USC 1862), February 1983
1989 Uranium Report	USDOC, The Effect of Imports of Uranium on the National Security, An Investigation under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), September 1989
1993 Ceramic Semiconductor Packages Report	USDOC, The Effect of Imports of Ceramic Semiconductor Packages on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, August 1993
2001 Iron Ore Report	USDOC, The Effect of Imports on Iron Ore and Semi-Finished Steel on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as amended, October 2001 (2001 Iron Ore Report)
Aluminium Report	USDOC, The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 17 January 2018
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EDT	Easter Daylight Time
GATT 1994	General Agreement on Tariffs and Trade 1994
Interim Final Rule – March 2018	USDOC, Interim Final Rule regarding the Requirements for Submissions Requesting Exclusions from the Remedies Instituted by Presidential Proclamations Adjusting Imports of Steel into the United States and

	Adjusting Imports of Aluminum from the United States; and the Filing of Objections to Submitted Exclusion Requests on Steel and Aluminum, Federal Register, Vol. 83, No. 53, 19 March 2018, pp. 12106-12112
Interim Final Rule – September 2018	USDOC, Interim Final Rule regarding Submissions of Exclusions Requests and Objections to Submitted Requests for Steel and Aluminium, Federal Register, Vol. 83, No. 176, 11 September 2018, pp. 46026-46065
HTSUS	US Harmonized Tariff Schedule
OMA	Orderly marketing arrangement
PPD-21	Presidential Policy Directive 21
Presidential Proclamation 9704	Presidential Proclamation 9704 of 8 March 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11619-11624
Presidential Proclamation 9705	Presidential Proclamation 9705 of 8 March 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11625-11630
Presidential Proclamation 9710	Presidential Proclamation 9710 of 22 March 2018 on Adjusting Imports of Aluminum into the United States, Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13355-13359
Presidential Proclamation 9711	Presidential Proclamation 9711 of 22 March 2018 on Adjusting Imports of Steel into the United States, Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13361-13365
Presidential Proclamation 9739	Presidential Proclamation 9739 of 30 April 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20677-20682

Presidential Proclamation 9740	Presidential Proclamation 9740 of 30 April 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20683-20705
Presidential Proclamation 9758	Presidential Proclamation 9758 of 31 May 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25849-25855
Presidential Proclamation 9759	Presidential Proclamation 9759 of 31 May 2018 on Adjusting Imports of Steel into the United States, including the Annex, Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25857-25877
Presidential Proclamation 9772	Presidential Proclamation 9772 of 10 August 2018 on Adjusting Imports of Steel into the United States, including the Annex To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 158, 15 August 2018, pp. 40429-40432
Presidential Proclamation 9776	Presidential Proclamation 9776 of 29 August 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45019-45023
Presidential Proclamation 9777	Presidential Proclamation 9777 of 29 August 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45025-45030
Section 232 / Section 232 of the Trade the Trade Expansion Act of 1962	Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862, as amended)

Steel Report	USDOC, 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, 11 January 2018
US CBP	US Customs and Border Protection
US CIT	US Court of International Trade
USDOC	US Department of Commerce
USDOD	US Department of Defense
USTR	United States Trade Representative
VER	Voluntary export restraint

LIST OF EXHIBITS

Number	Title of Exhibit
CHE-1	Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862, as amended), United States Code, Title 19: Customs Duties, Part IV: National Security, Edition 2017
CHE-2	USDOC, 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, 11 January 2018 (Steel Report), www.bis.doc.gov
CHE-3	US President Trump, “Memorandum on Steel Imports and Threats to National Security”, <i>Weekly Compilation of Presidential Documents</i> , 20 April 2017, www.gpo.gov
CHE-4	USDOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, Federal Register, Vol. 82, No. 79, 26 April 2017, pp. 19205-19207
CHE-5	USDOC, The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 17 January 2018 (Aluminium Report), www.bis.doc.gov
CHE-6	US President Trump, “Memorandum on Aluminum Imports and Threats to National Security”, <i>Weekly Compilation of Presidential Documents</i> , 27 April 2017, www.gpo.gov
CHE-7	USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, Federal Register, Vol. 82, No. 88, 9 May 2017, pp. 21509-21511
CHE-8	Presidential Proclamation 9705 of 8 March 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 51, 15 March 2018, pp.

	11625-11630 (Presidential Proclamation 9705)
CHE-9	Presidential Proclamation 9711 of 22 March 2018 on Adjusting Imports of Steel into the United States, Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13361-13365 (Presidential Proclamation 9711)
CHE-10	Presidential Proclamation 9740 of 30 April 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20683-20705 (Presidential Proclamation 9740)
CHE-11	Presidential Proclamation 9759 of 31 May 2018 on Adjusting Imports of Steel into the United States, including the Annex, Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25857-25877 (Presidential Proclamation 9759)
CHE-12	Presidential Proclamation 9772 of 10 August 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 158, 15 August 2018, pp. 40429-40432 (Presidential Proclamation 9772)
CHE-13	Presidential Proclamation 9704 of 8 March 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11619-11624 (Presidential Proclamation 9704)
CHE-14	Presidential Proclamation 9710 of 22 March 2018 on Adjusting Imports of Aluminum into the United States, Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13355-13359 (Presidential Proclamation 9710)
CHE-15	Presidential Proclamation 9739 of 30 April 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of

	Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20677-20682 (Presidential Proclamation 9739)
CHE-16	Presidential Proclamation 9758 of 31 May 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25849-25855 (Presidential Proclamation 9758)
CHE-17	Excerpt of Chapter 99 of the Harmonized Tariff Schedule of the United States
CHE-18	US CBP, Information relating to the allocation and use of quotas; QB 18-126 Absolute Quota for Steel Mill Articles: Argentina, Brazil and South Korea, www.cbp.gov
CHE-19	US CBP, Information relating to the allocation and use of quotas; QB 18-127 Absolute Quota for Aluminum Products: Argentina, www.cbp.gov
CHE-20	USDOC, Interim Final Rule regarding the Requirements for Submissions Requesting Exclusions from the Remedies Instituted by Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum from the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, Federal Register, Vol. 83, No. 53, 19 March 2018, pp. 12106-12112 (Interim Final Rule – March 2018)
CHE-21	Part 705 of the Code of Federal Regulations, Title 15, Vol. 2, Edition 2018 (15 CFR 705) (Section 705)
CHE-22	USDOC, Interim Final Rule regarding Submissions of Exclusions Requests and Objections to Submitted Requests for Steel and Aluminum, Federal Register, Vol. 83, No. 176, 11 September 2018, pp. 46026-46065 (Interim Final Rule – September 2018)

CHE-23	Presidential Proclamation 9777 of 29 August 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45025-45030 (Presidential Proclamation 9777)
CHE-24	Presidential Proclamation 9776 of 29 August 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States, Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45019-45023 (Presidential Proclamation 9776)
CHE-25	Compilation of Twitter statements of the US President Donald Trump
CHE-26	Fact sheet published by the White House on 8 March 2018, www.whitehouse.gov
CHE-27	Statement of the White House of 31 May 2018, www.whitehouse.gov
CHE-28	Opinion by the US Secretary of Commerce on www.cleveland.com dated 15 July 2018
CHE-29	Excerpts of the United States' Schedule of Concessions
CHE-30	Excerpts of Chapters 72 and 73 of the HTSUS
CHE-31	Excerpts of Chapter 76 of the HTSUS
CHE-32	Section 604 of the Trade Act of 1974 (19 U.S.C. § 2483), United States Code, Title 19 – Customs Duties, 2012 Edition, Supplement 5
CHE-33	US CBP, Information on annual absolute quota quantities for Argentina and Brazil steel imports as of 1 June 2018, (Amended) QB 18-122 Announcement for Steel Mill Articles, www.cbp.gov

CHE-34	Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Updated April 2, 2019), www.hsdl.org
CHE-35	Statements by the United States at the Meeting of the WTO Dispute Settlement Body (Excerpts), Geneva, 21 November 2018, https://geneva.usmission.gov/
CHE-36	US CIT, <i>American Institute for International Steel v. United States</i> , Court No. 18-00152, Slip op. 19-37, 25 March 2019
CHE-37	USDOC, The Effect of Imports of Nuts, bolts, and Large Screws on the National Security, Report to the President on an Investigation Conducted Under the Authority of Section 232 of the Trade Expansion Act of 1962, as Amended (19 USC 1862), February 1983 (Excerpts) (1983 Nuts, Bolts and Large Screws Report), www.bis.doc.gov
CHE-38	USDOC, Investigation of Imports of Glass-Lined Chemical Processing Equipment, Federal Register, Vol. 47, No. 53, 18 March 1982, pp. 11746-11754 (1982 Glass-Lined Chemical Processing Equipment Report)
CHE-39	USDOC, The Effect of Imports of Ceramic Semiconductor Packages on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, August 1993 (Excerpts) (1993 Ceramic Semiconductor Packages Report), www.bis.doc.gov
CHE-40	USDOC, The Effect of Imports of Uranium on the National Security, An Investigation under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), September 1989 (Excerpts) (1989 Uranium Report), www.bis.doc.gov
CHE-41	USDOC, The Effect of Imports on Iron Ore and Semi-Finished Steel on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as amended, October 2001 (2001 Iron Ore Report), www.bis.doc.gov

CHE-42	USDOD, Memorandum for Secretary of Commerce, Response to Steel and Aluminum Policy Recommendations
CHE-43	US CIT, <i>Severstal v. United States</i> , Court No. 18-00057, Slip Op. 18-37, 5 April 2018
CHE-44	US Senate Finance Committee, Staff Paper “Hearing on National Security Authority to Limit Imports”, Hearing before the Committee on Finance, United States Senate, 99 th Congress, Second Session on S. 1871, 13 August 1986
CHE-45	USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, Federal Register, Vol. 83, No.104, 30 May 2018, pp. 24735-24737
CHE-46	USDOC, Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Uranium, Federal Register, Vol. 83, No. 143, 25 July 2018, pp. 35204-35205
CHE-47	USDOC, Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Titanium Sponge, Federal Register, Vol. 84, No. 46, 8 March 2019, pp. 8503-8504
CHE-48	USDOC, Statement on Submission of Automobiles and Automobile Parts Section 232 Report to the US President of 17 February 2019, www.commerce.gov
CHE-49	USTR statement of 8 March 2018, https://ustr.gov/
CHE-50	USDOC Press Release, “U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports”, 23 May 2018, www.commerce.gov
CHE-51	Peter Navarro’s Interview with FOX Business Network on 31 May 2018, www.foxbusiness.com

CHE-52	Congressional Record, 115 th Congress, 2 nd Session, Vol. 164, No. 116, 11 July 2018
CHE-53	Secretary Ross's Opening Remarks at the Section 232 Hearing on Automobile and Automotive Parts Imports, 19 July 2018, https://content.govdelivery.com
CHE-54	US President Donald Trump's Interview with FOX Business Network on 22 March 2019, www.foxbusiness.com
CHE-55	CNBC interview with Secretary Wilbur Ross, Connecting the dots on auto imports and national security, 24 May 2018, www.cnbc.com/video/2018/05/24/wilbur-ross-connecting-the-dots-on-auto-imports-and-national-security.html

I. INTRODUCTION

1. In the present dispute, Switzerland, along with eight other co-complainants, challenges the adjustment measures imposed by the United States on imports of steel and aluminium products from other WTO Members. These measures consist of the additional duties and quotas applicable to imports of certain steel and aluminium products as well as the country exemptions and product exclusions from such duties and quotas. As a result of these measures, steel and aluminium products imported to the United States from Switzerland are subject to an additional duty of 25% for steel products and 15% for aluminium products.

2. Switzerland is deeply concerned by those trade restrictive measures which have a severe impact on trade and are manifestly inconsistent with several obligations under the Agreement on Safeguards and the General Agreement on Tariffs and Trade (“GATT 1994”).

3. The Steel and Aluminium Reports of the US Department of Commerce (USDOC) that led to the adoption of those measures as well as the Presidential Proclamations of the US President that imposed those measures reveal that the real purpose of the import adjustment measures is to prevent or remedy the injury allegedly caused to US steel and aluminium industries by increased imports and, more generally, that those measures have been taken for economic reasons. Both the Steel and Aluminium Reports found that imports in such quantities as are currently present “adversely impact” the economic welfare of the US steel and aluminium industries and thus, that imports of those products need to be reduced to a level that should enable US steel and aluminium production to use an average of 80% of their production capacity in order to maintain healthy and vibrant commercial steel and aluminium industries.

4. The measures at issue are thus safeguard measures, because they suspend at least one GATT obligation or withdraw at least one GATT concession and are designed to prevent or remedy serious injury to the US steel and aluminium industries caused or threatened by increased imports of steel and aluminium products.

5. The WTO agreements allow Members to protect their domestic industries in exceptional circumstances when, due to developments that were not foreseen at the time the tariff concessions were negotiated, imports increase such as to cause serious injury or threat thereof to those industries. The possibility of applying safeguard measures is provided for in Article XIX of the GATT 1994 and in the Agreement on Safeguards but is subject to strict procedural and substantive conditions laid down in those provisions. Those conditions must be complied with by any WTO Member wishing to impose measures otherwise inconsistent with GATT obligations that are designed to address the serious injury or threat thereof caused by increased imports. The United States, however, has failed to comply with the substantive and procedural obligations

laid down in Article XIX of the GATT 1994 and the Agreement on Safeguards. Moreover, by claiming that those measures have been taken for “national security” reasons and by invoking Article XXI of the GATT 1994, the United States seeks to circumvent its obligations under the WTO agreements.

6. In particular, Switzerland submits that the United States failed to demonstrate the existence of the “circumstances” and “conditions” required for the imposition of a safeguard measure, including the existence of unforeseen developments and of the effect of obligations incurred under the GATT 1994, the existence of increased imports such as to cause or threaten to cause serious injury to the domestic industry and the existence of a logical connection between the increased imports, on the one hand, and the unforeseen developments and the obligations incurred under the GATT 1994, on the other hand. The United States also failed to properly determine the existence of serious injury, or threat thereof, and to demonstrate the existence of the causal link between increased imports and the (threat of) serious injury to US domestic steel and aluminium industries. Furthermore, the United States imposed its measures beyond the extent and time necessary to prevent or remedy the alleged serious injury. Finally, the United States also failed to comply with various procedural requirements imposed by the Agreement on Safeguards.

7. Through the measures at issue, the United States has also sought, taken or maintained “other measures” similar to voluntary export restraints and orderly marketing arrangements that are explicitly prohibited by the Agreement on Safeguards.

8. Finally, by imposing and applying the import adjustment measures, the United States also violated its obligations under Articles I:1, II:1(a) and (b), X.3(a) and XI.1 of the GATT 1994.

9. Switzerland further challenges Section 232 of the Trade Expansion Act of 1962, as amended, as repeatedly interpreted by the current US administration. Section 232, so interpreted, provides for the imposition of measures that restrict imports from other WTO Members to shield the domestic production in the United States from competition with foreign products on the grounds of an alleged threat to national security. This measure has no basis in the covered agreements and is inconsistent with the balance of rights and obligations set out in the WTO Agreement and, in particular, with several provisions of the Agreement on Safeguards and of the GATT 1994. In the alternative, Switzerland challenges the ongoing use of Section 232 so as to afford protection to the US domestic industry. Similarly, such measure has no basis in the covered agreements and is inconsistent with several provisions of the Agreement on Safeguards and the GATT 1994.

10. In particular, these measures are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards since they provide for the imposition of safeguard

measures without complying with several obligations provided for in the Agreement on Safeguards and Article XIX of the GATT 1994. Moreover, these measures are inconsistent with Articles II:1(a) and (b) and Article XI:1 of the GATT 1994 since they provide for the imposition of duties in excess of those provided in the United States' schedule of concessions and for the imposition of import restrictions other than duties, taxes or other charges.

11. For these reasons, and as will be further developed in this submission, Switzerland respectfully asks the Panel to conclude that the United States has acted inconsistently with its obligations under the GATT 1994 and the Agreement on Safeguards and to recommend the Dispute Settlement Body (DSB) to request the United States to bring its measures into compliance with the Agreement on Safeguards, the GATT 1994 and the WTO Agreement.

II. PROCEDURAL BACKGROUND

12. On 9 July 2018, Switzerland requested consultations with the Government of the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 14 of the Agreement on Safeguards with respect to certain measures imposed by the United States to adjust imports of steel and aluminium¹ into the United States, including imposing additional *ad valorem* rates of duty on imports of certain steel and aluminium products and exempting certain selected WTO members from the measures. The request for consultations was circulated on 12 July 2018 as document WT/DS556/1.²

13. Consultations were held on 30 August 2018 with a view to reaching a mutually satisfactory solution. Unfortunately, those consultations failed to resolve the dispute.

14. On 8 November 2018, Switzerland requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 14 of the Agreement on Safeguards to examine the matter on the basis of the standard terms of reference set out in Article 7.1 of the DSU.³ The Dispute Settlement Body (DSB) considered this request at its meeting of 21 November 2018, but the United States rejected the establishment of the panel at that meeting.

¹ Switzerland uses the word "aluminum" (American spelling) where it quotes the relevant documents of the United States' authorities. Otherwise, this submission uses the word "aluminium" (British spelling) in line with the WTO Editorial Guide for Panel Submissions.

² *United States – Certain Measures on Steel and Aluminium Products*, Request for Consultations by Switzerland, WT/DS556/1, G/L/1251, G/SG/D59/1, 12 July 2018.

³ *United States – Certain Measures on Steel and Aluminium Products*, Request for the Establishment of a Panel by Switzerland, WT/DS556/15, 9 November 2018.

15. The DSB considered Switzerland's request a second time at its meeting of 4 December 2018 during which the DSB established a panel with the following terms of reference:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Switzerland in document WT/DS556/15 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁴

16. Eight other WTO Members, i.e. Canada, China, the European Union, India, Mexico, Norway, the Russian Federation and Turkey, have similarly requested consultations with the United States⁵ and the establishment of a panel⁶ with regard to the same matter. Panels were established by the DSB, in seven of those other cases at its meeting of 21 November 2018, and in one at its meeting of 4 December 2018.

17. The nine complainants requested the establishment of a single panel pursuant to Article 9.1 of the DSU. The United States, however, opposed the establishment of a single panel. Consequently, separate panels have been established by the DSB in the nine cases.

18. Given that the nine cases relate to "the same matter", Switzerland and the other complaining parties submitted that, in accordance with Article 9.3 of the DSU, the same persons have to serve as panelists on each of the separate panels and that the timetable for the panel process in such disputes has to be harmonized and thus the substantive meetings have to be consolidated.

⁴ *United States – Certain Measures on Steel and Aluminium Products*, Constitution of the Panel established at the Request of Switzerland, Note by the Secretariat, WT/DS556/16, 28 January 2019.

⁵ Request for Consultations by China (WT/DS544/1); Request for Consultations by India (WT/DS547/1); Request for Consultations by the European Union (WT/DS548/1); Request for Consultations by Canada (WT/DS550/1); Request for Consultations by Mexico (WT/DS551/1); Request for Consultations by Norway (WT/DS552/1); Request for Consultations by the Russian Federation (WT/DS554/1); Request for Consultations by Turkey (WT/DS564/1).

⁶ Request for the Establishment of a Panel by China (WT/DS544/8); Request for the Establishment of a Panel by India (WT/DS547/8); Request for the Establishment of a Panel by the European Union (WT/DS548/14); Request for the Establishment of a Panel by Canada (WT/DS550/11); Request for the Establishment of a Panel by Mexico (WT/DS551/11); Request for the Establishment of a Panel by Norway (WT/DS552/10); Request for the Establishment of a Panel by the Russian Federation (WT/DS554/17); Request for the Establishment of a Panel by Turkey (WT/DS564/15).

19. On 7 January 2019, Switzerland and the other complainants requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 25 January 2019, the Director-General composed the Panel as follows⁷:

- Mr. Elbio Rosselli (Chairperson)
- Mr. Esteban B. Conejos, Jr.
- Mr. Rodrigo Valenzuela

20. The Kingdom of Bahrain, Brazil, Canada, China, Colombia, Egypt, the European Union, Hong Kong, China, Guatemala, Iceland, India, Indonesia, Japan, Kazakhstan, Malaysia, Mexico, New Zealand, Norway, Qatar, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, South Africa, Chinese Taipei, Thailand, Turkey, Ukraine, the United Arab Emirates and the Bolivarian Republic of Venezuela have reserved their rights to participate in the Panel proceedings as third parties.

III. STANDARD OF REVIEW

21. Article 11 of the DSU provides the general standard of review for WTO panels. Pursuant to Article 11 of the DSU, a panel is required to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

22. The Appellate Body in *US – Hot-Rolled Steel* stated that Article 11 of the DSU imposes upon panels a comprehensive obligation to make an “objective assessment of the matter”, which embraces “all aspects of a panel’s examination of the ‘matter’, both factual and legal”.⁸ Thus, panels are required to make an “objective assessment of the facts”, of the “applicability” of the covered agreements, and of the “conformity” of the measure at issue with the covered agreements.⁹

23. As far as fact-finding is concerned, the applicable standard of review under Article 11 of the DSU is neither *de novo* review nor a total deference, but rather “the objective assessment of the facts”.¹⁰ Article 11 requires a panel to consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.¹¹

⁷ *United States – Certain Measures on Steel and Aluminium Products*, Constitution of the Panel established at the Request of Switzerland, Note by the Secretariat, WT/DS556/16.

⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

¹⁰ Appellate Body Report, *EC – Hormones*, para. 117.

¹¹ Appellate Body Report, *EC – Hormones*, para. 132-133.

24. With respect to “the applicability of ... the relevant covered agreements”, a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand. The touchstone of this obligation is that a panel’s assessment must be “objective”.¹²

25. This general standard of review applies to disputes under the GATT 1994 as well as other covered agreements to the extent that they do not contain any specific rules on the standard of review.

26. With respect to disputes under the Agreement on Safeguards, the Appellate Body in *Argentina – Footwear (EC)* clarified that given the silence of the Agreement on Safeguards as to the standard of review to be applied by panels in reviewing the WTO-consistency of safeguard measures and their related investigations, it is the general standard of review set out in Article 11 of the DSU that applies.¹³

27. The Appellate Body in *US – Cotton Yarn* summarized this general standard of review when applied to disputes under the Agreement on Safeguards as follows:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.¹⁴

28. Thus, the standard of review under Article 11 of the DSU, also in the context of safeguard measures, is neither a *de novo* review, which would involve repeating the analysis of the evidence made by the competent authority, nor is it a “total deference” which would imply accepting the national authority determination.¹⁵ Rather, a panel is required to assess whether the competent authority has examined all the relevant factors and has provided a reasoned and adequate explanation as to how the facts support its determination.¹⁶

¹² Appellate Body Report, *Colombia – Textiles*, para. 5.17.

¹³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 120.

¹⁴ Appellate Body Report, *US – Cotton Yarn*, para. 74.

¹⁵ Appellate Body Report, *Argentina – Footwear (EC)*, paras. 119 and 121.

¹⁶ Appellate Body Reports, *US – Lamb*, para. 103, in the context of a claim under Article 4.2(a) of the Agreement on Safeguards; and *US – Line Pipe*, para. 216, in the context of a claim under Article 4.2 (b) of the Agreement on Safeguards. See also Appellate Body Report, *US – Steel Safeguards*, paras. 296-297.

29. In the context of a claim under Article 4.2(a) of the Agreement on Safeguards, the Appellate Body in *US – Lamb* stated that:

[A] panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.¹⁷

30. The Appellate Body further stated that the panel has to examine whether the competent authorities provided a reasoned and adequate explanation that is “explicit” in the sense that it is “clear and unambiguous” and does “not merely imply or suggest an explanation.”¹⁸

31. In *US – Steel Safeguards*, the Appellate Body confirmed that the above standard equally applies to other obligations under the Agreement on Safeguards as well as to the obligations in Article XIX of the GATT 1994.¹⁹

32. A panel’s assessment of whether the competent authorities have complied with their obligations under the Agreement on Safeguards and Article XIX of the GATT 1994 is to be based on the relevant report published by the competent authorities pursuant to Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards.²⁰

33. Indeed, Article 3.1, last sentence, requires the competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Article 4.2(c) obliges the competent authorities to publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

34. The Appellate Body in *US – Steel Safeguards* clarified that “the ‘reasoned conclusions’ and ‘detailed analysis’ as well as ‘a demonstration of the relevance of the factors examined’ that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994”.²¹ The Appellate Body concluded that:

¹⁷ Appellate Body Report, *US – Lamb*, para. 106.

¹⁸ Appellate Body Reports, *US – Line Pipe*, para. 217; and *US – Steel Safeguards*, paras. 296-297.

¹⁹ Appellate Body Report, *US – Steel Safeguards*, para. 276.

²⁰ Appellate Body Report, *US – Steel Safeguards*, para. 299.

²¹ Appellate Body Report, *US – Steel Safeguards*, para. 299.

[W]here a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly.²²

35. This also implies that any reasoning, analysis or demonstrations provided after publication of the report – i.e. *ex post* explanations – are irrelevant and cannot be relied upon to remedy any deficiencies of the competent authorities' determinations.²³

IV. THE ADJUSTMENT MEASURES ON IMPORTS OF STEEL AND ALUMINIUM PRODUCTS

A. Introduction

36. Switzerland submits that the adjustment measures that have been imposed by the United States on imports of steel and aluminium products are inconsistent with various provisions of the Agreement on Safeguards and of the GATT 1994.

37. In the following sections, Switzerland will first provide the factual background necessary for a proper understanding of the measures at issue (Section IV.B). In the second section (Section IV.C), Switzerland will describe the measures at issue that are being challenged in the present case. Finally, in the third and fourth sections (Sections IV.D and IV.E), Switzerland will explain why those measures are inconsistent with several provisions of the Agreement on Safeguards and of the GATT 1994.

B. Factual Background

1. Introduction

38. The measures on imports of certain steel products and certain aluminium products that are challenged by Switzerland have been imposed by the United States pursuant to an investigation made under Section 232 of the Trade Expansion Act of 1962.²⁴

39. At the outset, it should be noted that in US law there are different legal instruments allowing the US authorities to restrict imports.²⁵ While some of those

²² Appellate Body Report, *US – Steel Safeguards*, para. 303.

²³ Panel Report, *Ukraine – Passenger Cars*, para. 7.27.

²⁴ Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862, as amended) (Section 232 of the Trade Expansion Act of 1962 or Section 232), Exhibit CHE-1.

²⁵ Imports can be restricted based on (i) investigations pursuant to Section 232 of the Trade Expansion Act of 1962; (ii) anti-dumping and countervailing duty investigations pursuant to Title VII of the Tariff Act of 1930; (iii) safeguard investigations pursuant to Sections 201-204 of the Trade

instruments appear to implement certain provisions under the GATT 1994 and/or other covered agreements, such as Title VII of the Tariff Act of 1930 which implements the WTO provisions relating to anti-dumping and countervailing measures, other instruments such as Section 232 of the Trade Expansion Act of 1962 do not appear to implement specific provisions of the covered agreements. When examining how the measures at issue - which have been taken pursuant to Section 232 - qualify, the fact that Section 232 does not implement specific provisions of the covered agreements, should not prejudice their qualification under WTO law. Such qualification must be determined objectively on the basis of the design, structure and expected operation of those measures as a whole.

40. As will be explained in further detail below in Section V of this submission, Section 232 of the Trade Expansion Act of 1962 as interpreted and as being used by the current US administration constitutes a safeguard mechanism to restrict imports for economic reasons, with a view to address the alleged injury suffered by a domestic industry.

41. In the following sections, Switzerland will:

- describe the investigations that have led to the imposition of the measures at issue;
- describe the findings and recommendations of the US Department of Commerce (USDOC) in each of the two investigations;
- describe the import adjustment measures taken by the US President with respect to steel and aluminium products following the USDOC investigations;
- identify the statements of the US authorities and US officials regarding the investigations and the import adjustment measures;
- identify the specific products at issue; and
- identify the United States' tariff bindings with regard to the steel and aluminium products concerned.

Act of 1974; and (iv) investigations that address violations or denial of US benefits under trade agreements pursuant to Section 301 of the Trade Act of 1974.

2. *Section 232 investigations concerning imports of steel and aluminium into the United States*

a. Investigation concerning imports of steel

42. On 19 April 2017, the US Secretary of Commerce Wilbur Ross initiated an investigation to determine the effect of imported steel on national security of the United States pursuant to Section 232 of the Trade Expansion Act of 1962, as amended.²⁶ The following day, President Donald Trump signed a Presidential Memorandum directing the US Secretary of Commerce to proceed expeditiously in conducting the investigation and submit a report on his findings to the President.²⁷

43. A notice regarding the initiation of the investigation was published in the Federal Register on 26 April 2017.²⁸ The notice invited interested parties to submit written comments and announced a public hearing to be held on 24 May 2017. During that hearing, the USDOC heard testimony from 37 witnesses. In addition, the USDOC received 201 written submissions concerning the investigation.

44. In the course of the investigation, the USDOC held interagency consultations with the US Department of Defence (USDOD) as well as the Department of State, Department of the Treasury, Department of the Interior/US Geological Survey, the Department of Homeland Security/US Customs and Border Protection (US CBP), the International Trade Commission, and the Office of the United States Trade Representative (USTR).

45. On 11 January 2018, the USDOC issued its report on the effect of imports of steel on the national security of the United States setting out its findings and recommendations for presidential action under Section 232.

b. Investigation concerning imports of aluminium

46. On 26 April 2017, the US Secretary of Commerce Wilbur Ross initiated an investigation to determine the effect of imported aluminium on national security of the United States pursuant to Section 232 of the Trade Expansion Act of 1962, as

²⁶ USDOC, *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*, 11 January 2018 (Steel Report), p. 18, Exhibit CHE-2. Available at: <https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file>.

²⁷ US President (Trump), "Memorandum on Steel Imports and Threats to National Security", *Weekly Compilation of Presidential Documents*, 20 April 2017, Exhibit CHE-3. Available at: <https://www.gpo.gov/fdsys/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf>.

²⁸ USDOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, Federal Register, Vol. 82, No. 79, 26 April 2017, p. 19205-19207, Exhibit CHE-4.

amended.²⁹ The following day, President Donald Trump signed a Presidential Memorandum directing the US Secretary of Commerce to proceed expeditiously in conducting the investigation and submit a report on his findings to the President.³⁰

47. Through a Notice published on 9 May 2017, the USDOC invited interested parties to submit written comments concerning the investigation.³¹ The public comment period ended on 23 June 2017. The USDOC received 91 written submissions concerning the investigation. In addition, on 22 June 2017, the USDOC held a public hearing during which it heard testimony from 32 witnesses.

48. In the course of the investigation, the USDOC held interagency consultations with the Department of Defence regarding methodological and policy questions that arose during the investigation as well as with other agencies of the United States' Government with expertise and information regarding the aluminium industry, including the US Geological Survey of the Department of the Interior and the US International Trade Commission.

49. On 17 January 2018, the USDOC issued its report on the effect of imports of aluminium on the national security of the United States setting out its findings and recommendations for presidential action under Section 232.

3. *Findings and Recommendations of the USDOC*

50. At the end of each investigation, the USDOC issued a report which contains its findings of the investigation and includes recommendations regarding the actions to be taken by the US President.

a. The Steel Report

51. On 11 January 2018, the USDOC submitted to the US President the final report summarizing the findings of the investigation into the effect of imports of steel on the national security of the United States (the Steel Report).³²

²⁹ USDOC, The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 17 January 2018 (Aluminium Report), p. 18, Exhibit CHE-5. Available at:

<https://www.bis.doc.gov/index.php/documents/aluminum/2223-the-effect-of-imports-of-aluminum-on-the-national-security-with-redactions-20180117/file>.

³⁰ US President (Trump), "Memorandum on Aluminum Imports and Threats to National Security", *Weekly Compilation of Presidential Documents*, 27 April 2017, Exhibit CHE-6. Available at: <https://www.gpo.gov/fdsys/pkg/DCPD-201700284/pdf/DCPD-201700284.pdf>.

³¹ USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, *Federal Register*, Vol. 82, No. 88, 9 May 2017, pp. 21509-21511, Exhibit CHE-7.

³² Presidential Proclamation 9705 of 8 March 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United

52. In the Steel Report, the USDOC concluded that the present quantities and circumstances of steel imports are weakening the US internal economy and therefore threaten to impair the US national security. More specifically, according to the Steel Report, three factors create “a persistent threat of further plant closures that could leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs”.³³ Those three factors are: (i) the displacement of domestic steel by excessive imports; (ii) the consequent adverse impact on the economic welfare of the domestic steel industry; and (iii) the global excess capacity in steel.

53. The USDOC’s analysis focused on the impact of the increased imports of steel products on the commercial viability of the domestic steel industry. Importantly, in its assessment, the USDOC considered that “the fact that some or all of the imports causing the harm are from reliable sources does not compel a finding that those imports do not threaten to impair national security”.³⁴ This constitutes a significant departure from the practice of the USDOC in previous Section 232 investigations whereby imports from reliable sources (i.e. allies) were taken into account together with the available domestic supply.³⁵

i. Increase in imports and its impact on the domestic steel industry

54. The Steel Report states that the increase in imports of steel products into the United States has resulted in the impairment in the position of the domestic steel industry, noting that “[s]teel manufacturers operating in the United States [...] have seen their commercial and industrial business steadily eroded by a growing influx of lower-priced imported product”³⁶ and that “[r]ising levels of imports of steel continue to weaken the U.S. steel industry’s financial health”.³⁷

55. The Steel Report analyses the trends in imports of steel products over the years, noting that imports rose from 25.9 million MT in 2011 to 40.2 million MT in 2014 and that during the first 10 months of 2017, imports were “increasing at a double-digit rate over 2016”.³⁸ The Steel Report concludes that “[s]teel producers in the United States are facing widespread harm from mounting imports” and the “[e]xcessive imports of steel [...] have displaced domestic steel production, the related skilled workforce, and threaten the

States (Presidential Proclamation 9705), Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11625-11630, recital 1, Exhibit CHE-8.

³³ The Steel Report, p. 16, Exhibit CHE-2.

³⁴ The Steel Report, p. 17, Exhibit CHE-2.

³⁵ For a detailed explanation of the previous USDOC practice under Section 232, see Section V.B.2 below.

³⁶ The Steel Report, p. 25, Exhibit CHE-2.

³⁷ The Steel Report, p. 37, Exhibit CHE-2.

³⁸ The Steel Report, p. 27, Exhibit CHE-2.

ability of this critical industry to maintain economic viability”.³⁹ It further observes that “the U.S. steel industry is being substantially impacted by the current levels of imported steel” and that the displacement of domestic steel products by excessive imports of steel is having the serious effect of causing the weakening of the US internal economy.⁴⁰ According to the Steel Report, “[t]he displacement of domestic product by excessive imports is having the serious effect of causing the domestic industry to operate at unsustainable levels, reducing employment, diminishing research and development, inhibiting capital expenditures, and causing a loss of vital skills and know-how”.⁴¹

ii. The state of the domestic steel industry

56. In examining the situation of the domestic steel industry, the Steel Report takes into account several factors, including high import to export ratio⁴², steel prices on the US market⁴³, closures of US steel mills⁴⁴, decline in employment⁴⁵ and capital expenditures⁴⁶, low-profit margins⁴⁷, the below-demand level of production⁴⁸, stagnation of steel production capacity⁴⁹, low capacity utilization⁵⁰ and decline in the number of steel production facilities⁵¹. According to the Steel Report, “[n]umerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies illustrate the decline of the U.S. steel industry”.⁵²

57. Amongst other, the Steel Report notes that since 2000, foreign competition and the displacement of domestic steel by excessive imports have resulted in the closure of six basic oxygen furnace facilities and idling of four more, a 35% decrease in employment in the steel industry (as compared to 1998) and caused the domestic industry as a whole to operate on average with negative net income since 2009.⁵³

58. On that basis, the Steel Report concludes that “[s]teel producers in the United States are facing widespread harm from mounting imports” and that “[e]xcessive imports of steel, now consistently above 30 percent of domestic demand, have displaced

³⁹ The Steel Report, p. 56, Exhibit CHE-2.
⁴⁰ The Steel Report, p. 57, Exhibit CHE-2.
⁴¹ The Steel Report, p. 57, Exhibit CHE-2.
⁴² The Steel Report, pp. 30-31, Exhibit CHE-2.
⁴³ The Steel Report, pp. 31-33, Exhibit CHE-2.
⁴⁴ The Steel Report, pp. 33-35, Exhibit CHE-2.
⁴⁵ The Steel Report, pp. 35-36, Exhibit CHE-2.
⁴⁶ The Steel Report, pp. 40-41, Exhibit CHE-2.
⁴⁷ The Steel Report, pp. 37-40, Exhibit CHE-2.
⁴⁸ The Steel Report, pp. 46-47, Exhibit CHE-2.
⁴⁹ The Steel Report, pp. 41-46, Exhibit CHE-2.
⁵⁰ The Steel Report, pp. 47-49, Exhibit CHE-2.
⁵¹ The Steel Report, pp. 49-51, Exhibit CHE-2.
⁵² The Steel Report, p. 4, Exhibit CHE-2.
⁵³ The Steel Report, pp. 4 and 35, Exhibit CHE-2.

domestic steel production, the related skilled workforce, and threaten the ability of this critical industry to maintain economic viability”.⁵⁴

iii. The circumstances accompanying the increase in imports

59. The Steel Report also considers that global excess steel capacity is a circumstance contributing to the weakening of the US economy, taking into account that US steel producers will continue to face increasing import competition.⁵⁵ It attributes that excess capacity primarily to the substantial global excess steel production led by China.

iv. The alleged threat of impairment to the national security

60. The Steel Report explains that, for the purpose of that investigation, the USDOC decided to rely on the interpretation of “national security” developed in the context of the 2001 investigation regarding imports of iron ore and semi-finished steel (*2001 Iron Ore Investigation*). Accordingly, the term “national security” is understood more broadly as covering not only the national defence requirements but also the general economic security and welfare of certain industries that are critical to the minimum operations of the economy and government (i.e. “critical industries”).⁵⁶ According to the USDOC, this is supported by the wording of Section 232(d) which is divided into two sentences, the first sentence “focus[ing] directly on ‘national defense’ requirements, thus making clear that ‘national defense’ is a subset of the broader term ‘national security’” and the second sentence “focus[ing] on the broader economy.”⁵⁷

61. The USDOC did not examine the different factors⁵⁸ relating to “national defense” which are referred to in the first sentence of Section 232(d). Instead, in relation to “national defense”, the Steel Report states that “steel articles are critical to the nation’s overall defense objectives”, noting that the USDOD “has a large and ongoing need for a range of steel products that are used in fabricating weapons and related systems for the nation’s defense”.⁵⁹ The Steel Report indicates that the USDOD requirements amount to 3% of US steel production.⁶⁰ It further states that this requires “commercially viable steel producers” because “[i]n order to supply those diverse national defense needs, U.S.

⁵⁴ The Steel Report, p. 56, Exhibit CHE-2.

⁵⁵ The Steel Report, pp. 51-54, Exhibit CHE-2.

⁵⁶ The Steel Report, pp. 13-14, Exhibit CHE-2.

⁵⁷ The Steel Report, p. 15, Exhibit CHE-2.

⁵⁸ Domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.

⁵⁹ The Steel Report, p. 23, Exhibit CHE-2.

⁶⁰ The Steel Report, p. 23, Exhibit CHE-2.

steel mills must attract sufficient commercial (i.e., non-defense) business.”⁶¹ This shows that, even with respect to national defense needs, the measures are justified by reference to non-defense business factors.

62. The USDOC also claimed that steel “is needed to satisfy the requirements for ‘those industries that U.S. Government has determined are critical to minimum operations of the economy and government.’”⁶² In the context of the *2001 Iron Ore Investigation*, the Department had identified 28 “critical industries”. However, for the purposes of this investigation, the USDOC relied on the 16 “critical infrastructure” sectors identified in Presidential Policy Directive 21 (PPD-21)⁶³. The Steel Report explains that the range of industries identified in the PPD-21 is comparable to the range of “critical industries” analyzed in the 2001 Iron Ore Report.⁶⁴ The USDOC claimed that many of those 16 “critical infrastructure sectors” “use high volumes of steel” and that “[i]ncreased quantities of steel will be needed for various critical infrastructure applications in the coming years.”⁶⁵ Again, the USDOC claimed that “the ability of the domestic steel industry to continue meeting national security needs depends on the continued capability of the U.S. steel industry to compete fairly in the commercial marketplace and maintain a financially viable domestic manufacturing capability.”⁶⁶

63. In the Steel Report, the USDOC explained that “U.S. steel producers would be unable to survive purely on defense or critical infrastructure steel needs” but that “it is commercial and industrial customer sales that generate the relatively steady production needed for manufacturing efficiency, and the revenue volume needed to sustain the business.”⁶⁷ Thus, the logic of the Steel Report is that since defence and critical infrastructure requirements alone are not sufficient to support a robust steel industry, US steel producers “must be financially viable and competitive in the commercial market to be available to produce the needed steel output in a timely and cost efficient manner”.⁶⁸ In that sense, the USDOC’s conclusion regarding the alleged threat of impairment to the national security is based not on the situation of the domestic steel industry with respect

⁶¹ The Steel Report, p. 23, Exhibit CHE-2.

⁶² The Steel Report, p. 23, Exhibit CHE-2.

⁶³ The 16 “critical infrastructure” sectors include: Chemical Production, Commercial Facilities, Communications, Critical Manufacturing, Dams, Defense Industrial Base, Emergency Services, Energy, Financial Services, Food and Agriculture, Government Facilities, Health Care/Public Health, Information Technology, Nuclear Reactors, Materials, and Waste Sector, Transportation Systems, Water and Waste Water Systems.

⁶⁴ The Steel Report, p. 24, Exhibit CHE-2. The USDOC also explained that “the ‘critical industries’ sector [...] is analogous to the more robust critical infrastructure sectors identified pursuant to PPD-21”. See the Steel Report, p. 26, Exhibit CHE-2.

⁶⁵ The Steel Report, p. 24, Exhibit CHE-2.

⁶⁶ The Steel Report, p. 26, Exhibit CHE-2.

⁶⁷ The Steel Report, p. 25, Exhibit CHE-2.

⁶⁸ The Steel Report, p. 55, Exhibit CHE-2.

to defence and critical infrastructure needs but more broadly on the overall economic situation of that industry.

v. Overall conclusion

64. Ultimately, the Steel Report concludes that “the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel” are weakening the United States’ internal economy and *therefore* “threaten to impair” the national security as defined in Section 232.⁶⁹ Thus, the finding of a threat of impairment to the national security is only consequential to the finding of the overall impairment in the position of the domestic industry caused by increased imports and the global excess capacity in steel.

vi. Recommendations for Presidential Action

65. The Steel Report concludes that the only effective means of removing the threat of impairment is to reduce imports to a level that should enable US steel mills to operate at 80% or more of their production capacity.⁷⁰ Based on the projected 2017 import levels, the Steel Report assesses that this would require reducing imports from 36 million MT to about 23 million MT. Accordingly, the Steel Report recommends that the US President take immediate action to adjust the level of steel imports, through quotas or tariffs, to a level sufficient, even after any exceptions (if granted), to enable US steel producers to operate at about an 80% or better average capacity utilization rate based on available capacity in 2017.⁷¹ The Steel Report observes that such increase in capacity utilization “will enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term.”⁷²

66. More specifically, the Steel Report suggests a global quota of 63%, adjusted as necessary, or a global 24% tariff on all steel imports.⁷³ The Steel Report also recommends that, in selecting the global steel quota or the global steel tariff, the US President may decide to exempt from those measures specific countries by limiting imports from the latter to 100% of their prior imports in 2017, based on an overriding economic or security interest of the United States.⁷⁴ It further recommends an appeal

⁶⁹ The Steel Report, p. 55, Exhibit CHE-2.

⁷⁰ The Steel Report explains that the US steel industry uses 80% as a benchmark for minimum operational efficiency (The Steel Report, p. 48, Exhibit CHE-2). It also notes that for most capital and energy-intensive US steel producers capacity levels of 80% or higher are required to maintain facilities, carry out periodic modernization, service company debt, and fund research and development (The Steel Report, p. 47, Exhibit CHE-2).

⁷¹ The Steel Report, pp. 58-59, Exhibit CHE-2.

⁷² The Steel Report, p. 59, Exhibit CHE-2.

⁷³ The Steel Report, pp. 59-60, Exhibits CHE-2.

⁷⁴ The Steel Report, pp. 60-61, Exhibit CHE-2.

process by which affected US entities could seek an exclusion from the tariff or quota based on a demonstrated (1) lack of sufficient US production capacity of comparable products, or (2) specific national security considerations.⁷⁵

b. The Aluminium Report

67. On 19 January 2018, the USDOC submitted to the US President the final report summarizing the findings of the investigation into the effect of imports of aluminium on the national security of the United States (the Aluminium Report).⁷⁶

68. The Aluminium Report concludes that the present quantities and circumstances of aluminium imports are weakening the US internal economy and therefore threaten to impair the national security. In particular, the Aluminium Report observes that recent import trends have left the US almost totally reliant on foreign producers of primary aluminium and that, as a consequence, the US aluminium industry is at risk of becoming unable to satisfy the existing national security needs or respond to a national security emergency that requires a large increase in domestic production. On that basis, the report concludes that in order to remove the threat of impairment to the national security, it is necessary to reduce imports to a level that will provide the opportunity for US primary aluminium producers to restart idled capacity, thereby “increa[sing] and stabiliz[ing] U.S. production of aluminum at the minimal level needed to meet current and future national security needs”.⁷⁷

i. Increase in imports and its impact on the domestic aluminium industry

69. The USDOC analysed the trends in imports of all aluminium products subject to the investigation combined as well as separately for different product categories.⁷⁸ The Aluminium Report indicates that, on a global basis, imports of aluminium products increased by 34% between 2013, when they amounted to 4.4 million MT and 2016 when they went up to 5.9 million MT. It further observes that for the first 10 months of 2017, imports are running 18% above 2016 levels on a tonnage basis.⁷⁹ According to the Aluminium Report, in 2016 imports of primary aluminium accounted for nearly 90% of domestic consumption, up from 64% in 2012.⁸⁰ The report adds that the import reliance

⁷⁵ The Steel Report, p. 61, Exhibit CHE-2.

⁷⁶ USDOC, The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 17 January 2018) (The Aluminium Report), Exhibit CHE-5.

⁷⁷ The Aluminium Report, p. 104, Exhibit CHE-5.

⁷⁸ The Aluminium Report, pp. 63-75, Exhibit CHE-5.

⁷⁹ The Aluminium Report, p. 64, Exhibit CHE-5.

⁸⁰ The Aluminium Report, p. 61, Exhibit CHE-5.

increased because domestic primary aluminium production decreased, “so U.S. manufacturers by necessity filled their materials needs through imports”.⁸¹

70. The Aluminium Report concludes that the increase in imports had a negative impact on the welfare of the US aluminium industry. More specifically, with respect to the upstream industry, the Aluminium Report observes that the “soaring imports due to overcapacity in the aluminum sector have damaged U.S. aluminum companies”⁸² and that “imported aluminum products [...] are steadily eroding the customer base for domestic production”.⁸³ The Aluminium Report also states that, generally, “[t]he economic stability of companies manufacturing aluminum in the United States is undermined by growing volumes of imported aluminum in key product sectors”.⁸⁴

ii. The state of the domestic aluminium industry

71. In assessing the state of the US aluminium industry and the need for import adjustments, the US Secretary of Commerce took into account the following elements: (i) domestic aluminium production capacity is declining; (ii) domestic production of aluminium is well below demand; (iii) the value of US aluminium exports is falling; (iv) high import to export ratio; and (v) the impact of imports on the welfare of the US aluminium industry (such as declining employment, the poor financial status of the US aluminium industry, R&D expenditures, capital expenditures, and aluminium prices).

72. The Aluminium Report attempts to link the poor economic situation of the US aluminium industry to the increase in imports. In particular, with respect to the upstream industry, it notes that the “financial performance of upstream aluminum companies was particularly poor between 2013 and 2016, when aluminum prices began to fall sharply” and “imports into the United States surged”.⁸⁵ It further states that “[w]hile the U.S. industry is seeing an upstick in demand and better pricing, it is not clear that this can be maintained given the rise of imported aluminum products, which are steadily eroding the customer base for domestic production”.⁸⁶ With respect to the impact of imports on the downstream aluminium industry, the Aluminium Report observes that while it has been limited to certain product categories, “Chinese firms are striving to enter the more profitable automotive and aerospace markets”.⁸⁷

⁸¹ The Aluminium Report, p. 62, Exhibit CHE-5.

⁸² The Aluminium Report, p. 91, Exhibit CHE-5.

⁸³ The Aluminium Report, p. 94, Exhibit CHE-5.

⁸⁴ The Aluminium Report, p. 40, Exhibit CHE-5.

⁸⁵ The Aluminium Report, p. 92, Exhibit CHE-5.

⁸⁶ The Aluminium Report, p. 94, Exhibit CHE-5.

⁸⁷ The Aluminium Report, p. 95, Exhibit CHE-5.

iii. The circumstances accompanying the increase in imports

73. The Aluminium Report also considers that global excess aluminium capacity is a circumstance that contributes to the weakening of the US aluminium industry and the US economy as a whole. In that regard, the Aluminium Report explains that “while U.S. production capacity has declined dramatically in recent years, other nations have increased their production capacity, with China alone able to produce as much as the rest of the world combined”.⁸⁸ This excess capacity means that US aluminum producers, for the foreseeable future, will face increasing competition from imported aluminum.

iv. The alleged threat of impairment to the national security

74. Similarly to the approach adopted in the steel investigation, the Aluminium Report explains that, for the purpose of that investigation, the USDOC decided to rely on the broad interpretation of “national security”, covering not only national defence requirements but also the general security and welfare of the 16 critical infrastructure sectors.⁸⁹

75. The Aluminium Report finds that aluminium is “essential” to US national security because it is needed to satisfy requirements of the USDOD and the critical infrastructure sectors in the United States.

76. With respect to the aluminium needed for national defence purposes by the USDOD, the Aluminium Report notes that the USDOD and its contractors use a small percentage of US aluminium production⁹⁰ but states that “[d]espite the low percentage of aluminum consumed directly by the DoD, a healthy, vibrant commercial aluminum industry (both primary and downstream) is critical to U.S. national security”.⁹¹

77. Regarding aluminium needed in “critical infrastructure sectors”, the Aluminium Report states that virtually all of these sectors rely on aluminium products as a part of their principal missions.⁹² Six of those sectors where “there is significant dependence on aluminum content” are: defense industrial base, energy, transportation, containers and packaging, construction and manufacturing.⁹³ The sector consuming the largest amount of aluminium is transportation. According to the Aluminium Report, “[t]he ready availability of high quality aluminum bar, rod, coils, plate, sheet, and extrusions is critical to the ability of manufacturers to deliver product to their customers in a timely way and to

⁸⁸ The Aluminium Report, p. 15, Exhibit CHE-5.
⁸⁹ The Aluminium Report, p. 13, Exhibit CHE-5.
⁹⁰ The Aluminium Report, p. 24, Exhibit CHE-5.
⁹¹ The Aluminium Report, p. 25, Exhibit CHE-5.
⁹² The Aluminium Report, p. 36, Exhibit CHE-5.
⁹³ The Aluminium Report, p. 24, Exhibit CHE-5.

respond to national emergencies”.⁹⁴ Another critical industry sector using large quantities of aluminium is agricultural and food supply industries relying on the availability of aluminium packaging, including canning materials and foils. Building and construction is mentioned as the third-largest major market for aluminium in 2016. The Aluminium Report explains that “[a]luminum is used for structural supports; door, wall, and door framing; roofs and awnings; architectural trim; utility cabinets; air conditioning systems; drawbridges and portable emergency bridges”.⁹⁵ The Aluminium Report concludes that “[c]ontinued access to U.S.-based aluminum production is important to critical infrastructure” and that “[e]xcessive reliance on offshore producers as the primary suppliers of aluminum ingot, semi-finished, and finished products to sustain systems for critical infrastructure would pose risks”.⁹⁶

78. The Aluminium Report takes into account, beyond the needs for aluminium for national defence and critical infrastructure, the commercial and industrial sales. Pursuant to the Aluminium Report, domestic production of aluminium is essential to national security and “[r]eliance on foreign suppliers for essential aluminum and aluminum products is contrary to U.S. national security”.⁹⁷ In that sense, to ensure US national security, the US must have “sufficient domestic aluminum production capacity to meet most commercial demand and to fulfill [USDOD] contractor and critical infrastructure requirements”.⁹⁸ The Aluminium Report explains that since defence and critical infrastructure requirements alone are not sufficient to support a robust aluminium industry, US primary and downstream aluminium producers “must be financially viable and competitive in commercial markets to be able to produce the needed output”.⁹⁹ It further adds that “it is in the interest of U.S. national security and overall economic welfare that the United States retains an aluminum industry that is financially viable and able to invest in research and development of the latest technologies”.¹⁰⁰

v. Overall conclusion

79. The Aluminium Report concludes that the displacement of domestic aluminium by excessive imports and the consequent adverse impact on the economic welfare of the domestic aluminium industry, along with global (primarily Chinese) excess capacity in aluminium are weakening the US internal economy and therefore “threaten to impair” the national security as defined in Section 232.¹⁰¹

⁹⁴ The Aluminium Report, p. 37, Exhibit CHE-5.

⁹⁵ The Aluminium Report, pp. 37-38, Exhibit CHE-5.

⁹⁶ The Aluminium Report, pp. 38-39, Exhibit CHE-5.

⁹⁷ The Aluminium Report, p. 39, Exhibit CHE-5.

⁹⁸ The Aluminium Report, p. 40, Exhibit CHE-5.

⁹⁹ The Aluminium Report, p. 105, Exhibit CHE-5.

¹⁰⁰ The Aluminium Report, p. 105, Exhibit CHE-5.

¹⁰¹ The Aluminium Report, p. 15, Exhibit CHE-5.

vi. Recommendations for Presidential Action

80. The Aluminium Report recommends that the US President adjust the levels of aluminium imports, through quotas or tariffs, to a level sufficient, even after any exemptions (if granted), to enable US aluminium producers to use an average of 80% of their production capacity, enabling them to operate profitably under current market prices for aluminium and allowing them to reopen idled capacity.¹⁰² The Aluminium Report stresses that the import adjustment measures should be in effect for a duration “sufficient to allow necessary time and assurances to stabilize the U.S. industry”, “build cash flow to pay down debt and to raise capital for plant modernization to improve manufacturing efficiency”.¹⁰³

81. More specifically, among different alternatives, the Aluminium Report suggests a worldwide quota of 86.7% or a global 7.7% tariff on aluminium products.¹⁰⁴ The Aluminium Report notes that quotas or tariffs should also be imposed on downstream products because global overcapacity, coupled with industrial policies that promote exports of downstream products, have had a negative impact on the US primary aluminium industry, as well as directly on the downstream companies that face increased import penetration in many aluminium product sectors.¹⁰⁵

82. The Aluminium Report also recommends that the US President may decide to exempt from the proposed quota specific countries by granting the latter 100% of their prior imports in 2017 or exempting them all together, based on an overriding economic or security interest of the United States.¹⁰⁶ It further recommends an appeal process by which affected US entities could seek an exclusion from the tariff or quota based on a demonstrated lack of sufficient US production capacity of comparable products, or specific national security considerations.¹⁰⁷

4. *Import adjustments on steel and aluminium products*

a. Additional import duties

i. Additional import duties on steel products

83. Following the findings of the Steel Report, the US President issued on 8 March 2018 Presidential Proclamation 9705¹⁰⁸ imposing an additional duty of 25% *ad valorem*

¹⁰² The Aluminium Report, p. 107, Exhibit CHE-5.

¹⁰³ The Aluminium Report, p. 7, Exhibit CHE-5.

¹⁰⁴ The Aluminium Report, p. 108, Exhibit CHE-5.

¹⁰⁵ The Aluminium Report, pp. 5 and 105, Exhibit CHE-5.

¹⁰⁶ The Aluminium Report, p. 109, Exhibit CHE-5.

¹⁰⁷ The Aluminium Report, p. 109, Exhibit CHE-5.

¹⁰⁸ Presidential Proclamation 9705 of 8 March 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United

on imports of certain steel products from all countries except Canada and Mexico, effective as of 23 March 2018. In that Presidential Proclamation, the US President observed that “[t]his relief will help [US] domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce [the] need to rely on foreign producers for steel”.¹⁰⁹ The temporary exemption from the application of the additional import duty, initially granted to Canada and Mexico, was extended through Presidential Proclamation 9711¹¹⁰ of 22 March 2018, to Australia, Argentina, South Korea, Brazil and the European Union, until 1 May 2018.

84. Accordingly, on 23 March 2018, the additional import duty entered into effect for steel products imported from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil and the European Union.

85. Through Presidential Proclamation 9740¹¹¹ of 30 April 2018, the US President permanently excluded South Korea from the additional import duty as a result of reaching an agreement on satisfactory “alternative means” to address the alleged threat to the US national security posed by imports of steel products from South Korea. This Presidential Proclamation also extended the temporary exemption of Argentina, Australia and Brazil in order to finalise the details regarding alternative means agreed in principle between these countries and the United States. It also extended, until 1 June 2018, the temporary exemption accorded to Canada, Mexico and the European Union, with a view to continue discussions on the alternative means with regard to imports of steel products from those countries.

86. Through Presidential Proclamation 9759¹¹² of 31 May 2018, the US President permanently excluded Australia, Argentina and Brazil from the additional import duty as a result of reaching agreements on satisfactory “alternative means” to address the alleged threat to the US national security posed by imports of steel products from those countries. In the absence of similar agreements with Canada, Mexico and the European

States (Presidential Proclamation 9705), Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11625-11630, Exhibit CHE-8.

¹⁰⁹ Presidential Proclamation 9705, recital 8, Exhibit CHE-8.

¹¹⁰ Presidential Proclamation 9711 of 22 March 2018 on Adjusting Imports of Steel into the United States (Presidential Proclamation 9711), Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13361-13365, Exhibit CHE-9.

¹¹¹ Presidential Proclamation 9740 of 30 April 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9740), Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20683-20705, Exhibit CHE-10.

¹¹² Presidential Proclamation 9759 of 31 May 2018 on Adjusting Imports of Steel into the United States, including the Annex (Presidential Proclamation 9759), Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25857-25877, Exhibit CHE-11.

Union and the expiry of the temporary exemptions, the additional import duty of 25% became effective with respect to steel imports from those countries on 1 June 2018.

87. Finally, on 10 August 2018, through Presidential Proclamation 9772¹¹³, the US President amended the additional import duty for steel products as applicable to imports from Turkey by increasing them from 25% to 50%, effective as of 13 August 2018.

ii. Additional import duties on aluminium products

88. Following the findings of the Aluminium Report, on 8 March 2018, President Trump issued Presidential Proclamation 9704¹¹⁴ imposing an additional duty of 10% *ad valorem* on imports of certain aluminium products from all countries except Canada and Mexico, effective as of 23 March 2018. In that Presidential Proclamation, the US President observed that “[t]his relief will 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 aluminum”. The temporary exemption from the application of the additional import duty, initially granted to Canada and Mexico, was extended through Presidential Proclamation 9710¹¹⁵ of 22 March 2018, to Australia, Argentina, South Korea, Brazil and the European Union, until 1 May 2018.

89. Accordingly, on 23 March 2018, the additional import duty entered into effect for aluminium products imported from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil and the European Union.

90. Through Presidential Proclamation 9739¹¹⁶ of 30 April 2018, the US President extended the temporary exemption of Argentina, Australia and Brazil in order to finalise the details regarding alternative means agreed, in principle, between these countries and the United States. It also extended, until 1 June 2018, the temporary exemption accorded to Canada, Mexico and the European Union, with a view to continue

¹¹³ Presidential Proclamation 9772 of 10 August 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9772), Federal Register, Vol. 158, No. 83, 15 August 2018, pp. 40429-40432, Exhibit CHE-12.

¹¹⁴ Presidential Proclamation 9704 of 8 March 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9704), Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11619-11624, Exhibit CHE-13.

¹¹⁵ Presidential Proclamation 9710 of 22 March 2018 on Adjusting Imports of Aluminum into the United States (Presidential Proclamation 9710), Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13355-13359, Exhibit CHE-14.

¹¹⁶ Presidential Proclamation 9739 of 30 April 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9739), Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20677-20682, Exhibit CHE-15.

discussions on the “alternative means” with regard to imports of aluminium articles from those countries.

91. On 1 May 2018, the additional import duty of 10% *ad valorem* entered into effect for aluminium products imported from South Korea.

92. Through Presidential Proclamation 9758¹¹⁷ of 31 May 2018, the US President permanently excluded Argentina and Australia from the additional import duty as a result of reaching agreements on satisfactory “alternative means” with those two countries. In the absence of similar agreements with Brazil, Canada, Mexico and the European Union and the expiry of the temporary exemptions, the additional import duty of 10% became effective with respect to aluminium imports from those countries on 1 June 2018.

b. Country exemptions and import quotas

93. In Presidential Proclamations 9704 and 9705, the US President reserved the right to remove or modify the restrictions on steel and aluminium imports from the exporting countries that will successfully negotiate “alternative means” to address the alleged threat to the national security of the United States. The US President agreed on “alternative means” with Argentina, Australia, Brazil and South Korea regarding steel products and with Argentina and Australia regarding aluminium products. Imports from those countries have therefore been exempted from the additional duties. Import quotas have been agreed with South Korea, Argentina and Brazil.

94. With respect to steel products, the United States agreed on absolute (yearly) import quotas with South Korea, Argentina and Brazil. The quotas applicable to imports from South Korea were established by Presidential Proclamation 9740 of 30 April 2018¹¹⁸, while the quotas applicable to imports from Argentina and Brazil were established by Presidential Proclamation 9759 of 31 May 2018.¹¹⁹

95. The quotas are provided for in 54 subheadings of Chapter 99 of the United States Harmonised Tariff Schedule (HTSUS) covering the relevant headings and subheading of Chapters 72 (iron and steel) and 73 (articles of iron or steel).¹²⁰

96. Note 16 to Subchapter III of Chapter 99 provides that, beginning on 1 July 2018, any imports of the products subject to absolute (yearly) quotas during any quarter that are in excess of 500,000 kg and in excess of 30% of the total yearly quota shall not be

¹¹⁷ Presidential Proclamation 9758 of 31 May 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9758), Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25849-25855, Exhibit CHE-16.

¹¹⁸ Presidential Proclamation 9740, recital 4 and Article 2, Exhibit CHE-10.

¹¹⁹ Presidential Proclamation 9759, recital 5 and Article 2, Exhibit CHE-11.

¹²⁰ Excerpt of Chapter 99 of the HTSUS, Exhibit CHE-17.

allowed. Accordingly, in addition to the absolute (yearly) import quotas, starting from 1 July 2018, the US CBP also determines quarterly quotas for steel products imported from South Korea, Argentina and Brazil.¹²¹

97. With respect to aluminium products, the United States agreed on absolute (yearly) import quotas only with Argentina. These quotas were established by Presidential Proclamation 9758 of 31 May 2018.¹²²

98. The quotas are provided for in 2 subheadings of Chapter 99 covering the relevant headings and subheadings of Chapter 76 (aluminium and articles thereof).¹²³

99. Note 19 to Subchapter III of Chapter 99 provides that, beginning on 1 July 2018, any imports of the products subject to absolute (yearly) quotas during any quarter that are in excess of 500,000 kg and in excess of 30% of the total yearly quota shall not be allowed. Accordingly, in addition to the absolute (yearly) import quotas, starting from 1 July 2018, the US CBP also determines quarterly quotas for aluminium products imported from Argentina.¹²⁴

100. In addition, Australia appears to be permanently exempted from the application of the additional import duties on steel and aluminium products without being subject to import quotas.

c. Product exclusions

101. Presidential Proclamations 9704 and 9705 authorized the US Secretary of Commerce to grant exclusions from the application of additional import duties for steel and aluminium products that are not produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality or based upon specific national security considerations.¹²⁵

102. On 19 March 2018, the USDOC issued an interim final rule¹²⁶ introducing supplements No. 1 and No. 2 to Part 705 of the Code of Federal Regulations (15 CFR

¹²¹ US CBP, Information Relating to the allocation and use of quotas; QB 18-126 Absolute Quota for Steel Mill Articles: Argentina, Brazil and South Korea, Exhibit CHE-18. Available at: <https://www.cbp.gov/trade/quota/bulletins/qb-18-126-absolute-quota-aluminum-products-argentina-brazil-south-korea>.

¹²² Presidential Proclamation 9758, recital 5 and Article 2, Exhibit CHE-16.

¹²³ Excerpt of Chapter 99 of the HTSUS, Exhibit CHE-17.

¹²⁴ US CBP, Information Relating to the allocation and use of quotas; QB 18-127 Absolute Quota for Aluminum Products: Argentina, Exhibit CHE-19. Available at: <https://www.cbp.gov/trade/quota/bulletins/qb-18-127-absolute-quota-aluminum-products-argentina>.

¹²⁵ Presidential Proclamation 9704, Article 3, Exhibit CHE-13; Presidential Proclamation 9705, Article 3, Exhibit CHE-8.

¹²⁶ USDOC, Interim Final Rule regarding the Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of

705) (Section 705)¹²⁷, which set forth the requirements and process for requesting product exclusions. According to those rules, an exclusion may be granted on the basis of a written request submitted by individuals or organisations using steel/aluminium in business activities in the United States. The exclusions are approved on a product basis and are limited to the individuals or organisations that submitted the specific exclusion request. On 11 September 2018, the USDOC issued an interim final rule revising supplements No. 1 and No. 2 to Section 705.¹²⁸

103. In addition, Presidential Proclamations 9777¹²⁹ and 9776¹³⁰ of 29 August 2018 authorized the US Secretary of Commerce to provide relief from the quotas applicable to steel and aluminium products from countries subject to quotas, in certain limited circumstances, including when given products are determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality, or upon specific national security considerations. The procedures for applying and for granting such a relief, are included in the interim final rule as published on 11 September 2018.¹³¹

5. *Relevant statements of the US authorities and US officials regarding the steel and aluminium investigations and the resulting adjustment measures*

104. The statements of the US President and of US officials issued before and after the imposition of adjustment measures on imports of steel and aluminium products constitute relevant context for understanding the real purpose and nature of those measures. Those statements clearly demonstrate that by imposing additional import duties and quotas on imports of steel and aluminium products, the United States intended to address the alleged injury caused to the domestic steel and aluminium

¹²⁷ Objections to Submitted Exclusion Requests for Steel and Aluminum, Federal Register, Vol. 83, No. 53, 19 March 2018, pp. 12106-12112 (Interim Final Rule – March 2018), Exhibit CHE-20.

Part 705 of the Code of Federal Regulations, Title 15, Vol. 2, Edition 2018 (15 CFR 705), Exhibit CHE-21. Note that the updated version of Section 705, including the supplements, is available in the Electronic Code of Federal Regulations (e-CFR) at: <https://www.ecfr.gov/cgi-bin/ECFR?page=browse>. The e-CFR is an editorial compilation of CFR material and Federal Register amendments and is not an official legal edition of the CFR.

¹²⁸ USDOC, Interim Final Rule regarding Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, Federal Register, Vol. 83, No. 176, 11 September 2018, pp. 46026-46065 (Interim Final Rule – September 2018), Exhibit CHE-22.

¹²⁹ Presidential Proclamation 9777 of 29 August 2018 on Adjusting Imports of Steel into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9777), Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45025-45030, Exhibit CHE-23.

¹³⁰ Presidential Proclamation 9776 of 29 August 2018 on Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9776), Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45019-45023, Exhibit CHE-24.

¹³¹ Interim Final Rule – September 2018, Exhibit CHE-22.

industries by the increased imports of those products. Amongst other, the following statements are relevant:

- On 9 June 2017, the US President tweeted: “Time to start building in our country, with *American workers & with American iron, aluminum & steel*. It is time to put #AmericaFirst”¹³²
- On 2 March 2018, the US President tweeted: “We must protect our country and our workers. Our *steel industry is in bad shape*. IF YOU DON’T HAVE STEEL, YOU DON’T HAVE A COUNTRY!”¹³³
- On 5 March 2018, the US President tweeted: “We have large trade deficits with Mexico and Canada. NAFTA, which is under renegotiation right now, has been a bad deal for U.S.A. Massive relocation of companies & jobs. *Tariffs on Steel and Aluminum will only come off if new & fair NAFTA agreement is signed.*”¹³⁴
- On 8 March 2018, the White House issued a fact sheet on Section 232 steel and aluminium adjustment measures explaining that “President Trump is taking *action to protect America’s critical steel and aluminum industries*, which have been harmed by unfair trade practices and global excess capacity.”¹³⁵
- On 10 March 2018, the US President tweeted: “The European Union, wonderful countries who treat the U.S. very badly on trade, are complaining about the tariffs on Steel & Aluminum. *If they drop their horrific barriers & tariffs on U.S. products going in, we will likewise drop ours. Big Deficit*. If not, we Tax Cars etc. FAIR!”¹³⁶
- On 6 April 2018, the US President tweeted: “Despite the Aluminum Tariffs, Aluminum prices are DOWN 4%. People are surprised, I’m not! *Lots of money coming into U.S. coffers and Jobs, Jobs, Jobs!*”¹³⁷
- On 31 May 2018, in an official statement, the White House stated that “[t]he Section 232 steel and aluminum tariffs have already had *major, positive effects*

¹³² Twitter statement by @realDonaldTrump on 9 June 2017, Exhibit CHE-25. (emphasis added)
¹³³ Twitter statement by @realDonaldTrump on 2 March 2018, Exhibit CHE-25. (emphasis added)
¹³⁴ Twitter statement by @realDonaldTrump on 5 March 2018, Exhibit CHE-25. (emphasis added)
¹³⁵ Fact sheet published by the White House on 8 March 2018, Exhibit CHE-26. (emphasis added)
Available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/>
¹³⁶ Twitter statement by @realDonaldTrump on 10 March 2018, Exhibit CHE-25. (emphasis added)
¹³⁷ Twitter statement by @realDonaldTrump on 6 April 2018, Exhibit CHE-25. (emphasis added)

*on steel and aluminum workers and jobs and will continue to do so long into the future.*¹³⁸

- On 9 June 2018, the US President tweeted: “PM Justin Trudeau of Canada acted so meek and mild during our @G7 meetings only to give a news conference after I left saying that, ‘US Tariffs were kind of insulting’ and he ‘will not be pushed around.’ Very dishonest & weak. *Our Tariffs are in response to his of 270% on dairy!*”¹³⁹
- On 15 July 2018, US Secretary of Commerce Wilbur Ross noted that “[t]he remarkable revitalization of American’s metal industries would not be happening without President Trump’s Section 232 tariffs”.¹⁴⁰
- On 4 August 2018, the US President tweeted: “Tariffs have had a tremendous positive impact on our Steel Industry. Plants are opening all over the U.S., Steelworkers are working again, and *big dollars are flowing into our Treasury.* Other countries use Tariffs against, but when we use them, foolish people scream!”¹⁴¹
- On 17 September 2018, the US President tweeted: “Our Steel Industry is the talk of the World. *It has been given new life, and is thriving.* Billions of Dollars is being spent on new plants all around the country!”¹⁴²
- On 28 January 2019, the US President tweeted: “Tariffs on the ‘dumping’ of Steel in the United States have *totally revived our Steel Industry. New and expanded plants are happening all over the U.S. We have not only saved this important industry, but created many jobs.* Also, billions paid to our treasury. A BIG WIN FOR U.S.”¹⁴³

6. *The products concerned*

105. The steel products concerned by the adjustment measures on imports of steel are defined in the US Harmonized Tariff Schedule (HTSUS) as:

¹³⁸ Statement of the White House on 31 May 2018, Exhibit CHE-27. (emphasis added) Available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-section-232-tariff-modifications-2/>.

¹³⁹ Twitter statement by @realDonaldTrump on 9 June 2018, Exhibit CHE-25. (emphasis added)
¹⁴⁰ Opinion by the US Secretary of Commerce on www.cleveland.com dated 15 July 2018, Exhibit CHE-28. (emphasis added) Available at: https://www.cleveland.com/opinion/2018/07/revitalizing_the_us_steel_and.html.

¹⁴¹ Twitter statement by @realDonaldTrump on 8 August 2018, Exhibit CHE-25. (emphasis added)

¹⁴² Twitter statement by @realDonaldTrump on 17 September 2018, Exhibit CHE-25. (emphasis added)

¹⁴³ Twitter statement by @realDonaldTrump on 28 January 2019, Exhibit CHE-25. (emphasis added)

(a) flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226;

(b) bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228; angles, shapes and sections of 7216 (except subheadings 7216.61.00, 7216.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229; sheet piling provided for in subheading 7301.10.00; rails provided for in subheading 7302.10; fish-plates and sole plates provided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00;

(c) tubes, pipes and hollow profiles provided for in heading 7304 or 7306; tubes and pipes provided for in heading 7305;

(d) ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224; and

(e) products of stainless steel provided for in heading 7218, 7219, 7220, 7221, 7222 or 7223.¹⁴⁴

106. The aluminium products concerned by the adjustment measures on imports of aluminium are defined in the HTSUS as:

(a) unwrought aluminum provided for in heading 7601;

(b) bars, rods and profiles provided for in heading 7604, wire provided for in heading 7605;

(c) plates, sheets and strip provided for in heading 7606; foil provided for in heading 7607;

(d) tubes, pipes and tube or pipe fittings provided for in heading 7608 and 7609; and

(e) castings and forgings of aluminum provided for in subheading 7616.99.51.¹⁴⁵

7. *The United States' tariff bindings on the products concerned*

107. The United States' Schedule of Concessions provides that the bound rate for the relevant steel products is 0%. For the relevant aluminium products, the bound rate ranges between 0% and 6.5% *ad valorem*. The United States' Schedule of Concessions does not report any "other duties or charges" applicable with respect to the steel and aluminium products at issue.¹⁴⁶

¹⁴⁴ Excerpts of Chapter 99 of the HTSUS, Exhibit CHE-17, see Note 16(b).

¹⁴⁵ Excerpts of Chapter 99 of the HTSUS, Exhibit CHE-17, see Note 19(b).

¹⁴⁶ Excerpts of the United States' Schedule of Concessions, Exhibit CHE-29.

C. The measures at issue

108. The measures at issue are the import adjustments imposed by the United States on imports of certain steel and aluminium products. They consist of the additional duties and quotas applicable to imports of certain steel and aluminium products as well as the country exemptions and product exclusions from such duties and quotas.

109. Those measures have been imposed by the United States for an unlimited period of time, but they are subject to changes by the President of the United States.¹⁴⁷

110. The measures at issue have been imposed by and are evidenced by the following documents, considered alone and in any combination:

- Presidential Proclamation 9705 of 8 March 2018 on Adjusting Imports of Steel Into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁴⁸
- Presidential Proclamation 9704 of 8 March 2018 on Adjusting Imports of Aluminum Into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁴⁹
- Presidential Proclamation 9711 of 22 March 2018 on Adjusting Imports of Steel Into the United States¹⁵⁰
- Presidential Proclamation 9710 of 22 March 2018 on Adjusting Imports of Aluminum Into the United States¹⁵¹
- Presidential Proclamation 9740 of 30 April 2018 on Adjusting Imports of Steel Into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁵²
- Presidential Proclamation 9739 of 30 April 2018 on Adjusting Imports of Aluminum Into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁵³

¹⁴⁷ For instance, Article 5 of Presidential Proclamation 9705 provides that the modifications to the HTSUS “shall continue in effect, unless such actions are expressly reduced, modified, or terminated”.

¹⁴⁸ Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11625-11630, Exhibit CHE-8.

¹⁴⁹ Federal Register, Vol. 83, No. 51, 15 March 2018, pp. 11619-11624, Exhibit CHE-13.

¹⁵⁰ Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13361-13365, Exhibit CHE-9.

¹⁵¹ Federal Register, Vol. 83, No. 60, 28 March 2018, pp. 13355-13359, Exhibit CHE-14.

¹⁵² Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20683-20705, Exhibit CHE-10.

¹⁵³ Federal Register, Vol. 83, No. 88, 7 May 2018, pp. 20677-20682, Exhibit CHE-15.

- Presidential Proclamation 9759 of 31 May 2018 on Adjusting Imports of Steel Into the United States, including the Annex¹⁵⁴
- Presidential Proclamation 9758 of 31 May 2018 on Adjusting Imports of Aluminum Into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁵⁵
- Presidential Proclamation 9772 of 10 August 2018 on Adjusting Imports of Steel Into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁵⁶
- Presidential Proclamation 9777 of 29 August 2018 on Adjusting Imports of Steel Into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁵⁷
- Presidential Proclamation 9776 of 29 August 2018 on Adjusting Imports of Aluminum Into the United States, including the Annex, To Modify Certain Provisions of Chapter 99 of the Harmonized Tariff Schedule of the United States¹⁵⁸
- USDOC, 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 (11 January 2018)¹⁵⁹
- USDOC, The Effect of Imports of Aluminum On the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended (17 January 2018)¹⁶⁰
- USDOC, Interim Final Rule regarding the Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum¹⁶¹

¹⁵⁴ Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25857-25877, Exhibit CHE-11.

¹⁵⁵ Federal Register, Vol. 83, No. 108, 5 June 2018, pp. 25849-25855, Exhibit CHE-16.

¹⁵⁶ Federal Register, Vol. 158, No. 83, 15 August 2018, pp. 40429-40432, Exhibit CHE-12.

¹⁵⁷ Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45025-45030, Exhibit CHE-23.

¹⁵⁸ Federal Register, Vol. 83, No. 171, 4 September 2018, pp. 45019-45023, Exhibit CHE-24.

¹⁵⁹ The Steel Report, Exhibit CHE-2.

¹⁶⁰ The Aluminium Report, Exhibit CHE-5.

¹⁶¹ Federal Register, Vol. 83, No. 53, 19 March 2018, pp. 12106-12112, Exhibit CHE-20.

- USDOC, Interim Final Rule regarding Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum¹⁶².

D. The measures at issue are inconsistent with the Agreement on Safeguards and Article XIX of the GATT 1994

111. Switzerland submits that the measures at issue are measures that fall within the scope of the Agreement on Safeguards and of Article XIX of the GATT 1994. These measures are inconsistent with Article XIX:1(a) and XIX:2 of the GATT 1994 as well as with Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7.1, 7.4, 11(a), 11.1(b), 12.1, 12.2 and 12.3 of the Agreement on Safeguards.

1. *The measures at issue fall within the scope of the Agreement on Safeguards and of Article XIX of the GATT 1994*

- a. Principles applicable to the legal characterisation of the measures at issue

112. The United States has not described the measures at issue as “safeguard measures”. In response to Switzerland’s request for consultations, the United States has claimed that “the tariffs imposed pursuant to Section 232 are not safeguard measures but rather tariffs on imports of steel and aluminum articles that threaten to impair the national security of the United States.”¹⁶³ The United States has stated that it “did not take action pursuant [to] Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures” and therefore has claimed that the Agreement on Safeguards is not applicable.¹⁶⁴

113. The legal characterisation of a measure for the purposes of determining the applicability of a relevant agreement is, however, not an issue to be decided unilaterally by the Member taking the measure. It is an issue that must be determined objectively. The examination as to whether the provisions of the covered agreements invoked by a complainant as the basis for its claims are “applicable” and “relevant” to the case at hand is part of the panel’s duty to make an “objective assessment” pursuant to Article 11 of the DSU.¹⁶⁵ As the Appellate Body noted in *Indonesia – Iron or Steel Products*:

A panel is thus under a duty to examine, as part of its "objective assessment", whether the provisions of the covered agreements invoked by a complainant as the basis for its claims are "applicable" and "relevant" to the case at hand. Where a measure is not subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's

¹⁶² Federal Register, Vol. 83, No. 176, 11 September 2018, pp. 46026-46065, Exhibit CHE-22.

¹⁶³ Communication from the United States, 19 July 2018, WT/DS556/4.

¹⁶⁴ Communication from the United States, 19 July 2018, WT/DS556/4.

¹⁶⁵ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.31.

consistency with that agreement. The examination regarding the "applicability" of certain provisions logically precedes the assessment of a measure's "conformity" with such provisions. Indeed, as noted by the Appellate Body, a panel may be required to "determine whether a measure falls within the scope of a particular provision or covered agreement before proceeding to assess the consistency of the measure" with that provision or covered agreement.¹⁶⁶

114. The Panel's duty to conduct an "objective assessment of the matter" implies that the Panel is not bound by the way the defending Member characterises the measure in its municipal law. Indeed, the description of the measure by a party and "the label given to [it] under municipal law" "cannot be the end of [the Panel's] analysis"¹⁶⁷ and are "not dispositive" of the proper legal characterization of that measure under the covered agreements."¹⁶⁸ As the Appellate Body emphasised, "a panel must assess the legal characterisation for purposes of the applicability of the relevant agreement on the basis of the 'content and substance' of the measure itself".¹⁶⁹ More specifically, the Appellate Body noted that a panel is called upon "to assess the design, structure, and expected operation of the measure as a whole".¹⁷⁰ For that purpose, "a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject."¹⁷¹

115. The Appellate Body noted that the manner in which the measure is characterised under domestic law, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards are relevant factors in such an evaluation. However, "no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards."¹⁷²

116. In fact, in *Indonesia – Iron or Steel Products*, the panel found that the fact that the specific duty had been described as a safeguard measure in the implementing regulation and had been imposed following an investigation conducted pursuant to Indonesia's domestic safeguards legislation, with a view to complying with the disciplines of the Agreement on Safeguards did not render the specific duty a "safeguard measure"

¹⁶⁶ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.31.

¹⁶⁷ Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 593.

¹⁶⁸ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32 referring to Appellate Body Reports, *US – Large Civil Aircraft (2nd Complaint)*, paras. 593 and 586; *US – Offset Act (Byrd Amendment)*, para. 259; *US – Softwood Lumber IV*, para. 56; *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127.

¹⁶⁹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 532 referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87.

¹⁷⁰ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

¹⁷¹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

¹⁷² Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

within the meaning of Article 1 of the Agreement on Safeguards.¹⁷³ The Appellate Body upheld the Panel's findings.

117. Thus, the fact that the United States does not describe the measures at issue as “safeguard measures” and did not impose such measures pursuant to an investigation conducted pursuant to the United States’ domestic safeguards legislation does not mean that such measures are not “safeguard measures” within the meaning of Article 1 of the Agreement on Safeguards. As emphasised above, the label given to a measure under a Member’s municipal law is not dispositive of the proper legal characterisation of that measure under the covered agreements. Such legal characterisation has to be based on the content and substance of the measure itself. As explained in the next subsections, the examination of the content and substance of the measures at issue shows that those measures constitute “safeguard measures” and that the Agreement on Safeguards and Article XIX of the GATT 1994 are therefore applicable to the measures at issue.

b. The scope of the Agreement on Safeguards

118. Article 1 of the Agreement on Safeguards provides that:

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

119. Thus, according to Article 1 of the Agreement on Safeguards, “safeguard measures” are “measures provided for in Article XIX of GATT 1994”.

120. Article XIX of GATT 1994 entitled “Emergency Action on Imports of Particular Products” provides in its paragraph 1(a) that:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

121. In *Indonesia – Iron or Steel Products*, the Appellate Body had to examine whether the panel rightly interpreted and applied Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 in concluding that the measure at issue in that case was not a safeguard measure.

¹⁷³ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.40 and paras. 7.33-7.39.

122. The Appellate Body considered, on the basis of the text of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 read in its context, that “in order to constitute one of the ‘measures provided for in Article XIX’, a measure must present certain constituent features, absent which it could not be considered a safeguard measure”.¹⁷⁴ The Appellate Body identified two such constituent features.

123. *First*, the measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. This follows from the text of Article XIX:1(a) of the GATT 1994 which refers to measures that suspend a GATT obligation and/or withdraw or modify a GATT concession.¹⁷⁵

124. *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.¹⁷⁶ As the Appellate Body emphasised, “[t]he use of the word ‘to’ [...] indicates that the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific objective, namely preventing or remedying serious injury to the Member’s domestic industry”.¹⁷⁷ Thus, the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must have “a demonstrable link” to the objective of preventing or remedying injury.¹⁷⁸

125. The Appellate Body has also emphasised that safeguard measures are “matters out of the ordinary”, “matters of urgency”, that is “emergency actions”.¹⁷⁹ This is reflected in the title of Article XIX which is “Emergency Action on Imports of Particular Products”. The Appellate Body has noted that “the WTO disciplines on safeguards give WTO Members ‘the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that ... makes it necessary to protect a domestic industry temporarily’”.¹⁸⁰

126. Finally, it should be noted that Article 11.1(b) of the Agreement on Safeguards also prohibits that Members “seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side”.

¹⁷⁴ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

¹⁷⁵ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

¹⁷⁶ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

¹⁷⁷ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

¹⁷⁸ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

¹⁷⁹ Appellate Body Report, *Korea – Dairy*, para. 86.

¹⁸⁰ Appellate Body Report, *Indonesia – Iron or Steel Products*, para 5.53 referring to Appellate Body Report, *US – Line Pipe*, para. 82.

c. The measures at issue fall within the scope of the Agreement on Safeguards and of Article XIX of the GATT 1994

127. The assessment of whether a measure presents the features highlighted above, and thus constitutes a safeguard measure, is to be made on a case-by-case basis, taking into account the design, structure, and expected operation of the measure as a whole. In order to make such an objective assessment, “a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject.”¹⁸¹

128. Switzerland submits that the following aspects are relevant and demonstrate that the measures at issue constitute “measures provided for in Article XIX of GATT 1994”:

- The measures at issue suspend a GATT obligation or withdraw or modify a GATT concession;
- The suspension, withdrawal or modification in question is designed to prevent or remedy serious injury to the US steel and aluminium industries;
- The measures present additional features supporting their qualification as “safeguard measures”.

129. As a preliminary observation, Switzerland wishes to emphasise the importance of examining the measure imposed on imports of steel products *as a whole* and the measure imposed on imports of aluminium products *as a whole*. For each set of products, i.e. steel products and aluminium products, the US authorities have carried out one single investigation. The outcome of each investigation was that it was necessary to impose import restrictions to address the “adverse impact” suffered by, respectively, the US steel industry and the US aluminium industry. The import restrictions took the form of principally an additional duty, but also of quantitative restrictions on imports of those products from countries with which the United States has reached an agreement. The additional duty, the quantitative restrictions and the corollary country exemptions from the additional duty as well as the product exclusions are different aspects of a single measure.

¹⁸¹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60 referring to Appellate Body Reports, *China – Auto Parts*, para. 171.

i. The measures at issue suspend a GATT obligation or withdraw or modify a GATT concession

130. The first constituent feature of the “measures provided for in Article XIX” is that such measures suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Through the measures at issue, the United States has suspended at least one GATT obligation or withdrawn or modified at least one GATT concession.

(a) The adjustment measure on imports of steel products

131. The adjustment measure on imports of steel products principally consists in the imposition of an additional *ad valorem* duty of 25% on imports of steel products. That duty which applies “in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles”¹⁸² has been introduced through a modification of Chapter 99 of the HTSUS which includes “Temporary modifications established pursuant to trade legislation”. The modification to Chapter 99 of the HTSUS has been introduced on the basis of Section 604 of the Trade Act of 1974 which authorizes “the imposition of any rate of duty or other import restriction”.¹⁸³

132. Subheading 9903.80.01 provides that the “product of iron or steel provided for in the tariff headings or subheadings enumerated in note 16 to this chapter” shall be subject to “the duty provided in the applicable subheading + 25%”.

133. Thus, imports of the products of iron or steel concerned (those listed in Note 16 to Chapter 99) are subject to the following duties:

Product description	Applicable rate of duty + additional import duty
flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226	0% + 25% (all countries except Australia, Argentina, South Korea, Brazil and Turkey) 0% + 50% (Turkey)
bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228; angles, shapes and sections of 7216 (except subheadings 7216.61.00, 72616.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229;	0% + 25% (all countries except Australia, Argentina, South Korea, Brazil and Turkey)

¹⁸² Presidential Proclamation 9705, Article 2, Exhibit CHE-8.

¹⁸³ Section 604 of the Trade Act of 1974 (19 U.S.C. 2483), United States Code, Title 19 – Customs Duties, 2012 Edition, Supplement, Exhibit CHE-32.

sheet piling provided for in subheading 7301.10.00; rails provided for in subheading 7302.10; fish-plate and sole plates provided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00	0% + 50% (Turkey)
tubes, pipes and hollow profiles provided for in heading 7304 or 7306; tubes and pipes provided for in heading 7305	0% + 25% (all countries except Australia, Argentina, South Korea, Brazil and Turkey) 0% + 50% (Turkey)
ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224	0% + 25% (all countries except Australia, Argentina, South Korea, Brazil and Turkey) 0% + 50% (Turkey)
products of stainless steel provided for in heading 7218, 7219, 7220, 7221, 7222 or 7223	0% + 25% (all countries except Australia, Argentina, South Korea, Brazil and Turkey) 0% + 50% (Turkey)

*Table prepared on the basis of the information included in Chapters 72 and 73 and 99 of the HTSUS.*¹⁸⁴

134. The United States' Schedule of Concessions shows tariff bindings of 0% regarding all the products of iron or steel concerned and does not report any "other duties or charges" with respect to those products.¹⁸⁵

135. It follows that, by imposing an additional duty of 25% on imports of the iron or steel products concerned, the United States has suspended at least one GATT obligation or modified or withdrawn at least one GATT concession, namely that included in Articles II:1(a) and (b) of the GATT 1994. This finding is without prejudice to the question of whether or not other GATT obligations are also suspended or whether other GATT concessions are also withdrawn or modified.

¹⁸⁴

Excerpts of Chapters 72 and 73 of the HTSUS, Exhibit CHE-30.

¹⁸⁵

Excerpts of the United States' Schedule of Concessions, Exhibit CHE-29.

(b) The adjustment measure on imports of aluminium products

136. The adjustment measure on imports of aluminium products consists in the imposition of an additional *ad valorem* duty of 10% on imports of aluminium products. That duty which applies “in addition to any other duties, fees, exactions, and charges applicable to such imported aluminium articles”¹⁸⁶ has been introduced through a modification of Chapter 99 of the HTSUS. The modification to Chapter 99 of the HTSUS has been made on the basis of Section 604 of the Trade Act of 1974 which authorizes “the imposition of any rate of duty or other import restriction.”

137. Subheading 9903.85.01 of the HTSUS provides that the “products of aluminium provided for in the tariffs headings or subheadings enumerated in note 19 to this subchapter” shall be subject to “the duty provided in the applicable subheading + 10%”.

138. The imports of the aluminium products concerned (which are listed in Note 19(b) of Chapter 99), are thus subject to the following duties:

Product description	Applicable rate of duty (tariff binding + additional import duty)		
unwrought aluminium provided for in heading 7601	7601.10	Aluminum, not alloyed:	
	7601.10.30	Of uniform cross section throughout its length, the least cross-sectional dimension of which is not greater than 9.5 mm, in coils.....	2,6% +10%
	7601.10.60	Other.....	0% +10%
	7601.20	Aluminum alloys:	
	7601.20.30	Of uniform cross section throughout its length, the least cross-sectional dimension of which is not greater than 9.5 mm, in coils.....	2,6% + 10%
	7601.20.60	Containing 25 percent or more by weight of silicon.....	2,1% + 10%
	7601.20.90	Other.....	0% +10%
bars, rods and profiles provided for in heading 7604; wire provided for in heading 7604	7604	Aluminum bars, rods and profiles:	
	7604.10	Of aluminum, not alloyed:	
	7604.10.10	Profiles.....	5,0% + 10%
	7604.10.30	Having a round cross section.....	2,6% + 10%
	7604.10.50	Other.....	3,0% + 10%
	7604.21.00	Hollow profiles.....	1,5% + 10%
	7604.29	Other:	
7604.29.10	Other profiles.....	5,0% + 10%	
7604.29.30	Having a round cross section.....	2,6% + 10%	

¹⁸⁶

Presidential Proclamation 9704, Article 2, Exhibit CHE-13.

7605	7604.29.50	Other.....	3,0% + 10%
	7605	Aluminum wire:	
	7605.11.00	Of which the maximum cross-sectional dimension exceeds 7 mm.....	2,6% + 10%
	7605.19.00	Other.....	4,2% + 10%
	7605.21.00	Of which the maximum cross-sectional dimension exceeds 7 mm.....	2,6% + 10%
	7605.29.00	Other.....	4,2% + 10%
plates, sheets and strip provided for in heading 7606; foil provided for in heading 7607	7606	Aluminum plates, sheets and strip, of a thickness exceeding 0.2 mm:	
	7606.11	Of aluminum, not alloyed:	
	7606.11.30	Not clad.....	3,0% + 10%
	7606.11.60	Clad.....	2,7% + 10%
	7606.12	Of aluminum alloys:	
	7606.12.30	Not clad.....	3,0% + 10%
	7606.12.60	Clad.....	6,5% + 10%
	7606.91	Of aluminum, not alloyed:	
	7606.91.30	Not clad.....	3,0% + 10%
	7606.91.60	Clad.....	2,7% + 10%
	7606.92	Of aluminum alloys:	
	7606.92.30	Not clad.....	3,0% + 10%
	7606.92.60	Clad.....	6,5% + 10%
	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 0.2 mm: Not backed:	
	7607.11	Rolled but not further worked:	
	7607.11.30	Of a thickness not exceeding 0.01 mm.....	5,8% + 10%
	7607.11.60	Of a thickness exceeding 0.01 mm.....	5,3% + 10%
	7607.11.90	Other.....	3,0% + 10%
	7607.19	Other:	
	7607.19.10	Etched capacitor foil.....	5,3% + 10%
7607.19.30	Cut to shape, of a thickness not exceeding 0.15 mm.....	5,7% + 10%	
7607.19.60	Other.....	3,0% + 10%	
7607.20	Backed:		
7607.20.10	Covered or decorated with a character, design, fancy effect or pattern.....	3,7% + 10%	
7607.20.50	Other.....	0% + 10%	
tubes, pipes and tube or pipe fittings provided for	7608	Aluminum tubes and pipes:	
	7608.10.00	Of aluminum, not alloyed:	
	7608.20.00	Of aluminum alloys:	
	7609.00.00	Aluminum tube or pipe fittings (for example, couplings, elbows, sleeves)	5,7% + 10%

in heading 7608 and 7609	
castings and forgings of aluminium provided for in subheading 7616.99.51	7616.99.51 Other..... 2.5% + 10%

Table prepared on the basis of the information included in Chapters 76 and 99 of the HTSUS.¹⁸⁷

139. The United States' Schedule of Concessions indicates tariff bindings for the aluminium products concerned, ranging from 0% to 6.5% and does not report any "other duties or charges" with respect to those products.¹⁸⁸

140. It follows that by imposing an additional duty of 10% on imports of the aluminium products concerned, the United States has suspended at least one GATT obligation or withdrawn or modified one GATT concession, namely that included in Articles II:1(a) and (b) of the GATT 1994. This finding is without prejudice to the question of whether or not other GATT obligations are also suspended and whether or not other GATT concessions are also withdrawn or modified.

ii. The suspension, withdrawal or modification in question is designed to prevent or remedy serious injury to the US steel and aluminium industries allegedly caused or threatened by imports

141. The other constituent feature of the "measures provided for in Article XIX" is that 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."¹⁸⁹ The Appellate Body emphasised that the use of the word 'to' in the expression "to prevent or remedy" serious injury in Article XIX:1(a) "indicates that the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific *objective*,

¹⁸⁷ Excerpts of Chapter 76 of the HTSUS, Exhibit CHF-31.

¹⁸⁸ Excerpts of the United States' Schedule of Concessions, Exhibit CHE-29.

¹⁸⁹ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. (emphasis added)

namely preventing or remedying serious injury to the Member's domestic industry".¹⁹⁰ In other words, the suspension of a GATT obligation must have "a demonstrable link" to the objective of preventing or remedying injury to the relevant domestic industry.

142. The measures at issue, whether in the form of additional duties or quantitative restrictions, are clearly designed to prevent or remedy serious injury to the US domestic steel and aluminium industries, as will be explained in the following paragraphs.

(a) The adjustment measures on steel

143. In conducting its investigation concerning imports of steel products, the US Secretary of Commerce found the following factors to be the "most relevant"¹⁹¹: the impact of foreign competition on the economic welfare of individual domestic industries and any serious effects resulting from the displacement of any domestic products by excessive imports. Both factors – which are referred to in the second sentence of Section 232(d) – focus on "the broader economy".¹⁹² The US Secretary of Commerce found a third factor, not on the list, to be relevant: the presence of massive excess capacity for producing steel. The US Secretary of Commerce concluded that it is these three factors that "create a persistent threat of further plant closures"¹⁹³ and this, in turn, "would leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs."¹⁹⁴ The US Secretary of Commerce therefore found that that "this 'weakening of [the US] internal economy may impair the national security'".

144. Regarding the first factor, the US Secretary of Commerce examined and found that the imports, in their quantities, "adversely impact[ed] the economic welfare of the U.S. steel industry". That conclusion was based on findings concerning the following injury factors: the continuing increase in imports of steel products, high import penetration, high import to export ratio, the lower prices of the imports, the closure of plants in the US, the declining employment, the financial distress of the US steel industry and the declining of capital expenditures.¹⁹⁵ All these elements examined by the US Secretary of Commerce relate to the *state of the US steel industry*.

145. Regarding the second factor, the US Secretary of Commerce examined and found that the displacement of domestic steel by excessive quantities of imports had "the serious effect of weakening [the US] internal economy". That conclusion was based on findings concerning the following injury factors: the stagnant production capacity of the

¹⁹⁰ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56. (emphasis original)

¹⁹¹ The Steel Report, p. 15, Exhibit CHE-2.

¹⁹² The Steel Report, p. 15, Exhibit CHE-2.

¹⁹³ The Steel Report, p. 16, Exhibit CHE-2.

¹⁹⁴ The Steel Report, p. 16, Exhibit CHE-2.

¹⁹⁵ The Steel Report, pp. 27-41, Exhibit CHE-2.

US steel industry, the fact that the US steel production is well below demand, utilization rates that are well below economically viable levels.¹⁹⁶ Again, all these elements relate to the *state of the US steel industry*.

146. It is on the basis of those factors – which all relate to the state of the US steel industry – that the US Secretary of Commerce concluded that imports had “the serious effect of weakening” the US internal economy.

147. A third factor was also found to be relevant: the massive excess capacity for producing steel. The US Secretary of Commerce found that:

The circumstance of excess global steel production capacity is a factor because, while U.S. production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much as the rest of world combined. This overhang of global excess capacity means that U.S. steel producers, for the foreseeable future, will continue to lose *market share* to imported steel as other countries export more steel to the United States to bolster their own economic objectives and offset loss of markets to Chinese steel exports.¹⁹⁷ (emphasis added)

148. The US Secretary of Commerce concluded that these three factors “create a persistent threat of further plant closures” which “could leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs.”¹⁹⁸

149. The US Secretary of Commerce noted that “as imports continue to take business away from domestic producers, these producers are in danger of falling below minimum viable scale and are at risk of having to exit the market and substantially close down production capacity, often permanently” and that “[s]teel producers in the United States are facing widespread *harm* from mounting imports”.¹⁹⁹ It is on the basis of those conclusions concerning *the state of the US steel industry* that the US Secretary of Commerce then concluded that this constitutes a “weakening of [the US] internal economy”:

The displacement of domestic product by excessive imports is having the serious effect of causing the domestic industry to operate at unsustainable levels, reducing employment, diminishing research and development, inhibiting capital expenditures, and causing a loss of vital skills and know-how. [...]

It is evident that the U.S. steel industry is being substantially impacted by the current levels of imported steel. The displacement of domestic steel by imports

¹⁹⁶ The Steel Report, pp. 41-51, Exhibit CHE-2.

¹⁹⁷ The Steel Report, p. 16, Exhibit CHE-2.

¹⁹⁸ The Steel Report, p. 16, Exhibit CHE-2.

¹⁹⁹ The Steel Report, p. 56, Exhibit CHE-2. (emphasis added)

has the serious effect of placing the United States at risk of being unable meet national security requirements.²⁰⁰

150. On the basis of those conclusions, the US Secretary of Commerce recommended “the President [to] take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States”, adding that “[t]he quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the U.S. steel producers to be able to operate at about an 80 percent or better of the industry’s capacity utilization rate.”²⁰¹ According to the US Secretary of Commerce, this is “the only effective means” in order “to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity.” The Steel Report underlines that “[t]his increase in U.S. capacity utilization will enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term.”²⁰²

151. In Presidential Proclamation 9705, the US President similarly underlined that the purpose of the adjustment measure is to improve the economic situation of the US steel industry. Indeed, the US President noted that the measure proposed by the US Secretary of Commerce “would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production.”²⁰³ The US President further emphasised that this relief “will help [the US] domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production”²⁰⁴ and that this “is an important first step in ensuring the economic viability of [the US] domestic steel industry.”²⁰⁵ Regarding the measures agreed with Argentina, Australia and Brazil, Presidential Proclamation 9759 states that those measures will “reduce excess steel production and excess steel capacity”, “will contribute to increased capacity utilization in the United States” and will “prevent the transshipment of steel articles and avoid import surges”.²⁰⁶

152. The above analysis shows that the measures taken by the United States on imports of steel products are designed to prevent or remedy the serious injury allegedly caused by imports to the US steel industry.

²⁰⁰ The Steel Report, p. 57, Exhibit CHE-2.

²⁰¹ The Steel Report, p. 58, Exhibit CHE-2.

²⁰² The Steel Report, p. 59, Exhibit CHE-2.

²⁰³ Presidential Proclamation 9705, recital 4, Exhibit CHE-8.

²⁰⁴ Presidential Proclamation 9705, recital 8, Exhibit CHE-8.

²⁰⁵ Presidential Proclamation 9705, recital 11, Exhibit CHE-8. See also Presidential Proclamation 9711, recital 11, Exhibit CHE-9.

²⁰⁶ Presidential Proclamation 9759, recital 5, Exhibit CHE-11.

(b) The adjustment measures on aluminium

153. In the *Aluminium Investigation*, the same three factors were found to be relevant by the US Secretary of Commerce: the displacement of domestic aluminium by excessive imports, the consequent impact on the economic welfare of the domestic aluminium industry and the global (primarily Chinese) excess capacity in aluminium.²⁰⁷ The first two factors are listed in the second sentence of Section 232(d) which focuses on the “broader economy” and the third factor is not listed. The US Secretary of Commerce concluded that it is these three factors that are “weakening the [US domestic] industry”. In its conclusions, the US Secretary of Commerce found that “the present quantities and circumstance of aluminium imports (wrought and unwrought) are ‘weakening [the US] internal economy.’”²⁰⁸ It considered that the imports have damaged the US aluminium production capability significantly.²⁰⁹ According to those conclusions, the aluminium industry needs to be “financially viable” and “competitive in commercial markets” to be able to produce the needed output for the national defense and critical infrastructure.²¹⁰

154. The conclusion regarding the decline in the US aluminium industry was primarily based on the following factors: the increase in imports of aluminium products, the decline in domestic aluminium production capacity and the permanent closure of several US aluminium smelters, the fact that domestic production is well below demand, the declining employment, the poor financial status of the US aluminium industry and the sharp drop in aluminium prices leading to bankruptcies and ceasing of operations.²¹¹ All these elements examined by the US Secretary of Commerce relate to the *state of the US aluminium industry*.

155. On the basis of those conclusions, the US Secretary of Commerce stated that “it is necessary to reduce imports to a level that will provide the opportunity for U.S. primary aluminum producers to restart idled capacity” and that “[t]his will increase and stabilize U.S. production of aluminum at the minimal level needed to meet current and future national security needs”.²¹² It added that this is also necessary with respect to downstream products since imports “have had a negative impact on the U.S. primary aluminum industry, [...] as well as directly on the downstream companies which face increased penetration in many aluminum product sectors.”²¹³ The US Secretary of Commerce recommended the imposition of quotas and/or tariffs “to enable U.S.

²⁰⁷ The Aluminium Report, pp. 14-15, Exhibit CHE-5.

²⁰⁸ The Aluminium Report, p. 104, Exhibit CHE-5.

²⁰⁹ The Aluminium Report, p. 105, Exhibit CHE-5.

²¹⁰ The Aluminium Report, p. 105, Exhibit CHE-5.

²¹¹ The Aluminium Report, pp. 40-103, Exhibit CHE-5.

²¹² The Aluminium Report, p. 104, Exhibit CHE-5.

²¹³ The Aluminium Report, p. 104, Exhibit CHE-5.

aluminum producers to utilize an average of 80 percent of their production capacity”. This “should be sufficient to enable U.S. aluminum producers to operate profitably under current market prices for aluminum” and to “allow them to reopen idled capacity”.²¹⁴

156. In Presidential Proclamation 9704, the US President similarly underlined that the purpose of the adjustment measures is to improve the economic situation of the US aluminium industry. Indeed, the US President noted that the proposed measures “would enable domestic aluminum producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production.”²¹⁵ It further noted that those measures “will help [the US] 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.”²¹⁶ With respect to measures agreed with Argentina and Australia, Presidential Proclamation 9758 states that those measures will “reduce excess aluminum production and excess aluminum capacity”, “contribute to increased capacity utilization in the United States” and “prevent the transshipment of aluminum articles and avoid import surges.”²¹⁷

157. The above shows that the measures taken by the United States on imports of aluminium products are designed to prevent or remedy the serious injury allegedly caused by imports to the US aluminium industry.

(c) Conclusions

158. In conclusion, both the steel and aluminium investigations focused on the “state” of the US steel and aluminium industries. The US Secretary of Commerce examined various injury factors relating to the state of the US steel and aluminium industries and concluded that imports adversely impacted those domestic industries. The “adverse impact” allegedly suffered by the US steel industry and the US aluminium industry takes the form, according to the findings of the US Secretary of Commerce, of a too low level of utilisation capacity, a decreased production, unemployment and a negative impact on the financial situation of those industries. The purpose of the adjustment measures imposed on imports of steel products and aluminium products is, as stated in the Steel and Aluminium Reports and in the relevant Presidential Proclamations, to address the “adverse impact” suffered by those industries. Therefore, the adjustment measures imposed on imports of steel products and aluminium products, in the form of additional duties and/or quantitative restrictions, are clearly *designed* to prevent or remedy the

²¹⁴ The Aluminium Report, p. 107, Exhibit CHE-5.

²¹⁵ Presidential Proclamation 9704, recital 3, Exhibit CHE-13.

²¹⁶ Presidential Proclamation 9704, recital 7, Exhibit CHE-13.

²¹⁷ Presidential Proclamation 9758, recital 5, Exhibit CHE-16.

injury, i.e. “the adverse impact” or the “harm”, suffered by the US steel and aluminium industries.

159. The fact that the adjustment measures are designed to prevent or remedy the injury allegedly caused by the imports to the US steel and aluminium industries is further confirmed by numerous statements of the US President and of US officials concerning those measures. In particular, the following statements are relevant:

- “President Trump is taking *action to protect America’s critical steel and aluminum industries, which have been harmed* by unfair trade practices and global excess capacity.”²¹⁸
- “[t]ariffs have had a tremendous positive impact on our Steel Industry. Plants are opening all over the U.S., Steelworkers are working again, and big dollars are flowing into our Treasury. Other countries use Tariffs against, but when we use them, foolish people scream!”²¹⁹
- “[o]ur Steel Industry is the talk of the World. It has been given *new life, and is thriving*. Billions of Dollars is being spent on new plants all around the country!”²²⁰
- “[t]ariffs on the ‘dumping’ of Steel in the United States have *totally revived our Steel Industry. New and expanded plants are happening all over the U.S. We have not only saved this important industry, but created many jobs*. Also, billions paid to our treasury. A BIG WIN FOR U.S.”²²¹
- “[t]he remarkable *revitalization of American’s metal industries* would not be happening without President Trump’s Section 232 tariffs”.²²²

160. These statements confirm that the measures at issue are designed to pursue the specific objective of preventing or remedying serious injury as they seek to “save” and to “revive” the US domestic steel and aluminium industries found to be harmed by increased imports.

218 Fact sheet published by the White House on 8 March 2018, Exhibit CHE-26. (emphasis added) Available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/>

219 Twitter statement by @realDonaldTrump on 4 August 2018, Exhibit CHE-25. (emphasis added)

220 Twitter statement by @realDonaldTrump on 17 September 2018, Exhibit CHE-25. (emphasis added)

221 Twitter statement by @realDonaldTrump on 28 January 2019, Exhibit CHE-25. (emphasis added)

222 Opinion by the US Secretary of Commerce Wilbur Ross on www.cleveland.com dated 15 July 2018, Exhibit CHE-28. (emphasis added) Available at: https://www.cleveland.com/opinion/2018/07/revitalizing_the_us_steel_and.html.

iii. The measures present additional features supporting their qualification as “safeguard measures”

161. Switzerland submits that the measures at issue present additional features which further support their qualification as “safeguard measures”.

162. First, the measures at issue constitute “extraordinary” measures. Safeguard measures “were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, ‘emergency actions’.”²²³ They have been defined as “extraordinary remedies” that “are imposed in the form of import restrictions” in “emergency situations”.²²⁴

163. The measures at issue constitute *import restrictions*. They are described as measures “Adjusting Imports of [Steel and Aluminum] Into the United States”²²⁵ whereby the United States seeks to limit the importation of the products concerned into its territory. The actions recommended by the US Secretary of Commerce and taken by the US President seek “to reduce imports to a level that the Secretary assessed would enable domestic [steel and aluminium] producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production.”²²⁶

164. Those measures are “out of the ordinary” or “emergency actions”. They have been taken pursuant to investigations carried out on the basis of Section 232 of the Trade Expansion Act of 1962 which authorizes the US President to adjust imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security and on the basis of Section 604 of the Trade Act of 1974, as amended, which authorizes the US President “to embody in the Harmonized Tariff Schedule (HTS) of the United States the substance of the relevant provisions of that Act, and of other Acts affecting import treatment, and actions thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction.”²²⁷ The additional duties of 25% imposed on imports of steel products and of 10% imposed on imports of aluminium products have been introduced through a modification to subchapter III of chapter 99 of

²²³ Appellate Body Report, *Korea – Dairy*, para. 86.

²²⁴ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.53 referring to Appellate Body Report, *US – Line Pipe*, para.80.

²²⁵ Presidential Proclamation 9704, Exhibit CHE-13, and Presidential Proclamation 9705, Exhibit CHE-8.

²²⁶ Presidential Proclamation 9704, recital 3, Exhibit CHE-13; Presidential Proclamation 9705, recital 4, Exhibit CHE-8. (emphasis added)

²²⁷ Section 604 of the Trade Act of 1974 (19 U.S.C. 2483), United States Code, Title 19 – Customs Duties, 2012 Edition, Supplement 5, Exhibit CHE-32.

the HTSUS which includes the “temporary modifications established pursuant to trade legislation”.

165. Second, the measures at issue complement existing trade remedy measures concerning steel and aluminium products. Indeed, while in the investigations leading to the adoption of the measures at issue, the US Secretary of Commerce has not investigated unfair trade practices²²⁸, the US Secretary of Commerce referred to existing trade remedy measures on steel and aluminium products, emphasising the need for broader measures.

166. As far as the steel investigation is concerned, the Steel Report refers to existing antidumping and countervailing measures and investigations and indicates in that respect that “[t]he number of U.S. antidumping and countervailing duty measures in effect illustrates the scope of the problem confronting the U.S. steel industry”²²⁹ and that “given the large number of countries from which the United States imports steel and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel, or attempts to transship or evade remedial duties”.²³⁰ In a similar vein, a Presidential Memorandum of 20 April 2017 observes that “both the United States and global markets for steel products are distorted by large volumes of excess capacity – much of which results from foreign government subsidies and other unfair practices” and that “[t]he United States has placed more than 150 antidumping and countervailing duty orders on steel products, but they have not substantially alleviated the negative effects that unfairly traded imports have had on the United States steel industry”.²³¹

167. Similarly, the Aluminium Report refers to existing antidumping and countervailing investigations and measures and emphasises that because of “the limited scope of these antidumping and countervailing duty investigations, any remedies will not be applicable to the broader aluminum industry.”²³²

168. It follows from the foregoing that, through the measures at issue, the United States seeks to address the “adverse impact”, i.e. the injury allegedly caused by the imports to the US steel and aluminium industries, without examining unfair trade practices precisely because, given the number of countries and products involved, “it could take years to identify and investigate every instance of unfairly traded steel [and

²²⁸ As pointed out in the Aluminium Report, “[a]n investigation under Section 232 looks at excessive imports for their threat to the national security, rather than looking at unfair trade practices as in an antidumping investigation.” The Aluminium Report, fn 5, Exhibit CHE-5.

²²⁹ The Steel Report, p. 36. See also pp. 28-29 and Appendix K, Exhibit CHE-2.

²³⁰ The Steel Report, p. 28, Exhibit CHE-2.

²³¹ US President (Trump), “Memorandum on Steel Imports and Threats to National Security”, *Weekly Compilation of Presidential Documents*, 20 April 2017, Exhibit CHE-3.

²³² The Aluminium Report, Appendix D, Exhibit CHE-5.

aluminium].”²³³ The foregoing further demonstrates that the US authorities are using Section 232 investigations to circumvent the conditions and procedure imposed by Article XIX of the GATT 1994 and the Agreement on Safeguards in order to apply safeguard measures.

169. Third, the steel and aluminium investigations focus on the “imports” of steel and aluminium products into the United States. Indeed, as emphasised in the Steel and Aluminium Reports, in its investigations, “the Secretary examined the effect of imports”. The Steel and Aluminium Reports further indicate that:

Section 232 directs the Secretary to determine whether imports of any article are being made “in such quantities or under such circumstances” that those imports “threaten to impair the national security.” See 19 U.S.C. § 1862(b)(3)(A). The statutory construction makes clear that either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding. They may also be considered together, particularly where the circumstances act to prolong or magnify the impact of the quantities being imported.²³⁴

170. Thus, in the investigations, the US Secretary of Commerce examined the impact or the effects that steel and aluminium imports had on the domestic industry, taking into account their “quantities” and the “circumstances” of those imports. This reflects the analysis required by Article 2 of the Agreement on Safeguards which is to examine the impact of the imports on the domestic industry, taking into account the “quantities” and “conditions” of those imports.

171. Fourth, the measures at issue have been adopted pursuant to a procedure which, while inconsistent with a number of requirements of the Agreement on Safeguards, is very similar to the procedure followed in safeguard investigations. The procedure involved the initiation of an investigation by the US Secretary of Commerce to investigate whether steel articles and aluminium articles were “being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States”.²³⁵ The investigation process involved a public hearing. At the initiation of the investigation, the USDOC also invited “interested parties” to submit “written comments, opinions, data, information, or advice relevant to the criteria listed in Section 705.4 of the National Security Industrial Base Regulations.”²³⁶ At the end of the investigation, in accordance with Section 232, the US Secretary of Commerce submitted to the US President a report setting forth his findings of the investigations and, based on such findings, his recommendations for action. Furthermore, in the course of

²³³ The Steel Report, p. 28, Exhibit CHE-2.

²³⁴ The Steel Report, p. 14, Exhibit CHE-2, and the Aluminium Report, p. 13, Exhibit CHE-5.

²³⁵ Presidential Proclamation 9705, recital 2, Exhibit CHE-8, and Presidential Proclamation 9704, recital 2, Exhibit CHE-13.

²³⁶ The Steel Report, pp. 18-19, Exhibit CHE-2; The Aluminium Report, pp. 18-19, Exhibit CHE-5.

the steel and aluminium investigations, the US authorities examined virtually the same injury factors as those examined in the context of safeguard investigations, i.e. changes in the market share taken by imports, changes in the level of sales, decreased production and productivity levels, decreased capacity utilization, poor financial performance, declining employment and inability to fund capital expenditures.²³⁷ This further shows that the measures at issue present all the characteristics of safeguard measures.

172. Thus, although the measures at issue have been adopted on the basis of section 232 of the Trade Expansion Act and not pursuant to the US domestic legislation on safeguard measures, the fact that the measures at issue constitute “emergency action” taken by the United States to address the “adverse impact” and “the serious effects” that the imports have on the US domestic industry pursuant to a procedure which is similar to the procedure followed in safeguard investigations further supports their qualification as “safeguard measures”.

iv. The measures at issue are measures which “afford protection” similar to the measures identified in Article 11.1(b) of the Agreement on Safeguards, including voluntary export restraints

173. The measures at issue also constitute measures similar to voluntary export restraints “which afford protection” to the domestic industries within the meaning of Article 11.1(b) and footnote 4 of the Agreement on Safeguards.

174. Indeed, to the extent that the United States has sought, taken and maintains restrictions pursuant to “arrangements” or “agreements” with exporting countries, those measures also qualify as measures similar to voluntary export restraints which “afford protection” to the domestic US steel and aluminium industries within the meaning of Article 11.1(b) and footnote 4 of the Agreement on Safeguards.

175. In particular, the United States has exempted imports from certain countries from the additional duties imposed on imports of steel products and aluminium products pursuant to “agreements” reached with those exporting countries about alternative means to limit the quantities of steel products and aluminium products imported to the

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These types of factors have been recently examined by the US authorities in the context of the safeguard investigations into imports of the crystalline silicon photovoltaic cells (Investigation No. TA-201-75) and large residential washers (Investigation No. TA-201-76). The reports of the US International Trade Commission (USITC) relating to those investigations are available at: https://www.usitc.gov/trade_remedy/publications/safeguard_pubs.htm

United States from those countries by introducing “quantitative limitations” on imports from those countries to the United States.²³⁸

176. This further supports the conclusion that overall the measures on imports of steel products and on imports of aluminium products, constitute measures which “afford protection” to the US steel and aluminium industries and fall within the scope of the Agreement on Safeguards.

d. Conclusions

177. For all the reasons explained above, Switzerland submits that the measures at issue fall within the scope of the Agreement on Safeguards and of Article XIX:1(a) of the GATT 1994.

2. *The measures at issue are inconsistent with the Agreement on Safeguards and Article XIX of the GATT 1994*

178. Switzerland submits that the measures at issue are inconsistent with Article XIX:1(a) and XIX:2 of the GATT 1994 and Articles 2.1, 2.2, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 7.4, 11.1(a), 11.1(b), 12.1, 12.2 and 12.3 of the Agreement on Safeguards as will be explained in the sub-sections below.

a. The relevant documents to be examined by the Panel

179. As explained in the section relating to the standard of review²³⁹, the Panel’s assessment of whether the competent authorities have complied with their obligations under the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 must be based on the relevant report published by the competent authorities.

180. Indeed, Article 3.1, last sentence, requires the competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Likewise, Article 4.2(c) requires the competent authorities to publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

181. In that regard, the Appellate Body in *US – Steel Safeguards* explained that:

²³⁸ See Presidential Proclamation 9740, Exhibit CHE-10 with respect to the agreement with Korea relating to imports of steel products; Presidential Proclamation 9759, Exhibit CHE-11, with respect to the agreements with Australia, Argentina and Brazil relating to imports of steel products; Presidential Proclamation 9758, Exhibit CHE-16, with respect to the agreements with Australia and Argentina relating to imports of aluminium products.

²³⁹ See para. 32 above.

It is precisely by “setting forth findings and reasoned conclusions on all pertinent issues of fact and law”, under Article 3.1, and by providing “a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined”, under Article 4.2(c), that competent authorities provide panels with the basis to “make an objective assessment of the matter before it” in accordance with Article 11. ... [A] panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities. Therefore, the “reasoned conclusions” and “detailed analysis” as well as “a demonstration of the relevance of the factors examined” that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994.²⁴⁰

182. As to the format of the report, the panel in *US – Steel Safeguards*, in a finding upheld by the Appellate Body, concluded that “it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law”.²⁴¹ The panel explained that a competent authority’s report can be issued in different parts but stressed that such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the *Agreement on Safeguards*.²⁴² The question of whether a report drafted in different parts or a multistage report constitutes “the report of the competent authority” is to be determined on a case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. The panel finally cautioned that “[t]he publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner”.²⁴³

183. On 11 January 2018, the USDOC submitted to the US President the final Steel Report summarizing the findings of the investigation into the effect of imports of steel on the national security of the United States.²⁴⁴ The Steel Report was made publicly available on 16 February 2018 on the website of the USDOC.²⁴⁵

184. On 19 January 2018, the USDOC submitted to the US President the final Aluminium Report summarizing the findings of the investigation into the effect of imports

²⁴⁰ Appellate Body Report, *US – Steel Safeguards*, para. 299. (footnote omitted)

²⁴¹ Panel Reports, *US – Steel Safeguards*, para. 10.49.

²⁴² Panel Reports, *US – Steel Safeguards*, para. 10.50.

²⁴³ Panel Reports, *US – Steel Safeguards*, para. 10.50.

²⁴⁴ The Steel Report, Exhibit CHE-2.

²⁴⁵ USDOC, “Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House”, Press Release of 16 February 2018. Available at: <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination>.

of aluminium on the national security of the United States.²⁴⁶ The Aluminium Report was made publicly available on 16 February 2018 on the website of the USDOC.²⁴⁷

185. In light of the foregoing, Switzerland submits that it is the Steel Report and the Aluminium Report that constitute the “published report[s]” within the meaning of Article 3.1, last sentence and Article 4.2(c) of the Agreement on Safeguards. It follows that the Panel should base its analysis as to whether the United States complied with its obligations under the Agreement on Safeguards and Article XIX of the GATT 1994 on those two documents. To the extent that the Presidential Proclamations are published in the Federal Register and set out additional findings and conclusions of the US authorities, they complement the Steel and Aluminium Reports and are also relevant for the analysis by the Panel.

b. The measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 in relation to the requirements of unforeseen developments and the effect of the obligations incurred under the GATT 1994

186. Switzerland submits that the measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 because the US authorities failed to demonstrate the existence of unforeseen developments and of the effect of obligations incurred under the GATT 1994 and because they failed to demonstrate a logical connection between unforeseen developments and the effect of obligations incurred under the GATT 1994 and the increased imports.

i. The legal standard

187. Article XIX:1(a) of the GATT 1994 provides that:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

188. As the Appellate Body emphasised in *Argentina – Footwear (EC)*, the “unforeseen developments” and “the obligations incurred by a Member under the Agreement” constitute “*circumstances* which must be demonstrated as a matter of fact in

²⁴⁶ The Aluminium Report, Exhibit CHE-5.

²⁴⁷ USDOC, “Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House”, Press Release of 16 February 2018. Available at: <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination>.

order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.”²⁴⁸ The Appellate Body also noted that there is “a logical connection” between those circumstances which are described in the first clause of Article XIX:1(a) and the conditions set forth in the second clause of Article XIX:1(a), i.e. that (i) a product is being imported in such quantities and under such conditions; (ii) as to cause (iii) serious injury or threat of serious injury to domestic producers.²⁴⁹

189. The existence of “unforeseen developments” and of the obligations incurred under the GATT 1994 and the logical connection between those circumstances and the increased imports causing or threatening to cause serious injury must be demonstrated before safeguard measures are imposed. They must be reflected in the published report of the relevant authorities.²⁵⁰

190. In *Korea – Dairy*, the Appellate Body noted that the ordinary meaning of the term “unforeseen” is synonymous with “unexpected”, in particular when it relates to the word “developments”. Thus, the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been “unexpected”.²⁵¹ The developments must have been unexpected at the time the relevant concessions or obligations have been undertaken, that is generally at the time the WTO Member concerned acceded to the WTO.²⁵² In *Argentina – Preserved Peaches*, the panel also underlined that increased quantities of imports should not be equated with unforeseen developments.²⁵³ Therefore, according to the panel, “a statement that the increase in imports, or the way in which they were being imported, was unforeseen, does not constitute a demonstration as a matter of fact of the existence of unforeseen *developments*.”²⁵⁴

191. As to the clause “of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions...”, the panel in *Ukraine – Passenger Cars* noted that “it is not just the obligation per se that is to be identified, but also its effect [...] It is therefore important for competent authorities to be clear as to which of the applicable obligations they find to have resulted in imports in increased quantities.”²⁵⁵

192. With respect to both the “unforeseen developments” and “the effect of the obligations incurred under the GATT 1994”, the authorities must also demonstrate the

²⁴⁸ Appellate Body Report, *Argentina – Footwear (EC)*, para. 92. (emphasis in the original) See also Appellate Body Report, *Korea – Dairy*, para. 85.

²⁴⁹ Appellate Body Report, *Korea – Dairy*, para. 85.

²⁵⁰ Appellate Body Report, *US – Lamb*, paras. 72-73.

²⁵¹ Appellate Body Report, *Korea – Dairy*, para. 84.

²⁵² Appellate Body Report, *Korea – Dairy*, para. 89 referring to GATT Working Party Report, *US – Fur Felt Hats*, adopted 22 October 1951.

²⁵³ Panel Report, *Argentina – Preserved Peaches*, para. 7.18.

²⁵⁴ Panel Report, *Argentina – Preserved Peaches*, para. 7.24.

²⁵⁵ Panel Report, *Ukraine – Passenger Cars*, para. 7.96.

existence of a “logical connection”. In other words, the authorities must demonstrate that the increase in imports allegedly causing injury or threat of serious injury *resulted from* the unforeseen developments and the effect of obligations incurred under the GATT 1994.

ii. The legal analysis

193. Switzerland submits that the United States failed to demonstrate the existence of unforeseen developments, as required by Article XIX:1(a) of the GATT 1994, since neither the Steel and Aluminium Reports nor the relevant Presidential Proclamations imposing the adjustment measures on imports of steel and aluminium identify any events as constituting “unforeseen developments”.

194. Furthermore, even if it were concluded that the US Secretary of Commerce identified “unforeseen developments”, there is no explanation as to why those developments can be regarded as “unforeseen”.

195. Regarding the adjustment measures on imports of steel, Presidential Proclamation 9705 indicates that the US Secretary of Commerce in its investigation considered the investigation of iron ore and semi-finished steel imports in 2001 but found the recommendations not to take any action in that previous investigation outdated “given the dramatic *changes* in the steel industry since 2001”, including “the increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency.”²⁵⁶ In addition, the Steel Report describes global excess steel capacity as a “circumstance” that contributes to the weakening of the domestic economy.²⁵⁷ Likewise, the Aluminium Report refers to “massive foreign excess capacity for producing aluminum” as resulting in “aluminum imports occurring ‘under such circumstances’ that that they threaten to impair the national security”.²⁵⁸

196. Even if one were to accept that the United States identified the global excess capacity in steel and aluminium sectors as an unforeseen development, the United States failed to demonstrate why such global excess capacity constitutes an “unforeseen development”. As explained by the panel in *Argentina – Preserved Peaches*, in order to satisfy the requirement to demonstrate the existence of “unforeseen developments”, the competent authorities need to provide “as a minimum, some discussion [...] as to why [such developments] were unforeseen at the appropriate time”.²⁵⁹ However, both the

²⁵⁶ Presidential Proclamation 9705, recital 3, Exhibit CHE-8 (emphasis added). See also the Steel Report, pp. 5 and 17, Exhibit CHE-2.

²⁵⁷ The Steel Report, p. 51, Exhibit CH-2.

²⁵⁸ The Aluminium Report, p. 15, Exhibit CH-5.

²⁵⁹ Panel Report, *Argentina – Preserved Peaches*, para. 7.23.

Steel and Aluminium Reports and the relevant Presidential Proclamations are silent on that issue.

197. Furthermore, the United States also failed to demonstrate the existence of a logical connection between the unforeseen developments and the increase in imports causing serious injury or threat thereof to the domestic industry. Indeed, both the Steel Report and the Aluminium Report refer to global overcapacity and excess steel/aluminium production in general but fail to link such developments to the specific product categories subject to those two investigations. In addition, in the context of the *Aluminium Investigation*, it appears that the findings relating to overcapacity relate mostly to primary aluminium, which constitute only one segment of the aluminium industry.²⁶⁰ The Aluminium Report does not explain, however, how the alleged overcapacity in primary aluminium products resulted in the increase in imports in other types of aluminium products subject to the investigation. By failing to examine the relation between the alleged unforeseen developments (i.e. the global excess capacity in steel and aluminium sectors) and the increase in imports of the specific products concerned, the US Secretary of Commerce failed to demonstrate the “logical connection” required by Article XIX:1(a) of the GATT 1994.

198. Finally, neither the Steel and Aluminium Reports nor the relevant Presidential Proclamations identify or demonstrate the existence of the obligations incurred by the United States under the GATT 1994 that resulted in the increased imports allegedly causing serious injury to the domestic steel/aluminium industry. *A fortiori*, those documents also fail to demonstrate the existence of a logical connection between the increased imports allegedly causing serious injury or threat of serious injury and the obligations incurred under the GATT 1994.

199. Thus, by imposing the measures at issue, without demonstrating the existence of unforeseen developments and the obligations incurred by the United States under the GATT 1994 and 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.

c. The measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards in relation to the requirement of increased imports

200. Switzerland submits that the measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the United States has applied those measures without having first determined

²⁶⁰ The Aluminium Report, p. 3, Exhibit CHE-5.

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.

i. The legal standard

201. Article XIX:1(a) of the GATT 1994 refers to situations where a product “is being imported into the territory of a contracting party *in such increased quantities* and under such conditions as to cause or threaten serious injury to domestic producers”.

202. Article 2.1 of the Agreement on Safeguards similarly provides that a safeguard measure may be applied if a Member has determined that a product “is being imported into its territory *in such increased quantities*, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry.”

203. Article 4.2(a) of the Agreement on Safeguards further provides that “[i]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, *in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms* [...]”.

204. The existence of “increased imports” is thus one of the “prerequisites” that must be fulfilled for a safeguard measure to be justified. It is a “pertinent issue[] of fact and law” for which “finding[s] and reasoned conclusion[s]” must be included in the published report of the authorities in accordance with Article 3.1 of the Agreement on Safeguards.²⁶¹

205. The Appellate Body emphasized that “the determination of whether the requirement of imports ‘in such increased quantities’ is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago.”²⁶² The Appellate Body found that the term “such” which appears in the phrase “such increased quantities” “clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof”.²⁶³ Accordingly, it requires “that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant

²⁶¹ Appellate Body Report, *US – Steel Safeguards*, para. 331.

²⁶² Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

²⁶³ Appellate Body Report, *US – Steel Safeguards*, para. 346.

enough, both quantitatively and qualitative, to cause or threaten to cause ‘serious injury’.”²⁶⁴

206. The Appellate Body also noted that the use of the phrase “such increased quantities” in Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 and the requirement in Article 4.2(a) of the Agreement on Safeguards to assess “the rate and amount” of the increase imply that the competent authorities consider *the trends* in imports over the period of investigation rather than just comparing the end points.²⁶⁵

207. Furthermore, the Appellate Body emphasized that “although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation.”²⁶⁶ It explained that “[t]he real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation” as “[i]f the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading.”²⁶⁷

ii. The legal analysis

208. Switzerland submits that the measures at issue are inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the US authorities did not make a determination of increased imports as required by those provisions.

209. In the *Steel Investigation*, the levels of imports were examined by the US Secretary of Commerce in Section B.1 of the Steel Report.²⁶⁸ In that section, the US Secretary of Commerce noted that “U.S. imports rose from 25.9 million metric tons in 2011, peaking at 40.2 million metric tons in 2014 at the height of the shale hydrocarbon drilling boom. For 2017 (the first ten months) imports are increasing at a double-digit rate over 2016, pushing finished steel imports consistently over 30 percent of U.S. consumption.”²⁶⁹ The section then includes a table (i.e. Figure 2) indicating the figures of

²⁶⁴ Appellate Body Report, *US – Steel Safeguards*, para. 346 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

²⁶⁵ Appellate Body Report, *US – Steel Safeguards*, para. 355 and Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

²⁶⁶ Appellate Body Report, *US – Lamb*, para. 138.

²⁶⁷ Appellate Body Report, *US – Lamb*, para. 138.

²⁶⁸ The Steel Report, pp. 27-29, Exhibit CHE-2.

²⁶⁹ The Steel Report, p. 27, Exhibit CHE-2.

imports of “All Steel Products” per exporting country and worldwide for 2011 and for 2017 (annualized - based on the first ten months of 2017).²⁷⁰

210. This analysis of the imports does not meet the requirements imposed by Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards for the following reasons.

211. First, the data listed in Figure 2 included on page 28 and to which the analysis on page 27 refers relate to “all steel products”. Article 2.1 of the Agreement on Safeguards, however, requires that the authorities examine whether “such product”, that is “the product” on which the safeguard measure applies is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. As the Appellate Body emphasised in *US – Lamb*, “a safeguard measure is imposed on a specific ‘product’, namely, the imported product. The measure may only be imposed if that specific product (“such product”) is having the stated effects upon the ‘domestic industry that produces like or directly competitive products’.”²⁷¹ In another dispute, the Appellate Body also noted that “[t]he term ‘such product’ in Article XIX:1(a) refers to the product that may be subject to a safeguard measure. That product, is necessarily, the product that ‘is being imported in such increased quantities’.”²⁷² Thus, the analysis of whether there is an increase in imports must relate to the product at issue in the investigation and on which the safeguard measure is ultimately applied. In the *Steel Investigation*, it is, however, unclear whether the import data of “all steel products” in Figure 2 on page 28 correspond to the steel products covered by the investigation and on which the United States applied the measure at issue. Similarly, it is unclear whether the import data of “Still Mill Products” included in Figure 4 on page 30 of the Steel Report correspond to the steel products covered by the investigation.

212. Second, referring to the data included in Figure 2 on page 28, the US Secretary of Commerce considered that there is an increase in imports given that US imports rose from 25.9 million metric tons in 2011 to 35.9 million metric tons in 2017, i.e. a 38% increase. However, by merely comparing two end points (i.e. 2011 and 2017), the US Secretary of Commerce has failed to examine the *trends* in imports.

213. As noted above, the use of the phrase “such increased quantities” in Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards and the obligation under Article 4.2(a) for the authorities to evaluate “the rate and amount of the increase in imports” imply that the authorities must “consider the trends in imports over the period of investigation (rather than just comparing the end points) under Article

²⁷⁰ The Steel Report, p. 28, Exhibit CHE-2.

²⁷¹ Appellate Body Report, *US – Lamb*, para. 86.

²⁷² Appellate Body Report, *US – Steel Safeguards*, para. 314.

4.2(a)”²⁷³ Thus, “[a] determination of whether there is an increase in imports cannot, therefore, be made merely by comparing the end points of the period of investigation”²⁷⁴.

214. The Appellate Body further emphasised that “what is called for in every case is an *explanation* of how the *trend* in imports supports the competent authority’s finding that the requirement of ‘such increased quantities’ within the meaning of Article XIX:1(a) and 2.1 has been fulfilled. It is this *explanation* concerning the *trend* in imports – over the period of investigation – that allows a competent authority to *demonstrate* that ‘a product is being imported in such increased quantities’.”²⁷⁵ The panel in *Ukraine – Passenger Cars* noted in relation to this finding of the Appellate Body that:

[T]hese statements make it clear that, for an affirmative determination of increased imports to be consistent with Article 2.1, it is not sufficient for the competent authorities to establish an increase in imports through a simple mathematical comparison of data for the two end points marking the beginning and end of the period of investigation. It is necessary, though still not sufficient by itself, that the competent authorities also set out in their published report a reasoned and adequate explanation concerning the development of imports between the end points, i.e. concerning the intervening trends in imports that occurred during the period of investigation.²⁷⁶

215. In the Steel Report, the US Secretary of Commerce did not examine the intervening trends between the two identified end points (2011 and 2017). By failing to examine the trends in imports, the US Secretary of Commerce could not and did not provide a reasoned and adequate explanation of how the trends in imports support a finding that the requirement of “such increased quantities” within the meaning of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards has been fulfilled, thereby acting inconsistently with Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards.

216. In *US – Steel Safeguards*, the Appellate Body explained why a determination of whether there is an increase in imports cannot be made by merely comparing the ends point, as “in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points. A comparison could support either a finding of an increase or a decrease in import volumes simply by choosing different starting and ending points.”²⁷⁷

²⁷³ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 129 and *US – Steel Safeguards*, paras. 354 and 355.

²⁷⁴ Appellate Body Report, *US – Steel Safeguards*, para. 354.

²⁷⁵ Appellate Body Report, *US – Steel Safeguards*, para. 374. (emphasis original)

²⁷⁶ Panel Report, *Ukraine – Passenger Cars*, para. 7.132.

²⁷⁷ Appellate Body Report, *US – Steel Safeguards*, para. 354.

217. Switzerland notes that, in the investigation at issue, the US Secretary of Commerce indicated that imports peaked “at 40.2 million metric tons in 2014”. Thus, imports actually decreased when the figure of 2017 (35.9 million metric tons) is compared with the figure of 2014 (40.2 million metric tons). This is confirmed by the data included in Figure 4 on page 30 which indicates a decreasing trend in imports between 2014 and 2016 (40.3 million metric tons in 2014, 35.4 million metric tons in 2015 and 30 million metric tons in 2016). This shows that the comparison of two end points (namely 2017 and 2011) does not suffice to demonstrate that the products at issue have been imported in such increased quantities as to cause or threaten to cause serious injury to the domestic industry. In fact, the level of imports has been decreasing during the years preceding the initiation of the investigation and this fact has not been taken into account by the US Secretary of Commerce in its analysis. In other words, the US Secretary of Commerce has failed to explain how it could make a determination of increased imports while imports have been decreasing between 2014 and 2016.

218. In light of the foregoing, Switzerland submits that the US Secretary of Commerce has failed to provide a reasoned and adequate explanation as to how the facts in the Steel Report support a finding that the increase in imports is recent enough, sudden enough, sharp enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.

219. In the *Aluminium Investigation*, the US Secretary of Commerce, in a section entitled “US Imports of Aluminum are Increasing” examined first “aluminum imports in aggregate” and then imports of aluminium products per category. That product category-specific analysis appears to relate only to primary and downstream aluminium products with the exclusion of the other segment of the US aluminium industry, i.e. secondary aluminium.

220. In the section concerning “aluminium imports in aggregate”, the US Secretary of Commerce noted that imports, in terms of value and in terms of weight, increased over the period considered. Regarding imports “by weight”, he indicated that:

By weight, US imports in these aluminium categories were 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013. For the first 10 months of 2017, imports are running 18 percent above 2016 levels on a tonnage basis. There is no levelling off in the level of imports on a volume basis; rather, there has been a consistent increase over year.²⁷⁸

221. The relevant section includes tables reporting the data per year between 2013 and 2016 and for 2016 (Jan-Oct) and 2017 (Jan-Oct). In terms of total imports of

²⁷⁸ The Aluminium Report, p. 64, Exhibit CHE-5.

aluminium by weight, it reports an increase of 18% between 2016 (Jan-Oct) and 2017 (Jan-Oct).²⁷⁹

222. Switzerland submits that the analysis in the Aluminium Report does not constitute a reasoned and adequate explanation that the increase in imports is “recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury”.

223. First, the US Secretary of Commerce failed to provide any explanation, let alone any reasoned and adequate explanation, as to why the increase in imports which it claims exists, represents an increase in imports that is “recent enough, sudden enough, sharp enough and significant enough” to cause or threaten to cause serious injury. In other words, the Aluminium Report does not characterize the increase as “sudden”, “sharp” or “significant” nor uses any similar language.

224. Second, the data available in Table 18 on page 66 of the Aluminium Report do not support a conclusion that the increase in imports was sudden enough, sharp enough and significant enough to cause or threaten to cause serious injury to the domestic industry. As noted above, the term “sharp” has been defined as “involving sudden change of direction; abrupt, steep” and “sudden” as “happening or coming without warning; unexpected” or “abrupt, sharp”.²⁸⁰ In *US – Steel Safeguards*, the panel noted that “the very purpose of a safeguard measure is to address the results of unexpected events (unforeseen developments pursuant to Article XIX of GATT), namely increased imports causing injury” and that “the unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures calls for an assessment of *whether imports increased suddenly* so that the situation became one of emergency for which safeguard measures became necessary”.²⁸¹ The data reported in Table 18 indicates a continuous increase of the imports throughout the period considered. As the US Secretary of Commerce itself concluded, “there has been a *consistent* increase year over year”.²⁸² A “consistent increase” can hardly be described as “sudden” or “sharp”²⁸³ and therefore as “sudden enough” and “sharp enough” to meet the requirement laid down in Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards.

²⁷⁹ The Aluminium Report, Table 18 “US Imports of Aluminum by Country and Weight”, p. 66, Exhibit CHE-5.

²⁸⁰ Panel Report, *Ukraine – Passenger Cars*, para. 7.146.

²⁸¹ Panel Reports, *US – Steel Safeguards*, para. 10.166. (emphasis added)

²⁸² The Aluminium Report, p. 64, Exhibit CHE-5. (emphasis added)

²⁸³ See Panel Report, *Ukraine – Passengers Cars*, para. 7.146 in which the panel concluded that under a scenario involving “a steady or gradual relative increase over three years”, “the relative increase in imports could not properly be described as ‘sharp’ or ‘sudden’.”

225. In light of the foregoing, Switzerland submits that the United States' determination of increased imports in both the *Steel Investigation* and the *Aluminium Investigation* is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

d. The measures at issue are inconsistent with Article 2.2 of the Agreement on Safeguards

226. Switzerland submits that the measures at issue are inconsistent with Article 2.2 of the Agreement on Safeguards because the United States did not apply those measures to the products concerned imported "irrespective of [their] sources".

i. The legal standard

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

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

228. Article 2.2 thus reflects the most-favoured-nation principle, implying that a safeguard measure must be applied on imports from all countries, with the exception of those from developing countries in accordance with Article 9.1 of the Agreement on Safeguards.

229. Pursuant to the parallel language found in Article 2.1 and Article 2.2, "where, for purposes of applying a safeguard measure, a Member has conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure".²⁸⁴ This is the so-called "principle of parallelism".

ii. The legal analysis

230. Regarding the adjustment measures on steel products, the additional duty of 25% is applied on imports from all countries except Argentina, Australia, Brazil and South Korea the imports of which are exempted from the additional duty.

231. Regarding the adjustment measures on aluminium products, the additional duty of 10% is imposed on imports from all countries except Argentina and Australia the imports of which are exempted from the additional duty.

232. The USDOC has conducted the steel and aluminium investigations with respect to imports from all countries. Indeed, the import data reported and examined by the

²⁸⁴ Appellate Body Report, *US – Steel Safeguards*, para. 441.

USDOC in the Steel and Aluminium Reports refer to data from all countries.²⁸⁵ The recommendations of the US Secretary of Commerce and the actions by the US President refer to the objective of enabling the US producers to operate at about an 80% or better of the industry's capacity utilisation rate, taking into account worldwide imports.²⁸⁶ To the extent that the USDOC conducted its investigations with respect to imports from all countries, it could not exempt certain countries from the scope of imposition of the safeguard measures.

233. Switzerland submits that, to the extent that the United States has imposed safeguard measures in the form of an additional duty on imports of steel products from all countries except from Argentina, Australia, Brazil and South Korea and on import of aluminium products from all countries except Argentina and Australia, those measures are inconsistent with the MFN principle embodied in Article 2.2 of the Agreement on Safeguards. Indeed, by excluding imports from certain countries from the scope of the safeguard measures at issue while imports from those countries have been taken into account in the investigations, the United States has failed to apply the measures to the products concerned "irrespective of [their] sources."

- e. The measures at issue are inconsistent with Articles 4.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to the requirement to demonstrate serious injury, or threat thereof, to a domestic industry

234. Switzerland submits that the measures at issue are inconsistent with Articles 4.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the US Secretary of Commerce has not properly determined that there is serious injury, or threat thereof, to a domestic industry, in accordance with the requirements laid down in those provisions.

²⁸⁵ Regarding the steel investigation, see the Steel Report, pp. 27-28 and Figure 2 on p. 28, Exhibit CHE-2; regarding the aluminium investigation, see the Aluminium Report, pp. 63 and following, Exhibit CHE-5.

²⁸⁶ The Recommendations in the Steel Report indeed indicate that "[i]f current import trends for 2017 continue, continued imports without any action are projected to be 36.0 million metric tons, an increase over 2016 of 6.0 million metric tons" and that to achieve a 80 % capacity utilization "based on the projected 2017 import levels will require reducing imports from 36 million metric tons to about 23 million metric tons" (The Steel Report, p. 58, Exhibit CHE-2) (emphasis added). The Recommendations in the Aluminium Report identify the solutions in order to reach the 80% target of US production capacity taking into account the level of imports (The Aluminium Report, pp. 106-107, Exhibit CHE-5).

i. The legal standard

235. Article 4.1(a) defines “serious injury” as “a significant overall impairment in the position of a *domestic industry*” and Article 4.1(b) defines “threat of serious injury” as “serious injury that is clearly imminent”.

236. Article 4.1(c) provides that a “domestic industry” “shall be understood “to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.”

237. Article 4.2(a) further provides that in the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the authorities shall evaluate “all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.”

238. Regarding Article 4.1(c) which defines “domestic industry”, the panel in *Dominican Republic – Safeguard Measures* noted that that provision “establishes the elements for the definition of the domestic industry”, namely firstly, that the domestic industry be defined with reference to the like or directly competitive products and secondly, that the domestic industry thus defined consist of the producers as a whole of the like or directly competitive product or, of those producers of that product whose collective output constitutes a major proportion of the total domestic production of the product in question.²⁸⁷

239. Regarding the requirement of “serious injury”, the Appellate Body noted “that the word ‘injury’ is qualified by the adjective ‘serious’” and that this “underscores the extent and degree of ‘significant overall impairment’ that the domestic industry must be suffering, or must be about to suffer, for the standard to be met.”²⁸⁸ The Appellate Body emphasised that the standard of “serious injury” in the Agreement on Safeguards is “a very high one” and that this is consistent with the object and purpose of the Agreement on Safeguards.²⁸⁹ Indeed, as “[t]he application of a safeguard measure does not depend on ‘unfair’ trade actions as is the case with anti-dumping or countervailing measures [...]

²⁸⁷ Panel Report, *Dominican Republic – Safeguards Measures*, para. 7.174 referring to Appellate Body Report, *US – Lamb*, para. 84.

²⁸⁸ Appellate Body Report, *US – Lamb*, para. 124.

²⁸⁹ Appellate Body Report, *US – Lamb*, para. 124.

the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen [...] as *extraordinary*.²⁹⁰

240. Pursuant to Article 4.2(a) of the Agreement on Safeguards, the competent authorities are required to examine “all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry.” Article 4.2(a) lists certain factors, namely market share, sales, production, productivity, capacity utilization, profits and losses and employment. Those listed factors must “at a minimum” be examined by the competent authorities.²⁹¹ In addition, the authorities must also evaluate “all other factors that are relevant to the situation of the industry concerned.”²⁹² This will vary from case to case depending on the specific circumstances of each case. The Appellate Body also noted that the evaluation of the injury factors pursuant to Article 4.2(a) is “not a mere ‘check list’”.²⁹³ In other words, “competent authorities must conduct a substantive evaluation of ‘the *bearing*, or the *influence* or *effect* or *impact* that the relevant factors have on the ‘situation of [the] domestic industry’”.²⁹⁴ Indeed, it is only “[b]y conducting such a substantive evaluation of the relevant factors, [that] competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the Agreement.”²⁹⁵

241. Furthermore, when examining whether the domestic industry suffers from serious injury or threat thereof, the authorities should examine the trends over the period of investigation and not merely compare end points.²⁹⁶

242. It is also important to underline that Article 4.2(a) refers to the evaluation of “all relevant factors of an objective and quantifiable nature” and that Article 4.2(b) further refers to a determination that is based on “objective evidence”. The Appellate Body emphasised in *US – Lamb* that “factors can only be ‘of an objective and quantifiable nature’ if they allow a determination to be made, as required by Article 4.2(b) of the Agreement on Safeguards, on the basis of ‘objective evidence’”, noting that [s]uch evidence is, in principle, objective data.²⁹⁷ It added that “[t]he words ‘factors of an objective and quantifiable nature’ imply, therefore, an evaluation of *objective data* which enables the measurement and quantification of these factors.”²⁹⁸ Thus, as the panel

²⁹⁰ Appellate Body Report, *US – Lamb*, para. 124 quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 94. (emphasis added)

²⁹¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.

²⁹² Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.

²⁹³ Appellate Body Report, *US – Lamb*, para. 104.

²⁹⁴ Appellate Body Report, *US – Lamb*, para. 104. (emphasis original, footnotes omitted)

²⁹⁵ Appellate Body Report, *US – Lamb*, para. 104.

²⁹⁶ Appellate Body Report, *US – Lamb*, para. 138.

²⁹⁷ Appellate Body Report, *US – Lamb*, para. 130.

²⁹⁸ Appellate Body Report, *US – Lamb*, para. 130. (emphasis added)

found in *India – Iron and Steel Products*, even though Article 4.2(a) does not provide guidance regarding the methodology for evaluating the factors listed in that provision, “the evaluation made by the competent authorities must be objective and unbiased”.²⁹⁹

243. With respect to the injury analysis in the context of industries consisting of different parts or sectors, such as steel and aluminium industries, the Appellate Body stressed that “where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole”.³⁰⁰ That is because “[d]ifferent parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a *misleading impression* of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry”.³⁰¹ The Appellate Body further explained that “by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry”.³⁰² The Appellate Body concluded that “an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of ‘objectiv[ity]’ in Article 3.1 of the Anti-Dumping Agreement”.³⁰³

244. Finally, the determination of the domestic industry and the analysis as whether the domestic industry suffers from serious injury or threat thereof is a “pertinent issue of fact and law” which must therefore, in accordance with Article 3.1, be included in the published report of the relevant authorities.

ii. The legal analysis

245. First, Switzerland submits that the measures at issue are inconsistent with Article 4.1(c) and Article 4.2(a) of the Agreement on Safeguards because the US Secretary of

²⁹⁹ Panel Report, *India – Iron and Steel Products*, para. 7.137.

³⁰⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. While the findings made in that case relate to the injury analysis in anti-dumping investigations, given the similarities between the requirements imposed in that regard by the Anti-Dumping Agreement and the Agreement on Safeguards, they are equally relevant to the present case.

³⁰¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. (emphasis added)

³⁰² Appellate Body Report, *US – Hot-Rolled Steel*, para. 205.

³⁰³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 206.

Commerce failed to make a determination of the domestic industry as required by Article 4.1(c) of the Agreement on Safeguards.

246. The US Secretary of Commerce has not made any determination concerning the “domestic industry”. Indeed, the Steel and Aluminium Reports and the Presidential Proclamations do not include any determination of the “domestic industry” for the purposes of the steel and aluminium investigations. The Steel Report and the Aluminium Report repetitively refer to the “steel industry” and the “aluminium industry”.³⁰⁴ The US Secretary of Commerce, however, failed to make, at the outset, any determination of what are the “steel industry” and the “aluminium industry” for the purposes of each of those investigations. In other words, the “steel industry” and the “aluminium industry” referred to in the Steel and Aluminium Reports do not correspond to any identified group of producers of the product concerned.

247. The Appellate Body emphasised in *US – Lamb* that “[t]he definition of ‘domestic industry’ in this provision refers to two elements. First, the industry consists of ‘producers’ [which] are those who grow or manufacture an article; [...] those who bring a thing into existence. This meaning of ‘producers’ is, however, qualified by the second element in the definition of ‘domestic industry’. This element identifies the particular products that must be produced by the domestic ‘producers’ in order to qualify for inclusion in the ‘domestic industry’.”³⁰⁵ The definition in Article 4.1(c) “focuses exclusively on the producers of a very specific group of products. Producers of products that are *not* ‘like or directly competitive products’ do not, according to the text of the treaty, form part of the domestic industry.”³⁰⁶ This definition of the “domestic industry” is further supported by Article 2.1 of the Agreement on Safeguards which provides that the legal basis for imposing a safeguard measure “exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are ‘like or directly competitive’ with that imported product.”³⁰⁷

248. Since there is no determination of the “domestic industry” in the Steel and Aluminium Reports, it is impossible to ensure that, whenever the US Secretary of Commerce examined a specific injury factor with respect to the “steel industry” and the “aluminum industry” in these two investigations, it refers to the producers “of the like or directly competitive products” as required by Article 4.1(c) of the Agreement on Safeguards. *A fortiori* it is also impossible to ensure that the producers concerned for each injury factor examined by the authorities in their investigation are either “the producers as a *whole* of the like or directly competitive products” or “those whose

³⁰⁴ The Steel Report, e.g. pp. 25, 26, 27, 29, 34, 35, 36, 37, 38 53, 5, 56 and 57, Exhibit CHE-2; The Aluminium Report, e.g. pp. 22, 39, 52, 89, 91, 98 and 104, Exhibit CHE-5.

³⁰⁵ Appellate Body Report, *US – Lamb*, para. 84.

³⁰⁶ Appellate Body Report, *US – Lamb*, para. 84.

³⁰⁷ Appellate Body Report, *US – Lamb*, para. 86.

collective output of the like or directly competitive products constitutes *a major proportion* of the total domestic production of those products”.

249. In light of the foregoing, Switzerland submits that, by failing to determine the “domestic industry” in accordance with the requirements of Article 4.1(c) for the purposes of assessing whether such industry suffers from serious injury or threat thereof, the United States acted inconsistently with Articles 4.1(c) and Article 4.2(a) of the Agreement on Safeguards.

250. Second, the US Secretary of Commerce has failed to establish that “*serious injury*” was suffered by the US steel and aluminium industries. Indeed, in its conclusions in the *Steel Investigation*, the US Secretary of Commerce determined that “the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel [were] ‘weakening [the US] internal economy’”.³⁰⁸ Similarly, in the *Aluminium Investigation*. The US Secretary of Commerce concluded that “the present quantities and circumstances of aluminium imports (wrought and unwrought) [were] ‘weakening [the US] internal economy’”.³⁰⁹ However, “serious injury” is defined as “a *significant overall impairment* in the position of a domestic industry”. As the Appellate Body emphasised, the standard of “serious injury” is, on its face, “very high”.³¹⁰ It added that the use of the word “serious” “connotes a much higher standard of injury than the word ‘material’” that is found in the Anti-Dumping Agreement and the SCM Agreement.³¹¹ By merely concluding that the imports are “weakening” the US internal economy, the US has failed to meet the “very high” threshold of “serious injury”.

251. Third, the measures at issue are inconsistent with Article 4.2(a) of the Agreement on Safeguards because the US Secretary of Commerce failed to examine *all* the injury factors listed in that provision. Pursuant to Article 4.2(a), the authorities must examine “all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry”, including market share, sales, production, productivity, capacity utilization, profits and losses and employment. Those factors which are expressly listed in Article 4.2(a) must “as a minimum” be examined by the competent authorities. Switzerland submits that the US Secretary of Commerce failed to examine all those factors in both the Steel and Aluminium investigations.

³⁰⁸ The Steel Report, p. 55, Exhibit CHE-2. (emphasis added)
³⁰⁹ The Aluminium Report, p. 104, Exhibit CHE-5. (emphasis added)
³¹⁰ Appellate Body Report, *US – Lamb*, para. 124.
³¹¹ Appellate Body Report, *US – Lamb*, para. 124.

252. In the *Steel Investigation*, the US Secretary of Commerce examined imports³¹², prices³¹³, plant closures³¹⁴, employment³¹⁵, financial situation³¹⁶, capital expenditure³¹⁷, production capacity³¹⁸ and production³¹⁹. However, although in the executive summary of the Steel Report, reference is made to the adverse impact on the steel industry, including “[n]umerous U.S. steel mill closures, a substantial decline in employment, *lost domestic sales and markets share*, and marginal annual net income for U.S.-based steel companies”³²⁰, the Report does not provide any data nor any analysis concerning the sales and the market share of the domestic industry.³²¹

253. In the *Aluminium Investigation*, the US Secretary of Commerce similarly examined imports³²², prices³²³, employment³²⁴, financial situation³²⁵, capital expenditure³²⁶, production³²⁷ and production capacity³²⁸, but did not provide any data nor any analysis concerning domestic sales³²⁹ and the market share of the domestic industry.

254. Fourth, even with respect to the factors that have been addressed in the Steel and Aluminium Reports, the US Secretary of Commerce has failed to provide a ‘reasoned and adequate’ explanation on how the facts support its determination that there is an adverse impact on the economic welfare of the US steel industry³³⁰ and a weakening of the US economy.³³¹ Moreover, the US Secretary of Commerce did not make an analysis that is objective and unbiased since the different factors have been examined by reference to different time periods and with regard to different sets of products and/or in relation to different producers.

³¹² The Steel Report, pp. 27-29, Exhibit CHE-2.

³¹³ The Steel Report, pp. 31-33, Exhibit CHE-2.

³¹⁴ The Steel Report, pp. 33-35, Exhibit CHE-2.

³¹⁵ The Steel Report, pp. 35-36, Exhibit CHE-2.

³¹⁶ The Steel Report, pp. 37-40, Exhibit CHE-2.

³¹⁷ The Steel Report, pp. 40-41, Exhibit CHE-2.

³¹⁸ The Steel Report, pp. 41-46, Exhibit CHE-2.

³¹⁹ The Steel Report, pp. 46-47, Exhibit CHE-2.

³²⁰ The Steel Report, p. 4, Exhibit CHE-2. (emphasis added)

³²¹ The Steel Report only refers to the import penetration level of finished steel products between 1998 and 2016. See the Steel Report, p. 29, Exhibit CHE-2.

³²² The Aluminium Report, pp. 63-75, Exhibit CHE-5.

³²³ The Aluminium Report, pp. 99-100, Exhibit CHE-5.

³²⁴ The Aluminium Report, pp. 89-91, Exhibit CHE-5.

³²⁵ The Aluminium Report, pp. 91-95, Exhibit CHE-5.

³²⁶ The Aluminium Report, pp. 97-99, Exhibit CHE-5.

³²⁷ The Aluminium Report, pp. 59-63, Exhibit CHE-5.

³²⁸ The Aluminium Report, pp. 40-50, Exhibit CHE-5.

³²⁹ The Aluminium Report only refers to the import penetration level of primary aluminium in 2016 as compared to 2012. See, the Aluminium Report, p. 3, Exhibit CHE-5.

³³⁰ The Steel Report, Section V.B, pp. 27-41, Exhibit CHE-2.

³³¹ The Steel Report, Section V.C, pp. 41-51, Exhibit CHE-2.

255. In the *Steel Investigation*, in relation to “steel prices”, the US Secretary of Commerce referred to “hot-rolled coil prices” indicating that “hot rolled coil is considered a ‘benchmark’ because it is a commodity product with a fairly common definition globally”.³³² By examining the “prices” by reference to “hot rolled coil” prices and not to the product under investigation, the US Secretary of Commerce fails to make a determination that is objective. Furthermore, the analysis refers to a time period that is different from the time period used when examining imports. In Figure 5,³³³ data for the period 2006 to 2017 are provided and in Figure 6³³⁴ data for the period 2012 to 2017 are provided while the data concerning imports related to 2011 and 2017. Finally, when examining the trends over the period reflected in Figure 6, namely from 2012 to 2017, the US Secretary of Commerce indicated that, while there has been a significant decrease in the prices in 2015, then the prices went up and overall, over the period considered, the decrease is minor. When looking at the broader period reflected in Figure 5, namely from 2006 to 2017, the data show an increase from USD 674.27 per metric tonne to USD 684.11 per metric tonne. The US Secretary of Commerce failed to provide a reasoned and adequate explanation as how those facts support its conclusion that there is an adverse impact on the economic welfare of the US steel industry.

256. In relation to “employment”, the US Secretary of Commerce indicated that “employment has declined 35 percent (216,400 in 1998 to 139,800 in January 2016-December 2016), including 14,100 lost jobs between 2015 and 2016.”³³⁵ It noted that “[w]hile employment numbers increased slightly in certain years, the trend is dramatically downward.”³³⁶ First, it is unclear to which extent the employment data relate to the domestic producers of the like or competitive products. Second, the US Secretary of Commerce examined the trend in employment from 1998 to 2016, while a different period has been used for the examination of the imports (2011-2017) and other injury factors. In fact, the data for 2017 show an increase in employment when compared to the data of 2016 (from 139.8 thousand workers in 2016 to 142.2 thousands workers in 2017). Furthermore, if the starting year taken is not 1998 (216.4 thousands workers) but 2011 (148.7 thousands workers), then the decrease observed between 2011 and 2017 is limited. Switzerland submits, in light of the foregoing, that the US Secretary of Commerce failed to make an objective analysis of the “employment” factor and failed to provide a reasoned and adequate explanation as how the facts concerning the employment support its conclusion that there is an adverse impact on the economic welfare of the US steel industry.

³³² The Steel Report, p. 31, Exhibit CHE-2.

³³³ The Steel Report, p. 31, Exhibit CHE-2.

³³⁴ The Steel Report, p. 32, Exhibit CHE-2.

³³⁵ The Steel Report, p. 35, Exhibit CHE-2.

³³⁶ The Steel Report, p. 35, Exhibit CHE-2.

257. Regarding the “*financial situation*” of the domestic industry, the US Secretary of Commerce noted that “[t]he US industry, as a whole, has operated on average with negative net income from 2009-2016” and that “[n]et income for U.S.-owned steel companies has averaged only \$162 million annually since 2010, challenging the financial viability of this vital industry.”³³⁷ As with other factors, it is unclear whether the analysis relates to domestic producers of the like or competitive products. In addition, the US Secretary of Commerce uses a period that is different from the one used for the examination of the imports and other injury factors. Furthermore, when examining the data reported in Figure 8 between 2011 and 2016, most years, with the exception of 2012 and 2015, show a positive net annual income. In particular, the last year of the period (2016) indicates a net annual income of USD 713 million. The US Secretary of Commerce further indicates that there has been a “slight uptick in net income for the first quarter in 2017”³³⁸ although the figure is not provided. In light of the foregoing, Switzerland submits that not only the US Secretary of Commerce failed to make an objective analysis of the “financial situation” factor but it also failed to provide a reasoned and adequate explanation as how the facts included in the Report support its conclusion that there is an adverse impact on the economic welfare of the US steel industry.

258. Regarding “*capital expenditures*”, the Steel Report indicates that “annual capital expenditures for companies making iron and steel ingot, bars, rods, plate and other semi-finished products wavered from \$5.7 billion to \$5.1 billion for 2010-2012, before ramping to \$7.1 billion in 2013” and that “[t]otal capital spending dropped to \$3.87 billion in 2014 and slid further to \$3.11 billion in 2015 – 32 percent below 2010 levels of \$5.66 billion”.³³⁹ First, it is unclear to which extent the data provided relate to the domestic producers of the like or competitive products. Moreover, the data examined cover a period different from the period used for the analysis of imports and other injury factors. Indeed, in relation to “capital expenditures”, the period ends in 2015 and does not include neither 2016 nor 2017. Thereby, the US Secretary of Commerce failed to make an objective analysis of that factor and failed to provide a reasoned and adequate explanation of how the facts relating to capital expenditures support its conclusions that there is an adverse impact on the economic welfare of the US steel industry.

259. Regarding “*production capacity*”, the Steel Report indicates that production capacity “remained stagnant” over the period 2006-2016, and that for 2016, the rated maximum capacity was 113 million metric tons for existing basic oxygen furnace and electric arc furnace facilities.³⁴⁰ The Steel Report, however, refers to the decline in the number of basic oxygen furnace facilities and units between 2000 and “today” which

³³⁷ The Steel Report, p. 37 referring to Figure 8 on p. 38, Exhibit CHE-2.

³³⁸ The Steel Report, p. 38, Exhibit CHE-2.

³³⁹ The Steel Report, p. 40, Exhibit CHE-2.

³⁴⁰ The Steel Report, p. 41, Exhibit CHE-2.

have declined from 105 companies producing raw steel at 144 locations to 38 companies producing at 93 locations.³⁴¹ The Steel Report also notes that “in 2000, thirteen companies ‘operated integrated steel mills, with an average of 35 blast furnaces in continuous operation during the year’ while today, there are only three companies operating 13 basic oxygen furnaces.”³⁴² The analysis of this factor is again not unbiased and objective since it refers to a different time period than the time period used for the analysis of the imports and other injury factors and since it does not refer to the domestic industry by reference to the producers of the like or directly competitive products. Furthermore, the US Secretary of Commerce failed to explain how the facts showing a stagnant production capacity over the period 2006-2016 support its conclusion that there is an adverse impact on the situation of the US steel industry.

260. Regarding “*production*”, the data reported for the period 2011 to 2017 shows an increase between 2011 (86.4 million metric tons) and 2012 (88.7 million metric tons) and then again between 2013 (86.9 million metric tons) and 2014 (88.2 million metric tons). Then, the production decreased in 2015 (78.8 million metric tons) and in 2016 (78.6 million metric tons) but increased again in 2017 (81.9 million metric tons).³⁴³ Switzerland notes that, although the US Secretary of Commerce reported those data in its Report, he did not *examine* them, and thereby failed to provide a reasoned and adequate explanation as how those data support a finding that the domestic industry is adversely impacted. In fact, the analysis of the US Secretary of Commerce appears to focus only on the fact that the US domestic steel production supplied only 70% of the demand although it could have, on average, supplied up to 100% of the demand.³⁴⁴

261. In the *Aluminium Investigation*, the US Secretary of Commerce focused on the situation of the primary aluminium industry. The Aluminium Report recognizes, however, that the aluminium industry consists of “three basic sectors”, i.e. primary, downstream and secondary.³⁴⁵ Nevertheless, the analysis included in the Report underlines the negative trends observed in injury factors in the primary aluminium industry while ignoring any positive developments in the situation of the two other sectors. This is particularly problematic given that the downstream and secondary sectors make up the majority of the US aluminium industry and the fact that those sectors have been performing and continue to perform very well. By focusing on the poorly performing part of the aluminium industry, the US Secretary of Commerce presented a misleading picture of the situation of the US domestic aluminium industry and thereby failed to make an objective evaluation of the state of the domestic industry as a whole.

³⁴¹ The Steel Report, p. 43, Exhibit CHE-2.

³⁴² The Steel Report, p. 43, Exhibit CHE-2.

³⁴³ The Steel Report, Figure 15, p. 47, Exhibit CHE-2.

³⁴⁴ The Steel Report, p. 47, Exhibit CHE-2.

³⁴⁵ The Aluminium Report, p. 23, Exhibit CHE-5.

262. Regarding “*production capacity*” and “*production*”, the US Secretary of Commerce first looked at the data concerning “primary aluminium production” and noted “a steep decline” in US production.³⁴⁶ He noted that “[t]he decline in U.S. production and capacity utilization has been particularly dramatic in just the past two years”, referring to Table 9 which reports data concerning production and capacity for the period between 2012 and 2017 (annualized).³⁴⁷ The US Secretary of Commerce referred to the number of producers that operate smelters and the number of smelters.³⁴⁸ The US Secretary of Commerce then examined the data concerning “secondary aluminium production capacity”. The data included in Table 12 which relate to “U.S. [s]econdary [r]ecovery of [n]ew [a]luminium and [o]ld [a]luminium [s]crap” show an increase between 2011 and 2016. The US authorities also referred to a study of the USITC which found that “U.S. secondary production capacity increased by 5.6 percent between 2011 and 2015, while actual production increased by 13.4 percent during that timeframe.”³⁴⁹ The US Secretary of Commerce, however, indicated that “[s]pecialized applications [...] require the cleanest materials, for which recycled aluminum is not suitable.”³⁵⁰ The US Secretary of Commerce then examined “downstream aluminium production”, noting that this industry segment is “diverse”. He referred to a report of the USITC concerning flat-rolled aluminium (HTS 7606 and 7607), extrusions (HTS 7604 and 7608) and wire and cable (HTS 7605) which relate to years 2012 to 2015.³⁵¹ In addition, the data included in Table 14 show that for the majority of downstream products, production, capacity and capacity utilization increased between 2012 and 2015.³⁵²

263. Switzerland notes that there is no consistency in the time periods used to examine production and production capacity of the primary aluminium products, secondary aluminium products and downstream aluminium products. Furthermore, the analysis of the downstream aluminium products refers to some but not all the products covered by the investigation. In particular, it does not refer to “aluminium tube and pipe fittings” (HTS 7609) nor to “castings” and “forgings” (7616.99.51.60 and 7616.99.51.79). Finally, the analysis of both the data concerning the secondary aluminium production and the downstream aluminium production show increasing trends over the period considered. The US Secretary of Commerce failed to explain, however, how it took these positive trends in secondary and downstream aluminium sectors into account in its determination of serious injury.

³⁴⁶ The Aluminium Report, p. 41, Exhibit CHE-5.

³⁴⁷ The Aluminium Report, p. 44, Exhibit CHE-5.

³⁴⁸ The Aluminium Report, pp. 45-49, Exhibit CHE-5.

³⁴⁹ The Aluminium Report, p. 50, Exhibit CHE-5.

³⁵⁰ The Aluminium Report, p. 50, Exhibit CHE-5.

³⁵¹ The Aluminium Report, pp. 53-54, Exhibit CHE-5.

³⁵² The Aluminium Report, p. 56, Exhibit CHE-5.

264. With regard to “*employment*”, the US Secretary of Commerce reported data from the Aluminium Association for 2013 and 2016 by sector, noting that there has been a significant decrease in employment in the primary aluminium sector by 58% although the other segments of industry have seen moderate growth. In total, the data provided in Table 39 shows an increase of 3% over the period considered.³⁵³ The US Secretary of Commerce also referred to data from the Bureau of the Census’ Annual Survey of Manufactures, which similarly shows a declining trend in employment in the primary aluminium sector between 2013 and 2015, but not in the other sectors.³⁵⁴

265. Switzerland notes that once again the US Secretary of Commerce has examined employment data in relation to a time period that is not the same as the one used for the examination of imports and other injury factors. Furthermore, the data do not even refer to all the years of the period considered (Table 39 indicates data for 2013 and 2016 and Table 40 data concerning 2013, 2014 and 2015), making a trend analysis impossible. Moreover, the data show a positive trend with respect to secondary and downstream aluminium sectors as well as a general positive trend with respect to employment in the US aluminium industry. The authorities failed, however, to explain how these facts support the conclusion that there is an adverse impact on the economic welfare of the US aluminium industry.

266. Regarding the “*financial status*” of the US aluminium industry, the US Secretary of Commerce distinguished between the upstream industry (i.e. primary industry) and the downstream companies. Regarding the upstream industry, it noted a poor financial performance between 2013 and 2016 referring to the “negative net incomes” for the three publicly traded companies which, in 2016, reported operating losses totaling USD 912 million.³⁵⁵ Regarding their sales, the US Secretary of Commerce noted a relatively stable sales/revenue during the period while the biggest producer, Alcoa, saw sales drop drastically between 2014 and 2015, continuing in 2016.³⁵⁶ The US Secretary of Commerce, however, noted an improved financial performance for the first quarter of 2017 which was “largely due to improved market pricing of aluminum”.³⁵⁷ Regarding the downstream industry, the US Secretary of Commerce noted that “[t]o date, the downstream sector has largely remained profitable by shifting production to markets not yet affected [by] imports” and that “the impact of imports on the downstream industry sector has so far been limited to certain product categories”.³⁵⁸ The Aluminium Report does not provide any data with respect to the secondary aluminium industry.

³⁵³ The Aluminium Report, pp. 89-90 and Table 39 on p. 90, Exhibit CHE-5.

³⁵⁴ The Aluminium Report, pp. 90-91 and Table 40 on p. 91, Exhibit CHE-5.

³⁵⁵ The Aluminium Report, p. 92 and Table 41 on p. 94, Exhibit CHE-5.

³⁵⁶ The Aluminium Report, p. 92 and Table 41 on p. 94, Exhibit CHE-5.

³⁵⁷ The Aluminium Report, p. 93, Exhibit CHE-5.

³⁵⁸ The Aluminium Report, p. 95, Exhibit CHE-5.

267. Switzerland submits that the analysis of the financial status factor is not objective and unbiased. First, with respect to the primary aluminium industry, the US Secretary of Commerce reported the data concerning the three major aluminium companies but those data may relate to products other than those under investigation. Furthermore, he referred to a period which is not identical to the period used for the analysis of imports and other factors. Moreover, he focused its analysis on the primary aluminium industry. Indeed, as regarding the downstream industry, no data are provided nor analysed even though it is indicated that it has largely remained profitable to date and the Report is silent on the financial status of the secondary aluminium industry. Finally, the US Secretary of Commerce failed to provide a reasoned and adequate explanation as to why this factor supports its finding that the domestic steel industry is adversely impacted by imports, while the data for the first quarter of 2017 show a substantial improvement for the upstream industry and while the downstream sector “has largely remained profitable” during the period considered.

268. Regarding “*R&D expenditures*”, the US Secretary of Commerce noted that of the three remaining companies with US smelting operations in 2016 only Alcoa reported spending on R&D, but that its R&D expenditures have “plunged from \$95 million in 2014 to \$33 million in 2016” and that during the first quarter of 2017, Alcoa’s R&D spending was USD 7 million (i.e. USD 28 million annualized). He considered that limitations on the funding of R&D “could have serious implications for development of next-generation aluminum-based products, including those required for U.S. national security.”³⁵⁹ Regarding the downstream industry, the US Secretary of Commerce did not provide any data but noted that those companies “continue to conduct R&D in specific areas” but claimed that “the absence of fully integrated aluminum companies in the United States may be an inhibiting factor in development of next generation aluminum technologies.”³⁶⁰ In relation to that factor, the analysis made by the US Secretary of Commerce is not objective and unbiased as he failed to examine the trends, referred to a limited time period which is not consistent with the time periods used in the context of the analysis of other injury factors, failed to provide and examine the data regarding the downstream and secondary aluminium industries.

269. As regards “*capital expenditures*”, the US Secretary of Commerce referred to information from the Bureau of Census’ Annual Survey of Manufactures for 2013, 2014 and 2015, noting that “capital expenditures by the industry as a whole have been largely consistent over the three-year period”.³⁶¹ Actually, the data shows an increase (except for aluminium rolling, drawing and extruding), which is even substantial for the sector “aluminium sheet, plate & foil manufacturing”. Switzerland notes that the analysis refers

³⁵⁹ The Aluminium Report, pp. 96-97, Exhibit CHE-5.

³⁶⁰ The Aluminium Report, p. 97, Exhibit CHE-5.

³⁶¹ The Aluminium Report, p. 98 and Table 42, Exhibit CHE-5.

to a time period which is different from the time periods used in the analysis of imports and of other injury factors. The US Secretary of Commerce also failed to provide a reasoned and adequate explanation as how the data concerning capital expenditures support its finding that there is an adverse impact on the economic welfare of the US aluminium industry, especially given that the data included in Table 42 show a clear increase in capital expenditure of all three sectors making up the US aluminium industry.

270. Regarding “prices”, the US Secretary of Commerce noted that aluminium is an exchange-traded commodity and global market prices for aluminium are determined on the basis of global supply and demand. Referring to the figures of the London Metals Exchanges for aluminium, the US Secretary of Commerce noted that there has been a recession in 2008 and that after bottoming out in 2008-2009, the price of aluminium recovered, only to fall dramatically between 2011 and 2016 in response to global oversupply.³⁶² The US Secretary of Commerce also noted that the prices rose again in 2017.

271. Switzerland notes that the Report refers only to “prices of primary aluminium” although the products covered by the investigation do not only include such products, but also downstream aluminium products and secondary aluminium products. Furthermore, although the data indicates a substantial decrease in prices in 2015, the most recent trends, namely since 2015, show an increase in the price of primary aluminium. This tends to support a finding that the situation of the domestic industry improved in terms of prices.

272. In conclusion, in both the steel investigation and the aluminium investigation, the US Secretary of Commerce has failed to make an unbiased and objective examination of the various injury factors. Indeed, by examining each factor on the basis of different time periods, by reference to different groups of products and different groups of producers and by focusing on the poorly performing parts of the industry, the authorities failed to make an examination that could lead to a proper overall determination that the domestic industry suffered from serious injury or threat thereof. Furthermore, the US Secretary of Commerce failed to provide a reasoned and adequate explanation of how, on the basis of the data before it, he could conclude that the domestic industry in each investigation was suffering serious injury or threat thereof caused by the increased imports.

³⁶² The Aluminium Report, pp. 99-100, Exhibit CHE-5.

f. The measures at issue are inconsistent with Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 in relation to the causation requirements

273. Switzerland submits that the measures at issue are inconsistent with Article 2.1 and Article 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the US authorities failed to demonstrate the existence of a causal link between increased imports and the alleged serious injury or threat thereof and because they failed to ensure that the alleged serious injury or threat thereof caused by factors other than increased imports was not attributed to increased imports.

i. The legal standard

274. Pursuant to Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards, in order to apply a safeguard measure, the Member concerned must demonstrate that the increased imports *have caused or are threatening to cause* serious injury to the domestic industry that produces like or directly competitive products.

275. Article 4.2(b) of the Agreement on Safeguards provides that:

The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

276. In *US – Line Pipe*, the Appellate Body emphasised that Article 4.2(b) establishes “two distinct legal requirements”, namely, first, that the investigation demonstrates the existence of the causal link between increased imports and the serious injury or threat thereof; and second, that the injury caused by factors other than the increased imports must not be attributed to increased imports.³⁶³

277. *In relation to the first requirement*, the Appellate Body explained that the causal link required by Article 4.2(b), first sentence is “a relationship of cause and effect such that increased imports contribute to ‘bringing about’, ‘producing’ or ‘inducing’ the serious injury.”³⁶⁴ More specifically, it said that “[t]he word ‘causal’ means ‘relating to a cause or causes’, while the word ‘cause’, in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, ‘brought about’, ‘produced’ or

³⁶³ Appellate Body Report, *US – Line Pipe*, para. 208.

³⁶⁴ Appellate Body Report, *US – Line Pipe*, para. 209, referring to Appellate Body Report, *US – Wheat Gluten*, para. 67.

‘induced’ the existence of the second element”.³⁶⁵ It further noted that “the word ‘link’ indicates “that increased imports have played a part in, or contributed to bringing about serious injury so that there is a causal ‘connection’ or ‘nexus’ between these two elements” and that “Article 4.2(b) does not require that increased imports be the sole cause of serious injury.”³⁶⁶ Thus, in order “to meet the causation requirement in Article 4.2(b), it is not necessary to show that increased imports alone – on their own – must be capable of causing serious injury.”³⁶⁷ The Appellate Body has referred to the “causal link” as involving “a genuine and substantial relationship of cause and effect”.³⁶⁸

278. In *Argentina – Footwear (EC)*, the Appellate Body agreed with the panel that “the words ‘rate and amount’ and ‘changes’ in Article 4.2(a) mean that ‘the *trends* - in both the injury factors and the imports – matter as much as their absolute levels” and that “it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.”³⁶⁹ This means that normally the increase in imports should *coincide in time* with a decline in the relevant injury factors.³⁷⁰ The Appellate Body noted that, although a coincidence by itself cannot prove causation, “its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.”³⁷¹

279. The Appellate Body also emphasised that the demonstration of the existence of the causal link must be based on “objective evidence”, i.e. on “objective data”,³⁷² and that this demonstration must be included in the report of the investigation which should set forth the findings and reasoned conclusions as required by Articles 3.1 and 4.2(c) of the Agreement on Safeguards.³⁷³

280. *In relation to the second requirement*, the Appellate Body emphasised that it implies that “when factors other than increased imports are causing injury at the same time as increased imports, competent authorities must ensure that injury caused to the domestic industry by other factors is not attributed to the increased imports”.³⁷⁴ In order to fulfil that requirement, competent authorities must thus “separate and distinguish the

³⁶⁵ Appellate Body Report, *US – Line Pipe*, para. 209, referring to Appellate Body Report, *US – Wheat Gluten*, para. 67.

³⁶⁶ Appellate Body Report, *US – Line Pipe*, para. 209, referring to Appellate Body Report, *US – Wheat Gluten*, para. 67..

³⁶⁷ Appellate Body Report, *US – Line Pipe*, para. 209, referring to Appellate Body Report, *US – Wheat Gluten*, para. 70.

³⁶⁸ Appellate Body Report, *US – Wheat Gluten*, para. 69.

³⁶⁹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 144. (emphasis original)

³⁷⁰ Panel Reports, *US – Steel Safeguards*, para. 10.299.

³⁷¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 144. (emphasis original)

³⁷² Appellate Body Report, *US – Lamb*, para. 130; Appellate Body Report, *US – Steel Safeguards*, para. 486.

³⁷³ Appellate Body Report, *US – Steel Safeguards*, para. 486.

³⁷⁴ Appellate Body Report, *US – Line Pipe*, para. 215.

injurious effects of the increased imports from the injurious effects of the other factors”.³⁷⁵ In other words, competent authorities are required “to identify the nature and extent of the injurious effects of the known factors other than increased imports” and “explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.”³⁷⁶

281. The Appellate Body also stated that “to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports” and that “[t]his explanation must be clear and unambiguous”.³⁷⁷

ii. The legal analysis

282. In the *Steel Investigation*, the US Secretary of Commerce examined “the effect of imports on national security requirements”³⁷⁸. The US Secretary of Commerce found that:

- Imports in such quantities as are presently found *adversely impact* the economic welfare of the US steel industry;³⁷⁹
- Displacement of domestic steel by excessive quantities of imports *has the serious effect of weakening* the US internal economy;³⁸⁰ and
- Global excess steel capacity is a circumstance that *contributes to the weakening* of the domestic economy.³⁸¹

283. In the *Aluminium Investigation*, the US authorities similarly examined “the effect of imports of aluminum on the national security of the United States”.³⁸² The US Secretary of Commerce found that:

- The present quantity of imports *adversely impacts* the economic welfare of the US aluminium industry;

³⁷⁵ Appellate Body Report, *US – Line Pipe*, para. 215, referring to Appellate Body Reports, *US – Wheat Gluten*, para. 70; *US – Lamb*, para. 179.

³⁷⁶ Appellate Body Report, *US – Line Pipe*, para. 215.

³⁷⁷ Appellate Body Report, *US – Line Pipe*, para. 217.

³⁷⁸ The Steel Report, p. 1, Exhibit CHE-2.

³⁷⁹ The Steel Report, Section V.B, p. 27-41, Exhibit CHE-2.

³⁸⁰ The Steel Report, Section V.C, p. 41-51, Exhibit CHE-2.

³⁸¹ The Steel Report, Section V.D, p. 51-54, Exhibit CHE-2.

³⁸² The Aluminium Report, p. 1, Exhibit CHE-5.

- Global excess aluminium capacity is a circumstance that *contributes* to the weakening of the US aluminium industry.

284. As noted above, in order to demonstrate the existence of a causal link, the authorities must normally show that there is a *coincidence in time* between the trends in imports and in the injury factors. However, as noted in the previous section, in the steel and aluminium investigations, the US Secretary of Commerce did not examine the trends in imports and the trends of some of the injury factors. *A fortiori*, they could not examine and demonstrate a *coincidence in time* between *the trends in imports* and *the trends in the injury factors*. Furthermore, the US Secretary of Commerce examined the imports and the various injury factors on the basis of different time periods. This too does not allow the establishment of a causal link between, on the one hand the imports and, on the other hand, the serious injury or threat thereof, as required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

285. As to the non-attribution analysis, Switzerland notes that the US Secretary of Commerce concluded in the Steel Report that “global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy.”³⁸³ Similarly, in the Aluminium Report, the US Secretary of Commerce concluded that “global excess aluminum capacity is a circumstance that contributes to the weakening of the U.S. aluminum industry”³⁸⁴. To the extent that global excess steel and aluminium capacity is a factor other than imports which is also causing injury to the US domestic steel and aluminium industries, the US Secretary of Commerce should have separated and distinguished the injurious effects caused by that factor from those allegedly caused by the imports. The US Secretary of Commerce, however, failed to explain how it ensured that the injurious effects of that factor were not included in the assessment of the injury ascribed to increased imports.

286. The US Secretary of Commerce further failed to address other factors contributing to the weakening of the US steel and aluminium industries. In that regard, the Steel Report suggests that the poor state of the US domestic steel industry is due, at least in part, to the regulatory burden faced by the US producers.³⁸⁵ Furthermore, the reasons behind the closure of steel mills of certain US producer, referred to in the Steel Report, suggest that the negative developments in the steel industry in the United States may not be due to the increase in imports but relate to factors such as reliance on obsolete facilities, poor management strategies and cancellations of customer orders.³⁸⁶ By failing to examine these factors and distinguish their effects from the effects of the

³⁸³ The Steel Report, pp. 4 and 51, Exhibit CHE-2.

³⁸⁴ The Aluminium Report, p. 4, Exhibit CHE-5.

³⁸⁵ The Steel Report, p. 33, Exhibit CHE-2.

³⁸⁶ The Steel Report, p. 34 and the documents referred to in footnote 46, Exhibit CHE-2.

increase in imports, the US Secretary of Commerce failed to conduct a proper non-attribution analysis.

287. Similar considerations apply with respect to the analysis made in the Aluminium Report. Indeed, the report – which strongly focuses on the state of the primary sector of the US aluminium industry – recognizes that “[o]ne of the main reasons for the decline in U.S. primary aluminum production capacity is that the United States is a relatively high cost producer”.³⁸⁷ The Aluminium Report fails, however, to examine the impact of the high costs of production on the US aluminium industry as opposed to the alleged impact of the increased imports.

288. For the foregoing reasons, the measures at issue are inconsistent with Article 2.1 and Article 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

g. The United States acted inconsistently with Article 3.1 and 4.2(c) of the Agreement on Safeguards

i. The legal standard

289. The first paragraph of Article 3.1 of the Agreement on Safeguards provides that:

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

290. In *US – Wheat Gluten* the Appellate Body noted with respect to Article 3.1 of the Agreement on Safeguards:

Article 3.1 of *Agreement on Safeguards*, which is entitled "*Investigation*". Article 3.1 provides that "A Member may apply a safeguard measure only following an *investigation* by the competent authorities of that Member ...". (emphasis added) The ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with

³⁸⁷

The Aluminium Report, p. 41, Exhibit CHE-5.

conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.

The nature of the "investigation" required by the *Agreement on Safeguards* is elaborated further in the remainder of Article 3.1, which sets forth certain investigative steps that the competent authorities "*shall include*" in order to seek out pertinent information. (emphasis added) The focus of the investigative steps mentioned in Article 3.1 is on "interested parties", who must be notified of the investigation, and who must be given an opportunity to submit "evidence", as well as their "views", to the competent authorities. The interested parties are also to be given an opportunity to "respond to the presentations of other parties". The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.³⁸⁸

291. It follows that, pursuant to Article 3.1 of the *Agreement on Safeguards*, the authorities must "carry out a systematic inquiry" into the matter before them which implies that the authorities "actively seek out pertinent information".³⁸⁹ The first sentence of Article 3.1 also makes it clear that such investigation must be carried out "pursuant to procedures previously established and made public in consonance with Article X of GATT 1994".

292. The second sentence of Article 3.1 provides "certain procedural guarantees to interested parties, notably 'reasonable public notice' and 'public hearings or other appropriate means ... [to] present evidence and their views including the opportunity to respond to the presentations of other parties'".³⁹⁰

293. The last sentence of Article 3.1 requires that "the competent authorities [...] publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

294. Article 4.2(c) of the *Agreement on Safeguards* provides that "[t]he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the factors examined."

295. In *Dominican Republic – Safeguard Measures*, the panel noted that:

[f]or its part, Article 4.2(c) requires the competent authorities to publish a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. Furthermore, Article 3.1, last sentence, of the *Agreement on Safeguards* stipulates that the report published by the authorities must set forth their findings and reasoned conclusions on all pertinent issues of fact and law. What these provisions require is that the competent authorities

³⁸⁸ Appellate Body Report, *US – Wheat Gluten*, paras. 53-54.

³⁸⁹ Appellate Body Report, *US – Wheat Gluten*, para. 53.

³⁹⁰ Panel Report, *Ukraine – Passenger Cars*, para. 7.402.

evaluate all relevant factors of an objective and quantifiable nature and set forth findings and reasoned conclusions.³⁹¹

296. In *US – Steel Safeguards*, the Appellate Body also explained that Article 4.2(c) is “an elaboration of the requirement set out in Article 3.1, last sentence, to provide a ‘reasoned conclusion’ in a published report.”³⁹² In that regard, the Appellate Body concluded that the last sentence of Article 3.1, as elaborated by Article 4.2(c) of the Agreement on Safeguards requires that: (i) the competent authorities publish a report; (ii) the report contain “a detailed analysis of the case”; (iii) the report demonstrat[e] ... the relevance of the factors examined”; (iv) the report “set[] forth findings and reasoned conclusions”; and (v) the “findings and reasoned conclusions” cover “all pertinent issues of fact and law” prescribed in Article XIX of the GATT 1994 and the relevant provisions of the *Agreement on Safeguards*.³⁹³

ii. The legal analysis

297. Switzerland submits that the United States did not comply with the requirements of Article 3.1 since (i) the authorities failed to provide the interested parties with “the opportunity to respond to the presentations of other parties”; (ii) the interested parties have not been provided a central role in the investigations and (iii) the authorities failed to provide a reasoned and adequate explanation on all pertinent issues of fact and law.

298. In the *Steel Investigation*, on 26 April 2017, the USDOC published in the Federal Register a “Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel”. In that Notice, the US Secretary of Commerce invited interested public participants to submit written comments by 31 May 2017 and/or participate in the Public Hearing to be held on 24 May 2017. The Notice identified the issues on which the Department was interested in obtaining the public’s views and set forth the procedures for public participation in the hearing.³⁹⁴ In its Report, the US Secretary of Commerce noted that the public hearing was held on 24 May 2017 and that the department heard testimony from 37 witnesses at the hearing. It also noted that the department received 201 written public comments concerning the investigation.

299. In the *Aluminium Investigation*, the Department of Commerce published in the Federal Register a “Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum”. In that Notice, the US Secretary of Commerce invited interested parties to provide written comments by 29

³⁹¹ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.281.

³⁹² Appellate Body Report, *US – Steel Safeguards*, para. 289.

³⁹³ Appellate Body Report, *US – Steel Safeguards*, para. 304.

³⁹⁴ USDOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, Federal Register, Vol. 82, No. 79, 26 April 2017, pp. 19205-19207, Exhibit CHE-4.

June 2017 and/or participate in a public hearing to be held on 22 June 2017. The Notice identified the issues on which the Department was interested in obtaining the public's views and set forth the procedures for public participation in the hearing.³⁹⁵ In its Report, the US Secretary of Commerce noted that the department received 91 written submissions and that a public hearing was held on 22 June 2017 during which the department heard testimony from 32 witnesses at the hearing.

300. First, Switzerland submits that while, in both investigations, interested parties have been given an opportunity to comment on the issues identified in the Notice of Request for Public Comments and Public Hearing, they have not been given the opportunity to respond to the presentations of other interested parties.

301. Second, while the word "investigation" implies that the authorities "must actively seek out pertinent information" and that the Agreement on Safeguards "envisages that the interested parties play a central role in the investigation and that "they will be a primary source of information for the competent authorities"³⁹⁶, this has not been the case in the steel and aluminium investigations. Indeed, the authorities have invited interested parties to comment on certain issues *at the beginning of the investigation*. However, the authorities have not actively sought out from the interested parties the information that has been used in the two investigations. In fact, for most of the factors examined in those investigations, in particular the injury factors, the information and data used have not been provided directly by the interested parties (in particular by the domestic producers for the injury factors) but comes from reports of other authorities or outside organisations. Thereby, interested parties have not played a central role in the investigations, contrary to the requirements of Article 3.1 of the Agreement on Safeguards.

302. Third, as demonstrated above and below, the US authorities have failed to provide a reasoned and adequate explanation regarding the determination of unforeseen developments, the effects of the obligations incurred under the GATT 1994, the increase in imports, the serious injury or threat thereof, the causal link and the imposition of the measures to the extent and for the time necessary to prevent or remedy serious injury, thereby acting inconsistently with Articles 2.1, 4.1, 4.2, 5.1, 7.1 and 7.4 of the Agreement on Safeguards. Consequently, the United States also acted inconsistently with Article 3.1, last sentence, and Article 4.2(c) of the Agreement on Safeguards as the Steel and Aluminium Reports do not set forth findings and reasoned conclusions on all pertinent

³⁹⁵ USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, Federal Register, Vol. 82, No. 88, 9 May 2017, pp. 21509-21511, Exhibit CHE-7.

³⁹⁶ Appellate Body Report, *US – Wheat Gluten*, para. 53-54.

issues of fact and law and do not contain a detailed analysis of the case nor a demonstration of the relevance of the factors.³⁹⁷

h. The measures at issue are inconsistent with Article 5.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because those measures are applied beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment

i. The legal standard

303. Article 5.1 of the Agreement on Safeguards provides that:

A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

304. Article XIX:1(a) of the GATT 1994 similarly provides that:

[T]he contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

305. Pursuant to those provisions, the importing Member imposing the safeguard measure must ensure “that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment.”³⁹⁸

306. In *US – Line Pipe*, the Appellate Body concluded that the first sentence of Article 5.1 “must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports”.³⁹⁹ The Appellate Body explained that “the ‘serious injury’ to which Article 5.1, first sentence, refers is, in any particular case, necessarily the same ‘serious injury’ that has been determined to exist by competent authorities of a WTO Member pursuant to Article 4.2.”⁴⁰⁰ However, that does not mean the “entirety” of the serious injury, including the part attributable to other factors.⁴⁰¹ The Appellate Body considered that the non-attribution language of the second sentence of Article 4.2(b) serves “as necessary context” for the interpretation of

³⁹⁷ Panel Report, *India – Iron and Steel Products*, para. 7.289.

³⁹⁸ Appellate Body Report, *Korea – Dairy*, para. 96.

³⁹⁹ Appellate Body Report, *US – Line Pipe*, para. 260.

⁴⁰⁰ Appellate Body Report, *US – Line Pipe*, para. 249.

⁴⁰¹ Appellate Body Report, *US – Line Pipe*, para. 249.

Article 5.1, first sentence. It noted that one of the objectives of the non-attribution language of the second sentence of Article 4.2(b) is to constitute “a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports” and “this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence.”⁴⁰²

307. In *Chile – Price Band*, the panel also emphasised that pursuant to Article 5.1 “the Member imposing the safeguard measure must *ensure* that the measure is only applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment”. It added that “a Member can only *ensure* that the safeguard measure is calibrated if there is, at a minimum, a *rational connection* between the measure and the objective of preventing or remedying serious injury and facilitate adjustment. In the absence of such a rational connection, a Member cannot possibly *ensure* that the measure is applied only to the extent necessary.”⁴⁰³

ii. The legal analysis

308. Switzerland submits that the United States acted inconsistently with Article 5.1 of the Agreement on Safeguards for the following reasons.

309. First, as demonstrated above, the US authorities failed to establish the causal link between the increased imports and the alleged serious injury to the domestic industry as required by Article 4.2(b) in both the steel and aluminium investigations. Consequently, they could not ensure that the safeguard measures were applied only “to the extent necessary” to prevent or remedy serious injury. Thereby, the United States acted inconsistently with Article 5.1 of the Agreement on Safeguards.

310. Second, there is no calibration between the additional duties imposed, i.e. 25% on steel products and 10% on aluminium products, and the objective of preventing or remedying serious injury. First, the US Secretary of Commerce recommended a global duty of 24% with respect to imports of steel products and a global duty of 7.7% with respect to imports of aluminium products. Both the Steel and Aluminium Reports explain that such level of additional duties is deemed necessary to allow the US steel and aluminium industries to achieve an 80% capacity utilization rate. The Steel and Aluminium Reports fail, however, to explain the link between that particular capacity utilization rate (80%) and the need to prevent or remedy serious injury suffered by the US steel and aluminium industries. While the Steel Report notes that “[u]tilization rates of 80 percent or greater are necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel

⁴⁰² Appellate Body Report, *US – Line Pipe*, para. 252.

⁴⁰³ Panel Report, *Chile – Price Band*, para. 7.183. (emphasis in the original)

sector⁴⁰⁴, there is no explanation as to why that capacity utilization rate of 80% is necessary to address serious injury or threat of serious injury. Second, although the US Secretary of Commerce recommended the imposition of an additional duty of 24% on steel products and of 7.7% on aluminium products, the US President imposed an additional duty of 25% and 10% respectively, without, however, providing any explanation as to why those increased level of duties were necessary to reach the target of 80% capacity utilization rate that was used to justify the 24% and 7.7% additional duties by the US Secretary of Commerce.

311. Third, the additional import duties are not limited to what is necessary to facilitate adjustment of the US steel and aluminium industries. Since those measures are not limited in time and do not provide for any progressive liberalization, they simply aim to reach and keep the target of 80% capacity utilization rate. This establishes that the goal of the measures is to protect the US steel and aluminium industries from imports and go beyond what is necessary to facilitate adjustment of the US steel and aluminium industries. Neither the Steel and Aluminium Reports nor the Presidential Proclamations imposing the additional import duties explain the role of those duties in the adjustment process of steel and aluminium industries in the United States to foreign competition.

i. The measures at issue are inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards

312. Switzerland submits that the measures at issue are inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards because those measures have been applied without making provision for their application only for the period necessary to prevent or remedy serious injury and to facilitate adjustment, without limitation to four years and without making provision for progressive liberalization at regular intervals.

i. The legal standard

313. Article 7 of the Agreement on Safeguards which is entitled “Duration and Review of Safeguard Measures” provides, in relevant parts, that:

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.
2. [...]
3. [...]

⁴⁰⁴ The Steel Report, p. 4, Exhibit CH-2.

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

314. Pursuant to Article 7.1 of the Agreement on Safeguards, safeguard measures can be applied only for a limited time period and such period cannot exceed four years. Furthermore, the time period must be determined such that the measures are applied only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.

315. Article 7.4 imposes an obligation of progressive liberalization with respect to safeguard measures with an expected duration of more than a year. The requirement is to “progressively liberalize [the measure] at regular intervals”. In the context of Article 7.4, “regular intervals of liberalization are uniform intervals, that is to say, intervals that are equally separated in time.”⁴⁰⁵ This understanding is supported by the purpose of the requirement which is to facilitate adjustment. In that regard, the panel in *Ukraine – Passenger Cars* noted that “[p]rogressive liberalization that proceeds at equal intervals over the period of application facilitates the adjustment of the domestic industry by exposing it to greater foreign competition following a pattern that allows – and forces – the industry to adjust to each stage of that liberalization, and prepare itself for the next one, at equal time intervals.”⁴⁰⁶

ii. The legal analysis

316. Switzerland submits that the measures at issue are inconsistent with Articles 7.1 and 7.4 of the Agreement on Safeguards.

317. First, the measures at issue are inconsistent with Article 7.1 of the Agreement on Safeguards since they are not legally limited in time. Indeed, Presidential Proclamations 9705 and 9704 indicate that the measures concerned “shall continue in effect, unless such actions are expressly reduced, modified, or terminated.”⁴⁰⁷ Therefore, there is no time limitation provided for with respect to those measures. This is inconsistent with the first sentence of Article 7.1 which requires that the Member shall apply safeguard

⁴⁰⁵ Panel Report, *Ukraine – Passenger Cars*, para. 7.362.

⁴⁰⁶ Panel Report, *Ukraine – Passenger Cars*, para. 7.362.

⁴⁰⁷ Presidential Proclamation 9705, Article 5(a), Exhibit CH-8; Presidential Proclamation 9704, Article 5(a), Exhibit CH-13.

measures “only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment”.

318. The obligation to apply a safeguard measure “only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment” implies that the measure must necessarily be limited in time. While Presidential Proclamations 9705 and 9704 provide that the US Secretary of Commerce shall continue to monitor and “from time to time” review the status of steel/aluminium imports and inform the US President of any circumstances indicating the need for further action⁴⁰⁸, there is no specific timeframe for such review or indication about further action that may be taken by the US President.

319. Furthermore, the language of Section 232, which provides the legal basis for the measures at issue, does not provide for any time-limit for measures taken pursuant to Section 232. Rather, Section 232(b) explicitly states that the US Presidential action shall be taken “for such time, as he deems necessary to adjust imports of such article and its derivatives so that such imports will not so threaten to impair the national security.” Hence, the duration of the measures under Section 232 is based on a purely subjective “necessity” standard contrary to what is required under Article 7.1.

320. Article 7.1, second sentence further provides that the period of application of safeguard measures “shall not exceed four years”. The measures at issue do not meet this requirement given that they are imposed for an unlimited period of time.

321. Second, the measures at issue are also inconsistent with Article 7.4 of the Agreement on Safeguards since they do not provide for progressive liberalization at regular intervals as required by that provision.

322. At the outset, it should be noted that the expected duration of the measures at issue is more than a year since as noted above the application of those measures is not limited in time. This therefore triggers the obligation pursuant to Article 7.4 of progressively liberalizing the measures at regular intervals during the period of application of those measures.

323. As explained above, the purpose of this requirement of progressive liberalization at regular intervals is to “facilitate[] the adjustment of the domestic industry by exposing it to greater foreign competition following a pattern that allows – and forces – the industry to adjust to each stage of that liberalization, and prepare itself for the next one, at equal time intervals”⁴⁰⁹.

⁴⁰⁸ Presidential Proclamation 9705, Article 5(b), Exhibit CHE-8; Presidential Proclamation 9704, Article 5(b), Exhibit CHE-13.

⁴⁰⁹ Panel Report, *Ukraine – Passenger Cars*, para. 7.362.

324. The measures at issue, however, do not provide for any kind of progressive liberalization, let alone at regular intervals. Indeed, it is specifically provided that those measures shall continue in effect “unless such actions are expressly reduced, modified or terminated.”⁴¹⁰ Although the US Secretary of Commerce is invited to “inform the President of any circumstances that [...] might indicate the need for further action by the President under section 232” and to “inform the President of any circumstance that [...] might indicate that the increase in duty rate provided for in this proclamation is no longer necessary”⁴¹¹, this does not constitute elements of “progressive liberalization”. Furthermore, it does not identify “any regular intervals”. Thereby, the United States failed to comply with Article 7.4 of the Agreement on Safeguards.

j. The measures at issue are inconsistent with Article 11.1(a) of the Agreement on Safeguards

325. Switzerland submits that the measures at issue are inconsistent with Article 11.1(a) of the Agreement on Safeguards because by taking those measures the United States has taken emergency actions on imports of steel products and aluminium products as set forth in Article XIX of GATT 1994 while such actions did not conform with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards.

i. The legal standard

326. Article 11.1(a) of the Agreement on Safeguards provides that:

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

327. The Appellate Body noted with regard to Article 11.1(a) of the Agreement on Safeguards that “[t]he ordinary meaning of the language in Article 11.1(a) – “unless such action conforms with the provisions of that Article applied in accordance with this Agreement” – is that any safeguard action *must conform* with the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*.”⁴¹²

⁴¹⁰ Presidential Proclamation 9705, Article 5(a), Exhibit CHE-8; Presidential Proclamation 9704, Article 5(a), Exhibit CHE-13.

⁴¹¹ Presidential proclamation 9705, Article 5(a), Exhibit CHE-8; Presidential Proclamation 9704, Article 5(b), Exhibit CHE-13.

⁴¹² Appellate Body Report, *Korea – Dairy*, para. 77.

ii. The legal analysis

328. Switzerland submits that by taking the measures at issue the United States acted inconsistently with Article 11.1(a) of the Agreement on Safeguards because those measures fail to comply with Articles XIX:1(a) and XIX:2 of the GATT 1994 as well as with Articles 2.1, 2.2, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 7.4, 12.1, 12.2 and 12.3 of the Agreement on Safeguards.

329. It has been demonstrated above and below that the measures at issue fail to comply with the requirements laid down in Articles XIX:1(a) and XIX:2 of the GATT 1994 and in Articles 2.1, 2.2, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 7.4, 12.1, 12.2 and 12.3 of the Agreement on Safeguards. Consequently, by taking those measures, the United States also acted inconsistently with Article 11.1(a) of the Agreement on Safeguards.

k. The measures at issue are inconsistent with Article 11.1(b) of the Agreement on Safeguards

330. Switzerland submits that the United States acted inconsistently with Article 11.1(b) of the Agreement on Safeguards because, through the measures at issue, it has sought, taken and maintained “other measures” similar to voluntary export restraints and orderly marketing arrangements.

i. The legal standard

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

Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.^{3,4} These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

³ An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

⁴ Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licencing schemes, any of which afford protection.

332. Article 11.1(b) of the Agreement on Safeguards thus prohibits Members from seeking, taking or maintaining “voluntary export restraints”, “orderly marketing arrangements” or “any other similar measures” on the export or the import side. Footnote 4 provides examples of such similar measures, namely “export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import

cartels and discretionary export or import licensing schemes, any of which afford protection”.

333. The different categories of measures prohibited pursuant to Article 11.1(b) of the Agreement on Safeguards are not defined in the Agreement on Safeguards.

334. Voluntary export restraint (VER) has been described as “a measure that limits exports, has been imposed by the exporting country itself, and affords protection to a domestic industry in an importing country against foreign competition.”⁴¹³

335. An orderly marketing arrangements (OMA) has been described as “an international arrangement between two or more countries in which the countries concerned agree to restrict exports or imports of specific products and serves to protect a domestic industry in an importing country against foreign competition”.⁴¹⁴

336. Finally, Article 11.1(b) also prohibits any other similar measures, i.e. any other measures which are similar to voluntary export restraints and orderly marketing arrangements. Footnote 4 provides a non-exhaustive list of such “other similar measures”. From the wording of footnote 4 and the requirement that such measures are similar to VERs and OMAs, it can be inferred that, in order to fall within this category, a measure must restrict exports or imports and “afford protection” to the domestic industry in the importing country against foreign competition.

ii. The legal analysis

337. Presidential Proclamations 9704 and 9705 reserved the right of the US President to remove or modify the restrictions on steel and aluminium imports from exporting countries with which the United States has a security relationship that will successfully negotiate “alternative means” to address the alleged threat to the national security of the United States.⁴¹⁵

338. As mentioned in Section IV.B.4 above, such “alternative means” in the form of *import quotas* have been *agreed* for steel products with South Korea⁴¹⁶, Argentina⁴¹⁷ and Brazil⁴¹⁸ and for aluminium products with Argentina⁴¹⁹.

⁴¹³ R. Wolfrum, P.-T. Stoll and M. Koebele (eds.), *WTO Trade Remedies*, Max Planck Commentaries on World Trade Law, Vol. 4 (Brill/Nijhoff, 2008), p. 381.

⁴¹⁴ R. Wolfrum, P.-T. Stoll and M. Koebele (eds.), *WTO Trade Remedies*, Max Planck Commentaries on World Trade Law, Vol. 4 (Brill/Nijhoff, 2008), p. 381.

⁴¹⁵ Presidential Proclamation 9704, recital 8, Exhibit CHE-13, and Presidential Proclamation 9705, recital 9, Exhibit CHE-8.

⁴¹⁶ Presidential Proclamation 9740, Exhibit CHE-10.

⁴¹⁷ Presidential Proclamation 9759, Exhibit CHE-11.

⁴¹⁸ Presidential Proclamation 9759, Exhibit CHE-11.

⁴¹⁹ Presidential Proclamation 9758, Exhibit CHE-16.

339. Regarding steel products, the quotas applicable to imports from South Korea were established by Presidential Proclamation 9740 of 30 April 2018. The Presidential Proclamation refers to a range of measures *agreed* with South Korea “including a quota that restricts the quantity of steel articles imported into the United States from South Korea.”⁴²⁰ The immediate consequence is that imports from South Korea have been excluded from the scope of the additional duty imposed by Presidential Proclamation 9705. Quotas applicable to imports from Argentina and Brazil were established by Presidential Proclamation 9759 of 31 May 2018. That Presidential Proclamation similarly refers to a range of measures agreed with Argentina, Australia and Brazil including “measures to prevent the transshipment of steel articles and avoid import surges.”⁴²¹ The Presidential Proclamation does not expressly refer to “quotas” since, while quotas have been imposed with respect to imports from Argentina and Brazil, no quotas have been imposed with respect to imports from Australia. The immediate consequence of those measures has been that those three countries have been excluded from the scope of the additional duty imposed by Presidential Proclamation 9705.

340. The quotas applicable to imports of steel products from South Korea, Argentina and Brazil are provided for in 54 subheadings of Chapter 99 of the HTSUS covering the relevant subheadings of Chapter 72 (iron and steel) and Chapter 73 (articles of iron and steel).⁴²²

341. Regarding aluminium products, the quotas applicable to imports from Argentina were established by Presidential Proclamation 9758 of 31 May 2018. The Presidential Proclamation refers to a range of measures agreed with Argentina and Australia including “measures to prevent the transshipment of aluminum articles and avoid import surges.”⁴²³ The immediate consequence of those measures has been that those two countries have been excluded from the scope of the additional duty imposed by Presidential Proclamation 9704.

342. The quotas applicable to imports of aluminium products from Argentina are provided for in 2 subheadings of Chapter 99 of the HTSUS covering the relevant headings and subheadings of Chapter 76 (aluminium and articles thereof).⁴²⁴

343. It follows that, with respect to imports of steel products and imports of aluminium products, the United States has sought, taken and is maintaining measures similar to voluntary export restraints.

⁴²⁰ Presidential Proclamation 9740, recital 4, Exhibit CHE-10.

⁴²¹ Presidential Proclamation 9759, recital 5, Exhibit CHE-11.

⁴²² Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

⁴²³ Presidential Proclamation 9758, recital 5, Exhibit CHE-16.

⁴²⁴ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

344. First, the United States *has sought* measures similar to voluntary export restraints since in Presidential Proclamations 9704 and 9705, it has invited countries that have a “security relationship” with the United States to discuss with the United States in order to “arrive at satisfactory alternative means” to address the “threat” posed by the imports from the countries concerned. Therefore, even though the adjustment measures constitute “safeguard measures” that are inconsistent with several provisions of the Agreement on Safeguards, those measures are also inconsistent with Article 11.1(b) of the Agreement on Safeguards.

345. In fact, through Presidential Proclamations 9711 and 9710, the United States exempted from the additional duties imports from Canada, Mexico, Australia, Argentina, South Korea, Brazil and the European Union with which the United States has “an important security relationship” in order to continue “discussions” “on satisfactory alternative means to address the threatened impairment to the national security by imports” from those countries. The US President also welcomed any other country with which the United States has a “security relationship” to discuss with the United States “alternative ways” “to address the threatened impairment of the national security caused by imports” from those countries.⁴²⁵

346. In Presidential Proclamations 9739 and 9740, the US President indicated that it had “agreed in principle with Argentina, Australia and Brazil on satisfactory alternative means to address the threatened impairment” to the US national security posed by steel and aluminium articles from those countries and therefore that imports from those countries were exempted and that it was not necessary to set an expiry date for these exemptions since the United States “has agreed in principle with these countries”.⁴²⁶ The US President also indicated that it was continuing “discussions with Canada, Mexico and the EU” and that regarding imports from those countries, it maintained a temporary exemption until 31 May 2018.⁴²⁷

347. Second, the United States has also taken and maintains measures similar to voluntary export restraints.

348. Indeed, the United States has agreed on “alternative means” with Argentina, Australia, Brazil and South Korea regarding steel products and with Argentina and Australia regarding aluminium products, with the immediate consequence that imports from those countries are no longer subject to the additional duty that applies to imports from all other countries. More specifically, the United States has imposed quantitative

⁴²⁵ Presidential Proclamation 9710, recital 4, Exhibit CHE-14, and Presidential Proclamation 9711, recital 4, Exhibit CHE-9.

⁴²⁶ Presidential Proclamation 9739, recital 4, Exhibit CHE-15, and Presidential Proclamation 9740, recital 5, Exhibit CHE-10.

⁴²⁷ Presidential Proclamation 9739, recital 5, Exhibit CHE-15, and Presidential Proclamation 9740, recital 6, Exhibit CHE-10.

restrictions on imports of steel products from Argentina, Brazil and South Korea and on imports of aluminium products from Argentina pursuant to agreements with those countries. Given that those quantitative restrictions have been imposed following an agreement reached by the United States and those countries with a view to afford protection to the US domestic industry, they constitute measures similar to “voluntary export restraints” or “orderly marketing arrangements” within the meaning of Article 11.1(b) of the Agreement on Safeguards. Since they are applied by the United States on imports, they can be described as “similar measures on [...] the import side.”

349. By taking and maintaining such measures, the United States is therefore acting inconsistently with Article 11.1(b) of the Agreement on Safeguards which expressly prohibits any Member from seeking, taking or maintaining this type of action.

I. The United States acted inconsistently with Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994

350. Switzerland submits that the United States acted inconsistently with Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 since it has failed to comply with any of the notification and consultation obligations provided for in these provisions.

i. The legal standard

351. Article 12.1 of the Agreement on Safeguards provides that:

A Member shall immediately notify the Committee on Safeguards upon:

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

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

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

352. Article 12.1 thus imposes three notification obligations which are each triggered upon the occurrence of an event specified in subparagraphs (a), (b) and (c). Article 12.1 provides that each notification must take place “immediately” upon the occurrence of the triggering events.⁴²⁸

353. Article 12.2 of the Agreement on Safeguards provides that:

In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee

⁴²⁸ Appellate Body Report, *US – Wheat Gluten*, para. 102.

on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. [...]

354. Article 12.2 thus provides details regarding the content of the notifications that the Member concerned must make pursuant to Articles 12.1(b) and 12.1(c). The Member notifying must include in its notification “all pertinent information”. Article 12.2 adds that such information shall include certain items that are listed, i.e. evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved, proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. As the Appellate Body emphasized, “[t]hese items, which are listed as mandatory components of ‘all pertinent information’, constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.”⁴²⁹

355. Finally, Article 12.3 of the Agreement on Safeguards provides that:

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

356. Article XIX:2 of the GATT 1994 similarly provides that:

Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. [...]

357. It follows from Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 that the Member proposing to apply a safeguard measure must provide adequate opportunity for prior consultations with Members having a substantial interest as exporters of the products concerned. This opportunity must be provided before the Member concerned applies the measure.⁴³⁰

358. The Appellate Body noted the objective of Article 12.3 which is for the Members having a substantial interest as exporters to review the information provided under Article 12.2, exchanging views and reaching an understanding on an equivalent level of

⁴²⁹ Appellate Body Report, *Korea – Dairy*, para. 107.

⁴³⁰ Panel Report, *Ukraine – Passenger Cars*, para. 7.521.

concessions in accordance with Article 8.1.⁴³¹ In light thereof, the Appellate Body concluded that “Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified.”⁴³²

359. Regarding the requirement to provide “sufficient information” to allow for the possibility of meaningful consultations, the panel in *Ukraine – Passenger Cars* noted that “the information whose review must be possible during the consultations is that which was ‘provided under paragraph 2 [of Article 12]’”. It means that “the information in question consists of ‘all pertinent information’ within the meaning of Article 12.2, including that pertaining to the items identified in Article 12.2 and the factors listed in Article 4.2.”⁴³³ The Panel concluded that “if the information is not ‘provided’ as per Article 12.2, that is, in the notifications referred to in Articles 12.1(b) and (c), a Member cannot be found to have complied with the relevant requirement.”⁴³⁴

ii. The legal analysis

360. Switzerland submits that the United States acted inconsistently with Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards as it failed to comply with the notification and consultations requirements laid down in those provisions.

361. First, the United States acted inconsistently with Article 12.1 of the Agreement on Safeguards since it has failed to notify the Committee on Safeguards upon any of the events referred to in sub-paragraphs (a), (b) and (c) of Article 12.1. In other words, the United States did not notify the Committee on Safeguards upon initiating an investigatory process relating to serious injury or threat thereof and the reasons for it, upon making a finding of serious injury or threat thereof caused by increased imports, and upon taking a decision to apply or extend a safeguard measure. By failing to make such notifications, the United States thus acted inconsistently with Articles 12.1(a), (b) and (c) of the Agreement on Safeguards.

362. Second, and *a fortiori*, the United States also acted inconsistently with Article 12.2 of the Agreement on Safeguards. Indeed, since the United States did not notify the Committee on Safeguards upon making a finding of serious injury or threat thereof and upon taking a decision to apply or extend a safeguard measure, the United States could not and did not provide the Committee on Safeguards “with all pertinent information” in making those notifications.

⁴³¹ Appellate Body Report, *US – Wheat Gluten*, para. 136.

⁴³² Appellate Body Report, *US – Wheat Gluten*, para. 136.

⁴³³ Panel Report, *Ukraine – Passenger Cars*, para. 7.534.

⁴³⁴ Panel Report, *Ukraine – Passenger Cars*, para. 7.535.

363. Third, the United States failed to provide adequate opportunity for prior consultations with Members having a substantial interest as exporters of the product concerned as required by Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

364. A number of countries (China⁴³⁵, the European Union⁴³⁶, India⁴³⁷, the Russian Federation⁴³⁸ and Turkey⁴³⁹) requested consultations with the United States pursuant to Article 12.3 and Article 8.1 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994. The United States invariably responded to those requests that the measures on imports of steel and aluminium products are not “safeguard measures” and therefore that “Article 12.3 does not apply” and that, consequently, the requests for consultations pursuant to Article 12.3 “have no basis in the *Agreement on Safeguards*”.⁴⁴⁰

365. The above demonstrates that the United States failed to provide any opportunity, let alone any “adequate opportunity” for prior consultations with Members having a substantial interest as exporters of the product concerned.

366. Switzerland submits that, in light of the foregoing, the Panel should conclude that the United States acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

3. *Article XXI of the GATT 1994 is not available as a defence to justify measures that are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards*

367. At this stage of the panel proceedings it is unclear whether the United States will

⁴³⁵ China, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a Safeguard Measure by the United States on Imports of Steel, G/SG/162, 26 March 2018; and China, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a safeguard Measure by the United States on Imports of Aluminum, G/SG/161, 26 March 2018.

⁴³⁶ European Union, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a Safeguard Measure by the United States on Imports of Certain Steel and Aluminium Products, G/SG/173, 16 April 2018.

⁴³⁷ India, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a Safeguard Measure by the United States on Imports of Aluminum, G/SG/176 and India, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a Safeguard Measure by the United States on Imports of Steel, G/SG/177, 17 April 2018.

⁴³⁸ The Russian Federation, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a Safeguard Measure on Imports of Steel and Aluminium Products, G/SG/181, 19 April 2018.

⁴³⁹ Turkey, Request for Consultations under Article 12.3 of the Agreement on Safeguards, Imposition of a Safeguard Measure by the United States on Imports of Steel and Aluminum, G/SG/183, 20 April 2018.

⁴⁴⁰ Communications from the United States, G/SG/168, 5 April 2018; G/SG/178, 19 April 2018; G/SG/179, 19 April 2018; G/SG/182, 20 April 2018; and G/SG/184, 23 April 2018.

invoke Article XXI as a defence with respect to Switzerland's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards. Up until now, the United States has consistently argued that the measures at issue "are not safeguard measures but rather tariffs on imports of steel and aluminum articles that threaten to impair the national security of the United States" and that "the tariffs imposed pursuant to Section 232 are issues of national security not susceptible to review or capable of resolution by WTO dispute settlement".⁴⁴¹ With this in mind, this section contains some preliminary observations on the relationship between Article XXI of the GATT 1994 that the United States may invoke and Switzerland's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards. This is, however, without prejudice to any further arguments Switzerland may present in response to the position of the United States.

368. Switzerland submits that the measures at issue constitute safeguard measures which are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards. At the outset of its analysis, the Panel is therefore called to assess whether the rules established by Article XIX and the Agreement on Safeguards are applicable to the measures at issue.⁴⁴² As explained in Section IV.D.1 above, the applicability of Article XIX and the Agreement on Safeguards is conditioned upon the measures at issue presenting certain constituent features, absent which those measures are not to be considered safeguard measures.

369. As emphasised by the Appellate Body in *Indonesia – Iron or Steel Products*, in order for Article XIX of the GATT 1994 and the Agreement on Safeguards to apply to a measure, the latter must (1) suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession, and (2) such suspension, withdrawal, or modification must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports.⁴⁴³ Once it is established that the challenged measure presents those two constituent features, that measure falls within the scope of application of Article XIX of the GATT 1994 and the Agreement on Safeguards and the panel is required to assess its consistency with the relevant provisions of Article XIX and the Agreement on Safeguards invoked by the complainant.

370. In light of the above, Switzerland submits that in so far as the measures at issue constitute safeguard measures, they must be assessed under Article XIX of the GATT 1994 and the Agreement on Safeguards.

⁴⁴¹ *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, WT/DS556/4, 20 July 2018.

⁴⁴² Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.31.

⁴⁴³ Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

371. Switzerland further submits that these measures cannot be justified by Article XXI of the GATT 1994 because that provision is not available as a defence with respect to safeguard measures falling within the scope of Article XIX of the GATT 1994 and the Agreement on Safeguards.

372. Both Article XIX and Article XXI constitute exception clauses allowing WTO Members, subject to specific conditions set out in those provisions, to depart from their GATT obligations and adopt trade-restrictive measures that would otherwise be inconsistent with the GATT 1994.⁴⁴⁴ While Article XIX deals with “emergency action on imports of particular products” and allows Members to impose measures in order to prevent or remedy injury caused to a domestic industry by increased imports, Article XXI allows the imposition of measures that are justified as “security exceptions” pursuant to that provision.

373. Article XIX of the GATT 1994 establishes a right to impose safeguard measures, which derogate from WTO Members’ obligations under the GATT 1994, provided that certain conditions and circumstances listed in that provision are satisfied. Article XIX does not require WTO Members to impose safeguard measures and the obligations laid down in that provision are “subsidiary” or “conditional” in that they arise only with respect to Members that seek to impose safeguard measures. Pursuant to Article XIX, when the conditions and circumstances set out in that provision are satisfied, WTO Members are “free ... to suspend the obligation in whole or in part or to withdraw or modify the concession”. In that sense, Article XIX, like Article XXI, operates as an exception to other obligations under the GATT 1994.

374. As demonstrated above, the measures at issue constitute safeguard measures and are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards. These measures cannot be justified by Article XXI of the GATT 1994 because that provision is not available as a defence with respect to safeguard measures falling within the scope of Article XIX of the GATT 1994 and the Agreement on Safeguards.

4. *Conclusions*

375. In conclusion, as demonstrated above, the measures at issue constitute “safeguard measures” and therefore fall within the scope of Article XIX of the GATT 1994 and of the Agreement on Safeguards. Those measures are inconsistent with Articles 2.1, 2.2, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 7.4, 11.1(a), 11.1(b), 12.1, 12.2 and 12.3 of the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994. Furthermore, Article XXI of the GATT 1994 is not available as a defence to justify

⁴⁴⁴ Appellate Body Report, *US – Gasoline*, p. 24.

measures that are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.

E. The measures at issue are inconsistent with several provisions of the GATT 1994

376. Switzerland submits that the measures at issue are inconsistent with Articles II:1(a) and (b), I:1, XI:1 and X:3(a) of the GATT 1994. The following sections will address each of these claims in turn.

1. *The measures at issue are inconsistent with Article II:1(b) of the GATT 1994*

377. The additional import duties imposed by the United States on imports of steel and aluminium products are inconsistent with Article II:1(b) of the GATT 1994 because by applying those duties, the United States fails to exempt products of most other WTO Members, including Switzerland, from ordinary customs duties in excess of those provided for in the United States' Schedule of Concessions or from all other duties or charges in excess of those imposed on the date of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date.

a. The legal standard under Article II:1(b) of the GATT 1994

378. Article II:1(b) of the GATT 1994 provides that:

The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

379. Article II:1(b) prohibits (i) the levying of ordinary customs duties in excess of the ceilings set forth in the Schedule of the importing Member concerned, and (ii) the levying of all other duties or charges of any kind imposed on or in connection with importation, in excess of those imposed on the date of entry into force of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing Member on that date. With regard to the latter category of duties, the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides that the importing Member has to record in its Schedule "other duties or charges" applied on the date of entry into force of the GATT 1994 or which has to be applied directly and mandatorily under legislation in force on that date.

380. The meaning of the term “ordinary customs duties” was examined by the panel in *Dominican Republic – Safeguard Measures*. The panel in that case concluded that this term refers to “duties collected at the border which constitute ‘customs duties’ in the strict sense of the term (*stricto sensu*) and that this expression does not cover possible extraordinary or exceptional duties collected in customs”.⁴⁴⁵ It further noted that the expression “*all other* duties or charges of any kind imposed on or in connection with the importation” is a residual category covering all duties or charges on or in connection with the importation that are not ordinary customs duties and which are not expressly provided for in Article II:2 of the GATT 1994, containing a list of measures that may be imposed on the importation of any product, irrespective of the content of Article II:1(b).⁴⁴⁶ The panel added that in order to reach a conclusion regarding the nature of the duties, it is necessary to take into account “the design and structure of the measures concerned.”⁴⁴⁷ In that regard, the panel in *Dominican Republic – Safeguard Measures* found relevant that the duty concerned was applied for a limited period of time and that it did not replace the MFN tariff since that tariff was applicable to imports originating in certain Members.⁴⁴⁸ These considerations led the panel to classify the impugned measures in the category of “other duties or charges”.

b. The relevant facts

381. The United States applies an additional import duty of 25% *ad valorem* on steel products originating in all countries except South Korea, Australia, Argentina and Brazil. This additional import duty has been imposed by means of Presidential Proclamation 9705, which introduced changes to subchapter III of chapter 99 of the HTSUS. This duty has been confirmed and maintained through a series of subsequent Presidential Proclamations (see, Section IV.B.4 above).

382. The additional import duty is provided for in Note 16 to Subchapter III of Chapter 99 of the HTSUS and the tariff provisions referred to in that Note. Subchapter III of Chapter 99 of the HTSUS includes the “temporary modifications established pursuant to trade legislation”.⁴⁴⁹

383. Subheading 9903.80.01 provides for the additional 25% *ad valorem* import duty applicable to products of iron or steel provided for in the tariff headings or subheadings enumerated in Note 16, except products of Australia, Argentina, South Korea, Brazil and

⁴⁴⁵ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85.

⁴⁴⁶ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.79. (emphasis original)

⁴⁴⁷ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85.

⁴⁴⁸ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.86.

⁴⁴⁹ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

Turkey, “or any exclusions that may be determined and announced by the Department of Commerce”.⁴⁵⁰

384. Subheading 9903.80.02 provides for the additional 50% *ad valorem* import duty applicable to products of iron or steel that “are the product of Turkey and provided for in the tariff headings or subheadings enumerated in note 16(b) to this subchapter, except any exclusions that may be determined and announced by the Department of Commerce”.⁴⁵¹

385. Subheadings 9903.80.05 to 9903.80.58 specify that imports of the products referred to in those subheadings coming from Argentina, Brazil or South Korea are not subject to any additional import duty (“free”) if entered within the agreed quotas.

386. The additional import duty of 10% *ad valorem* on aluminium products originating in all countries except Australia and Argentina is provided for in Note 19 to Subchapter III of Chapter 99 of the HTSUS and the tariff provisions referred to in that Note.⁴⁵²

387. Subheading 9903.85.01 provides for the additional 10% *ad valorem* import duty applicable to aluminium products provided for in the tariff headings or subheadings enumerated in Note 19 except products of Argentina and Australia, “or any exclusions that may be determined and announced by the Department of Commerce”.

388. Subheadings 9903.85.05 and 9903.85.06 specify that imports of products referred to in those subheadings coming from Argentina are not subject to any additional import duty (but only to “the duty provided in the applicable subheading”) if entered within the agreed quotas.

389. Pursuant to the Presidential Proclamations imposing the additional import duties on steel and aluminium products, those measures apply “in addition to any other duties, fees, exactions, and charges applicable to such imported [steel/aluminum] articles”.⁴⁵³ Likewise, Notes 16 and 19 to subchapter III of Chapter 99 of the HTSUS state that “[a]ll anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed”.

390. The United States’ Schedule of Concessions provides that the bound rate for the relevant steel products is 0%.⁴⁵⁴ For the relevant aluminium products, the bound rate ranges between 0% and 6.5% *ad valorem*.⁴⁵⁵ The United States’ Schedule of

⁴⁵⁰ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

⁴⁵¹ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

⁴⁵² Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

⁴⁵³ See Presidential Proclamation 9705, Article 2, Exhibit CHE-8; Presidential Proclamation 9704, Article 2, Exhibit CHE-13.

⁴⁵⁴ Excerpts of the United States’ Schedule of Concessions, Exhibit CHE-29.

⁴⁵⁵ Excerpts of the United States’ Schedule of Concessions, Exhibit CHE-29.

Concessions does not report any “other duties or charges” applicable with respect to the steel and aluminium products at issue.

c. The legal analysis

391. Switzerland submits that the additional import duties imposed by the United States on steel and aluminium products constitute “other duties or charges” within the meaning of the second sentence of Article II:1(b) of the GATT 1994. Those additional import duties are inconsistent with that provision since they are in excess of those recorded in the United States’ Schedule of Concessions.

392. Switzerland further submits that, if the additional import duties imposed by the United States on steel and aluminium products are considered to be “ordinary customs duties” (and not “other duties or charges”), they are inconsistent with the first sentence of Article II.1(b) of the GATT 1994 because they are in excess of those set forth in the relevant part of the United States’ Schedule of Concessions.

i. Claims under the second sentence of Article II:1(b)

393. Switzerland submits that the additional import duties on steel and aluminium products constitute “other duties or charges” and those additional import duties are inconsistent with Article II:1(b), second sentence, of the GATT 1994 because they are in excess of those recorded in the United States’ Schedule of Concessions.

394. The panel in *China – Auto Parts* looked at various definitions of the term “customs duties” and found that the word “customs duties” refers to “duties or charges” imposed when goods enter or leave the customs territory and because of importation or exportation.⁴⁵⁶ The additional import duties on steel and aluminium products constitute duties imposed in connection with the importation of those products that are imposed when such products enter the customs territory of the United States. Thus, those additional import duties fall within the definition of “customs duties”.

395. The panel in *Dominican Republic – Safeguard Measures* explained that the expression “*all other* duties or charges of any kind imposed on or in connection with the importation” is a residual category covering all duties or charges on or in connection with the importation that are not ordinary customs duties and which are not expressly provided for in Article II:2 of the GATT 1994 (i.e. (i) charges equivalent to internal taxes levied on like domestic products or in respect of articles from which the imported product has been manufactured, (ii) anti-dumping and countervailing duties, and (iii) fees or other charges commensurate with the cost of services rendered).⁴⁵⁷ In that case, in

⁴⁵⁶ Panel Reports, *China – Auto Parts*, para. 7.140.

⁴⁵⁷ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.79. (emphasis original)

determining whether the duties imposed by the Dominican Republic constituted “other duties or charges”, the panel considered the design and structure of the measures at issue and, in particular, took into account the following elements: (i) the fact that the measures were applied on a temporary basis for a limited period of time, (ii) the fact that they coexisted with the MFN tariff, and (iii) the fact that they were applied to imports from only certain countries.⁴⁵⁸

396. The characteristics of the additional import duties on steel and aluminium products demonstrate that those duties are extraordinary duties collected in customs which constitute “other duties or charges” within the meaning of the second sentence of Article II:1(b) of the GATT 1994.

397. First, considering their design and structure, the additional import duties do not replace, but rather coexist with, the MFN tariff. Indeed, the Presidential Proclamations imposing those duties describe them as “additional duties”, in other words duties which apply “in addition to any other duties, fees, exactions, and charges applicable to such imported [steel/aluminum] articles”.⁴⁵⁹ Furthermore, Notes 16 and 19 to Subchapter III of Chapter 99 of the HTSUS state that “[a]ll anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed”.⁴⁶⁰ Notes 16 and 19 further provide, with respect to special tariff treatment under any of the free trade agreements or preference programmes, that the additional import duty “shall be collected in addition to any special rate of duty otherwise applicable under the appropriate tariff subheading”.⁴⁶¹ In fact, in the relevant tariff provisions, the rates of duty indicated in Column 1 “general” of the relevant subheadings are “The duty provided in the applicable subheading + 25%” for steel products and “The duty provided in the applicable subheading + 10%” for aluminium products. This clearly shows that the additional duty, i.e. 25% for steel products and 10% for aluminium products, does not replace but actually applies *in addition* to the MFN duty.

398. Second, the additional import duties on steel and aluminium products are extraordinary in nature since their purpose is to protect the domestic industry from import competition on the ground of an alleged threat to the national security of the United States following a specific investigation of the US Secretary of Commerce. In that sense, the additional import duties constitute “emergency measures” that cannot be classified as “ordinary customs duties”. Those duties are described as “adjustment measures” whereby the United States seeks to temporarily limit the importation of the products concerned into its territory in order to address the alleged threat to the national security.

⁴⁵⁸ Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.86-7.87.

⁴⁵⁹ Presidential Proclamation 9705, Article 2, Exhibit CHE-8; Presidential Proclamation 9704, Article 2, Exhibit CHE-13.

⁴⁶⁰ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

⁴⁶¹ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

This further confirms that the additional import duties constitute an “extraordinary” or “exceptional” instrument and thus are not “ordinary customs duties”.

399. Third, the additional import duties only apply on imports of steel and aluminium products originating in certain Members. Indeed, steel products originating in South Korea, Australia, Argentina and Brazil and aluminium products originating in Australia and Argentina are exempted from the application of the additional import duties and instead are subject to the MFN tariff rate. The fact that the MFN tariff remains applicable to imports originating in certain Members further confirms that the additional import duties do not replace but simply coexist with the MFN tariff.

400. Fourth, although there is no specific time limitation provided for the application of those additional import duties which shall continue “unless such actions are expressly reduced, modified, or terminated”, the Presidential Proclamations expressly provide that “[t]he Secretary shall continue to monitor” the imports of steel and aluminium articles and shall “review the status of such imports with respect to the national security”.⁴⁶² In that sense, the additional duties are not expected to last forever. In other words, those measures appear to be imposed on a temporary rather than permanent basis. This is supported by the title of Subchapter III of Chapter 99 to the HTSUS which refers to “*Temporary* modifications established pursuant to trade legislation”.

401. Finally, although Notes 16 and 19 refer to the additional import duties on steel and aluminium products as “ordinary customs duties”, Switzerland submits that the manner in which a Member’s domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law.⁴⁶³ In that regard, the panel in *China – Auto Parts* clarified that the mere fact that a charge is described under domestic law as an “ordinary customs duty” is not determinative of its nature.⁴⁶⁴

402. Switzerland submits that in light of the above considerations, the additional import duties on steel and aluminium products constitute “other duties or charges” within the meaning of Article II:1(b) of the GATT 1994.

403. Article II:1(b), second sentence, of the GATT 1994 provides that products shall “be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date”. Pursuant to the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, Members had to record in their Schedule the “other duties or

⁴⁶² Presidential Proclamation 9705, Article 5(b), Exhibit CHE-8; Presidential Proclamation 9704, Article 5(b), Exhibit CHE-13.

⁴⁶³ Appellate Body Reports, *China – Auto Parts*, para. 178.

⁴⁶⁴ Panel Reports, *China – Auto Parts*, para. 7.190.

charges” applied on the date of entry into force of the GATT 1994 or which had to be applied directly and mandatorily under legislation in force on that date.

404. The United States’ Schedule of Concessions does not report any “other duties or charges” with respect to the products at issue.⁴⁶⁵ Therefore, the additional import duties on steel and aluminium products are inconsistent with Article II:1(b), second sentence, of the GATT 1994.

ii. Claim under the first sentence of Article II:1(b)

405. To the extent that the additional duties are not considered to be “other duties or charges” but “ordinary customs duties”, Switzerland submits that they are inconsistent with Article II:1(b), first sentence, of the GATT 1994 given that they are in excess of those provided for in the United States’ Schedule of Concessions.

406. Regarding the obligation under the first sentence of Article II:1(b) of the GATT 1994, the Appellate Body in *Argentina – Textiles and Apparel* explained that “[a] tariff binding in a Member’s Schedule provides an upper limit on the amount of duty that may be imposed” and that “[t]he principal obligation in the first sentence of Article II:1(b) [...] requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member’s Schedule”.⁴⁶⁶ The panel in *Russia – Tariff Treatment* further explained that the term “in excess of” means “more than”, and thus, “a particular number or quantity is ‘in excess of’ another number or quantity if it is greater, regardless of the extent to which it is greater”.⁴⁶⁷

407. The United States has tariff bindings for the products concerned in its Schedule of Concessions at the level of 0% for the steel products concerned and at a level varying between 0% and 6.5% *ad valorem* for the aluminium products concerned.⁴⁶⁸ It follows that the additional import duties of 25% and 10% *ad valorem* imposed on steel and aluminium products respectively are inconsistent with Article II:1(b), first sentence, of the GATT 1994 because they are in excess of the bound rates set forth in the United States’ Schedule of Concessions.

2. *The measures at issue are inconsistent with Article II:1(a) of the GATT 1994*

408. The additional import duties imposed by the United States on imports of steel and aluminium products are also inconsistent with Article II:1(a) of the GATT 1994 since, by applying those measures, the United States fails to accord to the commerce of most

⁴⁶⁵ Excerpts of the United States’ Schedule of Concessions, Exhibit CHE-29.

⁴⁶⁶ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46. (emphasis original)

⁴⁶⁷ Panel Report, *Russia – Tariff Treatment*, para. 7.22.

⁴⁶⁸ Excerpts of the United States’ Schedule of Concessions, Exhibit CHE-29.

other WTO Members, including Switzerland, treatment no less favourable than that provided for in the appropriate part of the United States' Schedule of Concessions.

a. The legal standard under Article II:1(a) of the GATT 1994

409. Article II:1(a) of the GATT 1994 provides that:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

410. Article II:1(a) contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule.⁴⁶⁹ The panel in *EC – IT Products* clarified that the reference to "less favourable treatment" means that "if a measure adversely affects the conditions of competition for a product from that which it is entitled to enjoy under a Schedule, this would be less favourable treatment under Article II:1(a)".⁴⁷⁰ Furthermore, the Appellate Body in *Colombia – Textiles*, explained that the term "commerce" is defined as referring broadly to the exchange of goods such that the "commerce" of a Member, within the meaning of Article II:1(a), should be understood to refer to all such exchanges of that Member.⁴⁷¹

411. With regard to the relationship between Article II:1(a) and Article II:1(b), the Appellate Body in *Argentina – Textiles and Apparel* explained that while Article II:1(a) contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule, Article II:1(b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a), namely, the application of ordinary customs duties in excess of those provided for in the Schedule.⁴⁷² In that regard, the Appellate Body considered it "evident ... that the application of customs duties *in excess* of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)".⁴⁷³ The panels in *EC – Chicken Cuts* and *EC – IT Products* also found that a violation of Article II:1(b) will necessarily result in "less favourable treatment" inconsistent with the obligation under Article II:1(a) of the GATT 1994.⁴⁷⁴

⁴⁶⁹ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

⁴⁷⁰ Panel Reports, *EC – IT Products*, para. 7.757.

⁴⁷¹ Appellate Body Report, *Colombia – Textiles*, para. 5.34.

⁴⁷² Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

⁴⁷³ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47. (emphasis original)

⁴⁷⁴ Panel Reports, *EC – Chicken Cuts*, para. 7.64, referring to the Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47; Panel Reports, *EC – IT Products*, para. 7.747.

b. The legal analysis

412. It is well established that a violation of Article II:1(b), which prohibits the imposition of ordinary customs duties and other duties and charges in excess of those recorded in Members' Schedules of Concessions, necessarily results in less favourable treatment which is inconsistent with the obligation under Article II:1(a).⁴⁷⁵

413. As explained above, the additional import duties on steel and aluminium products are inconsistent with Article II:1(b) of the GATT 1994 because (i) either, as "other duties or charges", they are in excess of those imposed on the date of the entry into force of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date, or (ii) if they constitute ordinary customs duties, they are in excess of those provided for in the United States' Schedule of Concessions. It follows that the additional import duties imposed by the United States on steel and aluminium products are also inconsistent with Article II:1(a) of the GATT 1994.

3. *The measures at issue are inconsistent with Article I:1 of the GATT 1994*

414. Through the measures at issue, the United States has imposed an additional duty of 25% (and 50% in case of Turkey)⁴⁷⁶ on imports of steel products from all countries except from Australia, Argentina, South Korea and Brazil. Similarly, the United States has imposed an additional duty of 10% on imports of aluminium products from all countries except those from Argentina and Australia. It follows that the measures at issue are inconsistent with Article I:1 of the GATT 1994 since, by exempting from the imposition of the additional duties imports from certain countries, the United States has granted to the products from those countries an "advantage, favour, privileged or immunity" within the meaning of Article I:1 of the GATT 1994 that has not been accorded immediately and unconditionally to like products originating in other WTO Members, including Switzerland.

a. The legal standard under Article I:1 of the GATT 1994

415. Article I:1 of the GATT 1994 provides that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in

⁴⁷⁵ Panel Reports, *EC – IT Products*, para. 7.747, Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

⁴⁷⁶ Throughout this submission all references to the additional import duty of 25% on imports of certain steel products should be understood as equally referring to the additional import duty of 50% applicable to imports of certain steel products from Turkey.

connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

416. The Appellate Body has emphasised that Article I:1 sets out a fundamental non-discrimination obligation⁴⁷⁷, which constitutes a “cornerstone of the GATT” and “one of the pillars of the WTO trading system”.⁴⁷⁸

417. There are four elements that must be demonstrated in order to establish a violation of Article I:1 of the GATT 1994: (i) the challenged measure must fall within the scope of Article I:1; (ii) the imported products at issue must be “like”; (iii) the measure must confer an “advantage, favour, privilege, or immunity” on a product originating in the territory of any country; and (iv) the advantage, favour, privilege or immunity granted is not extended “immediately” and “unconditionally” to “like” products originating in the territory of all Members.⁴⁷⁹

418. First, it must be established that the measure at issue falls within the scope of that provision. In that respect, Article I:1 of the GATT 1994 covers (i) customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports; (ii) the method of levying such duties and charges; (iii) all rules and formalities in connection with importation and exportation; and (iv) all matters referred to in paragraphs 2 and 4 of Article III of the GATT 1994.

419. Second, the products at issue must be “like”. In that regard, it is well established that “when origin is the sole criterion”⁴⁸⁰ for distinguishing between products of different origins, that fact becomes a “sufficient basis to conclude” that the products are “like” for the purpose of Article I:1.⁴⁸¹

420. Third, the measure at issue must confer an “advantage, favour, privilege or immunity”. Although none of these terms is defined in the GATT 1994, the term “advantage” has been interpreted broadly. Indeed, panels in previous cases have considered that “advantages” in the sense of Article I:1 are those that create “more

⁴⁷⁷ Appellate Body Reports, *EC – Seal Products*, para. 5.86.

⁴⁷⁸ Appellate Body Report, *EC – Tariff Preferences*, para. 101 (quoting Appellate Body Report, *Canada – Autos*, para. 69).

⁴⁷⁹ Appellate Body Reports, *EC – Seal Products*, para. 5.86.

⁴⁸⁰ Panel Report, *US – Poultry (China)*, paras. 7.427 and 7.431-7.432 (quoting Panel Reports, *Indonesia – Autos*, para. 14.113; *Argentina – Hides and Leather*, paras. 11.168-11.170; *Canada – Autos*, para. 10.74; *India – Autos*, paras. 7.174-7.176).

⁴⁸¹ Panel Reports, *EC – Trademarks and Geographical Indications*, para. 7.714. See also Appellate Body Report, *Argentina – Financial Services*, para. 6.36.

favourable competitive opportunities” or those that affect the commercial relationship between products of different origins.⁴⁸² This accords with “the fundamental purpose of Article I:1, namely, to preserve the equality of competitive opportunities for like imported products from all Members”.⁴⁸³

421. Fourth, the measure at issue must grant an advantage to a product originating in any other country that is not accorded “immediately and unconditionally” to the “like product” originating in all WTO Members. The word “immediately” means “without delay”, “at once” and “instantly”⁴⁸⁴, while the word “unconditionally” stands for “without conditions”.⁴⁸⁵ The panel in *Canada – Autos* further explained that:

... the obligation to accord “unconditionally” to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.⁴⁸⁶

b. The relevant facts

422. In the present case, the United States has imposed an additional duty of 25% *ad valorem* on imports of steel products from all countries except South Korea, Australia, Argentina and Brazil.⁴⁸⁷

423. The United States has imposed an additional import duty of 10% *ad valorem* on imports of aluminium products from all countries except Australia and Argentina.⁴⁸⁸

c. The legal analysis

424. The measures at issue are inconsistent with Article I:1 of the GATT 1994 because the United States does not apply the additional duties on imports of steel products originating in Argentina, Australia, Brazil and South Korea and on imports of aluminium products originating in Argentina and Australia. This constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in other WTO Members, including Switzerland.

425. First, the additional import duties imposed by the United States on steel and aluminium products fall within the scope of Article I:1 of the GATT 1994. Indeed, Article

⁴⁸² Panel Report, *US – Poultry (China)*, para. 7.415 citing Panel Reports, *Colombia – Ports of Entry*, para. 7.341 and *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.

⁴⁸³ Appellate Body Reports, *EC – Seal Products*, para. 5.87.

⁴⁸⁴ Panel Report, *US – Tuna II (Mexico) (Mexico – Article 21.5)*, para. 7.412.

⁴⁸⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.88.

⁴⁸⁶ Panel Report, *Canada – Autos*, para. 10.23.

⁴⁸⁷ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

⁴⁸⁸ Excerpt of Subchapter III of Chapter 99 of the HTSUS, Exhibit CHE-17.

I:1 covers a broad range of measures, including “customs duties and charges of any kind imposed on or in connection with importation or exportation”. In relation to the definition of “customs duties”, the Appellate Body emphasized that for a charge to constitute a customs duty the obligation to pay it must accrue at the moment and by virtue of or on importation.⁴⁸⁹ In other words, the measure must relate directly to the process of importation.

426. Pursuant to the Presidential Proclamations imposing the duties on steel and aluminium products, the latter constitute additional rates of duties that apply to imports of steel and aluminium products on top of any other duties, fees, exactions, and charges applicable to such imported products. In that regard, Article 2 of Presidential Proclamation 9705 provides that:

In order to establish *increases in the duty rate on imports of steel articles*, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation. Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to *an additional 25 percent ad valorem rate of duty* with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018. *This rate of duty*, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, *shall apply to imports of steel articles* from all countries except Canada and Mexico.⁴⁹⁰

427. Similarly, Presidential Proclamation 9704 provides that:

In order to establish *increases in the duty rate on imports of aluminum articles*, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation. Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all imports of aluminum articles specified in the Annex shall be subject to *an additional 10 percent ad valorem rate of duty* with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018. *This rate of duty*, which is in addition to any other duties, fees, exactions, and charges applicable to such imported aluminum articles, *shall apply to imports of aluminum articles* from all countries except Canada and Mexico.⁴⁹¹

428. Notes 16 and 19 to subchapter III of Chapter 99 of the HTSUS, which implement the additional import duties on steel and aluminium products, provide that “[t]he rates of duty ... apply to all imported products of iron or [steel/aluminium] classifiable in the provisions enumerated in this subdivision”.⁴⁹² It is therefore clear that those additional import duties of 25% *ad valorem* (in case of steel products) and 10% *ad valorem* (in case

⁴⁸⁹ Appellate Body Reports, *China – Auto Parts*, para. 158.

⁴⁹⁰ Presidential Proclamation 9705, Article 2, Exhibit CHE-8. (emphasis added)

⁴⁹¹ Presidential Proclamation 9704, Article 2, Exhibit CHE-13. (emphasis added)

⁴⁹² Excerpt of Subchapter III of Chapter 99 of the HTS, Exhibit CHE-17. (emphasis added)

of aluminium products) constitute “customs duties” and thus fall within the scope of Article I:1 of the GATT 1994.

429. Second, the products excluded from the imposition of the additional import duties and the products subject to those duties must be considered as “like”. The additional import duties apply to imports of steel products from all countries except South Korea, Australia, Argentina and Brazil and to imports of aluminium products from all countries except Australia and Argentina. Thus, the origin is the sole criterion to distinguish between the products. It follows that the products at issue must be considered “like” within the meaning of Article I:1 of the GATT 1994.

430. Third, by excluding from the application of the additional import duties the products which originate in certain countries, the United States is granting an “advantage” within the meaning of Article I:1 of the GATT 1994. Indeed, an “advantage” is one that creates “more favourable competitive opportunities” or one that “affect[s] the commercial relationship between products of different origins.”⁴⁹³ It is clear that the exemption from the additional import duties creates “more favourable competitive opportunities” for products from South Korea, Australia, Argentina and Brazil in comparison to products from all other countries that are subject to those duties. In fact, panels and the Appellate Body have expressly recognized that duty-free treatment or import duty exemption available to imports of a product originating in certain countries is an “advantage” within the meaning of Article I:1.⁴⁹⁴

431. While imports of steel and aluminium products originating in some of the exempted countries⁴⁹⁵ are instead subject to import quotas, it does not change the conclusion that the exemption from the additional import duties constitutes an “advantage” within the meaning of Article I:1 of the GATT 1994. In fact, being subject to import quotas instead of additional import duties allows imports of steel and aluminium products from countries subject to quotas to benefit from the increase in prices resulting from the additional import duties. Indeed, steel and aluminium products from countries subject to quotas can be sold at a lower price (given that they are not subject to any additional import duties) or they can be sold at a higher price (in line with the price of products subject to additional import duties) leading to higher profit margins. Under both scenarios, the import quotas create more favourable competitive opportunities for steel and aluminium products originating in countries subject to quotas in comparison to products originating in countries subject to additional import duties.

⁴⁹³ Panel Report, *US – Poultry (China)*, para. 7.415 citing Panel Reports, *Colombia – Ports of Entry*, para. 7.341 and *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.

⁴⁹⁴ Panel Reports, *EC – Bananas III (Article 21.5 – US)*, para. 7.560; *Canada – Autos*, para. 10.16 (as confirmed by the Appellate Body, see Appellate Body Report, *Canada – Autos*, para. 76).

⁴⁹⁵ For steel products, imports from Korea, Argentina and Brazil are subject to import quotas instead of the additional import duties. For aluminium products, imports from Argentina are subject to import quotas instead of additional import duties.

432. It follows that the exemption from the additional import duties, whether or not linked to the imposition of the import quotas, affects the commercial relationship between products of different origins and thereby amount to “advantage” within the meaning of Article I:1 of the GATT 1994.

433. Finally, the advantage, in the form of the exemption from the additional import duties, is not accorded “immediately” and “unconditionally” to the like products from other WTO Members, including Switzerland. Indeed, while steel products originating in South Korea, Australia, Argentina and Brazil are excluded from the application of the additional 25% *ad valorem* import duty, steel products from all other WTO Members are subject to that duty. Likewise, while aluminium products originating in Australia and Argentina are excluded from the application of the additional 10% *ad valorem* import duty, aluminium products from all other WTO Members are subject to that duty. Therefore, the exclusion from the additional import duties is not extended immediately and unconditionally to imports of steel and aluminium products from other WTO Members, including Switzerland.

434. It follows that by exempting from the application of the additional import duties the steel and aluminium products originating in certain WTO Members and by not according that advantage immediately and unconditionally to like products originating in other WTO Members, including Switzerland, the United States has acted inconsistently with Article I:1 of the GATT 1994.

4. *The measures at issue are inconsistent with Article XI:1 of the GATT 1994*

435. The import adjustments on steel and aluminium products imposed by the United States also consist of quotas imposed on imports of steel products from South Korea, Argentina and Brazil, and on imports of aluminium products from Argentina. Switzerland submits that by applying those quantitative restrictions the United States acts inconsistently with Article XI:1 of the GATT 1994, because, through those measures, the United States has instituted and maintains restrictions other than duties, taxes or other charges, made effective through quotas, on the importation of steel and aluminium products of the territory of other Members.

a. The legal standard under Article XI:1 of the GATT 1994

436. Article XI:1 of the GATT 1994 provides that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

437. Article XI:1 of the GATT 1994 sets out a general obligation to eliminate quantitative restrictions or prohibitions on, *inter alia*, the importation and exportation of any product of or destined for the territory of another WTO Member. The panel in *Turkey – Textiles* held that “[t]he prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system”.⁴⁹⁶

438. The panel in *India – Quantitative Restrictions* observed that the text of Article XI:1 “is very broad in scope, providing for a general ban on import or export restrictions or prohibitions ‘other than duties, taxes or other charges’”.⁴⁹⁷ The panel also referred to the findings of a GATT panel in *Japan – Semi-Conductors* that Article XI:1 applies “to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges”.⁴⁹⁸ With regard to the meaning of the words “made effective through”, the Appellate Body in *Argentina – Import Measures* clarified that they indicate that Article XI:1 “covers measures through which a prohibition or restriction is produced or becomes operative”.⁴⁹⁹

439. The concepts of “prohibition” and “restriction” were analysed by the Appellate Body in *China – Raw Materials*. In that case, the Appellate Body found that the word “restriction”, which is defined as “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation”, refers generally to “something that has a limiting effect”.⁵⁰⁰ Furthermore, according to the Appellate Body, the use of the term “quantitative” in the title of Article XI of the GATT 1994 suggests that Article XI:1 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.⁵⁰¹

440. The Appellate Body has also found that demonstrating this limitation does not require “quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context”.⁵⁰²

441. Importantly, an import quota constitutes a violation of Article XI of the GATT 1994 even though the quota has not been filled.⁵⁰³ This is because “the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons, e.g. it

⁴⁹⁶ Panel Report, *Turkey – Textiles*, para. 9.63.

⁴⁹⁷ Panel Report, *India – Quantitative Restrictions*, para. 5.128.

⁴⁹⁸ GATT Panel Report, *Japan – Semi-Conductors*, para. 104.

⁴⁹⁹ Appellate Body Reports, *Argentina – Import Measures*, para. 5.218.

⁵⁰⁰ Appellate Body Reports, *China – Raw Materials*, para. 319.

⁵⁰¹ Appellate Body Reports, *China – Raw Materials*, para. 320.

⁵⁰² Appellate Body Reports, *Argentina – Import Measures*, para. 5.217.

⁵⁰³ Panel Report, *US – Section 301 Trade Act*, para. 7.84.

would lead to increased transaction costs and would create uncertainties which could affect investment plans”.⁵⁰⁴

b. The relevant facts

442. With respect to steel products, the United States agreed on absolute yearly import quotas with South Korea, Argentina and Brazil. The quotas applicable to imports from South Korea were established by Presidential Proclamation 9740 of 30 April 2018 and are effective for goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. EDT on 1 May 2018.⁵⁰⁵ The quotas applicable to imports from Argentina and Brazil were established by Presidential Proclamation 9759 of 31 May 2018 and are effective for goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. EDT on 1 June 2018.⁵⁰⁶ Once the absolute quota amount is filled, no additional imports of the steel products subject to quota are allowed to enter the United States for consumption.⁵⁰⁷

443. Note 16 to Subchapter III of Chapter 99 of the HTSUS provides that, beginning on 1 July 2018, any imports of the products subject to absolute yearly quotas during any quarter that are in excess of 500,000 kg and in excess of 30% of the total yearly quota shall not be allowed.⁵⁰⁸ Accordingly, in addition to the absolute yearly import quotas, starting from 1 July 2018, the US CBP also determines quarterly quotas for steel products imported from South Korea, Argentina and Brazil.⁵⁰⁹

444. With respect to aluminium products, the United States agreed on absolute yearly import quotas with Argentina. These quotas were established by Presidential Proclamation 9758 of 31 May 2018 and are effective for goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. EDT on 1 June 2018.⁵¹⁰ Once the absolute quota amount is filled, no additional imports of the aluminium products subject to quota are allowed to enter the United States for consumption.⁵¹¹

⁵⁰⁴ GATT Panel Report, *Japan – Leather II (US)*, L/5623, BISD 31S/94, para. 55.

⁵⁰⁵ Presidential Proclamation 9740, Exhibit CHE-10.

⁵⁰⁶ Presidential Proclamation 9759, Exhibit CHE-11.

⁵⁰⁷ Pursuant to the information provided by US CBP: “Absolute quota merchandise may not be imported into the U.S for consumption after quota limit is reached [19 CFR 132]. Options after the quota limit is reached include warehouse, exportation or destruction.” See US CBP, QB 18-122 Announcement for Steel Mill Articles (Amended), Exhibit CHE-33. Available at: <https://www.cbp.gov/trade/quota/bulletins/qb-18-122-announcement-steel-mill-articles>.

⁵⁰⁸ Excerpt of Subchapter III of Chapter 99 of the HTS, Exhibit CHE-17.

⁵⁰⁹ US CBP, Information relating to the allocation and use of quotas; QB 18-126 Absolute Quota for Steel Mill Articles: Argentina, Brazil and South Korea, Exhibit CH-34. Available at: <https://www.cbp.gov/trade/quota/bulletins/qb-18-126-absolute-quota-aluminum-products-argentina-brazil-south-korea>.

⁵¹⁰ Presidential Proclamation 9758, Exhibit CHE-16.

⁵¹¹ Pursuant to the information provided by US CBP: Absolute quota merchandise may not be imported into the U.S for consumption after the quota limit is reached, per [19 CFR 132]. Options

445. Note 19 to Subchapter III of Chapter 99 of the HTSUS provides that, beginning on 1 July 2018, any imports of the products subject to absolute yearly quotas during any quarter that are in excess of 500,000 kg and in excess of 30% of the total yearly quota shall not be allowed.⁵¹² Accordingly, in addition to the absolute yearly import quotas, starting from 1 July 2018, the US CBP also determines quarterly quotas for aluminium products imported from Argentina.⁵¹³

c. The legal analysis

446. The import quotas imposed by the United States on imports of steel and aluminium products from South Korea, Argentina and Brazil are inconsistent with Article XI:1 of the GATT 1994 because they constitute restrictions on the importation of steel and aluminium products from those countries made effective through quotas. As observed by the Appellate Body in *China – Raw Materials*, Article XI:1 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.⁵¹⁴

447. The absolute yearly import quotas and the additional quarterly import quotas imposed by the United States with respect to steel products from South Korea, Argentina and Brazil as well as with respect to aluminium products from Argentina, restrict the quantities of steel and aluminium products that can be imported from those countries to the United States by imposing a maximum ceiling on the amount of steel and aluminium products that may be imported into the United States from those countries. Indeed, once the quota limit is reached, no additional imports of those products into the United States are allowed. In other words, those import quotas have a limiting effect on the quantity of steel and aluminium products being imported from South Korea, Argentina and Brazil.

448. The annexes to the relevant Presidential Proclamations together with Notes 16 and 19 to Subchapter III of Chapter 99 of the HTSUS, set out the maximum quantity (in kg) of different types of steel and aluminium products that may be imported to the United States from South Korea, Argentina and Brazil. Thus, the measures at issue, on their face, impose quantitative restrictions on imports of steel and aluminium products from those countries, in violation of Article XI:1 of the GATT 1994.

5. *The administration of the Presidential Proclamations and of the product exclusion mechanism is inconsistent with Article X:3(a) of the GATT 1994*

after the quota limit is reached include foreign trade zone, warehouse entry, exportation or destruction.” See US CBP, Information relating to the allocation and use of quotas; QB 18-127 Absolute Quota for Aluminum Products: Argentina, Exhibit CHE-19. Available at: <https://www.cbp.gov/trade/quota/bulletins/qb-18-127-absolute-quota-aluminum-products-argentina>.

⁵¹² Excerpt of Subchapter III of Chapter 99 of the HTS, Exhibit CHE-17.

⁵¹³ US CBP, Information relating to the allocation and use of quotas; QB 18-127 Absolute Quota for Aluminum Products: Argentina, Exhibit CHE-19.

⁵¹⁴ Appellate Body Reports, *China – Raw Materials*, para. 320.

449. Switzerland submits that, by providing for the possibility to countries with which the United States has “important security relationships” of agreeing on “alternative means” to address the alleged threat to the national security caused by the imports from those countries, without any indication as to what such “alternative means” might be and what is the process as well as the requirements to agree on such “alternative means”, the United States fails to administer the Presidential Proclamations regarding import adjustments with respect to steel and aluminium products in a uniform, impartial and reasonable manner.

450. Switzerland additionally submits that the United States fails to administer in a reasonable manner the product exclusion mechanism foreseen by Presidential Proclamations 9704 and 9705 and governed by specific rules set out in the Supplements to Section 705 of the Code of Federal Regulations.

451. Finally, Switzerland submits that by failing to provide any criteria for the examination of the need to amend or to discontinue the import adjustment measures, the United States fails to administer the Presidential Proclamations regarding import adjustments with respect to steel and aluminium products in a uniform and reasonable manner.

a. The legal standard under Article X:3(a) of the GATT 1994

452. Article X:3(a) of the GATT 1994 provides that:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

453. In *EC – Selected Customs Matters*, the panel found that the “due process theme underlying Article X of the GATT 1994 suggests that the aim of Article X:3(a) of the GATT 1994 is to ensure that traders are treated fairly and consistently when seeking to import from or export to a particular WTO Member”.⁵¹⁵ In more general terms, the Appellate Body has recognised that “Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations”.⁵¹⁶

454. Three elements are required in order to demonstrate a violation of Article X:3(a): (i) the legal instrument at issue is a law, regulation, decision or ruling of the kind described in Article X:1; (ii) the legal instrument is “administered”; and (iii) the administration of the legal instrument is not uniform, impartial or reasonable.

⁵¹⁵ Panel Report, *EC – Selected Customs Matters*, para. 7.108.

⁵¹⁶ Appellate Body Report, *US – Shrimp*, para. 183. See also Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 202 and Panel Reports, *US – COOL*, para. 7.861.

455. With respect to the first element, the “laws, regulations, decisions and rulings of the kind described in” Article X:1 of the GATT 1994 are “[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use”. Thus, Article X:1, and therefore also Article X:3(a), covers a wide range of measures that have the potential to affect trade and traders.⁵¹⁷

456. With regard to the second element, namely that the legal instrument must be “administered”, the Appellate Body in *EC – Selected Customs Matters* interpreted the term “administer” in the context of Article X:3(a) to mean “putting into practical effect, or applying, a legal instrument of the kind described in Article X:1”.⁵¹⁸ In that same case, the Appellate Body found that the term “administer” includes administrative processes, meaning “a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision”.⁵¹⁹ Furthermore, the Appellate Body held that Article X:3(a) applies to the substantive content of a legal instrument that regulates the administration of an Article X:1 legal instrument if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.⁵²⁰

457. As regards the third element, the panel in *Thailand – Cigarettes (Philippines)* ruled that “[t]he obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements”.⁵²¹ This means that a violation of any of the three obligations will lead to a violation of Article X:3(a).

458. With regard to the meaning of “uniform” administration, the panel in *US – COOL* explained that:

[t]he term “uniform” is defined as “of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times”. We find guidance for the meaning of “uniform” under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in *Argentina – Hides and Leather* stated that “uniform administration” requires that Members ensure that their laws are applied consistently and predictably. Additionally, in *US – Stainless Steel*, the panel noted that, “the requirement of uniform

⁵¹⁷ Panel Reports, *EC – IT Products*, para. 7.1026 and *Peru – Agricultural Products*, para. 7.453.

⁵¹⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 224 (emphasis omitted) (upholding Panel Report, *EC – Selected Customs Matters*, para. 7.104).

⁵¹⁹ Appellate Body Report, *EC – Selected Customs Matters*, para. 224.

⁵²⁰ Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

⁵²¹ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.867.

administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated”.⁵²²

459. According to the panel in *Argentina – Hides and Leather*, uniform administration means that “every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. ... Uniform administration requires that Members ensure that their laws are applied consistently and predictably [...]”.⁵²³

460. With regard to the requirement of “impartial” administration, the panel in *Thailand – Cigarettes (Philippines)* explained that:

[b]ased on the ordinary meaning [...] impartial administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.⁵²⁴

461. Finally, with regard to the meaning of “reasonable” administration, the panel in *US – COOL* explained that:

The term “reasonable” is defined as “in accordance with reason”, “not irrational or absurd”, “proportionate”, “sensible”, and “within the limits of reason, not greatly less or more than might be thought likely or appropriate”. We assess the parties’ claims of not reasonable administration in light of these definitions.

In our view, whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.⁵²⁵

462. Furthermore, the panel in *China – Raw Materials* held that “reasonable administration could be considered to be administration that is equitable, appropriate for the circumstances and based on rationality”.⁵²⁶

b. The relevant facts

i. Administration of the Presidential Proclamations regarding the “alternative means” that might be agreed with third countries

⁵²² Panel Reports, *US – COOL*, para. 7.876 (footnotes omitted). See also Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

⁵²³ Panel Report, *Argentina – Hides and Leather*, para. 11.83.

⁵²⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.899. See also Panel Reports, *China – Raw Materials*, para. 7.694.

⁵²⁵ Panel Reports, *US – COOL*, paras. 7.850-7.851.

⁵²⁶ Panel Reports, *China – Raw Materials*, para. 7.696.

463. Presidential Proclamations 9704 and 9705 imposing the additional import duties on steel and aluminium products provide that:

Any 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. Should the United States and any such country arrive at a *satisfactory alternative means* to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on [aluminum/steel] articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.⁵²⁷

464. “Alternative means” have been agreed by the United States with South Korea, Australia, Argentina and Brazil with regard to imports of steel products and with Australia and Argentina with regard to imports of aluminium products. It seems that the “alternative means” negotiated and agreed between the United States and South Korea, Argentina and Brazil took the form of yearly (and quarterly) import quotas.⁵²⁸ It is unclear what are the “alternative means” agreed with Australia. The import quotas have been imposed through:

- Presidential Proclamation 9740: import quotas on steel products from South Korea;
- Presidential Proclamation 9759: import quotas on steel products from Brazil and Argentina;
- Presidential Proclamation 9758: import quotas on aluminium products from Argentina.

465. Presidential Proclamations 9704 and 9705 do not provide any details as to the forms such “alternative means” could take nor the conditions for the agreement on such “alternative means” or the process to be followed by countries wishing to discuss and agree on “alternative means” with the United States.

ii. Administration of the product exclusion mechanism

466. Presidential Proclamations 9704 and 9705 authorize the US Secretary of Commerce to grant exclusions from the application of additional import duties for steel and aluminium products that are not produced in the United States in a sufficient and

⁵²⁷ Presidential Proclamation 9704, recital 8, Exhibit CHE-13, and Presidential Proclamation 7905, recital 9, Exhibit CHE-8. (emphasis added)

⁵²⁸ Switzerland notes that the Presidential Proclamations relating to the “alternative means” agreed with South Korea, Argentina and Brazil provide that those countries agreed on a “range of measures”.

reasonably available amount or of a satisfactory quality or based upon specific national security considerations.⁵²⁹

467. The specific rules regarding the granting of a product exclusion are set out in Supplements No. 1 and No. 2 to Section 705 of the Code of Federal Regulations (15 CFR 705). According to those rules, an exclusion may be granted on the basis of a written request submitted by individuals or organisations using steel/aluminium in business activities (such as construction, manufacturing or supplying steel/aluminium products to users) in the United States.⁵³⁰ One request can cover only one type of product and needs to specify the business activities in the United States which justify that request. Such request may be subject to objections submitted by any individual or organisation in the United States within 30 days from the moment the request was posted on the website by the US authorities (www.regulations.gov).⁵³¹ The objection should clearly identify, and provide support for, its opposition to the proposed exclusion, with reference to the specific basis identified in, and the support provided for, the submitted exclusion request. The changes to Supplements No. 1 and No. 2 to 15 CFR 705 published on 11 September 2018, introduced an additional rebuttal and surrebuttal process whereby the applicant requesting a product exclusion and the party objecting to such a request can respond to each other's arguments.⁵³²

468. The Department of Commerce will grant exclusions only if a product is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration. The exclusions are approved on a product basis and are limited to the individual or organisation that submitted the specific exclusion request. According to the Supplements to Section 705, the exclusions will generally be approved for one year and the review period should normally not exceed 106 days, including examination of any objections.

469. The decision of the Department of Commerce on whether or not to grant exclusion is not subject to appeal.

iii. Administration of the Presidential Proclamations regarding the examination of the need to amend or to discontinue the import adjustment measures

470. Presidential Proclamations 9704 and 9705 provide that the US Secretary of Commerce shall continue to monitor imports of steel and aluminium products and shall

⁵²⁹ Presidential Proclamation 9704, Article 3, Exhibit CHE-13; Presidential Proclamation 9705, Article 3, Exhibit CHE-8.

⁵³⁰ Interim Final Rule – March 2018, p. 12110, Exhibit CHE-20.

⁵³¹ Interim Final Rule – March 2018, p. 12111, Exhibit CHE-20.

⁵³² Interim Final Rule – September 2018, pp. 46058-46059 and 46063, Exhibit CHE-22.

“from time to time” review the status of such imports and inform the US President of the need for further action. The US Secretary of Commerce should also inform the US President of any circumstances indicating that “the increase in duty rate provided for in [those] proclamation[s] is no longer necessary”.

471. In other words, Presidential Proclamations 9704 and 9705 direct the US Secretary of Commerce to monitor imports of steel and aluminium products and to examine the need to amend or to discontinue the import adjustments measures already imposed by the US President. The two Presidential Proclamations fail, however, to provide any specific criteria on the basis of which the US Secretary of Commerce is to determine whether the import adjustments measures should be amended or terminated.

c. The legal analysis

i. Administration of the Presidential Proclamations regarding the “alternative means” that might be agreed with third countries

472. The panel in *US – COOL* observed that “[a]lthough, in general, a WTO Member has the discretion to administer its laws and regulations in the manner it deems fit, it equally has the responsibility to respect ‘certain minimum standards for transparency and procedural fairness’ as regards its actions”.⁵³³ Indeed, as the Appellate Body observed, Article X:3(a) of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.⁵³⁴

473. The manner in which the United States administers the Presidential Proclamations imposing import adjustments on steel and aluminium products in relation to the possibility of agreeing on “alternative means” is characterised by a fundamental lack of transparency and procedural fairness and is therefore inconsistent with Article X:3(a) of the GATT 1994.

474. First, the Presidential Proclamations fall within the scope of Article X:1, and thus also within the scope of Article X:3(a), as they constitute laws or regulations, made effective by the United States, that pertain to rates of duty and restrictions on imports of steel and aluminium products. Furthermore, since they affect an unidentified number of economic operators, they constitute measures of general application.

475. Second, the Presidential Proclamations are “administered” by the United States in the sense that they are being applied or put in practical effect. Indeed, the possibility of agreeing on “alternative means”, stated in Presidential Proclamations 9704 and 9705, has been applied by the President of the United States and has resulted in the exclusion

⁵³³ Panel Reports, *US – COOL*, para. 7.861.

⁵³⁴ Appellate Body Report, *US – Shrimp*, para. 183.

of certain countries from the application of the additional import duties on steel and aluminium products in exchange of other measures, such as import quotas.

476. Third, the administration of the Presidential Proclamations with regard to the “alternative means” that might be agreed is not uniform, impartial and reasonable. As a general matter, it should be noted that, while the Presidential Proclamations provide for the possibility for countries with which the United States has “important security relationship” to negotiate and agree on “alternative means” (in lieu of additional import duties), they do not identify the forms that “such alternative means” can take. Furthermore, they also fail to clarify the process to be followed and the conditions to be met by a country in order to agree on those “alternative means”. Notably it is unclear what information should be provided by a country wishing to discuss “alternative means” with the United States or to whom such information should be presented. The Presidential Proclamations also fail to provide any procedural rights for countries wishing to agree on “alternative means” and are completely silent on the criteria applied by the US authorities in evaluating possible “alternative means”. In fact, it appears that the decision as to whether “alternative means” may be agreed and, thus imports not be subject to the additional import duties, is left entirely to the discretion of the President of the United States.

477. As explained above, the requirement of “uniform administration” means that WTO Members must ensure that their laws are applied consistently and predictably. The lack of any guidelines or standards as to what the “alternative means” may be and which conditions apply to agreeing on such “alternative means” renders the application of the Presidential Proclamations unpredictable. In addition, the lack of any official process that should be followed by countries seeking an agreement on “alternative means” with the United States creates serious uncertainty for those countries. It also means that, in practice, the steps taken for reaching an agreement on “alternative means” will likely vary from country to country thereby making the administration of the Presidential Proclamations not uniform.

478. Switzerland further submits that the lack of any guidelines or standards with regard to “alternative means” entails a serious risk that the administration of the Presidential Proclamations providing for the possibility to agree on “alternative means” will not be impartial. Looking at the “alternative means” agreed so far between the United States and third countries suggests that the decision regarding the “alternative means” is politically motivated. As explained by the panel in *Thailand – Cigarettes (Philippines)*, “impartial administration” means the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.⁵³⁵ A decision regarding

⁵³⁵ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.899.

import restrictions that is based solely on political considerations cannot be considered as “fair, unbiased and unprejudiced”.

479. Finally, the fact that there are no guidelines or standards with regard to “alternative means” and the absence of any official process applicable to reaching an agreement on “alternative means” also suggests that the Presidential Proclamations are not administered in a reasonable manner, i.e. in a manner that is appropriate for the circumstances and that is based on rationality. As stated above, it appears that the President of the United States enjoys unlimited discretion with regard to agreeing on “alternative means”, his decisions on that matter are politically motivated and are not subject to any review mechanism.

ii. Administration of the product exclusion mechanism

480. In *EC – Selected Customs Matters*, the Appellate Body found that a legal instrument that regulates the application or implementation of the legal instrument of the kind described in Article X:1 of the GATT 1994 can be examined under Article X:3(a) “if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument”.⁵³⁶ The Appellate Body observed that in such circumstances, it is not sufficient for the complainant merely to cite the provisions of that legal instrument but that it must, in addition, substantiate how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1.⁵³⁷

481. Presidential Proclamations 9704 and 9705 authorize the US Secretary of Commerce to grant product exclusions and direct him to issue procedures for the requests for exclusions. These procedures have been set out in the two supplements to Section 705 entitled “Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamation 9704 [9705]”.⁵³⁸

482. As explained above, Presidential Proclamations 9704 and 9705 fall within the scope of Article X:1 as they constitute laws or regulations of general application, made effective by the United States, that pertain to rates of duty and restrictions on imports of steel and aluminium products. It follows that the supplements to Section 705 which set out specific rules for the product exclusions authorized by Presidential Proclamations 9704 and 9705 qualify as legal instruments that regulate the application (or implementation) of those Presidential Proclamations and thus can be challenged under Article X:3(a).

⁵³⁶ Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

⁵³⁷ Appellate Body Report, *EC – Selected Customs Matters*, para. 201.

⁵³⁸ Interim Final Rule – March 2018, pp. 12106-12112, Exhibit CHE-20, and Interim Final Rule – September 2018, pp. 46026-46065, Exhibit CHE-22.

483. The rules set out in those supplements establish a lack of reasonable administration of Presidential Proclamations 9704 and 9705. More specifically, the criteria for granting the product exclusions set out in those supplements, coupled with the lack of appeal procedure against the decision of the Department of Commerce, do not meet the standard of reasonable administration, i.e. administration that is proportionate, equitable, appropriate for the circumstances and based on rationality.⁵³⁹

484. Pursuant to the supplements to Section 705, an exclusion “will only be granted if an article is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for specific national security consideration”.⁵⁴⁰ In accordance with the clarifications, provided in the amended supplements to Section 705, the criterion that a product is “not produced in the United States in a sufficient and reasonably available amount” means that the amount of steel that is needed by the end user requesting the exclusion is not available “immediately” in the United States to meet its specified business activities. A product is considered to be “immediately” available if it is currently being produced or could be produced within eight weeks in the required quantity.⁵⁴¹ The applicable rules further provide that in case the USDOC denies the request for exclusion based on the claim that a product is available in the United States, but such product is then not immediately supplied, the party requesting product exclusion may submit a new exclusion request that refers back to the original denied exclusion request.⁵⁴² The fact that in such a situation, the applicant is required to submit a brand-new exclusion request and go through the entire exclusion process again makes it easy for domestic producers to continuously block exclusion requests by falsely alleging that they are able to provide the product concerned to the applicants.

485. Switzerland therefore submits that the criterion that a product is “not produced in the United States in a sufficient and reasonably available amount” expressed in the revised Supplements to Section 705 necessarily leads to unreasonable administration inconsistent with Article X:3(a) of the GATT 1994.

486. Similar concerns arise with respect to the second criterion, namely that a product is not produced in the United States in a satisfactory quality. The Supplements to Section 705 provide that, pursuant to that criterion, the product available in the United States does not have to be identical “but it does need to be equivalent as a substitute product”. Supplement No. 2 to Section 705 relating to the requirements for exclusion requests for aluminium products gives the following example:

⁵³⁹ Panel Reports, *China – Raw Materials*, para. 7.696.
⁵⁴⁰ Interim Final Rule – September 2018, p. 46057, Exhibit CHE-22.
⁵⁴¹ Interim Final Rule – September 2018, p. 46058, Exhibit CHE-22.
⁵⁴² Interim Final Rule – September 2018, p. 46058, Exhibit CHE-22.

a U.S. pharmaceutical manufacturer that requires approval from the Food and Drug Administration (FDA) to make any changes in its aluminum product pill bottle covers. An objector would not have to make aluminum for use in making the product covers that was identical, but it would have to be a “substitute product” meaning it *could* meet the FDA certification standards.⁵⁴³

487. In practice, that criterion imposes an unreasonable burden on the end user requesting the product exclusion by effectively requiring him to undergo the necessary certification procedure afresh for the domestic “substitute” product. Hence, Switzerland submits that the criterion that a product is “not produced in the United States in a satisfactory quality” expressed in the revised Supplements to Section 705 necessarily leads to unreasonable administration inconsistent with Article X:3(a) of the GATT 1994.

488. Finally, Switzerland submits that the unreasonable administration of the product exclusion process is further aggravated by the fact that the examination of product exclusion requests notoriously exceeds the 90-day deadline established in the Supplements to Section 705. In that regard, Switzerland notes that many affected companies have complained about the intensive, time-consuming process to submit exclusion requests and the lengthy waiting period for receiving the USDOC’s response.⁵⁴⁴

iii. Administration of the Presidential Proclamations regarding the examination of the need to amend or to discontinue the import adjustment measures

489. As explained above, the Presidential Proclamations fall within the scope of Article X:1, and thus also within the scope of Article X:3(a), as they constitute laws or regulations, made effective by the United States, that pertain to rates of duty and restrictions on imports of steel and aluminium products. Furthermore, since they affect an unidentified number of economic operators, they constitute measures of general application. These Presidential Proclamations are “administered” by the United States in the sense that they are being applied or put in practical effect. Indeed, in August 2018, the US President decided to amend the rate of duty applicable to imports of steel products from Turkey on the basis of the information received from the US Secretary of Commerce with respect to the need to amend the import adjustment measures.⁵⁴⁵

490. Switzerland submits that the administration of the Presidential Proclamations with regard to the examination of the need to amend or to discontinue the import adjustment measures is not uniform and reasonable. This is so because of the lack of

⁵⁴³ Interim Final Rule – September 2018, p. 46062, Exhibit CHE-22. (emphasis added)

⁵⁴⁴ Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Updated April 2, 2019), p. 10, Exhibit CHE-34. Available at: <https://fas.org/sqp/crs/misc/R45249.pdf>

⁵⁴⁵ Presidential Proclamation 9772, recitals 3-6, Exhibit CHE-12.

any criteria or guidelines as to how the US Secretary of Commerce should assess the need to amend or to discontinue the measures. This poses a serious risk that such examination will not be conducted in a uniform manner.

491. As explained above, pursuant to the requirement of “uniform administration”, WTO Members are required to ensure that their laws are applied consistently and predictably. The lack of any criteria or guidelines as to when there is need for “further action” or when the import adjustment measures already in place are “no longer necessary” renders the application of the Presidential Proclamations unpredictable.

492. Switzerland further submits that the lack of any criteria or guidelines with regard to the examination of the need to amend or to discontinue the import adjustment measures entails a serious risk that the Presidential Proclamations are not administered in a reasonable manner, i.e. in a manner that is appropriate for the circumstances and that is based on rationality.⁵⁴⁶

6. *Considerations regarding a possible defence by the United States on the basis of Article XXI of the GATT 1994*

493. In a Communication circulated to the DSB, after Switzerland requested consultations, the United States indicated that the tariffs imposed on steel and aluminium articles “were necessary to adjust the imports of steel and aluminum articles that threaten to impair the national security of the United States” and that “[i]ssues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement”.⁵⁴⁷ The United States further claimed that “[e]very Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.”⁵⁴⁸ The United States expressed a similar position at the meetings of the DSB at which Switzerland’s request for the establishment of a panel was discussed. At the DSB meeting of 21 November 2018, the United States claimed that:

Because the United States has invoked Article XXI, there is no basis for a WTO panel to review the claims of breach raised by Switzerland. Nor is there any basis for a WTO panel to review the invocation of Article XXI by the United States.⁵⁴⁹

⁵⁴⁶ See Panel Report, *China – Raw Materials*, para. 7.741, 7.745-7.746.

⁵⁴⁷ *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, WT/DS556/4, 20 July 2018.

⁵⁴⁸ *United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States, WT/DS556/4, 20 July 2018.

⁵⁴⁹ Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 21 November 2018, p. 37, Exhibit CHE-35. Available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_.Stmt_.as-deliv.fin_.public.pdf.

494. As noted during the DSB meetings on 21 November 2018 and 4 December 2018, Switzerland firmly challenges the United States' argument that, if Article XXI of the GATT 1994 is merely invoked by the United States, the panel is precluded from reviewing the claims raised against the measures imposed by the United States. In accordance with its terms of reference and Article 7 of the DSU, the Panel is required to address the relevant provisions in the covered agreements cited by the parties, including Article XXI invoked as a defence by the United States. The Panel is also required to make findings and recommendations with respect to the challenged measures pursuant to Article 19.1 of the DSU.

- a. The invocation of Article XXI of the GATT 1994 by the United States is subject to review by the Panel

495. Without prejudging the position that may be taken by the United States in its submissions with respect to Article XXI of the GATT 1994, Switzerland wishes to respond to the arguments voiced by the United States on that issue earlier in these proceedings. Switzerland submits that, contrary to what the United States argues, the fact that the United States invokes Article XXI of the GATT 1994 does not imply that the Panel has no authority to review the claims at issue and the US invocation of Article XXI of the GATT 1994. Indeed, without the possibility of such a review, each WTO Member could unilaterally – by simply invoking Article XXI of the GATT 1994 – remove from the WTO dispute settlement any trade-restrictive measure inconsistent with the GATT 1994 under the guise of protecting national security. Such an interpretation would seriously undermine the rules-based multilateral trading system to the detriment of all WTO Members.⁵⁵⁰

496. Article XXI of the GATT 1994, entitled “Security Exceptions”, starts with the words “[n]othing in this Agreement shall be construed” followed by three paragraphs laying down the type of measures that may be justified on the basis of that provision. It follows that Article XXI of the GATT 1994 is an affirmative defence which may be invoked to justify a measure that is otherwise inconsistent with the obligations under the GATT 1994. Nothing in the text of Article XXI suggests, however, that this provision is not subject to review or that it limits or overrides the rules relating to a panel's jurisdiction laid down in the DSU⁵⁵¹ or the rules on consultations and dispute settlement in Articles XXII and XXIII of the GATT 1994.⁵⁵² Furthermore, the DSU itself does *not* contain a

⁵⁵⁰ According to the Appellate Body in *US – Shrimp*, “[m]aintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement”. See Appellate Body Report, *US – Shrimp*, para. 116.

⁵⁵¹ Pursuant to Article 1.1 of the DSU, the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1, including the GATT 1994.

⁵⁵² The “Decision Concerning Article XXI of the General Agreement” of 30 November 1982, recognizes that “[w]hen action is taken under Article XXI, all contracting parties affected by such action retain

security exceptions clause. There is therefore no basis for the United States' argument that measures relating to national security or the invocation of Article XXI are not subject to the panel's review.

497. The jurisdiction of a WTO panel is established by its terms of reference, governed by Article 7 of the DSU.⁵⁵³

498. The Panel in the present case was established with standard terms of reference, instructing the Panel “[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Switzerland in document WT/DS556/15 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.”⁵⁵⁴ Those terms of reference do not include any carve-out with respect to Article XXI of the GATT 1994.

499. Article 7.2 of the DSU, further provides that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” The Appellate Body clarified that the use of the words “shall address” indicates that panels are *required* to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.⁵⁵⁵ It also observed that “as a matter of due process, and the proper exercise of the judicial function, panels are *required* to address issues that are put before them by the parties to a dispute”.⁵⁵⁶

500. It thus follows that, in accordance with its terms of reference and Article 7.2 of the DSU, this Panel is required to examine and to make findings and recommendations with respect to each of the provisions of the covered agreements cited by Switzerland and the United States, including Article XXI of the GATT 1994.

501. In fact, accepting the United States' position that Article XXI is not subject to a review by the Panel would be contrary to the Panel's obligations under Article 11 of the DSU to “make an objective assessment of the matter before it”. Indeed, the “matter” before the panel includes all legal and factual issues raised with respect to the challenged measures, including the possible defence under Article XXI.

their full rights under the General Agreement”. See, GATT, Decision concerning Article XXI of the General Agreement, Decision of 30 November 1982, L/5426 (2 December 1982), para. 2. This clearly confirms that the invocation of Article XXI does not nullify the rights of other Members with respect to dispute settlement under Articles XXII and XXIII of the GATT 1994.

⁵⁵³ Appellate Body Report, *India – Patents (US)*, para. 92.

⁵⁵⁴ *United States – Certain Measures on Steel and Aluminium Products*, Constitution of the Panel established at the Request of Switzerland, Note by the Secretariat, WT/DS556/16, 28 January 2019, para. 2.

⁵⁵⁵ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.

⁵⁵⁶ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36. (emphasis added)

502. The fact that the invocation of Article XXI must be subject to a review is further supported by other provisions of the DSU, including Articles 3.2 and 3.3. Article 3.2 recognizes that the dispute settlement system is a “central element in providing security and predictability to the multilateral trading system” and “serves to preserve the rights and obligations of Members under the covered agreements”. This is further reinforced by Article 3.3, pursuant to which, the ability of Members to bring disputes “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members”.

503. Accepting that the mere invocation of Article XXI would automatically exclude the challenged measure from any scrutiny under WTO law would effectively nullify the rights of Members affected by such measure to have recourse to the dispute settlement and would be inconsistent with the provisions of Articles 3.2 and 3.3 of the DSU. It would also appear to disregard Article 23 of the DSU which requires that WTO Members resolve their disputes through multilateral dispute settlement system and which prohibits them from making a determination to the effect that a violation of an obligation under any of the covered agreements has occurred. Indeed, should Article XXI be exempted from any review by a panel or the Appellate Body, this would mean that by merely invoking that provision WTO Members would be able to unilaterally decide the outcome of a dispute, in place of WTO adjudicating bodies.

504. Switzerland also notes that, contrary to what the United States argued during the DSB meeting on 21 November 2018, WTO Members have not “consistently held the position that actions taken pursuant to Article XXI are not subject to review in GATT or WTO dispute settlement”.⁵⁵⁷ Rather, the negotiating history of Article XXI makes it clear that while Members enjoy certain discretion with respect to security exceptions under Article XXI, the invocation of that provision is subject to a review in the framework of the dispute settlement system.⁵⁵⁸

505. Finally, the fact that the invocation of Article XXI of the GATT 1994 by a Member is subject to a panel’s review has been recently confirmed by the panel in *Russia – Traffic in Transit*. In reaching its conclusion, the panel stressed that “[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member’s GATT and WTO

⁵⁵⁷ Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 21 November 2018, p. 36, Exhibit CHE-35.

⁵⁵⁸ In fact, the United States itself confirmed that Article 35 of the ITO Charter, i.e. the predecessor to Articles XXII and XXIII of the GATT 1947, would equally apply to actions taken under Article 94, containing the security exception currently included in Article XXI of the GATT. See, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (24 July 1947), pp. 26-27.

obligations to a mere expression of the unilateral will of that Member.”⁵⁵⁹ Importantly, the panel in that case expressly rejected the United States’ arguments that Article XXI(b)(iii) is non-justiciable and that the panel cannot review its invocation because issues of national security are political matters not susceptible to review by WTO dispute settlement.⁵⁶⁰

506. In light of the above, Switzerland submits that the invocation of Article XXI of the GATT 1994 is subject to the Panel’s review and therefore, the fact that the United States may raise Article XXI as a justification for the measures challenged in the present dispute in no way bars the Panel from examining Switzerland’s claims. Rather, pursuant to Article 11 of the DSU, and in accordance with its terms of reference, the Panel is required to make an objective assessment of the matter before it, including any potential defence under Article XXI of the GATT 1994. Should the Panel conclude that the import adjustment measures challenged by Switzerland are inconsistent with the Agreement on Safeguards and/or the GATT 1994 (and cannot be justified by Article XXI), the Panel is required to make recommendations with regard to those measures in accordance with Article 19.1 of the DSU.

b. The measures at issue cannot be justified by Article XXI of the GATT 1994

507. Switzerland submits that the measures at issue which aim to improve the economic state of the US domestic steel and aluminium industries cannot be justified by Article XXI of the GATT 1994. This is without prejudice to more specific arguments that may be raised by Switzerland later in these proceedings in response to the United States’ defence under any of the paragraphs of Article XXI of the GATT 1994 and recalling that, in any event, the burden of proof rests on the United States to show that the conditions set out in Article XXI are met.⁵⁶¹

7. Conclusions

508. In conclusion, the measures at issue are inconsistent with Articles II:1(a) and (b), I:1, XI:1 and X:3(a) of the GATT 1994.

⁵⁵⁹ Panel Report, *Russia – Traffic in Transit*, para. 7.79.

⁵⁶⁰ Panel Report, *Russia – Traffic in Transit*, para. 7.103 and fn 183.

⁵⁶¹ As confirmed by the Appellate Body in *US – Wool Shirts and Blouses*, “the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.” See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

V. SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, AS REPEATEDLY INTERPRETED BY THE UNITED STATES' AUTHORITIES AND THE ONGOING USE OF SECTION 232

A. Introduction

509. Switzerland submits that Section 232 as repeatedly interpreted by the United States' authorities is inconsistent with the Agreement on Safeguards and the GATT 1994. Indeed, Section 232, so interpreted, provides for the imposition of measures that restrict imports from other WTO Members to shield the domestic production in the United States from competition with foreign products on the grounds of an alleged threat to national security. This measure has no basis in the covered agreements and is inconsistent with the balance of rights and obligations set out in the WTO Agreement and in particular, violates several provisions of the Agreement on Safeguards and of the GATT 1994.

510. In the alternative, Switzerland submits that the ongoing use of Section 232 by the United States' authorities is inconsistent with the Agreement on Safeguards and the GATT 1994 given that this ongoing use of Section 232 seeks to afford protection to the domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to the US national security. Such measure has no basis in the covered agreements and is inconsistent with the balance of rights and obligations set out in the WTO Agreement and in particular, violates several provisions of the Agreement on Safeguards and of the GATT 1994

511. In the following sections, Switzerland will first provide the factual background necessary for a proper understanding of the measures at issue (Section V.B). In that section, Switzerland will provide a description of Section 232 (Section V.B.1). Switzerland will then summarise the interpretation of Section 232 by the United States' authorities to date (Section V.B.2) and the use of Section 232 by the United States' authorities (Section V.B.3). In the following section (Section V.C), Switzerland will describe the measures at issue that are being challenged. Finally, in Section V.D, Switzerland will elaborate why those measures are inconsistent with the United States' obligations under the GATT 1994, the Agreement on Safeguards and the WTO Agreement.

B. Factual background

1. Section 232 of the Trade Expansion Act of 1962, as Amended

512. Section 232 provides the US Secretary of Commerce with the authority to conduct investigations to determine the effect on the national security of the United States of imports of any product.⁵⁶² Such investigations may be initiated on the basis of an application from an interested party or a request from the head of any department or agency. They may be also self-initiated by the US Secretary of Commerce.

513. Pursuant to Section 232(b), within 270 days of initiating the investigation, the US Secretary of Commerce is required to submit a report to the President of the United States, which includes his findings on whether the product under consideration is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, together with his recommendations for action or inaction by the US President. Section 232 does not define a threshold for when “such quantities” of imports are sufficient to threaten to impair the national security nor does it specify what “circumstances” may be relevant. The US authorities recognize that either of these two elements – quantities of imports or circumstances – considered alone, may be sufficient to support an affirmative finding. However, the quantities and the circumstances may also be considered together.⁵⁶³

514. In accordance with Section 232(c), the US President has 90 days to determine whether he concurs with the findings of the US Secretary of Commerce and, if he does, to determine the nature and duration of the action that in his judgment “must be taken to adjust imports of the article and its derivatives so that such imports will not threaten to impair the national security”.

515. Section 232(d), first sentence, contains a list of factors to which the US Secretary of Commerce and the US President shall “give consideration” in determining whether imports of the product concerned “threaten to impair the national security”. Those factors are the following:

- domestic production needed for projected national defence requirements,
- the capacity of domestic industries to meet such national defence requirements,
- existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defence,
- the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and

⁵⁶² Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862, as amended), United States Code, Title 19: Customs Duties, Part IV: National Security, Edition 2017, Exhibit CHE-1.

⁵⁶³ The Steel Report, p. 14, Exhibit CHE-2; The Aluminium Report, p. 13, Exhibit CHE-5.

- the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.

516. Section 232(d), second sentence, provides that the US Secretary of Commerce and the US President, “[i]n the administration of this section,” shall “further recognize the close relation of the economic welfare of the Nation to [the US] national security” and shall take into consideration “the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports” in determining whether such weakening of internal economy may impair the national security.

517. Section 232 does not define the type of action that the US President may take “to adjust imports of the article and its derivatives so that such imports will not threaten to impair the national security”. It has been recognized that the US President has the power to determine the method to be used to adjust imports.⁵⁶⁴ The measures adopted in the past pursuant to Section 232 include embargo, additional import duties and licence fees.⁵⁶⁵

518. Section 232 must be read together with its implementing regulations in Section 705 of the Code of Federal Regulations entitled “Effect of imported articles on the national security”.⁵⁶⁶ The latter sets forth the rules applicable to the investigations conducted by the USDOC to determine the effect on the national security of the imports of any article pursuant to Section 232.

519. Section 705.4, similarly to Section 232(d), contains a list of criteria that guide the USDOC in determining an effect of imports on the national security. Section 705.4(a) largely reproduces the factors set out in Section 232(d), first sentence. Section 705.4(b) contains the requirements similar to those set out in Section 232(d), second sentence. In particular, Section 705.4(b) requires the USDOC “[i]n recognition of the close relation between the strength of [US] national economy and the capacity of the United States to

⁵⁶⁴ *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), p. 561; US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, p. 11, Exhibit CHE-36.

⁵⁶⁵ Presidential Proclamation 4907 of March 10, 1982, Imports of Petroleum, Federal Register, Vol. 47, No. 48, p. 10507, 11 March 1982; Presidential Proclamation 4702 of November 12, 1979, Imports of Petroleum and Petroleum Products, Federal Register, Vol. 44, No. 221, p. 65581, 14 November 1979; Presidential Proclamation 4341 of January 23, 1975, Modifying Proclamation No. 3279, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees, 89 STAT. 1224.

⁵⁶⁶ Part 705 of the Code of Federal Regulations, Title 15, Vol. 2, Edition 2018 (15 CFR 705), Exhibit CHE-21.

meet national security requirements”, to consider “with regard for the quantity, availability, character and uses of the imported article under investigation”, also the following factors:

- the impact of foreign competition on the economic welfare of any domestic industry essential to US national security;
- displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects;
- any other relevant factors that are causing or will cause a weakening of US national economy.

520. The list of factors contained in Section 232(d) and Section 705.4 is non-exhaustive and the USDOC may consider other factors in evaluating the effects of imports on national security.⁵⁶⁷

2. *Interpretation of Section 232 by the US authorities*

521. Investigations conducted pursuant to Section 232 seek to determine the “effects on national security” of imports of articles and, more specifically, whether “an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” In that sense, the key concept for actions taken pursuant to Section 232 is that of “national security”. Neither Section 232 nor its implementing Section 705, however, contain a definition of “national security”, although both provisions list a number of factors that shall be taken into account to make a determination about the existence of a threat to impair the national security.

522. The following sub-sections explain how Section 232 as currently interpreted so as to provide for the imposition of measures that restrict imports from other WTO Members to shield domestic production from competition with foreign products departs from previous interpretation of Section 232. Reference is made to the interpretation by the US authorities, including the USDOC, the US Secretary of Commerce, the US President and the US courts.

- a. “National security” under Section 232 as interpreted by the USDOC, its predecessors and the US President

⁵⁶⁷ The Steel Report, p. 15, Exhibit CHE-2; The Aluminium Report, p. 14, Exhibit CHE-5.

523. The USDOC, the US Secretary of Commerce⁵⁶⁸ and the US President have interpreted the national security clause in the context of investigations conducted pursuant to Section 232.

524. The review of past investigations shows that the term “national security” under Section 232(d) has originally been interpreted narrowly, “national security” being closely linked to “national defence”. The US authorities have, however, shifted the interpretation of the term “national security”, the new interpretation by the US authorities now referring to the overall commercial viability of individual domestic industries.

i. Interpretation of the concept of “national security” in the context of Section 232 investigations before 2001

525. Before 2001, the USDOC and its predecessors, i.e. the US authorities that were previously in charge of Section 232 investigations, generally interpreted “national security” as closely linked to “national defence” in at least three respects. First, Section 232 investigating authorities relied on the projected demand in a potential national emergency situation (military conflict) according to the planning of the respective US defence and emergency planning authorities. Second, in assessing whether such projected demand could be met, the investigating authorities considered the availability of reliable supply, taking into account the domestic production capacity, domestic product inventories *and imports from reliable sources*. Third, in assessing threat to national security, Section 232 investigating authorities were taking into account broader foreign policy considerations.

526. *As regards the first element*, in the context of the *1983 Nuts, Bolts and Screws Investigation*, the USDOC considered that the national security requirement under Section 232 encompassed three elements: (i) direct defence; (ii) indirect defence; and (iii) civilian demand (during national emergency).⁵⁶⁹ To the extent that Section 232 investigating authorities analysed the economic situation of a particular US industry, they did so not in isolation, but in direct connection to mobilization planning by the US defence authorities. In the context of the *1982 Glass-Lined Chemical Processing Equipment Investigation*, the US Secretary of Commerce relied on the information as regards the national security requirements provided by the USDOD and Federal

⁵⁶⁸ Pursuant to Section 705.2 of the Code of Federal Regulations, the USDOC is the Department responsible for commencing and conducting a Section 232 investigation. Based on that investigation, the US Secretary of Commerce then makes “a report and recommendation to the President for action or inaction regarding an adjustment of the imports of the article.”

⁵⁶⁹ USDOC, *The Effect of Imports of Nuts, bolts, and Large Screws on the National Security*, Report to the President on an Investigation Conducted Under the Authority of Section 232 of the Trade Expansion Act of 1962, as Amended (19 USC 1862), February 1983 (Excerpts) (1983 Nuts, Bolts and Large Screws Report), p. ii, Exhibit CHE-37.

Emergency Management Agency.⁵⁷⁰ Similarly, in the context of *1983 Nuts, Bolts and Screws Investigation*, the mobilization requirements were identified based on a scenario developed for National Defense Stockpile planning, information from the USDOD as regards the direct defence mobilization requirements and calculations by Federal Emergency Management Agency on indirect defence requirements and civilian requirements during mobilization.⁵⁷¹ In the later investigations, even when the USDOD was not able to provide a quantitative estimate of national security requirements, the USDOC still relied on the USDOD's general anticipations of future demand and focused primarily on defence-intensive sectors.⁵⁷²

527. *As regards the second element*, the USDOC and its predecessors consistently took into account not only the capacity of the US domestic industry to meet the domestic demand in emergency situations, but also the availability of reliable import supply, i.e. from US allies and politically reliable third countries.⁵⁷³ For instance, in the *1983 Nuts, Bolts and Screws Investigation*, the USDOC concluded that during mobilization, domestic production would be insufficient to meet civilian demand, which, however, could be met by the surge of domestic production *and/or the reliable imports*.⁵⁷⁴ In the context of that investigation, the USDOC concluded that imports from the ally countries in Asia were reliable and sufficient to cover the shortfall in local production.⁵⁷⁵

528. *Regarding the third element*, Section 232 investigating authorities in past investigations took into account foreign policy considerations when assessing a potential threat to the US national security. Foreign policy considerations were not only part of the analysis of supply reliability, but often were considered by the USDOC in preparing recommendations as regards import adjustment measures. For instance, in the context of the *1982 Glass-Lined Chemical Processing Equipment Investigation*, the USDOC considered “the likely effects of any import restrictions on benefits accruing to the United States from adherence to the GATT system and from good relations with the suppliers of

⁵⁷⁰ USDOC, Investigation of Imports of Glass-Lined Chemical Processing Equipment, Federal Register, Vol. 47, No. 53, 18 March 1982, pp. 11746-11754 (1982 Glass-Lined Chemical Processing Equipment Report), p. 11750, Exhibit CHE-38. (emphasis added)

⁵⁷¹ The 1983 Nuts, Bolts and Large Screws Report, p. 58, Exhibit CHE-37.

⁵⁷² See USDOC, The Effect of Imports of Ceramic Semiconductor Packages on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, August 1993 (Excerpts) (1993 Ceramic Semiconductor Packages Report), pp. ES-7 – ES-8, Exhibit CHE-39. Available at: <https://www.bis.doc.gov/index.php/documents/section-232-investigations/77-ceramic-semiconductor-packaging-1993/file>. See also USDOC, The Effect of Imports of Gears and Gearing Products on the National Security, 1992, pp. ES-4-ES-5, available at: https://www.bis.doc.gov/index.php/component/docman/?task=doc_download&gid=80&Itemid=182.

⁵⁷³ See e.g. the 1983 Nuts, Bolts and Large Screws Report, p. 63, Exhibit CHE-37; the 1982 Glass-Lined Chemical Processing Equipment Report), p. 11753, Exhibit CHE-38.

⁵⁷⁴ The 1983 Nuts, Bolts and Large Screws Report, p. 63, Exhibit CHE-37.

⁵⁷⁵ The 1983 Nuts, Bolts and Screws Report, p. 62, Exhibit CHE-37.

the equipment involved”, in particular France being the major exporter of glass processing equipment to the United States at the time.⁵⁷⁶

529. The USDOC summarised its practice in the context of the *1989 Uranium Investigation*, noting that a determination of whether capacity of domestic industry is sufficient to meet national defence needs was based on a two-step analysis.⁵⁷⁷ First, the USDOC would compare *anticipated supply* (from domestic producers, domestic product inventories and reliable importers) *during a national security emergency*, i.e. “a one year mobilization period followed by the first three years of a major conventional conflict of indeterminate length”, against *expected demand* based on estimates of direct and indirect requirements of the USDOD for the product concerned. Second, only for the categories of the product where the shortfall of supply was established, the USDOC would examine whether imports “were a significant cause of the identified shortfall”.⁵⁷⁸

530. In the context of that second step, the USDOC typically analysed whether other factors have contributed or led to the shortfall of domestic supply and deterioration of the domestic industry condition. For instance, in the context of *1989 Uranium Investigation*, the USDOC also considered industrial organisation and existing government initiatives that affect the industry’s production capabilities.⁵⁷⁹ In the *1993 Ceramic Semiconductor Packages Investigation*, the USDOC asked producers and importers “whether U.S. governmental policies, laws and regulations had affected their firms’ business practices” and resulted in competitive disadvantages for domestic producers.⁵⁸⁰ In the *1983 Nuts, Bolts and Screws Investigation*, the USDOC concluded that “[w]hile it is true that the domestic industry has declined, general economic conditions contributed greatly, and import penetration alone is not causal to its reduced capacity”.⁵⁸¹

531. In light of the foregoing, Switzerland notes that the interpretation of “national security” in Section 232 investigations before 2001 demonstrates that the USDOC’s original approach was based on a close link to US national defence requirements.

ii. Interpretation of “national security” in the context of the *2001 Iron Ore Investigation*

532. A first shift in the interpretation of “national security” by the USDOC in Section 232 investigations occurred in 2001.

⁵⁷⁶ The 1982 Glass-Lined Chemical Processing Equipment Report, p. 11754, Exhibit CHE-38.
⁵⁷⁷ See USDOC, *The Effect of Imports of Uranium on the National Security, An Investigation under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862)*, September 1989 (Excerpts) (1989 Uranium Report), p. I-4, Exhibit CHE-40. Available at: <https://www.bis.doc.gov/index.php/documents/section-232-investigations/88-uranium-1989/file>.
⁵⁷⁸ See the 1989 Uranium Report, p. I-4, Exhibit CHE-40.
⁵⁷⁹ The 1989 Uranium Report, p. I-4, Exhibit CHE-40.
⁵⁸⁰ The 1993 Ceramic Semiconductor Packages Report, p. III-14, Exhibit CHE-39.
⁵⁸¹ The 1983 Nuts, Bolts and Screws Report, p. vi, Exhibit CHE-37.

533. In the context of the *2001 Iron Ore Investigation*, the USDOC noted that an assessment of the US “national security” requirement must include, at a minimum, a military or “national defense” component.⁵⁸² However, it held that the term “national security” can be interpreted more broadly to also include “the general security and welfare of certain industries [...] that are critical to the minimum operations of the economy and government (‘critical industries’)”.⁵⁸³ In the context of that investigation, the USDOC identified 28 “critical industries” ranging from motor vehicles (passenger cars and trucks) to finance and health services.⁵⁸⁴ The USDOC explicitly acknowledged that this constitutes a departure from the interpretation in previous investigations, noting that “[p]revious Section 232 investigations have adopted a more limited definition of national security”.⁵⁸⁵ The USDOC noted that this interpretation “is not dictated by statute”, but is supported by the wording in Section 232 which refers to the need “to recognize the close relation of the economic welfare of the Nation to the [US] national security.”⁵⁸⁶ The USDOC also explicitly noted that by adopting a broader definition of national security than is compelled by the text of Section 232, it has interpreted the requirements of Section 232 in the manner “most likely to result in a positive finding”.⁵⁸⁷ Therefore, in that investigation, the USDOC examined demand for the products concerned not only on the basis of the national defence requirements by the USDOD but also on the basis of the requirements of critical industries, “notwithstanding the fact that a substantial portion of these needs are likely *not integral to national security*”.⁵⁸⁸

534. In that case, the USDOC still took into account not only domestic but also reliable foreign supply noting that “[i]mports of iron ore and semi-finished steel are from diverse

⁵⁸² USDOC, *The Effect of Imports on Iron Ore and Semi-Finished Steel on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as amended, October 2001* (2001 Iron Ore Report), p. 5, Exhibit CHE-41. Available at: <https://www.bis.doc.gov/index.php/documents/section-232-investigations/81-iron-ore-and-semi-finished-steel-2001/file>.

⁵⁸³ The 2001 Iron Ore Report, p. 5, Exhibit CHE-41.

⁵⁸⁴ The list of “critical industries” is included in table 2 of the 2001 Iron Ore Report and covers (1) Crude petroleum and natural gas; (2) New construction, including own-account construction; (3) Maintenance and repair construction, including own account construction; (4) Ordnance and accessories; (5) Petroleum refining and related products; (6) Metal containers; (7) Engines and turbines; (8) Computer and office equipment; (9) Audio, video, and communication equipment; (10) Motor vehicles (passenger cars and trucks); (11) Truck and bus bodies, trailers, and motor vehicle parts; (12) Aircraft and parts; (13) Other transportation equipment; (14) Railroads and related services, passenger ground transportation; (15) Motor freight transportation and warehousing; (16) Water transportation; (17) Air transportation; (18) Pipelines, freight forwarders, and related services; (19) Communications, except radio and TV; (20) Radio and TV broadcasting; (21) Electric services (utilities); (22) Gas production and distribution (utilities); (23) Water and sanitary services; (24) Finance; (25) Insurance; (26) Computer and data processing services; (27) Health services; and (28) National defense: consumption expenditures. See The 2001 Iron Ore Report, p. 16, Exhibit CHE-41.

⁵⁸⁵ The 2001 Iron Ore Report, p. 5, Exhibit CHE-41.

⁵⁸⁶ The 2001 Iron Ore Report, p. 5, Exhibit CHE-41.

⁵⁸⁷ The 2001 Iron Ore Report, p. 7, Exhibit CHE-41.

⁵⁸⁸ The 2001 Iron Ore Report, p. 7, Exhibit CHE-41. (emphasis added)

and ‘safe’ foreign suppliers, with the largest suppliers of these products being U.S. allies in the Western Hemisphere (Canada, Mexico, and Brazil).⁵⁸⁹ The USDOC concluded that “there is no evidence that imports threaten the viability of U.S. producers so fundamentally as to threaten to impair U.S. national security” and did not recommend that the President take action to adjust imports.⁵⁹⁰

iii. Interpretation of “national security” in the *2017 Steel and Aluminium Investigations*

535. The most fundamental changes in the interpretation of “national security” occurred in the *2017 Steel and Aluminium Investigations*.

536. First, in the *2017 Steel and Aluminium Investigations*, the USDOC confirmed the broader interpretation of “national security” adopted in the *2001 Iron Ore Investigation*.⁵⁹¹ The USDOC emphasised that this interpretation is based on Section 232, noting that while “the first sentence [of Section 232(d)] focuses directly on ‘national defense’ requirements, thus making clear that ‘national defense’ is a subset of the broader term ‘national security’”, the second sentence “focuses on the broader economy” as it “expressly directs that the Secretary and the President ‘shall recognize the close relation of the economic welfare of the Nation to [the US] national security’.”⁵⁹² In fact, in those investigations, the USDOC found that two of the factors listed in the second sentence of Section 232(d) were “most relevant”, namely the impact of foreign competition on the economic welfare of individual domestic industries and the serious effects resulting from displacement of any domestic products by excessive imports.⁵⁹³

537. Following the approach adopted in the *2001 Iron Ore Investigation*, in the *2017 Steel and Aluminium Investigations*, in assessing the demand, the USDOC thus took into account not only the steel and aluminium needed for national defence requirements but also the steel and aluminium required for US critical infrastructures.⁵⁹⁴ Regarding the steel and aluminium needed for national defence requirements, the USDOC concluded that the current military requirements were about three per cent of US steel and aluminium production each.⁵⁹⁵ In its memorandum addressing the findings and recommendations in the *2017 Steel and Aluminium Investigations*, the USDOC explicitly noted that it “does not believe that the findings in the reports impact the ability of

⁵⁸⁹ The 2001 Iron Ore Report, p. 2, Exhibit CHE-41.

⁵⁹⁰ The 2001 Iron Ore Report, p. 37, Exhibit CHE-41.

⁵⁹¹ The Steel Report, pp. 12-13, Exhibit CHE-2; The Aluminium Report, p. 13, Exhibit CHE-5.

⁵⁹² The Steel Report, p. 15, Exhibit CHE-2; The Aluminium Report, p. 14, Exhibit CHE-5.

⁵⁹³ The Steel Report, p. 15, Exhibit CHE-2; The Aluminium Report, p. 14, Exhibit CHE-5.

⁵⁹⁴ The Steel Report, pp. 13-14 and Appendices H and I, Exhibit CHE-2; The Aluminium Report, pp. 13, 36-40, Exhibit CHE-5.

⁵⁹⁵ The Steel Report, p. 23, Exhibit CHE-2; The Aluminium Report, p. 25, Exhibit CHE-5 (note that numbers are retracted). See also USDOC, Memorandum for Secretary of Commerce, Response to Steel and Aluminum Policy Recommendations, Exhibit CHE-42.

[US]DOD programs to acquire the steel or aluminium necessary to meet national defense requirements”.⁵⁹⁶ The USDOC, however, noted that steel and aluminium is also needed to satisfy the requirements of the US critical infrastructure. The 16 critical infrastructure sectors relied on by the USDOC (comparable to the 28 critical industries used in the context of the *2001 Iron Ore Investigation*) are extremely broad and cover virtually the entire economy, without apparent link to national security. Regarding steel, the USDOC noted that the use of steel in critical industries in 2007 amounted to 54 million metric tons, an increase of 63% in comparison to 1997.⁵⁹⁷ Regarding aluminium, the USDOC noted that use of aluminium in 2016 for electrical applications accounted for 7% (836,000 metric tons) of total US aluminium consumption, in transportation – for 35% (4.2 million metric tons), for aluminium containers and packaging – 18% (2.2 million metric tons), building and construction – 12% (1.5 million metric tons).⁵⁹⁸

538. In addressing the national security requirements, the USDOC, however, went even beyond the expansive interpretation of domestic demand, comprising national defence requirements and critical infrastructure demand adopted in the *2001 Iron Ore Report*. Indeed, the USDOC focused on the overall commercial viability and economic health of the US steel and aluminium industries. The USDOC explicitly stated that its investigation was focused “on the larger inquiry” than that pursued in the *2001 Iron Ore Investigation*.⁵⁹⁹ In particular, the USDOC considered necessary to inquire whether these US industries attract “sufficient commercial (i.e., non-defense) business” and to address the “commercial and industrial customer sales”.⁶⁰⁰ The USDOC explained that “[i]n a free market system, the ability of the domestic steel industry to continue meeting national security needs depends on the continued capability of the U.S. steel industry *to compete fairly in the commercial marketplace* and maintain a *financially viable domestic manufacturing capability*”.⁶⁰¹ The USDOC also concluded that “the nation must have sufficient domestic aluminum production capacity to meet *most commercial demand* and to fulfil DoD contractor and critical infrastructure requirements” and it also “must have a strong aluminum manufacturing capability and commercial product portfolio (e.g., automotive, industrial, packaging).”⁶⁰² Hence, pursuant to the USDOC’s current interpretation, the ultimate goal of Section 232 is to ensure the “economic stability” of the domestic industries.⁶⁰³ Based on the above considerations, the USDOC recommended that the US President take action to enable utilization of *an average of 80%* of

⁵⁹⁶ USDOD, Memorandum for Secretary of Commerce, Response to Steel and Aluminum Policy Recommendations, Exhibit CHE-42.

⁵⁹⁷ The Steel Report, p. 27, Exhibit CHE-2.

⁵⁹⁸ The Aluminium Report, pp. 36-37, Exhibit CHE-5.

⁵⁹⁹ The Steel Report, fn 22, Exhibit CHE-2.

⁶⁰⁰ The Steel Report, pp. 23, 25, Exhibit CHE-2.

⁶⁰¹ The Steel Report, p. 26, Exhibit CHE-2. (emphasis added)

⁶⁰² The Aluminium Report, p. 40, Exhibit CHE-5. (emphasis added)

⁶⁰³ The Aluminium Report, p. 40, Exhibit CHE-5.

production capacity of aluminium and steel based on 2017 level.⁶⁰⁴ This level of capacity utilization, in the USDOC's opinion, would enable a *commercially and financially viable and competitive* steel and aluminium industry to meet the needs of the "critical industries".⁶⁰⁵

539. Second, in the context of the *2017 Steel and Aluminium Investigations* the USDOC disregarded, when assessing the availability of supply, supply from reliable import sources. This constitutes a significant departure from the *2001 Iron Ore Investigation* in which the USDOC considered that "[i]mports of iron ore and semi-finished steel are from diverse and 'safe' foreign suppliers, with the largest suppliers of these products being U.S. allies in the Western Hemisphere".⁶⁰⁶ In justifying this departure from its earlier interpretation, the USDOC considered that "because Congress in Section 232 chose to explicitly direct the Secretary to consider whether the 'impact of foreign competition' and 'the displacement of any domestic products by excessive imports' are 'weakening our internal economy' but made no reference to an assessment of the sources of imports, it appears likely that Congress recognized adverse impacts might be caused by imports from allies or other reliable sources."⁶⁰⁷ The USDOC further noted that "[g]iven the bipolar nature of the world at the time [i.e. in 1962], the absence of a distinction between communist and non-communist countries in Section 232 suggests that Congress expected Section 232 to be applied to imports from all countries – including allies and other 'reliable' sources".⁶⁰⁸ By disregarding the availability of supply from reliable import sources, the USDOC further increased the likelihood of a positive finding as regards the shortfall of supply by taking into account only available domestic supply.

540. The US President endorsed this extensive interpretation of "national security" of the USDOC by concurring with the findings of the US Secretary of Commerce.⁶⁰⁹ As regards the import adjustment measures on aluminium, the US President explicitly noted that they "will help [US] 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 [US] Nation's need to rely on foreign producers for aluminum and ensure that domestic producers can continue to supply all the aluminum necessary for critical industries and national defense".⁶¹⁰ The US

⁶⁰⁴ The Aluminium Report, p. 7, Exhibit CHE-5; The Steel Report, p. 6, Exhibit CHE-2.

⁶⁰⁵ The Aluminium Report, p. 105, Exhibit CHE-5; The Steel Report, p. 26, Exhibit CHE-2.

⁶⁰⁶ The 2001 Iron Ore Report, pp. 2, 27, Exhibit CHE-41.

⁶⁰⁷ The Steel Report, pp. 16-17, Exhibit CHE-2. See also the Aluminium Report, p. 16, Exhibit CHE-5.

⁶⁰⁸ The Steel Report, fn 20, Exhibit CHE-2; The Aluminium Report, fn 17, Exhibit CHE-5.

⁶⁰⁹ Presidential Proclamation 9705, recital 5, Exhibit CHE-8; Presidential Proclamation 9704, recital 4, Exhibit CHE-13.

⁶¹⁰ Presidential Proclamation 9704, recital 7, Exhibit CHE-13.

President made an analogous statement with respect to the objective of the import adjustment measures applicable to steel products.⁶¹¹

541. Based on the foregoing, Switzerland submits that there has been a major shift in the interpretation of Section 232 as of the *2017 Steel and Aluminium Investigations*. Under this new interpretation, the USDOC does not only take into account the needs of US national defence but also of all critical infrastructure and beyond, by addressing the general state of the domestic industry concerned. Furthermore, in terms of supply, the USDOC does not take into account reliable foreign sources of supply, thus significantly increasing the likelihood of a finding of a shortfall of supply. Pursuant to this new interpretation, Section 232 therefore operates as a safeguard mechanism whereby the US President imposes import restrictions in order to protect a domestic industry whose economic situation is deteriorating, from competition with foreign products.

b. “National security” under Section 232 as interpreted by US courts

542. The steel and aluminium measures, based on the new interpretation of Section 232 by the USDOC and the US President, have led to several court proceedings in the United States. In three cases⁶¹², the plaintiffs challenged those measures before the US Court of International Trade (US CIT).

543. The US CIT has so far issued judgements in two of those three cases. First, in *Severstal v. United States*, the US CIT denied the motion for preliminary injunction, finding that no statutory authority or legislative history that was presented on file suggested that Section 232(d) forecloses the US President from finding a threat to national security due to the overall economic situation of the steel industry. In assessing the argument that the US President misconstrued his authority under Section 232, the US CIT concluded that “[w]here, as here, an industry is found to produce goods vital to U.S. national security, [...] it [is] highly unlikely that Presidential statements indicating an overarching economic rationale for Section 1862 [i.e. Section 232] tariffs are clearly inconsistent with that statute’s grant of authority”.⁶¹³

⁶¹¹ Presidential Proclamation 9705, recital 8, Exhibit CHE-8.

⁶¹² See Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Updated April 2, 2019), p. 20-21, Exhibit CHE-34; US CIT, *Severstal v. United States*, Court No. 18-00057, Slip Op. 18-37, 5 April 2018, Exhibit CHE-43; US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, Exhibit CHE-36. A case brought by Turkish steel importers, *Medtrade, Inc. et al. v. United States, et al.*, CIT No. 19-00009, is currently pending before the US CIT. In that case, the plaintiffs have claimed that the imposition of 50% additional duties on steel from Turkey violates the equal protection and due process clauses of the US Constitution.

⁶¹³ US CIT, *Severstal v. United States*, Court No. 18-00057, Slip Op. 18-37, 5 April 2018, p. 22. Exhibit CHE-43.

544. Second, in *American Institute for International Steel v. United States*, the US CIT considered the scope of Section 232 in the context of claims of an improper delegation of legislative authority in violation of the US Constitution and the doctrine of separation of powers.⁶¹⁴ Judge Katzmann noted in his dubitante opinion that “[t]here is no guidance provided on the remedies to be undertaken in relation to the expansive definition of ‘national security’ in the statute – a definition so broad that it not only includes national defense but also encompasses the entire national economy.”⁶¹⁵

545. Based on the foregoing, Switzerland submits that the findings in *Severstal v. United States* and in *American Institute for International Steel v. United States* support the current excessively expansive interpretation of Section 232.

3. Overview of the use of Section 232 by the US authorities

546. Since 1962, the USDOC has conducted 28 investigations pursuant to Section 232.⁶¹⁶ In 16 of these cases, the USDOC determined that imports of the product concerned did not threaten to impair the national security. In 11 cases, the USDOC found that imports did threaten to impair the national security and made recommendations to the US President accordingly.⁶¹⁷ Out of these 11 cases, the US President took action in only 8 cases. The list of the 28 investigations conducted pursuant to Section 232 is presented in chronological order in the Table below.⁶¹⁸

Industry	Year of Initiation	Finding resulting from the investigation ⁶¹⁹	Presidential action
Manganese and Chromium Ferroalloys and Electrolytic	1963	Negative	-

⁶¹⁴ US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, p. 2, Exhibit CHE-36.

⁶¹⁵ US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, p. 26, Exhibit CHE-36. The US CIT denied the plaintiff’s motion for summary judgment stating that it was bound by the US Supreme Court precedent. See US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, pp. 1, 6-7, 14 and fn 6, Exhibit CHE-36.

⁶¹⁶ Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Updated April 2, 2019), Appendix B, Exhibit CHE-34. This number does not include the three most recent investigations into imports of autos and auto parts, uranium and titanium sponge.

⁶¹⁷ One investigation was terminated at the request of the petitioner.

⁶¹⁸ This table is based on Appendix B of the Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Updated April 2, 2019), Exhibit CHE-34.

⁶¹⁹ “Negative” means that the Section 232 investigating authorities have found that imports did not threaten to impair the national security and therefore have not recommended the US President to take action. “Positive” means that the Section 232 investigating authorities have found that imports threatened to impair the national security and have recommended the US President to take action.

Manganese and Chromium Metals			
Tungsten Mill Products	1964	Negative	-
Anti-Friction Bearings and Parts	1964	None (investigation terminated at petitioner's request)	-
Watches, Movements and Parts	1965	Negative	-
Chromium, Manganese and Silicon Ferroalloys and Refined Metals	1968	Negative	-
Miniature and Instrument Precision Ball Bearings	1969	Negative	-
EHV Power Circuit Breakers and HEV Power Transformers and Reactors	1972	Negative	-
Oil	1973	Positive	Shift from existing quota system to a license fee
Oil	1975	Positive	Supplemental fee to the license fee; the fee was later reduced to zero
Nuts, Bolts and Large Screws of Iron and Steel	1978	Negative	-
Oil	1978	Positive	Supplemental conservation fee, which was later found to be illegal
Petroleum from Iran	1979	Positive	Embargo on petroleum from Iran

Glass-Lined Chemical Processing Equipment	1981	Negative	-
Chromium, Manganese and Silicon Ferroalloys and Related Materials	1981	Negative	-
Crude Oil from Libya	1982	Positive	Embargo on crude oil from Libya
Nuts, Bolts and Large Screws of Iron and Steel	1982	Negative	-
Metal-Cutting and Metal-Forming Machine Tools	1983	Positive	The US President sought voluntary restraint agreements (VRA) with leading foreign suppliers. VRAs have been reached with Japan and Taiwan in 1986 and applied till 1993 ⁶²⁰
Antifriction Bearings	1987	Negative	-
Petroleum	1987	Positive	-
Plastic Injection Molding Machinery	1988	Negative	-
Uranium	1989	Negative	-
Gears and Gearing Products	1991	Negative	-
Integrated Circuit Ceramic Semiconductor Packaging	1992	Negative	-

⁶²⁰

See USDOC, Section 232 Investigations Program Guide. The Effect of Imports on the National Security: Investigations conducted under the Trade Expansion Act of 1962, as amended (June 2007), p. 15. Available at: <https://www.bis.doc.gov/index.php/documents/section-232-investigations/86-section-232-booklet/file>.

Crude Oil and Petroleum Products	1994	Positive	-
Crude Oil	1999	Positive	-
Iron ore and finished steel	2001	Negative	-
Steel	2017	Positive	Additional tariffs on steel imports
Aluminium	2017	Positive	Additional tariffs on aluminium imports

547. Prior to the current Trump administration, a US President last acted in 1986, following the metal-cutting and metal-forming machine tools investigation. In that case, the US President deferred a formal decision under Section 232 and instead sought voluntary restraint agreements with leading foreign exporters and developed a domestic support program to revitalize the industry. The last import restrictions under Section 232 were imposed by the US President in 1982, when Ronald Reagan imposed an oil embargo on Libya.⁶²¹ Notably, between 1962 and 2017 only in 6 out of the 9 cases in which the USDOC made positive findings, has the US President adopted measures to “adjust imports”.⁶²² All but one of these cases concerned oil and other petroleum products. Furthermore, all past cases in which US Presidents adopted import adjustment measures under Section 232 were subject to investigations between 1962 and 1986, i.e. during the Cold War and before the establishment of the WTO, and therefore in a very different geopolitical and foreign policy context than the present context.

548. In some cases, the US President took no import adjustment actions because the investigation resulted in a negative finding. For instance, in the *2001 Iron Ore Investigation*, based on the results of the investigation, the USDOC was not able to conclude “that imports of iron ore and semi-finished steel fundamentally threaten the capability of U.S. iron ore and semi-finished steel producers to satisfy national security requirements”.⁶²³ The USDOC further noted that the US national security requirements were easily satisfied by domestic production, even if it were to decrease due to imports, and concluded that no Presidential action to adjust imports was necessary.⁶²⁴

⁶²¹ Presidential Proclamation 4907 of March 10, 1982, Imports of Petroleum, Federal Register, Vol. 47, No. 48, 11 March 1982, p. 10507.

⁶²² Congressional Research Service, Section 232 Investigations: Overview and Issues for Congress (Updated April 2, 2019), p. 39, Exhibit CHE-34.

⁶²³ The 2001 Iron Ore Report, p. 37, Exhibit CHE-41.

⁶²⁴ The 2001 Iron Ore Report, p. 37, Exhibit CHE-41.

549. In some cases, the USDOC did not recommend any import adjustment actions to the US President, despite a finding of a very high import penetration. For instance, in the context of the 1993 *Ceramic Semiconductor Packages Investigation*, the USDOC established that the share of imports constituted 85% by value and 92% by unit of all identifiable defence shipments, whereas about 20% of the ceramic packages consumed in the United States accounted for defence uses.⁶²⁵ Despite the increase of import penetration from 78% to 91% between 1990 and 1992, the USDOC recommended the US President not to take any import adjustment measures and instead provide support to strengthen the viability and technological standing of the domestic ceramic package industry.⁶²⁶

550. Hence, before 2017 the US Presidents used the powers to adjust imports with caution. In 1986, the Committee on Finance explained that the US Presidents have been generally reluctant to unilaterally limit imports based on the national security criteria for at least two reasons:

1. The narrowness of the GATT Article XXI exception which permits import restrictions for national security reasons in peacetime to the extent restrictions are applied to “implements of war”, other materials used to supply a military establishment, or fissionable materials.
2. The concern over creating a giant national security loophole in rules of the trading system, which could be abused by all trading nations.⁶²⁷

551. In contrast to this previous practice, the current US President readily took action to adjust imports of steel and aluminium in 2018 despite the negative reaction of the USDOD to the steel and aluminium policy recommendations. Indeed, the USDOD concluded that the US military requirements for steel and aluminium each only represent about 3 per cent of US production of steel and aluminium and therefore the imports do not impair the ability of USDOD to acquire the product in question to meet national defence requirements.⁶²⁸ Furthermore, the USDOD expressed its concerns about the negative impact of the Presidential actions against steel and aluminium imports on the key US allies and highlighted that it should be clear that these actions “are focused on

⁶²⁵ The 1993 Ceramic Semiconductor Packages Report, p. VII-1, Exhibit CHE-39.

⁶²⁶ The 1993 Ceramic Semiconductor Packages Report, pp. VII-1, VII-3, Exhibit CHE-39.

⁶²⁷ US Senate Finance Committee, Staff Paper “Hearing on National Security Authority to Limit Imports”, Hearing of the Committee on Finance, United States Senate, 99th Congress, Second Session on S. 1871, 13 August 1986, p. 5, Exhibit CHE-44.

⁶²⁸ USDOD, Memorandum for Secretary of Commerce, Response to Steel and Aluminum Policy Recommendations, Exhibit CHE-42.

correcting Chinese overproduction and countering their attempts to circumvent antidumping tariffs”.⁶²⁹

552. Finally, it should be noted that while for more than 55 years (between 1962 and 2017) only 26 investigations pursuant to Section 232 have been conducted, under the current US administration, in less than 2 years, 5 investigations have been initiated. Indeed, in addition to the steel and aluminium investigations, the current US administration has started three other Section 232 investigations one of which was recently completed and two are currently ongoing: (i) an investigation concerning imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts (initiated on 23 May 2018),⁶³⁰ (ii) an investigation concerning imports of uranium (launched on 18 July 2018)⁶³¹ and (iii) an investigation concerning imports of titanium sponge (launched on 4 March 2019)⁶³². The US Secretary of Commerce submitted the official results of the automobile and automobile parts investigation to the US President on 17 February 2019.⁶³³ The USDOC reports in the two other investigations are due in mid-April 2019 and end November 2019, respectively.

C. The measures at issue

1. Section 232 as repeatedly interpreted by the US authorities

553. Article 3.3 of the DSU provides that the dispute settlement system addresses “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member”. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body clarified that “[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings”.⁶³⁴ In the same case, the Appellate Body also indicated that those “acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state,

⁶²⁹ USDOD, Memorandum for Secretary of Commerce, Response to Steel and Aluminum Policy Recommendations, Exhibit CHE-42.

⁶³⁰ USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, Federal Register, Vol. 83, No.104, 30 May 2018, pp. 24735-24737, Exhibit CHE-45.

⁶³¹ USDOC, Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Uranium, Federal Register, Vol. 83, No. 143, 25 July 2018, pp. 35204-35205, Exhibit CHE-46.

⁶³² USDOC, Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Titanium Sponge, Federal Register, Vol. 84, No. 46, 8 March 2019, pp. 8503-8504, Exhibit CHE-47.

⁶³³ USDOC, Statement on Submission of Automobiles and Automobile Parts Section 232 Report to the US President of 17 February 2019, Exhibit CHE-48. Available at: <https://www.commerce.gov/news/press-releases/2019/02/statement-department-commerce-submission-automobiles-and-automobile>.

⁶³⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

including those of the executive branch”.⁶³⁵ The scope of measures that can be challenged in WTO dispute settlement is therefore broad and is not limited merely to rules or norms of general and prospective application and their individual applications.⁶³⁶

554. The Appellate Body in *Argentina – Import Measures* clarified that “the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant”.⁶³⁷ The two elements that must invariably be shown are (i) the attribution of the measure to the WTO Member concerned and (ii) its precise content. Moreover, depending on the characteristics or nature of the measure, other elements may also need to be substantiated to prove the existence of the challenged measure.

555. In the present case, Switzerland challenges Section 232 of the Trade Expansion Act of 1962 *as repeatedly interpreted by the US authorities*. That measure provides for the US authorities to impose measures that restrict imports from other WTO Members to shield the domestic production in the United States from competition with foreign products on the grounds of an alleged threat to the national security.

556. By challenging Section 232 of the Trade Expansion Act of 1962 *as repeatedly interpreted by the US authorities*, Switzerland is thus not challenging the legal act itself, i.e. Section 232, but the interpretation of that act by the US authorities. In fact, the text of Section 232 does not mandate the interpretation challenged in the present case.

557. That measure is clearly attributable to the United States because it is the very interpretation given to the US legislation by the US authorities, including the USDOC and the President of the United States.

558. The content of the measure is the US authorities’ *interpretation* of Section 232 of the Trade Expansion Act which provides for the imposition of import restrictions, on the grounds of an alleged threat to the national security, for the purposes of protecting a domestic industry from foreign competition because the imports of such products, taking into account their quantities and/or the circumstances, cause or threaten to cause injury to that domestic industry. Such interpretation is found in the following elements.

559. First, this interpretation is reflected in the reports of the USDOC in the context of the *2017 Steel and Aluminium Investigations*. Indeed, in those two investigations, the USDOC focused in the first place on the “economic state” of the US industry noting that imports have weakened the US domestic steel industry through the closure of facilities,

⁶³⁵ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

⁶³⁶ Appellate Body Reports, *Argentina – Import Measures*, para. 5.109.

⁶³⁷ Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

decrease in employment and negative net income since 2009.⁶³⁸ The conclusions of the Steel Report focus on the fact that “[s]teel producers in the United States are facing widespread harm from mounting imports” and that “[e]xcessive imports of steel [...] have displaced domestic steel production, the related skilled workforce, and threaten the ability of this critical industry to maintain economic viability”.⁶³⁹ The Steel Report recommended import adjustment measures allowing to reach 80% utilization rate considered as “necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector”.⁶⁴⁰

560. Likewise, in the Aluminium Report, the USDOC focused on the effect of the displacement of domestic aluminium by excessive imports.⁶⁴¹ The Aluminium Report found that “[i]mports and global aluminum production overcapacity [...] have had a substantial negative impact on the economic welfare and production capacity of the United States primary aluminum industry.”⁶⁴² The Aluminium Report also recommended import adjustment measures “to enable U.S. aluminum production to utilize an average of 80 percent of production capacity.”⁶⁴³

561. Second, in taking his decision pursuant to Section 232(c) following the *2017 Steel and Aluminium Investigations*, the US President concurred with the findings of the US Secretary of Commerce and referred to import adjustment measures as a “relief” for domestic steel and aluminium industries. The US President also emphasized that import adjustment measures “will help [US] domestic steel [and aluminum] industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new [...] workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers [...] and ensure that domestic producers can continue to supply all the steel [and aluminum] necessary”.⁶⁴⁴ The President further noted that “the tariff[s] imposed [...] [are] an important first step in ensuring the economic viability of [US]domestic aluminum [and steel] industry”.⁶⁴⁵

562. Third, the statements of the US authorities and of US officials further confirm that Section 232 is intended to function as a mechanism whereby the United States imposes trade restrictive measures because imports cause or threaten to cause injury to a

⁶³⁸ The Steel Report, p. 16, Exhibit CHE-2.

⁶³⁹ The Steel Report, p. 56, Exhibit CHE-2.

⁶⁴⁰ The Steel Report, p. 4, Exhibit CHE-2.

⁶⁴¹ The Aluminium Report, p. 15, Exhibit CHE-5.

⁶⁴² The Aluminium Report, pp. 2-3, Exhibit CHE-5.

⁶⁴³ The Aluminium Report, p. 6, Exhibit CHE-5.

⁶⁴⁴ Presidential Proclamation 9704, Recital 7, Exhibit CHE-13; Presidential Proclamation 9705, Recital 8, Exhibit CHE-8.

⁶⁴⁵ Presidential Proclamation 9704, Recital 10, Exhibit CHE-13; Presidential Proclamation 9705, Recital 11, Exhibit CHE-8.

domestic industry, which therefore needs to be protected from import competition. Among others, the following statements are relevant:

- On 5 March 2018, the US President tweeted: “We have large trade deficits with Mexico and Canada. NAFTA, which is under renegotiation right now, has been a bad deal for U.S.A. Massive relocation of companies & jobs. *Tariffs on Steel and Aluminum will only come off if new & fair NAFTA agreement is signed.*”⁶⁴⁶ Hence, US authorities have used steel and aluminium tariffs to exercise pressure on its partners in free trade agreement negotiations *rather than* for the purposes of protecting national security.
- On 8 March 2018, the official statement of the US Trade Representative addressed the Presidential Proclamations related to tariffs on imported steel and aluminium as follows: “Under the Leadership of President Trump, America has a robust trade agenda that supports our national security. The President is once again demonstrating he will protect our country, *fight for American workers and strictly enforce our trade laws.*”⁶⁴⁷
- In March 2018, the White House in its factsheet on the President’s Section 232 tariffs explained that “President Trump is taking *action to protect America’s critical steel and aluminum industries*, which have been harmed by unfair trade practices and global excess capacity.”⁶⁴⁸ Furthermore, it is notable that the announcements of the Presidential Proclamations under Section 232 on the webpage of the White House (www.whitehouse.gov) are posted in the section “economy and jobs” rather than “national security”.
- On 6 April 2018, the US President tweeted: “Despite the Aluminum Tariffs, Aluminum prices are DOWN 4%. People are surprised, I’m not! *Lots of money coming into U.S. coffers and Jobs, Jobs, Jobs!*”⁶⁴⁹
- On 23 May 2018, as noted in the USDOC press release on the initiation of Section 232 investigation into autos imports, US Secretary of Commerce Ross stated that “[t]here is evidence suggesting that, for decades, imports from abroad have eroded our domestic auto industry.” The same press release explains that “[a]utomobile manufacturing has long been a significant source of American

⁶⁴⁶ Twitter statement by @realDonaldTrump on 5 March 2018, Exhibit CHE-25. (emphasis added)

⁶⁴⁷ USTR statement of 8 March 2018, Exhibit CHE-49. (emphasis added) Available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/february/ustr-robert-lighthizer%E2%80%99s-statement>.

⁶⁴⁸ Fact sheet published by the White House on 8 March 2018, Exhibit CHE-26. (emphasis added) Available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/>.

⁶⁴⁹ Twitter statement by @realDonaldTrump on 6 April 2018, Exhibit CHE-25. (emphasis added)

technological innovation” and that the investigation will consider “whether the decline of domestic automobile and automotive parts production *threatens to weaken the internal economy* of the United States”.⁶⁵⁰

- In an official statement dated 31 May 2018, the White House stated that “[t]he Section 232 steel and aluminum tariffs have already had *major, positive effects on steel and aluminum workers and jobs* and will continue to do so long into the future”.⁶⁵¹
- On 31 May 2018, Peter Navarro, White House National Trade Council Director, stated in an interview with the FOX Business Network that “[a]ll we are trying to do here with the 232 tariffs is to provide our domestic industries an *opportunity to earn a decent rate of return and invest in this country*”.⁶⁵²
- During a debate concerning possible amendments to Section 232 in July 2018, senator Brown from Ohio noted that she strongly supports the Section 232 steel tariffs because “thousands of steelworkers across the country have lost their jobs due to Chinese steel overcapacity” and that “[t]hese tariffs are a tool to bring China to the table and to get long-term structural changes to support American jobs”,⁶⁵³
- On 9 June 2018, the US President tweeted: “PM Justin Trudeau of Canada acted so meek and mild during our @G7 meetings only to give a news conference after I left saying that, ‘US Tariffs were kind of insulting’ and he ‘will not be pushed around.’ Very dishonest & weak. *Our Tariffs are in response to his of 270% on dairy!*”⁶⁵⁴
- On 22 June 2018, the US President tweeted: “Based on the Tariffs and Trade Barriers long placed on the U.S. & its great companies and workers by the European Union, *if these Tariffs and Barriers are not soon broken down and*

⁶⁵⁰ USDOC Press Release, “U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports”, 23 May 2018, Exhibit CHE-50. (emphasis added) Available at: <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.

⁶⁵¹ Statement of the White House on 31 May 2018, Exhibit CHE-27. (emphasis added) Available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-section-232-tariff-modifications-2/>.

⁶⁵² Peter Navarro’s Interview with FOX Business Network on 31 May 2018, Exhibit CHE-51. (emphasis added) Available at: <https://www.foxbusiness.com/politics/trump-tariffs-are-about-national-security-peter-navarro>.

⁶⁵³ Congressional Record, 115th Congress, 2nd Session, Vol. 164, No. 116, July 11, 2018, Exhibit CHE-52. (emphasis added)

⁶⁵⁴ Twitter statement by @realDonaldTrump on 9 June 2018, Exhibit CHE-25. (emphasis added)

*removed, we will be placing a 20% Tariff on all of their cars coming into the U.S. Build them here!*⁶⁵⁵

- In July 2018, the US Secretary of Commerce noted that “[t]he remarkable revitalization of America’s metal industries would not be happening without President Trump’s Section 232 tariffs”. The US Secretary of Commerce went on to say that the aluminium industry “has suffered a virtual collapse” due to a drop in production and a rise in imports, largely from a single source, i.e. China.⁶⁵⁶
- On 19 July 2018, in his opening remarks at the Section 232 Hearing on Automobile and Automotive Parts Imports, the US Secretary of Commerce stated that “[t]he automobile industry continues to *drive American innovation*”, “provides the *backbone of [US] industrial economy*”, “supports millions of Americans with *high-paying jobs*” and “is central to the *advancement of new technologies*”.⁶⁵⁷
- On 17 September 2018, the US President tweeted: “Our Steel Industry is the talk of the World. *It has been given new life, and is thriving.* Billions of Dollars is being spent on new plants all around the country!”⁶⁵⁸
- On 8 March 2019, the US President tweeted: “Aluminum prices are down 12% since I instituted Tariffs on Aluminum Dumping - and *the U.S. will be taking in Billions, plus jobs.* Nice!”⁶⁵⁹
- On 22 March 2019, the US President stated as regards the Section 232 autos investigation in its interview with FOX Business Network: “*What poses a national security risk is our balance sheet.* We have to have -- we need a strong balance sheet. Otherwise, you don’t have national security.”⁶⁶⁰

563. Hence, those statements confirm the current US authorities’ and US officials’ understanding that import adjustment actions that were or will be adopted under Section 232 aim at protecting American domestic industries, American workers and general economic welfare under the disguise of an alleged threat to national security.

⁶⁵⁵ Twitter statement by @realDonaldTrump on 22 June 2018, Exhibit CHE-25. (emphasis added)
⁶⁵⁶ Opinion by the US Secretary of Commerce on www.cleveland.com dated 15 July 2018, Exhibit CHE-28. (emphasis added) Available at:

⁶⁵⁷ https://www.cleveland.com/opinion/2018/07/revitalizing_the_us_steel_and.html.
Secretary Ross’s Opening Remarks at the Section 232 Hearing on Automobile and Automotive Parts Imports, 19 July 2018, Exhibit CHE-53. (emphasis added) Available at: <https://www.commerce.gov/news/speeches/2018/07/opening-remarks-section-232-hearing-automobile-and-automotive-parts>.

⁶⁵⁸ Twitter statement by @realDonaldTrump on 17 September 2018, Exhibit CHE-25. (emphasis added)
⁶⁵⁹ Twitter statement by @realDonaldTrump on 8 March 2019, Exhibit CHE-25. (emphasis added)
⁶⁶⁰ Donald Trump’s Interview with FOX Business Network on 22 March 2019, Exhibit CHE-54. (emphasis added) Available at: <https://www.foxbusiness.com/politics/trump-exclusive-us-economic-growth-hindered-by-fed-rate-hikes>.

564. Finally, while the US authorities have not published yet the Section 232 report following the investigation into autos imports, all publicly available information suggests that the initiation and conduct of the *Autos Investigation* falls within the same pattern of the repeated interpretation adopted by the current US administration. In addition to the statements of the US officials referred to above, in the context of the *Autos Investigation*, the Notice of Request of Public Comments and Public Hearing mirrors the requests for information in *Steel and Aluminium Investigations*. Notably, the requested information relates to a number of topics that have no relation to national security, including “[t]he impact of foreign competition on the economic welfare of the U.S. automobiles and automotive parts industry” and “[t]he displacement of any domestic automobiles and automotive parts causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects”.⁶⁶¹ Furthermore, in a television interview with CNBC on 24 May 2018, the US Secretary of Commerce Wilbur Ross confirmed that the US administration will continue to broadly interpret national security allowing it to impose restrictions on imported cars motivated by purely economic reasons. In particular, he stated that “under Section 232 of the Trade Expansion Act of 1962, national security is broadly defined to include the economy, to include the impact on employment, to include a very big variety of things that one would not normally associate directly with military security. But it is also the case that economic security is military security, and without economic security you can’t have military security”.⁶⁶²

565. In conclusion, the foregoing shows the existence of a current repeated and consistent interpretation of Section 232 by the US authorities which results in the imposition of import restrictions with the purpose of protecting US domestic industries from foreign competition.

2. *The ongoing use of Section 232 by the US authorities*

566. In the alternative, Switzerland challenges the ongoing use of Section 232 by the US authorities so as to afford protection to the domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to the US national security (the ongoing use).

⁶⁶¹ USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, Federal Register, Vol. 83, No.104, 30 May 2018, pp. 24735-24737, Exhibit CHE-45.

⁶⁶² CNBC interview with Secretary Wilbur Ross, Connecting the dots on auto imports and national security, 24 May 2018, Exhibit CHE-55. Available at: <https://www.cnbc.com/video/2018/05/24/wilbur-ross-connecting-the-dots-on-auto-imports-and-national-security.html>, at 1:34.

567. In *Argentina – Import Measures*, the Appellate Body noted that “the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant” and that “[d]epending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence.”⁶⁶³

568. Previous panels and the Appellate Body have recognized that measures that may be challenged include an “ongoing conduct”⁶⁶⁴ understood as “conduct that is currently taking place and is *likely to continue* in the future”.⁶⁶⁵ Importantly, the “absolute certainty as to the future conduct” is not required.⁶⁶⁶ The Appellate Body emphasised in *Argentina – Import Measures* that “[a] complainant that is challenging a measure characterized as ‘ongoing conduct’ would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue.”⁶⁶⁷

569. Switzerland has described the measure at issue as “the ongoing use of Section 232 by the US authorities so as to afford protection to the domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to the US national security.” The word “use” means “the action of using something; the fact or state of being used; application or conversion to some purpose”.⁶⁶⁸ Through the description of the measure at issue as “the ongoing use of Section 232 so as to afford protection to the domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to the US national security”, Switzerland thus refers to the “action” of the US authorities of “using” Section 232 “so as to afford protection to the domestic production by restricting imports from other WTO members”. By describing that use as “ongoing”, Switzerland refers to a “repeated” use that is “likely to continue in the future”.

570. The existence of this measure is evidenced by the following elements.

571. First, Section 232 has been used by the US authorities since 2017 in order to protect the US domestic industry from competition with imported products under the disguise of protecting national security. Indeed, as explained above, the USDOC has adopted an extensive interpretation of the concept of “national security” as including not only national defence but also critical infrastructures and by considering that the US steel

⁶⁶³ Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

⁶⁶⁴ Appellate Body Report, *US – Continued Zeroing*, para. 181.

⁶⁶⁵ Panel Report, *US – Orange Juice (Brazil)*, para. 7.176.

⁶⁶⁶ Panel Report, *US – Orange Juice (Brazil)*, para. 7.175, referring to the Appellate Body Report, *US – Continued Zeroing*, para. 191.

⁶⁶⁷ Appellate Body Reports, *Argentina – Import Measures*, para. 5.108.

⁶⁶⁸ *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 3484.

and aluminium industries must be financially viable and competitive in the commercial market since defence and critical infrastructure requirements alone are not sufficient to support a robust industry. In other words, in their investigations, the US authorities have focused on the imports and on the “economic state” of the US industries, considering in particular as “most relevant” the displacement of domestic steel/aluminium by excessive imports and the consequent adverse impact on the economic welfare of the domestic steel/aluminium industry.⁶⁶⁹ On that basis, the US authorities concluded that those imports are weakening the US internal economy and therefore “threaten to impair” the national security. Thus, according to the USDOC and the US President, import restrictions under Section 232 can be introduced simply because of the negative impact imports have on the economic welfare and viability of an individual domestic industry.

572. Second, the use of Section 232 by the US authorities so as to afford protection to the US domestic industry is “ongoing” since this use is repeated and likely to continue in future investigations.

573. In that regard, the US President emphasised in his interview with FOX Business Network on 22 March 2019 that, “[w]hat poses a national security risk is [US] *balance sheet*.”⁶⁷⁰ In light of this objective to improve the US balance sheet, only in the last two years, five investigations were initiated pursuant to Section 232. This number is telling especially if compared with the 26 investigations initiated between 1962 and 2017.

574. The “ongoing” use of Section 232 by the US authorities so as to afford protection to the US domestic industry is further confirmed by the US authorities’ position in the *2018 Autos Investigation*. Indeed, in the context of that investigation, similar to the *Steel and Aluminium Investigations*, the US authorities expressly sought comments from interested parties on certain economic factors which appear to be unrelated to national security, including “the impact of foreign competition on the economic welfare of the U.S. automobiles and automotive parts industry” and “[r]elevant factors that are causing or will cause a weakening of [the US] economy”.⁶⁷¹

575. The use of Section 232 so as to afford protection to the US domestic industry in the context of the *2018 Autos Investigation* is further confirmed by statements of US authorities and US officials. Indeed, in the context of the Section 232 hearing, the US Secretary of Commerce explicitly referred in his opening statement to the same

⁶⁶⁹ The Steel Report, pp. 15-16, Exhibit CHE-2; The Aluminium Report, pp.14-15, Exhibit CHE-5.

⁶⁷⁰ Donald Trump’s Interview with FOX Business Network on 22 March 2019, Exhibit CHE-54. (emphasis added) Available at: <https://www.foxbusiness.com/politics/trump-exclusive-us-economic-growth-hindered-by-fed-rate-hikes>.

⁶⁷¹ USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, Federal Register, Vol. 83, No. 104, 30 May 2018, pp. 24735-24737, Exhibit CHE-45. (emphasis added)

protectionist rationale that has been used in the steel and aluminium investigations in 2017:

President Trump understands how indispensable the U.S. auto industry is to our economy and the “close relation” of our economic strength to national security.

The automobile industry continues to drive American innovation. *It provides the backbone of our industrial economy. It supports millions of Americans with high-paying jobs. And the industry is central to the advancement of new technologies such as autonomous vehicles, fuel cells, electric motors, battery storage [...].*⁶⁷²
(emphasis added)

576. The US President Donald Trump also indicated that the Section 232 investigation regarding autos was motivated by economic reasons: “[t]here will be *big news coming soon for our great American Autoworkers*. After many decades of losing your jobs to other countries, you have waited long enough.”⁶⁷³

577. Finally, the ongoing use of Section 232 will likely continue because it is likely to survive any challenge before US courts. Indeed, US courts recognized that Section 232 confers discretion on the US President in broadest terms to act.⁶⁷⁴ Most recently, the US CIT denied the motion for preliminary injunction in *Severstal v. United States* implicitly suggesting that it would be up to the Congress to limit this broad Presidential power and to allow a Congressional review of President’s actions under Section 232.⁶⁷⁵ In *American Institute for International Steel v. United States*, the US CIT denied the motion for summary judgment seeking a declaration that section 232 of the Trade Expansion Act contains an impermissible delegation of legislative authority.⁶⁷⁶ The US CIT found that “determinations pursuant to section 232 are committed to presidential discretion” and “section 232 regulation plainly unrelated to national security would be, *in theory*, reviewable as action in excess of the President’s section 232 authority”.⁶⁷⁷ The US CIT held that in light of the US Supreme Court precedent, a finding of an impermissible

⁶⁷² Secretary Ross’s Opening Remarks at the Section 232 Hearing on Automobile and Automotive Parts Imports, 19 July 2018, Exhibit CHE-53. Available at: <https://www.commerce.gov/news/speeches/2018/07/opening-remarks-section-232-hearing-automobile-and-automotive-parts>.

⁶⁷³ Twitter statement by @realDonaldTrump on 23 May 2018, Exhibit CHE-25. (emphasis added)

⁶⁷⁴ *Pancoastal Petroleum, Ltd. v. Udall*, 348 F. 2d 805(D.C. Cir. 1965), p. 807; United States Attorney General, Restrictions of Oil Imports, 43 U.S. Op. Atty. Gen. 20 (U.S.A.G.), 1975 WL 15510, January 14, 1975, p. 3.

⁶⁷⁵ US CIT, *Severstal v. United States*, Court No. 18-00057, Slip Op. 18-37, April 5, 2018, fn 14, Exhibit CHE-43. The Congress enacted the Crude Oil Windfall Profit Tax Act in 1980 to allow Congress to override oil-related Presidential actions under Section 232. Indeed, a bill to amend Section 232, introduced to the US Congress in September 2018, aims to introduce a general Congressional disapproval procedure under Section 232. See H.R. 6923, 115th Congress, 2d session, available at: <https://www.congress.gov/bill/115th-congress/house-bill/6923/text>.

⁶⁷⁶ US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, p. 1, Exhibit CHE-36.

⁶⁷⁷ US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, pp. 11, 14, Exhibit CHE-36. (emphasis added)

delegation of legislative power is only possible if it is not based on an “intelligible principle”, pursuant to which a person or a body is authorised to act. Indeed, since 1935 no act in the United States “has been struck down as lacking an intelligible principle”.⁶⁷⁸ The US CIT concluded that it is bound by the US Supreme Court finding that “section 232 ‘easily’ met the intelligible principle standard”.⁶⁷⁹

578. The foregoing elements demonstrate the existence of an ongoing use of Section 232 by the US authorities whereby the latter impose import restrictions so as to afford protection to its domestic industry on the grounds of an alleged threat to the US national security.

D. The measures at issue are inconsistent with the Agreement on Safeguards, the GATT 1994 and Article XVI:4 of the WTO Agreement

579. Section 232 as repeatedly interpreted by the US authorities and the ongoing use of Section 232 by the US authorities (referred to below as the “measures at issue”) do not have any basis in the covered agreements. These measures are inconsistent with the balance of rights and obligations set out in the WTO Agreement and, in particular, are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards and with Articles II:1(a) and (b) and XI:1 of the GATT 1994. By maintaining these measures, the United States also fails to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the Agreement on Safeguards and the GATT 1994, thereby acting inconsistently with Article XVI:4 of the WTO Agreement.

1. Introduction

580. Section 232 as repeatedly interpreted by the US authorities provides for the imposition of restrictions on imports of products from other WTO Members, on the grounds of an alleged threat to national security, because the imports of such products, taking into account their quantities and/or the circumstances, cause or threaten to cause injury to the domestic industry. Similarly, through the ongoing use of Section 232, the US authorities afford protection to the domestic industry by restricting imports from other WTO Members on the grounds of an alleged threat to the US national security because the imports cause or threaten to cause injury to the domestic industry.

581. These measures do not have any basis in the covered agreements and, in particular, in the GATT 1994. The GATT 1994 contains a number of fundamental obligations, among which the obligation to grant most-favoured-nation treatment (Article

⁶⁷⁸ US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, p. 6, Exhibit CHE-36.

⁶⁷⁹ US CIT, *American Institute for International Steel v. United States*, Court No. 18-00152, Slip op. 19-37, 25 March 2019, pp. 6-7 and fn 6, Exhibit CHE-36.

I), the obligation not to impose duties beyond the level bound in each Member's schedule (Article II) and the obligation not to impose quantitative restrictions on imports or exports (Article XI). The GATT 1994 also provides for exceptions allowing Members to depart from these obligations in certain specific circumstances, e.g. the imposition of anti-dumping measures and countervailing measures (Article VI), the imposition of safeguard measures (Article XIX), the imposition of measures justified by non-trade legitimate objectives such as human, animal or plant life or health (Article XX) and the imposition of measures justified by essential security interests (Article XXI). Thus, the GATT 1994 in itself strikes a balance between the rights of Members under substantive provisions, such as Article I, Article II or Article XI and the rights of other Members to invoke one of the exceptions provided for in that agreement. This balance needs to be preserved. This is reflected in Article 3.2 of the DSU which provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements" and Article 3.3 of the DSU which refers to "the maintenance of a proper balance between the rights and obligations of Members".

582. The Appellate Body emphasised the importance of preserving the balance of rights and obligations of Members when noting in *US – Shrimp* in relation to the chapeau of Article XX of the GATT 1994 that:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.⁶⁸⁰

583. Switzerland submits that the measures at issue are inconsistent with the balance of rights and obligations under the WTO Agreement as they constitute an "emergency action" mechanism which amounts to a safeguard mechanism within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards without, however, complying with the rules provided for in those agreements.

2. *The measures at issue are inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards*

584. Switzerland submits that the measures at issue provide for the imposition of import restrictions which amount to safeguard measures without, however, complying with the obligations laid down in Article XIX of the GATT 1994 and in the Agreement on

⁶⁸⁰ Appellate Body Report, *US – Shrimp*, para. 159.

Safeguards. The measures at issue are therefore inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.

- a. The measures at issue provide for the imposition of import restrictions which amount to safeguard measures

585. Section 232, as interpreted by the US authorities and the ongoing use of Section 232 so as to afford protection to the US domestic industry constitute a mechanism providing for the imposition of “safeguard measures”, within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards. In other words, those measures constitute instruments which provide for the imposition of import restrictions suspending, withdrawing or modifying a GATT obligation or a GATT concession, which are designed to prevent or remedy serious injury to the US domestic industry and therefore constitute “safeguard measures” within the meaning of Article 1 of the Agreement on Safeguards.

586. Switzerland refers in that regard to the explanations provided above in the section concerning the adjustment measures on steel and aluminium products which constitute instances of application of Section 232, as interpreted, and are part of the ongoing use of Section 232.⁶⁸¹

- b. The measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards

587. Switzerland submits that while the measures at issue constitute a mechanism for the imposition of “safeguard measures”, they do not comply with the obligations laid down in Article XIX:1(a) of the GATT 1994 and in the Agreement on Safeguards and are therefore inconsistent with those provisions. More specifically, the measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2, 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards.

588. For the purposes of this section, Switzerland refers to the legal standard as explained in Section IV.D.2 above.

- i. The measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards

589. Switzerland submits that the measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards since those measures provide for the imposition of import restrictions in order to protect a domestic industry from foreign competition, without examining whether the products at issue are being imported into the territory of the United States in such

⁶⁸¹ See section IV.D.1.

increased quantities and under such conditions as to cause or threaten to cause serious injury to the US domestic producers of like or directly competitive products, as a result of unforeseen developments, and of the effects of the obligations incurred under the GATT 1994.

590. Under the measures at issue, an import restriction is imposed for the purposes of protecting a domestic industry from foreign competition because the imports of such products cause or threaten to cause serious injury to that domestic industry. However, the measures at issue do not provide for any consideration of whether the import restriction that is imposed is consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards.

591. First, the measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 since they do not require the US authorities to demonstrate the existence of unforeseen developments, i.e. events that were unexpected at the time the United States acceded to the WTO, nor of the obligations incurred by the United States under the GATT 1994. *A fortiori*, they do not require the demonstration of a logical connection between such unforeseen developments and the effect of the obligations incurred under the GATT 1994 and the increase in imports.

592. Second, the measures at issue are inconsistent with Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards since, while they require the US authorities to examine the effects of the imports on the US domestic industry, taking into account the quantities and circumstances of the imports, and whether the US domestic industry suffers serious injury, the measures at issue do not provide for an objective evaluation of all relevant factors having a bearing on the situation of the domestic industry and a demonstration of the causal link between the increased imports and the serious injury or threat thereof as required by Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards. In particular, as shown in the *2017 Steel and Aluminium Investigations*, while the US authorities examine the imports and the state of the domestic industry, taking into account injury factors, they do not examine all the factors listed in Article 4.2(a) and do not make an objective and unbiased analysis. Indeed, in these investigations, they have examined injury factors on the basis of a time period which varies depending on the factor examined; they failed to examine trends in imports and/or trends in the injury factors; they failed to define a domestic industry for the purposes of the investigation, resulting in injury factors being examined on the basis of data relating to a non-uniform set of producers and they did not carry out a causal link analysis – positive and negative – as required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

593. In light of the foregoing, Switzerland submits that the measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards because they provide for the imposition of safeguard measures while not complying with the requirements laid down in those provisions in

relation to the unforeseen developments, the effect of obligations incurred under the GATT 1994, the increase in imports, the domestic industry, the serious injury or threat thereof and the causal link between the increased imports and the (threat of) serious injury.

ii. The measures at issue are inconsistent with Article 3.1 of the Agreement on Safeguards

594. Switzerland submits that the measures at issue are inconsistent with Article 3.1 of the Agreement on Safeguards since they provide for the imposition of safeguard measures without providing for an investigation whereby the US authorities actively seek out from the interested parties the information that is used in the investigation and without providing for the publication of a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

595. First, the measures at issue do not provide for an investigation in which “the interested parties play a central role in the investigation” and in which “they will be a primary source of information for the competent authorities”.⁶⁸² Indeed, in the investigations carried out pursuant to the measures at issue, the analysis is not based on data or evidence provided directly by the interested parties, but on information collected from other authorities or which is somehow available. Thereby, the measures at issue do not comply with the requirement under Article 3.1 to carry out an investigation in which the interested parties will be the primary source of information for the authorities.

596. Second, the measures at issue do not provide for the publication of a report setting forth the US authorities’ findings and reasoned conclusions reached on all pertinent issues of fact and law. The “pertinent issues of fact and law” referred to in Article 3.1 of the Agreement on Safeguards at least include all the prerequisites set forth in Article XIX:1(a) of the GATT 1994 and in the Agreement on Safeguards, i.e. that, as a result of unforeseen developments and of the effects of obligations incurred, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic industry that produces like or directly competitive products. The measures at issue do not provide for the publication of a report setting forth the US authorities’ findings and reasoned conclusions reached on all the pertinent issues of fact and law within the meaning of the Agreement on Safeguards and, thereby, are inconsistent with Article 3.1 of the Agreement on Safeguards.

⁶⁸² Appellate Body Report, *US – Wheat Gluten*, paras. 53-54.

iii. The measures at issue are inconsistent with Articles 5.1, 7.1 and 7.4 of the Agreement on Safeguards

597. Switzerland submits that the measures at issue are inconsistent with Articles 5.1, 7.1 and 7.4 of the Agreement on Safeguards since they do not provide for the imposition of safeguard measures only to the extent and for such time as may be necessary to prevent or remedy serious injury and to facilitate adjustment and since they fail to provide that those measures cannot exceed four years and that they shall be progressively liberalised at regular intervals.

598. First, the measures at issue are inconsistent with Articles 5.1 and 7.1 of the Agreement on Safeguards because they do not provide for the imposition of safeguard measures only to the extent and for such time as may be necessary “to prevent or remedy serious injury”. Section 232 provides that the US President “shall take such action, and for such time, as he deems necessary to adjust imports of such article and its derivatives so that such imports will not so threaten to impair national security.” However, to the extent that the measures at issue do not provide for a causal link analysis, including a non-attribution analysis, as required by Article 4.2(b), the US authorities cannot ensure that the safeguard measures taken pursuant to the measures at issue are applied “only to the extent and for such time” as necessary to prevent or remedy serious injury.

599. Second, the measures at issue are inconsistent with Article 7.1 of the Agreement on Safeguards because they fail to provide that any actions taken cannot exceed four years. In fact, as the measures on steel and aluminium show, the measures taken by the US President pursuant to the measures at issue “continue in effect, unless such actions are expressly reduced, modified, or terminated.” In other words, under the measures at issue, the US President can act as he deems necessary, without any time constraints regarding the measures.

600. Third, the measures at issue are inconsistent with Article 7.4 of the Agreement on Safeguards because they fail to provide that actions taken pursuant to such measures shall be progressively liberalized at regular intervals.

iv. The measures at issue are inconsistent with Article 11.1(a) of the Agreement on Safeguards

601. Switzerland submits that the measures at issue are inconsistent with Article 11.1(a) since they constitute a mechanism of “emergency action” as set forth in Article XIX of the GATT 1994 that does not conform with the provisions of that Article and is not applied in accordance with the Agreement on Safeguards.

602. As demonstrated above, under the measures at issue, safeguard measures are imposed by the United States on imports of certain products without, however,

complying with the requirements laid down in Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2, 5.1, 7.1 and 7.4 of the Agreement on Safeguards. Through those measures, the United States therefore also acts inconsistently with Article 11.1(a) of the Agreement on Safeguards.

3. The measures at issue are inconsistent with Articles II:1(a) and (b) and XI:1 of the GATT 1994

603. Switzerland submits that the measures at issue are inconsistent with Articles II:1(a) and (b) and XI:1 of the GATT 1994. Switzerland refers to Sections IV.E.1, IV.E.2 and IV.E.4 above regarding the relevant legal standards with respect to each of these provisions.

- a. The measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994

604. Switzerland submits that the measures at issue are inconsistent with Articles II:1(a) and (b) of the GATT 1994 to the extent that they provide for the US authorities to impose ordinary customs duties on products from WTO Members in excess of those provided for in the United States' Schedule of Concessions or other duties or charges in excess of those imposed on the date of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date. Therefore, those measures also accord to the commerce of other WTO Members, including Switzerland, treatment less favourable than that provided for in the United States' Schedule.

605. Switzerland submits that the additional import duties imposed by the United States pursuant to the measures at issue amount to "other duties or charges" within the meaning of the second sentence of Article II:1(b) of the GATT 1994 and refers in that regard to the explanations provided above in Section IV.E.1 in relation to the adjustment measures on imports of steel and aluminium products.

606. Switzerland submits that regardless of whether the duties imposed pursuant to the measures at issue are "ordinary customs duties" or "other duties or charges", the measures at issue are inconsistent with Articles II:1(b) and (a) of the GATT 1994.

607. Under the measures at issue, an import restriction, in the form of a duty, is imposed for the purposes of protecting a domestic industry from foreign competition because the imports of the product concerned cause or threaten to cause injury to that domestic industry.

608. Since the measures at issue do not provide for any consideration of whether such import restriction that is imposed, in the form of a duty, is consistent with the United States' obligations under Articles II:1(b) and (a) and the United States' Schedule of

Concessions, and by taking the view that the mere assertion that a measure is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the GATT 1994, the measures at issue are designed to be applied in disregard of the United States' obligations under Article II:1(b) and (a) of the GATT 1994.

609. Switzerland refers in that regard to the adjustment measures on imports of steel and aluminium products which are instances of application of Section 232 as interpreted and are part of the ongoing use of Section 232 so as to afford protection to the US domestic industry.

b. The measures at issue are inconsistent with Article XI:1 of the GATT 1994

610. Switzerland submits that the measures at issue are inconsistent with Article XI:1 of the GATT 1994 to the extent that they provide for the US authorities to impose restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, on the importation of products of the territory of other WTO Members.

611. Under the measures at issue, an import restriction, other than duties, taxes or other charges, is imposed for the purposes of protecting a domestic industry from foreign competition because the imports of the product concerned cause or threaten to cause injury to that domestic industry. Since the measures at issue provide for the imposition of import restrictions or prohibitions other than duties, taxes or other charges, without consideration of whether such restrictions or prohibitions are consistent with the United States' obligations under Article XI:1 of the GATT 1994, and by taking the view that the mere assertion that a measure is subject to Article XXI of the GATT 1994 suffices to exclude it from the disciplines of the GATT 1994, the measures are designed to apply in disregard of the United States' obligations under Article XI:1 of the GATT 1994.

612. Switzerland refers in that regard to the adjustment measures on imports of steel and aluminium products, discussed above, which are instances of application of Section 232 as interpreted and are part of the ongoing use of Section 232 so as to afford protection to the US domestic industry.

4. *The measures at issue are inconsistent with Article XVI:4 of the WTO Agreement*

613. Switzerland submits that the United States also acts inconsistently with Article XVI:4 of the WTO Agreement because, through the measures at issue, the United States fails to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the GATT 1994 and the Agreement on Safeguards.

a. The legal standard under Article XVI:4 of the WTO Agreement

614. Article XVI:4 of the WTO Agreement provides as follows:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

615. In *US – 1916 Act (EC)*, the panel stated:

If Article XVI:4 has any meaning, it is that when a law, regulation or administrative procedure of a Member has been found incompatible with the WTO obligations of that Member under any agreement annexed to the WTO Agreement, that Member is also in breach of its obligations under Article XVI:4.⁶⁸³

616. As to the meaning of “laws, regulations and administrative procedures”, the panel in *US – Section 301 Trade Act* observed that:

The three types of measures explicitly made subject to the obligations imposed in the WTO Agreements – ‘laws, regulations and administrative procedures’ – are measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under WTO Agreements, expands the type of measures made subject to these obligations.⁶⁸⁴

617. The ordinary meaning of the term “law”, according to the Shorter Oxford English Dictionary, is a “rule of conduct imposed by secular authority”⁶⁸⁵ while “regulation” is defined as a “rule prescribed for controlling some matter, or for the regulating of conduct”.⁶⁸⁶ The word “procedure” should be understood as “the fact or manner of proceeding; a system of proceedings; conduct, behaviour”⁶⁸⁷ and the word “administrative” means “pertaining to management of affairs, executive”⁶⁸⁸. In the context of Article XVI:4, the term “administrative procedure” may therefore be understood as the manner of proceeding or the conduct/behaviour of the administrative authorities of a Member.

618. Switzerland notes that similar wording is included in Article 18.4 of the Anti-Dumping Agreement which also requires the WTO Members to ensure the conformity of their “laws, regulations and administrative procedures” with the provisions of the Anti-Dumping Agreement. In that context, the Appellate Body in *US – Corrosion-Resistant*

⁶⁸³ Panel Report, *US – 1916 Act (EC)*, para. 6.223.

⁶⁸⁴ Panel Report, *US – Section 301 Trade Act*, para. 7.41.

⁶⁸⁵ *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 1559.

⁶⁸⁶ *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2515.

⁶⁸⁷ *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2355.

⁶⁸⁸ *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 29.

Steel Sunset Review found that “the phrase ‘laws, regulations and administrative procedures’ seem to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.”⁶⁸⁹ The Appellate Body reasoned that if some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of “conformity” set forth in Article 18.4.

619. Furthermore, also in the context of Article 18.4 of the Anti-Dumping Agreement, the Appellate Body in *US – Zeroing (EC)*, explained that the determination of the scope of “laws, regulations and administrative procedures” must be based on the “content and substance” of the alleged measure, and “not merely on its form”. Accordingly, the mere fact that a “rule or norm” is not expressed in the form of a written instrument is not determinative of the issue of whether it can be challenged, as such, in dispute settlement proceedings.⁶⁹⁰

620. Switzerland submits that similar considerations apply with respect to the terms “laws, regulations and administrative procedures” in Article XVI:4 of the WTO Agreement which encompass different types of measures that are applicable generally beyond specific instances. Indeed, as explained by the panel in *US – 1916 Act (Japan)*, “if some of the terms of Article XVI:4 differ from those of Article 18.4, they are identical and unqualified as far as the basic obligation of ensuring the conformity of laws, regulations and administrative procedures found in both articles is concerned”. Thus, “[t]he same reasoning as for Article 18.4 applies to Article XVI:4 regarding the terms found in both provisions”.⁶⁹¹

621. This broad interpretation of the terms “laws, regulations and administrative provisions” is also supported by the panel’s findings in *US – Section 301 Trade Act*. The panel in that case observed that “[w]hen evaluating the conformity of national law with WTO obligations in accordance with Article XVI:4 of the WTO Agreement account must be taken of the wide-ranging diversity in the legal systems of the Members” and that “[t]he meaning of the term ‘laws’ in Article XVI:4 of the WTO Agreement must accommodate the very broad diversity of legal systems of WTO Members”.⁶⁹²

622. In light of the foregoing, the words “laws, regulations and administrative procedures” in Article XVI:4 of the WTO Agreement must be understood as covering not only written instruments containing Members’ rules and procedures applicable in their territory but also, more broadly, the practice of the Members and their authorities with respect to such rules and procedures.

⁶⁸⁹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

⁶⁹⁰ Appellate Body Report, *US – Zeroing (EC)*, para. 192.

⁶⁹¹ Panel Report, *US – 1916 Act (Japan)*, para. 6.287.

⁶⁹² Panel Report, *US – Section 301 Trade Act*, para. 7.24 and fn 641. (footnotes omitted)

b. The relevant facts

623. As explained in the sections above, Section 232 as repeatedly interpreted by the US authorities and the ongoing use of Section 232, are inconsistent with the United States' obligations under Articles II:1(a) and (b), XI:1 and XIX of the GATT 1994 as well as with Articles 2.1, 3.1, 4.1, 4.2, 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards.

c. The legal analysis

624. Switzerland submits that the United States acts inconsistently with Article XVI:4 of the WTO Agreement because, through the measures at issue, the US fails to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the GATT 1994 and the Agreement on Safeguards.

625. The measures at issue, i.e. Section 232, as repeatedly interpreted by the US authorities and the ongoing use of Section 232 by the US authorities so as to afford protection to the US domestic industry, fall within the category of "laws, regulations and administrative procedures" within the meaning of Article XVI:4 of the WTO Agreement.

626. The repeated interpretation and the ongoing use of Section 232 by the US authorities constitute a manner of proceeding or the conduct/behaviour of the administrative authorities. Indeed, the measures at issue establish a methodology and a standard approach for the US authorities to follow in Section 232 investigations and which should guide them in their conclusion on matters of the alleged threat to the national security under Section 232. Hence, the repeated interpretation and the ongoing use of Section 232 amount to administrative procedures within the meaning of Article XVI:4 of the WTO Agreement.

627. Since, Section 232 as repeatedly interpreted by the US authorities and the ongoing use of Section 232 so as to afford protection to the US domestic industry, are inconsistent with the United States' obligations under several provisions of the GATT 1994 and the Agreement on Safeguards, it follows that the United States also fails to ensure the conformity of its "laws, regulations and administrative procedures" with the provisions of the GATT 1994 and the Agreement on Safeguards, and therefore, acts inconsistently with Article XVI:4 of the WTO Agreement.

VI. CONCLUSIONS

628. For the reasons set forth in this submission, Switzerland respectfully requests the Panel to find that the adjustment measures imposed by the United States on imports of steel and aluminium products are inconsistent with:

- Article XIX:1(a) of the GATT 1994 because the United States failed to demonstrate the existence of unforeseen developments and of the effect of obligations incurred under the GATT 1994 and because it failed to demonstrate a logical connection between unforeseen developments and the effect of obligations incurred under the GATT 1994, on the one hand, and the increased imports, on the other hand;
- Article XIX:1(a) and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the United States failed to determine that the products at issue were imported in 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;
- Article 2.2 of the Agreement on Safeguards because the United States failed to apply the safeguard measures on imports of steel and aluminium products “irrespective of [their] sources”;
- Articles 4.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the United States failed to properly determine that there is serious injury, or threat thereof, to the US domestic steel and aluminium industries, in accordance with the obligations laid down in those provisions;
- Articles 2.1 and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the United States failed to demonstrate the existence of a causal link between increased imports and the alleged serious injury or threat thereof and because it failed to ensure that the alleged serious injury or threat thereof caused by factors other than increased imports was not attributed to increased imports;
- Articles 3.1 and 4.2(c) of the Agreement on Safeguards because the United States failed to provide the interested parties with the opportunity to respond to the presentations of other parties; because interested parties have not been provided a central role in the investigations and because the United States failed to provide its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as demonstration of the relevance of the factors examined;

- Article 5.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because the United States failed to apply the safeguard measures on imports of steel and aluminium products only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment;
- Articles 7.1 and 7.4 of the Agreement on Safeguards because the United States failed to apply the safeguard measures on imports of steel and aluminium products only for such time as may be necessary to prevent or remedy serious injury and to facilitate adjustment and because it failed to limit those measures to four years and to provide for progressive liberalization of the measures at issue;
- Article 11.1(a) of the Agreement on Safeguards because the United States imposed the safeguard measures in violation of Articles 2.1, 2.2, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 7.4, 12.1, 12.2 and 12.3 of the Agreement on Safeguards as well as Article XIX of the GATT 1994;
- Article 11.1(b) of the Agreement on Safeguards because, through the measures at issue, the United States has sought, taken or maintained “other measures” similar to voluntary export restraints and orderly marketing arrangements;
- Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 because the United States failed to comply with any of the notification and consultation obligations provided for in these provisions.

629. Furthermore, by imposing the adjustment measures on imports of steel and aluminium products, the United States also acts inconsistently with:

- Articles II:1(a) and (b) of the GATT 1994 because, by imposing additional duties on imports of steel and aluminium products, the United States fails to exempt products of most other WTO Members, including Switzerland, from ordinary customs duties in excess of those provided for in the United States’ Schedule of Concessions or from all other duties or charges in excess of those imposed on the date of GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date and thereby fails to accord to the commerce of most other WTO Members, including Switzerland, treatment no less favourable than that provided for in the appropriate part of the United States’ Schedule of Concessions;
- Article I:1 of the GATT 1994 because, by exempting from the imposition of the additional duties imports from certain countries, the United States has granted to the products from those countries an “advantage, favour, privilege or immunity” that has not been accorded immediately and unconditionally to like products originating in other WTO Members, including Switzerland;

- Article XI:1 of the GATT 1994 because, by imposing quotas on imports of steel and aluminium products from several WTO Members, the United States has imposed and maintains quantitative restrictions other than duties, taxes or other charges;
- Article X:3(a) of the GATT 1994 because the United States fails to administer in a uniform, impartial and reasonable manner the Presidential Proclamations and the product exclusion mechanism.

630. Switzerland further requests the Panel to find that Section 232, as repeatedly interpreted by the current US administration and, in the alternative, the ongoing use of Section 232 by the US authorities so as to afford protection to the US domestic production of steel and aluminium are inconsistent with:

- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards because those measures provide for the imposition of safeguard measures without, however, complying with the obligations laid down in those provisions;
- Article 3.1 of the Agreement on Safeguards because those measures provide for the imposition of safeguard measures without providing for an investigation whereby the US authorities actively seek out from the interested parties the information that is used in the investigation and without providing for the publication of a report setting forth their reasoned conclusions and findings reached on all pertinent issues of fact and law;
- Articles 5.1, 7.1 and 7.4 of the Agreement on Safeguards because those measures do not provide for the imposition of safeguard measures only to the extent and for such time as may be necessary to prevent or remedy serious injury and to facilitate adjustment and since they fail to provide that those measures cannot exceed four years and that they shall be progressively liberalized at regular intervals;
- Article 11.1(a) of the Agreement on Safeguards because those measures constitute a mechanism of “emergency action” as set forth in Article XIX of the GATT 1994 that does not conform with the provisions of that Article and is not applied in accordance with the Agreement on Safeguards;
- Articles II:1(a) and (b) of the GATT 1994 because those measures provide for the US authorities to impose ordinary customs duties on goods from WTO Members in excess of those provided for in the United States’ Schedule of Concessions or other duties or charges in excess of those imposed on the date of GATT 1994, or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date and thereby accord to the commerce of

other WTO Members treatment less favourable than that provided for in the United States' Schedule of Concessions;

- Article XI:1 of the GATT 1994 because those measures provide for the US authorities to impose restrictions other than duties, taxes or other charges, made effective through quotas, import or export licenses or other measures, on the importation of products of the territory of other WTO Members;
- Article XVI:4 of the WTO Agreement, because through those measures, the United States fails to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the GATT 1994 and the Agreement on Safeguards.

631. In light of the above, Switzerland respectfully requests the Panel, in accordance with Article 19.1 of the DSU, to recommend that the United States bring its measures, found to be inconsistent with the above-listed provisions of the Agreement on Safeguards, of the GATT 1994 and of the WTO Agreement, into conformity with its obligations under these agreements.

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